



**Republic v Chief Officer Finance Nyandarua County Government
& another; Njenga & another (Exparte Applicants) (Judicial Review
5 of 2023) [2024] KEHC 8588 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8588 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
JUDICIAL REVIEW 5 OF 2023
CM KARIUKI, J
JULY 11, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**CHIEF OFFICER FINANCE NYANDARUA COUNTY GOVERNMENT 1ST
RESPONDENT**

**COUNTY ATTORNEY NYANDARUA COUNTY GOVERNMENT 2ND
RESPONDENT**

AND

SAMUEL MAINA NJENGA EXPARTE APPLICANT

MARGARET NJERI NJENGA EXPARTE APPLICANT

RULING

1. The application before the court is the ex-parte applicants’ notice of motion application dated 9th September 2022 and filed pursuant to leave granted by the orders of the court issued on 25th May 2022 in Nyahururu High Court Judicial Review Miscellaneous Cause No. 3 of 2022 seeking the following orders:-
 - i. That an order of mandamus directed to the Chief Officer Finance, Nyandarua County Government and County Attorney, Nyandarua County Government.



- ii. That the Chief Officer Finance, Nyandarua County Government and the County Attorney, Nyandarua County shall comply by satisfying the decree, costs and interest at 12% annum in Nyandarua CMCC No. 133 of 2017 within 7 days from date of service of this order.
 - iii. That in default, notice to show cause do issue against the Chief Officer Finance, Nyandarua County Government and the County Attorney, Nyandarua County for them to show cause why they should not be cited for contempt of court.
2. On the other hand, the respondents filed a replying affidavit dated 30th January 2024 sworn by Joseph Wahome.
3. **Exparte Applicants' Submissions**
4. On whether the respondents fall within the purview of judicial review, the exparte applicants' cited Article 6 of *the Constitution*, Section 103 of the *Public Finance Management Act* and Section 7 of the Office of the County Attorney Act. It was submitted that it is without doubt that the 1st respondent has a role to play in regard to finance and fiscal matters in Nyandarua County. Further, that the county attorney failed to advise the 1st respondent who have a public duty to satisfy the decree and in case of failure on their part to discharge the duty, this court has the power to compel them to do so. It was stated that from the respondent's' replying affidavit no substantial reason has been adduced as to why the decreed amount has never been paid almost seven since judgement was rendered by the trial court.
5. The exparte applicants averred that the respondents have not disputed the existence of the said decree and certificate of order against them. As per their replying affidavit, the respondents have not placed evidence and/or grounds substantially sufficient to counter the averments in the exparte applicants' application. Reliance was placed on Section 21 of the *Government Proceedings Act*. Additionally, it was asserted that they have met the tests established in the case of Republic v County Government of Lamu & 2 Others ex parte Superserve Limited [2021] eKLR which cited the case of Apotex Inc vs Canada (Attorney General) and was also discussed in Dragon vs Canada (Minister of Citizenship and Immigration) for the court to grant the order of mandamus.
6. Further reliance was placed on Republic v County Secretary, Narok County Government & Another exparte SEC & M Company Limited [2022] eKLR & Republic v County Government of Bomet exparte DKN (suing as the father and next friend of the minor DK) [2021] eKLR. It was stated that the only way the applicants can enjoy the fruits of the judgment is by this court granting an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount.
7. The applicants argued that judicial review orders are discretionary and this honourable court has the ultimate discretion to either grant or decline. They filed this application in time, acted in good faith, had no alternative remedy to pursue for the satisfaction of the decreed amounts. That no grounds have ever been placed by the respondents before this court to warrant a decline of orders sought by the applicants.
8. Lastly, the applicants urged the court to grant the orders sought in the notice of motion application dated 9th September 2022 and the respondents be ordered to pay the whole decretal amount together with interests at 12% per annum accrued to date. They also prayed for costs to be awarded to them.



Respondent's Submissions

9. The respondent asserted that the issues for determination are :-
 - i. Whether the judicial review pleadings as filed has stated any grounds upon which an order of mandamus may be granted
 - ii. Whether the notice of motion application is incompetent for seeking orders that no leave was granted
 - iii. Whether the respondent has an alternative remedy against Monarch Insurance Company Ltd
10. In regards to the first issue, the respondent contended that the ex parte applicants have not pleaded illegality, irrationality and procedural impropriety. To the extent that these grounds are not pleaded it means that the orders sought cannot be granted. It was stated that the county government insured that all the vehicles were insured by Monarch Insurance Company Ltd and followed up with them as they were statutorily required to honour the judgements. They argued that Monarch Insurance undertake to make payment and issued cheques which were dishonored. To that extent, there can be no ground of issuing an order of mandamus.
11. Reliance was placed on the case of Republic v Public Procurement Administrative Review Board & Another ex parte Intertek Testing Services (EA) Pty Limited & Authentix Inc; Accounting Officer, Energy and Petroleum Regulatory Authority & Another [2022] eKLR
12. On the 2nd issue, the respondents averred that the notice of motion dated 9th September 2022 contains 3 principal orders. However, in the chamber summons filed at the lever state, the applicant sought only one principal order and it was different from the orders sought in the later. it was stated that an ex parte applicant cannot see new reliefs other than the ones leave was granted according to Order 53 rule 4 (1) of the Civil Procedure Rules. Further, it was contended that order 2 and 3 in the notice of motion are not in the nature of mandamus, prohibition or certiorari and not available to the ex parte applicant. They cited the case of Republic v Attorney & 2 Others ex-parte Onesmus Wambua Kasivo [2014] eKLR
13. On the 3rd issue, it was stated that by issuing cheques, the insurer admitted liability to settle the claims subject of this proceedings. Further, it was alleged bat under Insurance (Motor Vehicle Third Party Risk) Act once Monarch Insurance Company Ltd being the insurer accepted liability and even made partial payments, the respondents were fully discharged from their liability for damage payable under the accident. That the ex parte applicants have recourse against the insurance which should be to institute a declaratory suit and execute the decree against Monarch. In addition, the cause of action lies on issuance of dishonored cheques against Monarch.
14. Lastly, it was submitted that a case for issuance of judicial review has not been met since;
 - i. No grounds for grant of judicial review orders were pleaded and/or demonstrated.
 - ii. The applicants have introduced different grounds from which leave was granted
 - iii. The ex parte applicants have an alternative remedy and therefore the judicial review orders sought are no efficacious.



Analysis and Determination

15. Having considered the ex parte applicants' and respondents' pleadings and submissions, the main issue that arises for determination is whether an Order of Mandamus should issue as prayed in the ex parte Applicants' application.

16. It is settled law that before an order of mandamus is issued, an Applicant must abide by the procedure in Section 21 of *Government Proceedings Act* which provides:-

“(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.”

17. Section 21 (3) provides that:-

“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.”

18. I am also guided by the holding of the Court of Appeal on the nature of the remedy of mandamus in its decision in *Republic vs Kenya National Examinations Council ex parte Gathenji & 9 Others* [1997] e KLR, where the court stated as follows:-

“The next issue we must deal with is this: What is the scope and efficacy of an Order of Mandamus? Once again we turn to Halsbury's Law of England, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right;



and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed....”

19. Furthermore, the requirements for an order of mandamus to issue were further explained by Mativo J. in *Republic vs Principal Secretary, Ministry of Internal Security & another exparte Schon Noorani & Another* [2018] eKLR as follows:-

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in *Apotex Inc. vs. Canada (Attorney General)*, and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. The eight factors that must be present for the writ to issue are:-

- i. (i) There must be a public legal duty to act;
- ii. (ii) The duty must be owed to the Applicants;
- iii. (iii) There must be a clear right to the performance of that duty, meaning that:
 1. The Applicants have satisfied all conditions precedent; and
 2. There must have been:
 - i. A prior demand for performance;
 - ii. A reasonable time to comply with the demand, unless there was outright refusal; and
 - iii. An express refusal, or an implied refusal through unreasonable delay;
 - iv. No other adequate remedy is available to the Applicants;
 - v. The Order sought must be of some practical value or effect;
 - vi. There is no equitable bar to the relief sought;
 - vii. On a balance of convenience, mandamus should lie

20. In the instant case, the exparte applicants have moved this court to compel the satisfaction of a judgement already decreed in their favour by a competent court of law .It is not disputed in the present application that judgment for costs was entered in favour of the exparte applicant in *Nyandarua CMCC No. 133 of 2017*. Evidently, the applicants have demonstrated by way of evidence compliance with the provisions of Section 21 of the *Government Proceedings Act*. On the other hand, the



respondents have not given any satisfactory reason as to why the decree has not been fulfilled long after it was issued despite being served with the Certificate of Orders against the government and letters and a demand and notice of intention to sue as per the law.

21. As outlined by the applicants, Nyandarua County is one of the counties established by Article 6 of *the Constitution* and the First Schedule to *the Constitution*, and is constitutionally recognized as a distinct government level of government by the said Article. In addition, the definition of “Government” in the *Government Proceedings Act* refers to the “Government of Kenya.’
22. As to whether the respondent herein is under a public duty and obligation to satisfy the orders issued in favour of the exparte applicants in the said judgment, Section 103 of the *Public Finance Management Act* provides that:-

“The County Executive Committee Member for finance shall be the head of the County Treasury.”
23. Moreover, in Republic vs. Kisii County Government Ex-Parte Peter Kaunda Nyamosi & 2 Others [2018] eKLR the court held that:-

“It is therefore clear that the accounting officer for the County Government is the County Executive Member for Finance. Since the order of mandamus was against the County Government, I do not think that this is fatal as the order of mandamus remains alive and the court may issue a notice to show cause against the accounting officer, upon whom the statutory duty is imposed, to ensure that its decision is enforced (see Consolata Kihara & 21 Others v Director of Kenya Trypanosomiasis Research Institute [2003] KLR 582 and Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi) NBI HC Misc. App. 222 of 2016 [2018] eKLR).”
24. Accordingly, execution proceedings against a government or public authority under the *Government Proceedings Act* can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body. Contrary to the respondents’ assertion, the county government is the judgement debtor in the instant case and not Monarch Insurance thus liable to pay the decretal sums. An order of mandamus is normally issued when an officer or an authority by compulsion of law or statute is required to perform a duty, and that duty, despite demand in writing, has not been performed.
25. From the record, the respondent has failed to pay the decretal sum despite the attempts and requests made by the applicants in pursuit of payment of the decretal sums. In my considered opinion and in agreement with the applicants, it is a willful refusal by the respondents to pay the sums demanded for.
26. In the premises, I find that the exparte applicants’ Notice of Motion dated 9th September 2022 is merited. Accordingly, I grant the following orders:-
 - i. That an order of mandamus to compel the Chief Officer Finance, Nyandarua County Government and County Attorney, Nyandarua County Government to satisfy the decree, costs and interest at 12% annum in Nyandarua CMCC No. 133 of 2017 within thirty (30) days from date of service of this order.
 - ii. That in default, notice to show cause do issue against the Chief Officer Finance, Nyandarua County Government and the County Attorney, Nyandarua County for them to show cause why they should not be cited for contempt of court.



III. **Same orders to apply to JR 6 & 7 of 2023.**

Ruling dated and signed at Nyandarua this 11th day of July, 2024 and delivered via Microsoft Teams platform.

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C. KARIUKI

JUDGE

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