



Republic v Embu County Government & 3 others; Olaka (Exparte Applicant) (Judicial Review Application E007 of 2022) [2023] KEHC 3365 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3365 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

JUDICIAL REVIEW APPLICATION E007 OF 2022

LN MUGAMBI, J

APRIL 20, 2023

IN THE MATTER OF AN APPLICATION BY VICTOR

ONYANGO OLAKA TO APPLY FOR AN ORDER OF

MANDAMUS

IN THE MATTER OF THE LAW REFORM ACT CAP 26 OF

THE LAWS OF KENYA

IN THE MATTER OF ORDER 53 RULE 3 OF THE CIVIL

PROCEDURE RULES 2010

BETWEEN

BETWEEN

REPUBLIC APPLICANT

AND

EMBU COUNTY GOVERNMENT 1ST RESPONDENT

THE CHIEF OFFICER FINANCE EMBU COUNTY GOVERNMENT 2ND RESPONDENT

THE COUNTY EXECUTIVE COMMITTEE MEMBER FINANCE EMBU COUNTY GOVERNMENT 3RD RESPONDENT

THE COUNTY SECRETARY EMBU COUNTY GOVERNMENT 4TH RESPONDENT

AND

VICTOR ONYANGO OLAKA EXPARTE APPLICANT



RULING

1. By a notice of motion application dated 14th September 2022 and filed in court on 16th September 2022 under Order 53 Rule 3 of the Civil Procedure Rules 2010, Section 8(2) and 9 of the Law Reform Act CAP 26 and Section 21 of the Government Proceedings Act, the ex-parte applicant sought the following orders:
 - a. That a prerogative order of mandamus do issue compelling the 2nd Respondent, the Chief Officer Finance Embu County Government, the 3rd Respondent, the County Executive Committee Member Finance Embu County Government and the 4th Respondent, the County Secretary Embu County Government directing the said officers to pay the ex-parte applicant within 30 days of the order the sum of Kshs. 2,731,662/= being the decretal sum in respect of EMBU CMCC E045 of 2021.
 - b. That in default, the Chief Officer Finance Embu County Government, the County Executive Committee Member Finance Embu County Government and the County Secretary Embu County Government be committed to civil jail at Embu GK Prison for a period of not less than 3 months.
 - c. That the costs of this application be provided for.
2. The application was based on the grounds shown on the face of the application as follows:
 - i. That on 25th November 2021, judgment was entered against the 1st respondent in EMBU CMCC E045 of 2021 where the county government was ordered to pay the exparte applicant a sum of Kshs. 2,480,000/= and a decree thereof issued.
 - ii. That thereafter the costs in EMBU CMCC E045 of 2021 were assessed at Kshs. 251,662/=.
 - iii. That the 1st respondent was dissatisfied with the said judgment and lodged an appeal of the trial court decision via Embu High Court Civil Appeal No. 49 of 2021 and after a full hearing, the Appeal was found to be unmerited and was dismissed via judgment delivered on 2nd June 2022.
 - iv. That the respondents' despite being served with the judgment and decree of the trial court and the judgment of the High Court have refused to pay the decretal sum to the ex parte applicant.
 - v. That there are no orders of stay issued either by this court, the Court of Appeal or at the Supreme Court. The decree of the trial court is therefore due and payable and there is indeed default.
 - vi. That the applicant is barred from executing against the government and his remedy lies in a judicial review order of mandamus compelling the respondents to satisfy the decree of the court.
 - vii. That the ex parte applicant wishes to enforce the judgment and decree of the trial court through a judicial review order of mandamus and hence the present application before this Honourable Court.
 - viii. That the ex parte applicant has lodged this application before court for inter alia the refusal by the respondents to pay the decretal sum to ex parte applicant.



- ix. That an order of mandamus compels 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.
 - x. It is in the manifest interests of justice and fairness that the orders herein sought do issue as prayed.
3. In addition to the grounds set out above, the ex parte applicant swore the supporting affidavit dated 14th September 2022 in which he reiterated the aforesaid grounds.
 4. The Respondents filed their Replying Affidavit dated 12th October 2022 on 13th October 2022. It was sworn by Johnson N. Nyaga who is the County Secretary of the 1st Respondent and on behalf of the 2nd and 3rd Respondents. He deposed that the 1st Respondent is aware of the primary suit being Embu Chief Magistrates Court Civil Case no. E045 of 2021 wherein judgment was entered in favour of the ex parte applicant on 25th November 2021. Being dissatisfied with the said judgment, the 1st Respondent preferred an appeal in Embu High Court Civil Appeal No. E048 of 2021 which was heard and determined vide judgment of this court delivered on 2nd June 2022 whereby the appeal was dismissed with each party bearing their own costs. He stated that the matter was pending assessment of the ex-parte applicant's Bill of Costs in the primary suit being Embu CMCC No. E045 Of 2021. Upon being served with the instant application he was shocked to discover that the costs in the primary suit were assessed at Kshs. 251,662/= in favour of the ex-parte applicant and they were neither served with the ex-parte applicant's Bill of Costs nor a Taxation Notice to enable them participate in the assessment of costs payable to the ex-parte applicant.
 5. He cited that Paragraph 72 of the Advocates (Remuneration) Order 2009 which mandates that upon a Bill of Costs being lodged in court for taxation, the applicant must serve both the Bill of Costs and Taxation Notice upon the other party participating in the proceedings and it is clear that the ex-parte applicant acted contrary to the rules set out under Paragraph 72 of the Advocates (Remuneration) Order 2009 by failing to serve them with the said Bill of Costs and a Taxation Notice to enable them participate in the assessment of costs payable to the applicant. The said actions amounted to infringement of their right to a fair hearing as enshrined in Article 50 of *the Constitution*. He continued that they established that the ex parte Applicant's Bill of Costs dated 27/06/2022 was filed on 4/07/2022 and upon perusal of the court file being Embu CMCC NO. E045 of 2021, they established that there was no affidavit of service filed by the applicant to prove that both the Bill of Costs dated 27/06/2022 and Taxation Notice were served upon either their advocates on record or upon them before assessment of the said Bill of Costs. Upon further perusal of the attached Certificate of Costs it was evident that the costs were assessed on 27/07/2022 and the Certificate of Costs extracted on 17/08/2022 and contended that the said Certificate of Costs was obtained unlawfully, irregularly and in deliberate circumvention of the provisions of the *Advocates (Remuneration) Order* 2009 and the *Civil Procedure Rules* 2010.
 6. He stated that they have since instructed their advocates on record to challenge the Certificate of Costs dated 16/08/2022 issued in the primary suit to enable it ascertain the justified costs payable to the ex parte applicant. He stated that to his knowledge the 1st Respondent is not aware of the exact decretal sum to be budgeted and paid for by the Respondent as it is disputing the process and the costs awarded to the ex parte applicant through a process where it was never informed contrary to the provisions of law and the execution process cannot commence until and unless the unjustified and unlawful costs awarded to the ex parte applicant are fully addressed.



7. He said that there is no absolute wilful refusal to pay the decretal amount as the 1st Respondent is still in a transition period and there is no money that had already been set aside to settle the decretal amount herein and once the issue of taxation of costs has been fully heard and determined then the decretal sum will be budgeted for. He stated that it was in the interest of justice that the motion be dismissed as there is no wilful refusal to settle the decretal amount and the same will be duly settled once the issue of the costs in the primary suit has been fully addressed which will enable the 1st Respondent ascertain the decretal sum to be budgeted and paid for by the 1st Respondent to the ex parte applicant.
8. The Respondents filed a supplementary affidavit dated 31st October 2022 and filed in court on 2nd November 2022 sworn by Johnson N. Nyaga. He deposed that they have since filed a reference to this Honourable Court being Embu High Court Miscellaneous Application No. 46 of 2022 Embu County Government v Victor Onyango Olaka dated 24/10/2022 challenging the irregular and unjustified costs awarded to the ex parte applicant in the primary suit upon which these proceedings are premised on. He stated that it was in the interest of justice that the Reference filed by the Respondent be determined first to enable them ascertain the costs payable to the ex parte applicant. He had been informed that the execution proceedings against the Respondent are irregular as the costs the ex parte applicant is seeking payment is still a matter in dispute as the reference is pending hearing and determination.
9. The hearing of the application was dispensed with by way of written submissions.

Ex-parte Applicant's submissions

10. The Ex-parte Applicant filed his submissions on 21st November 2022 and submitted that mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. He submitted that the 2nd, 3rd and 4th Respondents are the accounting officers of the 1st respondent and have a public duty to ensure that a money decree of the court issued against the 1st respondent is settled unless there is a stay of execution of such decree. He submitted that it is the respondents' public duty to satisfy the applicant's decree and failure to do so attracts the court's discretion to issue an order of mandamus commanding them to do so. He cited the decision in Republic V. Kenya National Examinations Council Ex Parte Gathengi & 8 Others Civil Appeal No. 234 Of 1996 where the Court of Appeal cited with approval Halsbury's Law of England, 4th Edn. Vol. 7p. 111 para 89 thus:

“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.”
11. He stated that mandamus applies in instances where statutory duty is cast upon a public officer in his official capacity as the duty is owed not to the state but to the public and thus any person having a sufficient legal interest in the performance of the duty may apply to the courts for an order of mandamus to enforce it. He cited the decision in Republic v. Attorney General & another ex parte James Alfred Koroso (2013) eKLR where the court in granting the judicial review of mandamus held that:

“In the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from



mandamus, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of *the Constitution* which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of *the Constitution* executive authority derives from the people of Kenya and is to be exercised in accordance with *the Constitution* in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.”

12. In conclusion he submitted that he has litigated in the trial court and on appeal to this Honourable Court and won on both occasions and prayed that the application be allowed.

Respondents' submissions

13. The Respondents filed their submissions on 28th November 2022 and submitted on two issues for determination. On whether the applicant is entitled to the reliefs sought, they submitted that the conditions for grant of order of mandamus are that it must be shown that the public officer has failed to perform his duty. They referred to decision in *Republic V. Town Clerk, Kisumu Municipality Ex Parte East African Engineering Consultants* (2007) 2 EA 441 where it was held that an order of mandamus compels a public officer to act in accordance with the law.
14. They submitted that the ex parte applicant commenced the instant proceedings against the 1st Respondent whereby the Respondents were ambushed that costs in the primary suit being Embu CMCC. No. E045 of 2021 were assessed at Kshs. 251,662/=. The failure to inform the Respondents of the assessment of costs offends the provisions of Paragraph 72 of the *Advocates (Remuneration) Order* 2009 which mandates that once a Bill of Costs is lodged in court for taxation, the Applicant must serve both the Bill and Taxation Notice upon the other party participating in the proceedings. They said that they were not aware of the exact decretal sum to be budgeted for and paid for by them as the reference is yet to be determined by this Honourable Court. They urged the court to not grant the writ of mandamus and relied on the authority of *REPUBLIC V Jomo Kenyatta University Of Agriculture And Technology Ex Parte Elijah Kamau Mwangi* Nairobi Hc Judicial Review Application No. E001 Of 2020 where the court in dismissing a similar judicial review application held that where there is a dispute as to whether a public duty has crystallised, the court will not by an order of mandamus compel the Respondent to exercise that duty until the dispute is sorted out.
15. They continued that there is no wilful refusal by the 1st Respondent to settle the disputed decretal sum and the same will be duly settled once the issue of costs in the primary suit is addressed *vide* Embu High Court Miscellaneous Application no. 46 of 2022 which is pending determination and relied on the decision in *Republic V Land Adjudication & Settlement Officer & 3 Others Ex Parte Clay Pascal Mwandambo Mombasa* Elc Misc. No. 33 Of 2018 where the court declined to issue writ of mandamus as there was no wilful refusal by the public officer to perform their duties. Further in *Republic V. National Land Commission & 2 Others Ex Parte Cabn Crew Investment Limited* Nairobi Hc Jr Misc. Application No. 89 Of 2019 where the court declined to issue orders of mandamus as the costs claimed



by the ex parte applicant had not been properly certified and processed in accordance with Section 21 of the *Government Proceedings Act*. It was therefore in the interest of justice that the application herein be dismissed in its entirety as the writ of mandamus is not one to be issued as a matter of course taking into account that the decretal sum can only be paid after the same has been budgeted for as per the provisions of the *County Government Act* and the *Public Finance Management Act* 2012.

16. On which party is to bear the costs of the application, they cited Section 27 of the *Civil Procedure Act* 2010 and it is the practice of courts in our jurisdiction to award costs to the successful party in a suit. It is a matter of discretion but the present application as against the Respondent is premature and unmerited and it serves justice that the respondents are awarded costs.

Analysis and Determination

17. Having reviewed the application together with the response and rival submissions thereof, I am of the humble view that there are two salient issues that fall for determination in this application, namely;
- a. Whether the application is merited;
 - b. Who should pay costs of the application?
18. Execution of decrees against the National Government and County Governments are undertaken through a special procedure provided for in the *Government Proceedings Act*. County Governments are not mentioned in the *Government Proceedings Act* but it is to be appreciated that with Kenya ushering a new constitutional dispensation, two levels of government were established in Kenya. In *Republic Vs, A.g & Another Ex-parte Stephen Wanyee Roki* (2016) Eklr, Odunga J held that reading the *Government Proceedings Act* together with the transitional clauses in *the constitution* brought the County Governments within the purview of the said Act as there were now two recognised levels of Government in this country, a position which I fully concur with. The Judge 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 being 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...”

19. Section 21 of the *Government Proceedings Act* regulates the manner in which a decree against the Government is to be settled, it states as follows:

“(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 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.”

20. Section 21 of the [Government Proceedings Act](#) thus makes it clear before a party seeking payment of decretal sum and/or costs owed by the National Government or a County Government as is in the present case, it must first apply to the court to be issued with a certificate in the prescribed form that gives details of the order and the said certificate must then be served on the Attorney General. In the instant case, I believe it must be the County Government Secretary.

21. Order 29, Rule 3 of [Civil Procedure Rules](#) provides as follows:

“...Any application for a certificate under section 21 of the [Government Proceedings Act](#) (which relates to satisfaction of orders against the Government) shall be made to a Registrar or, in the case of a subordinate court, to the Court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered be paid to the applicant shall be made to the court and may be made ex parte without summons, and such certificate shall be in one of the forms numbers 24 and 25 of Appendix C with such variations as circumstances may require...”



22. The ex parte applicant said that he served upon the Respondents the judgment and decree via a letter dated 9th June 2022 which he annexed to his supporting affidavit as ‘VOO4’. On the face of the letter there are stamps imprints from the office of the 2nd and 4th Respondents showing it was received on 13th June 2022. The decree attached to the notice of motion is ‘VOO1B’ is however not the prescribed certificate of Order Against the Government or the certificate for costs against the Government as required by section 21 (1) of the [Government Proceedings Act](#) which by virtue of Order 29 rule 3 of [Civil procedure Rules](#), must conform to appendix 22 and 23.
23. My reading of Section 21(3) of the [Government Proceedings Act](#) is that the ex parte applicant should have served upon the respondents the prescribed Certificate of Order against the Government stating the amounts payable. He has not attached any certificate of order against the Government that he applied for and obtained from the court upon expiry of 21 days from the date of judgment. This is what would have demonstrated that the payment from the Government was now legally due and for which a mandamus could then be sought. In

[Republic Vs. Permanent Secretary, Ministry Of State For Provincial Administration And Internal Security Exparte Fredrick Manoah Egunza](#) [2012] EKLK, Githua J remarked as follows:

“... The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the [Government Proceedings Act](#) (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon...”

24. The ex-parte applicant did not demonstrate that he had complied with the procedure stipulated in section 21 by applying for and obtaining the prescribed certificate of order against the Government contemplated in section 21 (3) of the [Government Proceedings Act](#) which takes the form provided for in order 29 rule 3 appendix 22 & 23 of [Civil Procedure Rules](#) before commencing these proceedings in which he seeks to enforce payment against the County Government by way of mandamus. Further, there is no affidavit of service confirming that the ex parte applicant served upon the respondents the prescribed certificate of order against the Government or indeed the extracted the certificate of costs against the Government and presented it in the prescribed format. In any case, the respondents have even filed a reference against the costs that were taxed on 27/07/2022 which is yet to be determined.
25. It is thus apparent that the application for the order of judicial review of mandamus has been sought prematurely before the legal obligation on the part of the Government to make payment pursuant to a court process has properly crystallized. The purpose of the order of mandamus is compel the performance of a public duty and the Court cannot intervene unless that duty is demonstrated to have legally fallen due on the part of the Government Officer or Department concerned.
26. There can be no duty on Government to pay damages awarded through a court process unless section 21 of the [Government Proceedings Act](#) is fully complied with. The process employed in this case is



misconceived and cannot thus be the basis for issuance of prerogative writ of mandamus to compel the Government to pay as the provisions of the primary statute through which the Government ought to be informed of such liability were not met.

27. It is thus the finding of this court that the application dated 14th September 2022 is legally incompetent and is thus hereby struck out with costs.

RULING DATED AND DELIVERED VIRTUALLY THIS 20 DAY OF APRIL, 2023.

L.N. MUGAMBI

JUDGE

In Presence of: =

Coram-

Court Assistant-Alice

Appellant-

Respondent- Mbeka for Respondent

Appellant Advocate- Muthoni Gitari for the exparte Applicant/Appellant - absent

Respondent Advocate-

Ruling delivered digitally to be transmitted by the Deputy Registrar to the Parties Advocates on record through their respective email addresses.

L.N. MUGAMBI

JUDGE

