



Republic v County Secretary, Nakuru County Government & another; Ndonge (Exparte Applicant) (Judicial Review E005 of 2021) [2023] KEHC 3846 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEHC 3846 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
JUDICIAL REVIEW E005 OF 2021**

GL NZIOKA, J

MAY 4, 2023

**IN THE MATTER OF AN APPLICATION BY JULIUS MUNYAMBU
NDONYE FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS**

AND

IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT, CAP 40 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 22 AND ORDER 29 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF ORDER 53(1) OF THE CIVIL PROCEDURE RULES

AND

**IN THE MATTER OF DECREE OF KSHS 1,039,071.71 AND IN THE MATTER
OF ARTICLES 1(1),(2),(2)(1),(2),10(1)(B)20(1),21(1),23(1),27(1),28,73,156
AND 165 OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

REPUBLIC APPLICANT

AND

**THE COUNTY SECRETARY, NAKURU COUNTY GOVERNMENT ... 1ST
RESPONDENT**

**THE CHIEF FINANCIAL OFFICER, FINANCE NAKURU COUNTY
GOVERNMENT 2ND RESPONDENT**

AND

JULIUS MUNYAMBU NDONYE EXPARTE APPLICANT



JUDGMENT

1. By a Notice of Motion dated 1st February 2022, brought under the provisions of Order 53 Rule 3 of the Civil Procedure Rules, the ex-parte applicant, seeks for the following orders:
 - a. That an order of Mandamus to issue against the respondents herein namely the County Secretary Nakuru, the Chief Finance Officer Nakuru and the Nakuru County Government to compel them to proceed and pay out the decretal was delivered on 3rd December 2019 and it continues to attract interest at court rates.
 - b. That the court be pleased to set a timeline and/or duration within which the Respondents will settle the decretal sum with interest accruing until date of payment.
 - c. That the applicant be at liberty to apply to this court for all necessary and/or consequential orders that this Hon. Court may deem fit and just to grant.
 - d. That the costs of this application be costs in the cause.
2. The application is based on the ground thereto, the statutory statement and the verifying affidavit of the even date. The ex-parte applicant's case is that, on or about 25th June 2014 he was driving his motor vehicle registration number XGKD 44 along the Nakuru-Nairobi Highway when motor vehicle registration KBY Toyota Fortuner belonging to the respondent, Nakuru County Government, and driven by Felix Kembo its employee, swung into his lane resulting into a head on collision. As a result, he suffered injuries and his vehicle was extremely damaged.
3. That, Felix Kombo was charged with the offence of dangerous driving vide Naivasha Chief Magistrate Traffic Case No. 9113 of 2014 and on 7th June 2016, he was convicted and sentenced to pay a fine of Kshs. 30,000 and in default to serve a term of six (6) months imprisonment.
4. The applicant avers that he instructed his advocates to file a suit and filed Naivasha Chief Magistrate Civil Case No. 272 of 2017 against Felix Kombo and the County Government of Nakuru. The suit was heard and judgment was entered in his favour on 3rd December 2019.
5. On the 19th March 2021, he extracted a Certificate of Order against the Government indicating the total sum owing as Kshs. 1,039,071.71. However, from the date of judgment, a demand for payment and several reminders have been send to the respondents but they have failed, refused and/or neglected to settle the decretal amount plus costs.
6. He avers that the respondents are under a public duty to make the payment but they have acted in excess of their powers by refusing, absconding or abdicating their duties by failing to pay.
7. That no other remedy exists in law to compel the respondents to carry out their duties and pay the decretal amount except through the orders sought herein
8. However, the respondents opposed the application through the replying affidavit dated, 22nd February 2022 sworn by Joseph Muchinah Gitau, its Chief Officer, Finance. He averred that the respondent is aware of the decree and has not refused to settle the same.
9. That in making payments to any third party, the respondent is guided by it is budget and therefore cannot make any payments outside the scope of the budget in any financial year unless a supplementary budget is prepared as provided for in the *Public Finance Management Act*, 2012.



10. That provision for payment of outstanding decrees was made in the 2020/2021 budget but the same could not be effected as the monies were diverted towards combating the insurgence of the corona virus pandemic.
11. Further, the monies that was to be utilized for the payment of the decrees in the budget for the financial year 2020/2021 was factored in the current budget for the financial year 2021/2022, and at the time the applicant served the respondent with the Certificate of Order, the budget making process was at an advanced stage and therefore his decree could not be included therein.
12. That the respondent has a number of outstanding decrees and is in the process of settling them starting with the decrees that were not settled during the corona virus pandemic. The respondent urged the court to allow it settle the decretal amount in the next financial year that commences on July 2022. That the application be dismissed with costs.
13. The application was disposed of by filing of submissions. The applicant filed submissions dated 17th February 2022 and submitted that the Nakuru County Government is established under Article 6 of *the Constitution* and the 1st Schedule to *the Constitution*. Therefore, the *Government Proceedings Act* guide execution of decrees against it.
14. The applicant relied on the case of; Republic v AG & another Ex-parte Stephen Wanyee Roki [2016] eKLR where the court stated that, the *Government Proceedings Act* should be construed with the necessary alterations, adaptations, qualifications and exceptions necessary to bring it in conformity with *the Constitution* and in that case, as there are two level of governments, they should be treated same in respect to execution proceedings.
15. Further, that the County Secretary and the Chief Officer Finance are established under the County Government Act and under sections 44(1), 44 (3) and 45 of the said Act, they are the ones charged with the operation of the Public Service and County Treasury respectively.
16. He relied on the case of; Republic vs County Secretary of Nairobi City Council & 3 Others where the court held that, by virtue of section 44 of the County Government Act and section 103 of the *Public Finance Management Act* No. 18 of 2012, the County Secretary and the County Executive Committee Member for Finance are jointly responsible to satisfy court orders.
17. The applicant submitted that he has satisfied the requirements for issuance of an order of mandamus spelt out under section 21 of the *Government Proceedings Act* and Order 29 of the Civil Procedure Rules and relied on the decision in; Kisy Investment Ltd v AG [2005] 1KLR 74 where the Court of Appeal discussed the rationale and importance of the *Government Proceedings Act*, in relation to in prohibition of execution and attachment of government assets and stated that, the Act it prevents an onslaught that would cripple the government.
18. The applicant also relied on the case of Republic vs County Secretary of Migiru & Another ex-parte Magambo [2020] eKLR where the court explained that, the purpose of the elaborate procedure for seeking mandamus under the *Government Proceedings Act* is to give the government adequate notice to make arrangements to satisfy the decree.
19. He argued that the respondents had adequate notice to settle the decree but chose to ignore the same creating the impression that they wanted to hold him at ransom. That, the rationale of mandamus was discussed in the case of; Republic v Kenya National Examination Concill ex-parte Gathenji & Others [1997] eKLR that, it is meant to ensure that justice is done where there is a specific legal right and no specific legal remedy to enforce that right.



20. However, the respondents filed their written submissions dated 24th February 2022, and submitted that in an application for judicial review, the court must satisfy itself that the applicant has demonstrated the respondents action was marred with illegality, irrationality and procedural impropriety as stated in Council of Civil Servants Union vs Minister for the Civil Service [1985] 2 AC.
21. Further in the case of; Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others (supra) the Court of Appeal made specific reference to the prerogative writ of mandamus stating that it compels performance of a public duty imposed on a person or a body of persons by a statute.
22. It was reiterated that the Certificate of Order was served, however, the budget cycle for the year was 2020/2021 was already utilized by the insurgence of corona virus pandemic. That, the respondent is willing to pay the decretal sum but the failure to do so was occasioned by factors beyond its control. The court was urged not to grant the orders as prayed as the respondents have demonstrated that plans are underway to settle the decree and therefore should be accorded more time to ensure it is settled once funds are available for the next financial year.
23. Further, that the respondent should not be condemned to pay costs of the matter as they have ably discharged their mandate as stipulated by the Constitution, the Public Finance Management Act and the County Governments Act. Further, section 27 (1) of the Civil Procedure Act gives the court unfettered discretion to determine whom and out of what property and the extent that costs are to be paid as stated in the case of; Cecilia Karuru Ngayu vs Barclays Bank of Kenya (2016) eKLR.
24. Having considered the arguments advanced by the respective parties and I find that, the main issue herein is whether the applicant has met the threshold of grant of the orders sought, namely to be allowed to execute the judgment and resultant decree in; CMCC No. 272 of 2017 in his favour against the respondents.
25. In regard, section 21(4) of the Government Proceedings Act provides that:

“ 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”.
26. The question that arises is; how then can a decree holder enforce a judgment in its favour against the government. It is settled law that the only remedy available to the judgment creditor is to institute proceedings as herein and seek for an order of mandamus to compel the government to pay.
27. The order of Mandamus is derived from the Latin word “Mandare” meaning to command. It is a judicial remedy in the form of an order from a court to any government, subordinate court, corporation, or public authority, to do some specific act which that body is obliged under law to do, and which is in the nature of public duty, and in certain cases one of a statutory duty, where a public body or official has unlawfully refused, declined or otherwise failed to undertake the duty.
28. In discussing the writ of mandamus the Court of Appeal in the case of; Kenya National Examination Council v Republic , Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR 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.”

29. To revert back to the matter herein, copy of the judgment that gave rise to the decree, notices of judgment to the respondents dated 16th June, 2020 and 21st May, 2021, the demand notice dated 6th October, 2014, the Certificate of Order dated 9th March, 2021, have all been produced in support of the ex parte applicant’s demand for payment of the decretal sum. Even then, the respondents concede that it is under a duty to satisfy the subject decree herein, save for lack of funds.
30. It is a fact that, all the respondents are seeking for is time to pay, due to lack of funds, however, judgment herein was entered in the year 2016. The notice thereof was issued as far back as 2021. For how long can the ex parte applicant wait to enjoy the fruit of justice. The respondents are litigants like any other litigant under the law. The fact that section 21(4) of the Government Proceedings Act shields them as aforesaid does not mean it exonerates them from liability.
31. The old adage states that justice delayed is justice denied and article 159 of the constitution implores the courts to dispense justice expeditiously and finally article 48 of the constitution gives the ex parte applicant the right to access justice.
32. In the circumstances and taking into account that, the only remedy available to the ex parte applicant is an order of mandamus, I allow the notice of application dated 1st February 2022, is allowed as prayed in terms of prayers 1, and 4.
33. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 4TH MAY 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Musyoka for Mr. Pareno for the Petitioner

N/A for the Respondent

Ms Ogutu -Court assistant

