



**Republic v County Executive Committee Member Finance & Economic Affairs,
Nairobi City County & 2 others; Ojienda & Associates (Exparte) (Application
52 of 2017) [2024] KEHC 8274 (KLR) (Judicial Review) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8274 (KLR)

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

APPLICATION 52 OF 2017

J NGAAH, J

JULY 12, 2024

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY EXECUTIVE COMMITTEE MEMBER FINANCE & ECONOMIC
AFFAIRS, NAIROBI CITY COUNTY 1ST RESPONDENT**

COUNTY SECRETARY 2ND RESPONDENT

**CHIEF OFFICER, FINANCE/COUNTY TREASURER NAIROBI CITY
COUNTY 3RD RESPONDENT**

AND

PROFESSOR OJIENDA & ASSOCIATES EXPARTE

JUDGMENT

1. The application before court is a motion dated 27 September 2023 in which the applicant seeks, in the main, an order for mandamus against the respondents. The prayer for this order has been phrased as follows:

“ 1. That an Order of *Mandamus* be issued compelling the Respondents to pay to the Applicant forthwith and without delay, the decretal sum delineated hereunder together with the accrued interest until payment in full, that is to say;



- a) Principal Amount...Kshs.
17,646,862.50/=
- b) Interest at 12% p.a from 16th May, 2019 to 16th May, 2020
amounting to.....Kshs. 2,291,674.75/=
- Total. Kshs. 19,938,537.25/=”

2. Besides asking for costs, the applicant has also prayed for the order that a notice be issued against the respondents for them to show cause why they should not be cited for contempt of court orders.

The application is based on a statutory statement dated 15 February 2023 and an affidavit verifying the facts relied upon sworn on even date by Prof. Tom Ojienda.

3. According to Professor Ojienda, he filed an advocate/client bill of costs dated 24 October 2017. The bill was for the costs incurred when he represented the County Government of Nairobi (the client) in a judicial review application filed in this Honourable Court as application no. 640 of 2016; *Republic versus Kenya Revenue Authority & 4 Others*. By a ruling rendered by the taxing officer on 27 July 2018, the bill was taxed at Kshs. 17,646,862.50.

4. On 27 November 2018, the taxing officer issued a certificate of taxation for the taxed amount. Although the applicant wrote to the client on diverse dates in April, May and June 2019, demanding payment, the client did not settle the bill. Subsequently, in particular, on 27 January 2020, the applicant successfully obtained a judgment against the client, in the sum stated in the certificate of taxation in an application filed for that purpose.

5. The applicant then extracted a decree and a certificate of order against government respectively dated 27 January 2020 and 1 July 2020. These documents were served upon the respondents but to date, the decretal amount as stated in the certificate of order against government has not been settled.

It is for this reason that the applicant has moved this Honourable court for the order of mandamus to compel the respondents to pay the applicant the amount due to him.

6. The respondents opposed the application and filed grounds of objection to the effect that the application is premature, misconceived and without merit. The application is also said to be frivolous and an abuse of the court process. The application is further impeached for the reason that it is contrary to section 21 of the *Government Proceedings Act*, cap. 40. In particular, the applicant is alleged to have failed to serve the respondents with the decree and the certificate of order against the government.

7. It is also contended on behalf of the respondents that the 2nd respondent is not a member of the County Government of Nairobi treasury and that, although the 1st and 3rd respondents are officers in the County Treasury there are other officers in treasury as well; thus, the suit against the 1st and 3rd respondents to the exclusion of the rest of the officers in the treasury is discriminatory. The respondents have also intimated that the provision for settlement of the decree in issue was not made in the County’s 2023/2024 budget.

Only the applicant filed written submissions in support of the position he has adopted in this case. Despite seeking and being given time to file their submissions, the respondents did not file any submissions.

8. It is not in doubt that execution or attachment of property is one of the ways through which decrees or orders are enforced. But the Government is protected from such process of execution or attachment or other similar process in enforcement of decrees or orders. This protection is encapsulated in section 21 of the *Government Proceedings Act*, in particular, section 21(3) thereof. That 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. In the face of this protection from execution or attachment, the only available route open to the applicant is to compel the respondents to perform their statutory duty under section 21(3) of the Act and pay what has been decreed as due and owing to the applicant. In other words, only the order of mandamus would be the appropriate order under the circumstances.

10. According to *Halsbury's Laws of England*/Judicial Review (Volume 61 (2010) 5th Edition)/5. Judicial Remedies/ (1) Introduction paragraph 689:

“A mandatory order is, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal requiring him, or them, to do some particular thing specified in the command which appertains to his or their office and is in the nature of



a public duty (See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL). The breach of duty may be a failure to exercise a discretion, or a failure to exercise it according to proper legal principles.”

This is reiterated in paragraph 703 which states:

“A mandatory order is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or it to do some particular thing specified in the order which appertains to his or its office and is in the nature of a public duty... the purpose of a mandatory order is to compel the performance of a public duty, whether of an inferior court or tribunal to exercise its jurisdiction, or that of an administrative body to fulfil its public law obligations. It is a discretionary remedy.”

11. And with particular reference to public officers who, like in the instant case, fail to perform their public duty, paragraph 706 is clear that a mandamus order may be issued to compel them to carry out the duty. It reads as follows:

“706. Public duties by government officials.

If public officials or public bodies fail to perform any public duty with which they have been charged, a mandatory (mandamus) order may be made to compel them to carry out the duty (See *R v Metropolitan Police Comr, ex p Blackburn* (No 3) [1973] QB 241, [1973] 1 All ER 324, CA; *R v London Transport Executive, ex p GLC* [1983] QB 484, [1983] 2 All ER 262, DC.)”

12. The applicant has demonstrated that he extracted a certificate of order against government and that the same was duly served upon the respondents. Kyalo Kamina, a court process server swore an affidavit of service to demonstrate that the respondents were duly served with the certificate of order against government and the decree on 6 April 2021. None of the respondents has sworn any affidavit to controvert the fact of service and, therefore, in the absence of any rebuttal, the court is entitled to proceed on the presumption that the respondents were duly served.
13. Apart from bringing the certificate of order against the Government to the attention of the officer or officers of the County Government of Nairobi who are under duty to make the payment, the applicant has complied with the rest of the conditions prescribed in section 21 of the [Government Proceedings Act](#). There is no evidence that the applicant defaulted in any other step prescribed under this provision of the law as to disentitle him to the order of mandamus.
14. A demand for payment having been made and the respondents having failed to pay, no other evidence is required to demonstrate that the respondents have failed to perform a public duty with which they are charged under section 21(3) of the [Government Proceedings Act](#). A mandamus order would properly issue in such circumstances.
15. Accordingly, I allow the applicant’s application to the extent that the order of mandamus is hereby granted compelling the respondents, jointly or severally, to pay the applicant in terms of the certificate of order against the government issued on 1 July 2020. The applicant will also have costs of the application. It is so ordered.

SIGNED, DATED AND POSTED ON THE CTS ON 12 JULY 2024

NGAAH JAIRUS

JUDGE

