



Republic v Secretary/Chief Executive Officer National Land Commission & another; Tom Ojienda & Associates (Exparte) (Application E145 of 2021) [2024] KEHC 9580 (KLR) (Judicial Review) (2 August 2024) (Judgment)

Neutral citation: [2024] KEHC 9580 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E145 OF 2021**

**J NGAAH, J
AUGUST 2, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**SECRETARY/CHIEF EXECUTIVE OFFICER NATIONAL LAND
COMMISSION 1ST RESPONDENT**

CHAIRPERSON, NATIONAL LAND COMMISSION 2ND RESPONDENT

AND

PROF. TOM OJIENDA & ASSOCIATES EXPARTE

JUDGMENT

1. The application before court is the applicant’s motion dated 21 September 2023. It is expressed to be brought under section 20(4) of the *National Land Commission Act*, 2012 and Order 53 rule 3 of the Civil Procedure Rules. The application seeks the following orders:

“ 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;

Particulars

Amount awarded Kshs. 1,005,633/=

Interest at 12% p. a from



11th November 2019 to 6th September 2021 Kshs. 225,506.63

Total Kshs. 1,228,139.63/=

2. That in default, Notice to Show Cause do issue against the Respondents to show cause why they should not be cited for contempt of Court Orders.
 3. That the costs of this application be borne by the respondents.”
2. The application is based on a statutory statement dated 30 September 2021 and an affidavit verifying the facts relied upon sworn on even date by Prof. Tom Ojienda. According to Professor Ojienda, he filed an advocate client-bill of costs dated 15 June 2017. The bill of costs arose out of a judgment in this Honourable Court Petition No. 402 of 2014, National Land Commission versus Cabinet Secretary, Ministry of Lands, Housing and Urban Development & Another in which he represented the respondent.
 3. By a ruling delivered on 15 June 2017, the bill of costs was taxed at Kshs. 1,005,633/=. A certificate of taxation to this end was issued on 24 October 2019. Although the applicant demanded payment, the respondent did not pay as a result of which the applicant sought for and obtained judgment against the respondent in the sum of Kshs. 1,005, 633/=. The judgment was obtained on 25 January 2021.
 4. Subsequently, the applicant extracted a decree and a certificate of order against government and served them upon the respondents. According to the certificate of order against government the respondent is required to pay the applicant the decretal sum broken down as follows:

Amount awarded Kshs. 1,005,633.00

Interest at 12% per annum from 11 November 2019 to

6 September 2021 Kshs. 225, 506.63

Total Kshs. 1,228,139.63

Despite several demands, the respondent has not made the payment hence this application.

The respondents have not contested the applicant’s application.

5. Considering that the judgment or decree or the certificate of order against the Government have neither been challenged nor stayed, the applicant is entitled to enforce payment of the decretal sum. Inevitably, a mandatory or mandamus order would ensue in these circumstances.
6. The mandatory order is the appropriate order because although one of the ways through which decrees or orders are enforced is by execution or attachment, the Government is insulated from such process of execution or other similar process in enforcement of decrees or orders by section 21 of the *Government Proceedings Act*, in particular, section 21(3) thereof. In the Matter of the National Land Commission [2015] Eklr, the Supreme court has held that independent Commissions established under *the Constitution* such as the 2nd respondent Commission are part of the Government and, therefore, enjoy the same protection provided by section 21 of the *Government Proceedings Act*. 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.

7. In the face of this protection from execution or attachment, the only available route open to the applicant is to compel the 1st respondent to perform his statutory duty under section 21(3) of the Act and pay what has been decreed as due and owing to the applicant. Besides section 21(3) of the [Government Proceedings Act](#), section 20(4) of the National [Land Act](#), 2012 enjoins the 1st respondent, as the accounting officer of the [National Land Commission Act](#), 2012, to expend such resources of the Commission as is necessary to settle, among other expenditures, the Commission's liabilities such as the applicant's decree. The subsection reads as follows:

- (4) The secretary, shall be the accounting officer of the Commission and shall be responsible to the Commission for—
 - (a) all income and expenditure of the Commission;
 - (b) all assets and the discharge of all liabilities of the Commission; and
 - (c) the proper and diligent implementation of Part IV of this Act.

8. Of particular relevance to this application is sub section (4) (a) and (b)



The mandamus order is the appropriate order to issue to compel the 1st respondent to perform the public duty with which he is charged under section 20(4) of the *National Land Commission Act* as read with section 21(3) of the *Government Proceedings Act*. This order is defined in Halsbury's Laws of England/Judicial Review (Volume 61 (2010) 5th Edition)/5. Judicial Remedies/ (1) Introduction paragraph 689 as follows:

“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.”

9. And with particular reference to public officers who, like the 1st respondent in the instant case, fail to perform their 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.)”

10. The applicant has demonstrated that he extracted a certificate of order against government and that the same was duly served upon the respondents. Neither of the respondents has denied having received the certificate of order against government. As matter of fact, they have not contested the applicant's application. Most importantly, the 1st respondent, as the accounting of the National Land Commission has not discharged his duty and paid the sums due to the applicant. A mandamus order would properly issue in such circumstances.
11. Accordingly, I allow the applicant's application to the extent that the order of mandamus is hereby granted compelling the 1st respondent to pay the applicant in terms of the certificate of order against the government issued on 8 September 2021. The applicant will also have costs of the application. It is so ordered.

SIGNED, DATED AND POSTED ON CTS ON 2 AUGUST 2024

NGAAH JAIRUS

JUDGE

