



Republic v Trans Nzoia County Public Service Board & 2 others; Prof. Nixon Sifuna t/a Sifuna & Sifuna Advocates (Exparte Applicant) (Judicial Review 16 of 2022) [2023] KEHC 3267 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3267 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
JUDICIAL REVIEW 16 OF 2022
AC MRIMA, J
APRIL 20, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

TRANS NZOIA COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

THE CHAIRMAN, TRANS NZOIA COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

THE SECRETARY, TRANS NZOIA COUNTY PUBLIC SERVICE BOARD 3RD 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 October 11, 2022 and filed on October 12, 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 68 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 Chairman (2nd Respondent) and the Secretary (3rd 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 assessed at Kshs 120,000/=.
2. The gist of the application is that the 1st Respondent instructed the *ex parte* Applicant to represent it 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 up to its final determination.
 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 81 of 2019.
 5. The outcome of the assessment of costs was that the Taxing Master taxed the bill at Kshs 1,702, 778/=.
 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 68 of 2021. In its decree issued on March 7, 2022, judgment was entered against the 1st Respondent for the said sum as per the Certificate of Costs.
 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. The *ex parte* Applicant averred that under the [County Governments Act](#), a County Public Service Board is a legal entity capable of suing and being sued in its own name and responsible for its own debts. He further averred that by virtue of that proposition, the proceedings stood merited. Reference was made to Section 57 of the [County Governments Act](#), cap 40 of the Laws of Kenya (hereinafter referred to as 'the Act').
13. Being a creation of the [Act](#), a County Public Service Board is part of a County Government. Under Section 59(1) of the Act, the County Public Service Board discharges its functions on behalf of the County Government. The Board is also supposed to deliver its annual report to the County Assembly and also publish it in the County Gazette not later than seven days after the report has been delivered to the County Assembly.



14. In that regard, execution of orders and decrees against such an entity are special in nature. They must take the format set out in the Act. Consequently, an Applicant must meet the threshold set out in Section 21 of the Act as read together with Order 29 of the Civil Procedure Rules for an order of *mandamus* to issue.

15. Section 21 of the Act provides 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, 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.

16. Expounding on the foregone 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 judgements 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."

17. In [Permanent Secretary Office of the President Ministry of Internal Security & another ex parte Nassir Mwadhibi](#) (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.....
18. 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.
19. In this matter, the Court gathers from the record that a Decree and a Certificate of Costs in the civil suit were drawn and issued. The Court did not set its legal eyes on any Certificate of Order.
20. 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.
21. 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.
22. 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.
23. 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.
24. In the end, the following orders do hereby issue: -
 - a. The Notice of Motion dated October 11, 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.

