



Republic v County Government of Trans Nzoia & 3 others; Prof. Nixon Sifuna t/a Sifuna & Sifuna Advocates (Exparte Applicant) (Judicial Review 13 of 2022) [2023] KEHC 3265 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3265 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
JUDICIAL REVIEW 13 OF 2022
AC MRIMA, J
APRIL 20, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF TRANS NZOIA 1ST RESPONDENT

THE EXECUTIVE COMMITTEE MEMBER OF FINANCE, COUNTY GOVERNMENT OF TRANS NZOIA 2ND RESPONDENT

THE CHIEF OFFICER OF FINANCE, COUNTY GOVERNMENT OF TRANS NZOIA 3RD RESPONDENT

THE COUNTY SECRETARY, COUNTY GOVERNMENT OF TRANS NZOIA 4TH RESPONDENT

AND

PROF. NIXON SIFUNA T/A SIFUNA & SIFUNA ADVOCATES EXPARTE APPLICANT

JUDGMENT

Introduction and Background:

1. The Ex parte Applicant in his application by way of Notice of Motion dated 3rd October, 2022 and filed on 11th October, 2022, sought for orders the following orders: -
 - a. An Order of Mandamus do issue, compelling the Respondents to forthwith and without any delay, pay or cause out to be paid of the revenues of Trans Nzoia County Government the sum of Kshs. 1,702, 778.00 (Kshs. One Million Seven Hundred and Two Thousand



Seven Hundred and Seventy-Eight Only) to satisfy the decree passed in Kitale High Court Miscellaneous Civil Application No. 67 of 2021;

- b. The said payment be made in full within thirty (30) days from the date of this order and in default, a Notice to Show Cause be issued against the 1st Respondent's Executive Committee Member of Finance (2nd Respondent), the Chief Officer of Finance (3rd Respondent) and County Secretary (4th Respondent) to show cause why they should not be cited and committed to civil jail for six months for contempt of court;
 - c. Costs of these judicial review proceedings be granted to Sifuna & Sifuna Advocates.
2. The gist of the application is that on 13th June, 2014, the 4th Respondent on behalf of the 1st Respondent instructed the Ex-parte Applicant to represent inter alia, the 1st Respondent in Kitale High Court Constitutional Petition No. 3 of 2014.
 3. The Ex-parte Applicant, at the behest of those instructions, took over the conduct of the matter where the final determination of the said Petition favored the 1st Respondent.
 4. In seeking to obtain his legal fees for the aforementioned Petition, the Ex-parte Applicant filed its Bill of Costs in Kitale High Court Miscellaneous Civil Application No. 48 of 2019.
 5. The outcome of the assessment of costs was that the Taxing Master taxed the bill at Kshs. 1,702,778.00 (Read Kenya Shillings: One Million Seven Hundred and Two Thousand Seven Hundred and Seventy-Eight Only).
 6. Following issuance of the Certificate of Costs, the Ex-parte Applicant filed an application pursuant to Section 51 (2) of the *Advocates Act* in Kitale High Court Miscellaneous Application Civil Application No. 67 of 2021. In its decree issued on 7th March, 2022, judgment was entered against the 1st Respondent for the said sum as per the Certificate of Costs dated 26th October, 2021.
 7. Citing non-satisfaction of the decree, the Ex-parte Applicant filed the instant matter.
 8. The application under consideration is hinged on the Ex-parte Applicant's contention that the 1st Respondent has despite continued issuance of revenue from the Exchequer, failed to pay the said costs which continue to accrue interest. The Applicant lamented that the said legal fees continues to remain unpaid for over a period of 8 years. He accused the 1st Respondent of imploring delaying tactics to defeat settlement of the decretal sum.
 9. The proceedings are instituted as the 1st Respondent being part of the Government of the Republic of Kenya.
 10. During the hearing of the substantive motion, this Court confirmed and was satisfied that service of the pleadings upon the Respondents was properly effected. The Respondents, however, elected not to defend these proceedings or at all.

Analysis:

11. This Court is now invited to determine whether the present motion is with merit and ought to be granted in the circumstances.
12. In dealing with such an application, this Court must remain alive to the fact that the 1st Respondent is a creature of *the Constitution* and is established pursuant to Article 6 (1) under the First Schedule. As such, execution proceedings of decrees and orders against such an entity are special in nature.



13. Being a County Government, any proceedings against the 1st Respondent ought to comply with the [Government Proceedings Act](#), Cap. 40 of the Laws of Kenya (hereinafter referred to as ‘the Act’). That position is apparently provided for under Section 21(5) of the Act courtesy of an amendment in 2015.
14. The enactment of Section 21(5) of the Act was as a result of the interpretation of [the Constitution](#) by the Courts. In one instance, my Lordship Odunga, J (as he then was) in Republic vs. A.G & Another Ex-Parte Stephen Wanyee Roki (2016) eKLR rightly so stated as follows: -

Although the provisions of the [Government Proceedings Act](#) do not expressly refer to County Governments, Section 7 of the Sixth Schedule to [the Constitution](#) (Transitional and Consequential Provisions) provides that; all law in force immediately before the effective date continues in force and shall be construed with alteration, adaptation, qualification and exceptions necessary to bring into conformity with this Constitution. It follows that the provisions of the [Government Proceedings Act](#), a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring conformity with [the Constitution](#). One such construction would be the reality that the Government is now at two levels and Article 189 (1) (a) of [the Constitution](#) requires that the Constitutional status and institutions of Government both at the National and County levels be respected.... In my view, such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to execution proceedings.

15. As said, Section 21(5) of the Act now provides for compliance with the Act in proceedings by or against County Governments.
16. Having so stated, it now becomes crucial that this Court ascertains compliance with the Act in this matter.
17. There is no doubt that before an order of mandamus is issued, the elaborate procedure provided for under Section 21 of the Act and Order 29 of the Civil Procedure Rules must be strictly complied with.
18. For ease of this discussion, I hereby reproduce Section 21 of the Act:

- (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 required 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.
19. Expounding on the foregoing my Lordships Visram and Ibrahim, JJ (as then were) discussed the rationale for the immunity against the normal execution proceedings against the Government and by extension the foregoing elaborate procedure. This is what they stated in *Kisya Investments Ltd vs. Attorney General* (2005) 1KLR 74: -

Order 28, rules 2 (1) (a), (2) and (4) of the Civil Procedure Rules subject themselves to the provisions of the *Government Proceedings Act* which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. Many a times such application may indeed not attain that goal due to the effect of the said laws. On the question of abuse of the process of the court, the application of any written law cannot amount to an abuse of the process of the court however much its effect is harsh or even undesirable.... History and rationale of Government's immunity from execution arises from the following: - Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i). The raising of revenue – (by taxation or borrowing); (ii). Its expenditure; and (iii). The audit of Public accounts. The satisfaction of decrees or judgments is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government's expenditure. It is for this reason that section 32 of the *Government Proceedings Act* provides that any expenditure incurred by or on behalf of the Government by reasons of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorized by statute, and any unauthorized payment may be recovered. See Halsbury's Law of England 4th Edn Vol. 11 Para 970, 971 and 1370. As a result of the foregoing, which was borrowed from the Crown proceedings Act, 1974 (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No ministry or Department has any ready funds at all times to satisfy decrees or judgments. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. See *Auckland Harbour Board VS. R* (1924) AC 318, 326. The second situation, which arises from the above, is that once a decree or judgment is obtained against the Government,



it would require some reasonable time to have it forwarded to the ministry of Finance, Treasury, Comptroller and Auditor General etc for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their “own” funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and / or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgments and will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer’s hammer. No Government can possibly survive such an onslaught. The Government and therefore the state operations will ground to a halt and paralyzed and soon the Government will not only be bankrupt but it’s Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the law that prohibits execution against and attachment of the Government assets and property.”

20. In Permanent Secretary Office of the President Ministry of Internal Security & Another ex parte Nassir Mwachhihi (2014) eKLR, the High Court further stated as follows: -
 33. It therefore follows from the foregoing discourse that the rules applicable to normal execution proceedings by way of committal to civil jail are not necessarily applicable to enforcement of an order of the Court arising from an order of mandamus by way of committal. It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the *Government Proceedings Act* have been complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule. See *The District Commissioner Kiambu vs. R and Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960* [1960] EA 109; *R vs The Brecknock And Abergavenny Canal Co.* 111 ER and *R vs. The Bristol and Exeter Railway Co* 114 ER 859.
 34. The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court.....
21. This Court need not re-emphasize the need for strict compliance with Section 21 of the Act which in any event is the law of the land.
22. In this matter, the Court gathers from the record that a Decree and a Certificate of Costs in Kitale High Court Miscellaneous Application Civil Application No. 67 of 2021 were issued. However, this Court did not set its legal eyes on any Certificate of Order.
23. There is a specific procedure on how the Certificate of Order required under the Act is obtained. The procedure is contained in Order 29 of the Civil Procedure Rules. Under Rule 3 thereof, the application



is made to the Deputy Registrar in the High Court or to the Court in the subordinate Court. The format of the Certificate of Order is provided in Appendix A Form No. 22 of the Civil Procedure Rules. Form No. 23 provides the format for a Certificate of Costs in the event it is separately issued.

24. Once a party obtains the Certificate of Order and the Certificate of Costs, in the event the Certificate of Costs is obtained separately, together with the Decree, then such a party must satisfy the Court of service of those documents upon the party named in the Certificates. In this case there is neither evidence of issuance of the Certificates nor service thereof on the Respondents or their Advocates.
25. This Court, therefore, finds no difficulty in finding that the Ex-parte Applicant did not fully comply with the legal requirements for an order of mandamus to issue. The application is premature and cannot stand.
26. Having said so and as I come to the end of this judgment, this Court, once again, implores upon the Respondents to consider settling this matter amicably for the simple reason that there is a valid decree of the Court and that the liability grows, so to say, by the day. It is of importance to note that given the age of this matter as a whole and once compliance with Section 21 of the Act is made, drastic orders against the Respondents are likely to issue.
27. In the end, the following orders do hereby issue: -
 - a. The Notice of Motion dated 3rd October, 2022 is hereby struck out with no order on costs.
 - b. This judgment be served upon the Respondents.

DELIVERED, DATED AND SIGNED AT KITALE THIS 20TH DAY OF APRIL, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of: -

No appearance, Learned Counsel for the Ex-parte Applicant.

Miss Mukamo for the Respondents.

Regina/Chemutai – Court Assistants.

