



**Medix East Africa Limited v County Secretary, County Government of Taita Taveta & 2 others
(Application E186 of 2023) [2024] KEHC 8438 (KLR) (Judicial Review) (12 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8438 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E186 OF 2023**

**J NGAAH, J
JULY 12, 2024**

BETWEEN

MEDIX EAST AFRICA LIMITED APPLICANT

AND

**COUNTY SECRETARY, COUNTY GOVERNMENT OF TAITA
TAVETA 1ST RESPONDENT**

**COMMITTEE EXECUTIVE MEMBER, FINANCE COUNTY GOVERNMENT
OF TAITA TAVETA 2ND RESPONDENT**

**THE CHIEF OFFICER IN CHARGE OF FINANCE COUNTY GOVERNMENT
OF TAITA TAVETA 3RD RESPONDENT**

RULING

1. The application before court is a chamber summons 31 October 2023 in which the applicant seeks leave to file a suit for the judicial review relief of mandamus against the respondents. The prayer for the leave is couched as follows:

“1. That the applicant herein be granted leave to apply for an order of mandamus to compel the 1st to 3rd respondents to pay the applicant an amount of Kshs 13,994, 419.75/- plus interest at 12% per annum from 6th June 2022, till payment in full.”

2. The application is based on a statutory statement dated 31 October 2023 and an affidavit verifying the facts relied upon sworn on even date by Mr. Solomon Kuria, the director of the applicant company.



3. According to Mr. Kuria, on 8 April 2022, the applicant obtained judgment against the County Government of Taita Taveta in Nairobi Chief Magistrates Court Civil Case No E10762 of 2021. The judgment amount was for the sum of Kshs 13, 684,859.20. Costs were assessed at Kshs 309, 560.55. Even after the decree and a certificate of order against government were served upon the respondents, they have neglected, ignored or refused to make the payment. It is for this reason that the applicant seeks leave to file a motion for the order of mandamus to compel the respondents to settle the decretal sum.
4. The application was opposed by the respondents when I invited them to respond to the application before my determination on whether leave should be granted. In the replying affidavit sworn by Paul Maingi Musyimi, the learned counsel for the respondents, it has been stated that while it is true that the applicant obtained judgment against the County Government of Taita Taveta, the same was stayed by the same Chief Magistrates Court which entered the judgment. The order was obtained on 9 July 2023. It is the learned counsel's position that since the applicant did not disclose this fact to the court, leave should not be granted.
5. In a further affidavit sworn by Mr. Kuria, the applicant admitted that indeed stay orders had been obtained but, according to him, those orders were against warrants of attachment and proclamation apparently obtained in execution of the decree. To quote Mr. Kuria:
 - “6. That from the onset, the applicant states and underscores that the respondent (sic) only obtained stay orders against warrants of attachment and proclamation and not a blanket stay of execution, therefore, nothing precluded the applicant from proceeding with the execution in form of a judicial review application to compel the 3rd respondent to pay the decretal sum awarded.”
6. I must hasten to state that if the applicant has initiated in the magistrates' court a process that would achieve the same purpose for which a judicial review relief of mandamus is sought, it is unnecessary and indeed, an abuse of the process of the court, for the applicant to have filed this application. If the applicant is of the firm view that its decree against the County Government of Taita could be executed by way of attachment and sale of the County Government's property there would be no need of seeking an order of mandamus compelling the officers of the Government to settle the same decree.
7. That said, the least that was expected of the applicant was to inform this Honourable Court, in its application for leave, that it has not only initiated execution proceedings before the magistrates court but also that a stay against execution had been granted by that court. As to whether the procedure adopted by the applicant to execute its judgment in the magistrates is plausible is a question whose answer I would have wished to avoid discussing at this juncture considering that it is a question that may be interrogated by the magistrates court in the application from which the order of stay was obtained. However, I cannot help but note what the applicant has itself acknowledged in the affidavit sworn on its own behalf as the proper means of enforcing payment against government. In paragraph 10 of the affidavit of Mr. Kuria, has sworn, inter alia, as follows:
 - “e. no execution can issue against Government in respect of money decrees or any other decree apart from bring (sic) such proceedings against it;
 - f. the only condition precedent in instituting judicial review proceedings against the Government for enforcement and satisfaction of decrees or orders is the service of the certificate of order against government as has been done in this case;



- g. it is only an order issued against the Accounting Officer in this case the 1st to 3rd respondents that can compel them to pay the amount as ordered by the court.”
8. No doubt, in making these “depositions” which are legal issues rather than evidence, the applicant must have had in mind section 21 of the *Government Proceedings Act*, cap. 40 which provides guidance on enforcement of court decrees and order against government. This section reads as follows:
21. Satisfaction of orders against the Government
- (1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:
- Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.
- (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.
- (3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:
- Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.
- (4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.
- (5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.
9. The County Government’s accounting officer would be compelled to settle the decree under section 21(3) of the Act and since this is a duty bestowed upon him by statute he would be compelled to perform it if he ignores, neglects or refuses to perform it. In the same breath and, with particular



reference to section 21 (4) of the Act, execution or attachment would not issue against the County Government.

10. It follows that if the applicant's application was properly before court, the applicant would not only be granted leave to file the motion for an order of mandamus, but also it would be ultimately be granted the order, if it can be proved that the respondents or any of them has failed to perform their public duty.
11. But as noted, the applicant suppressed facts material to its application to the effect that the applicant has filed parallel proceedings of execution in which an order for stay has been obtained. It is trite material non-disclosure would disentitle an applicant to leave to file a judicial review application or to the relief itself if the application has been filed. In *Rex v Kensington Income Tax Commissioners*. (C.A.) (1917) 1KB 509, the English Court of Appeal spoke of this issue and held as follows:

“It is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.” (per Warrington, L.J).

I need not belabour the point save to say that suppression of material facts is fatal to an application for leave to file a judicial review application.

12. One other thing I have noticed in the applicant's application, is that although it has been sworn in the affidavit verifying the facts relied upon that the certificate of order against government was served prior to the filing of the application in October 2023, it is apparent on the face of the certificate that it was extracted on 26 March 2024. That being the case, it is not possible that it could have been served in 2023.
13. For reasons I have given, I am inclined to exercise my discretion against grant of leave. The applicant's application is hereby dismissed. As the decretal sum is outstanding, I will not make any order as to costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 12 JULY 2024

NGAAH JAIRUS

JUDGE

