



**Republic v Attorney General & 3 others; Law Society of Kenya
& 2 others (Exparte) (Judicial Review Application E107 of 2021)
[2023] KEHC 19025 (KLR) (Judicial Review) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19025 (KLR)

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

JUDICIAL REVIEW APPLICATION E107 OF 2021

JM CHIGITI, J

JUNE 15, 2023

BETWEEN

REPUBLIC APPLICANT

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

**THE PRINCIPAL SECRETARY MINISTRY OF INTERIOR & CO-
ORDINATION OF NATIONAL GOVERNMENT 4TH RESPONDENT**

AND

LAW SOCIETY OF KENYA EXPARTE

BRIAN NZENZE EXPARTE

ERICKSON ALUDA MAMBO EXPARTE

(Orders made on the 13th day of April 2018 by the Honourable Justice Edward M. Muriithi and read in Court by the Honourable Judge E. C.mwita in Constitutional Petition No.311 Of 2016)



JUDGMENT

1. The application before this Court is the Notice of Motion application dated 27th August 2021. The Application seeks the following orders;

- “ 1. That the Honourable Court be pleased to and do hereby grant Judicial Review order of an order of mandamus compelling the 4th Respondent to comply with the orders of the Honourable Court made on the 13th day of April 2018 by the Honourable Justice Edward M. Muriithi And Read In Court By The Honourable Judge E. C.mwita in Constitutional Petition No.311 of 2016 directed at the Respondents to pay the Applicants the sum of Kenya Shillings Five Million (Ksh. 5,000,000/=) only each.
2. That in default of compliance with prayer number one (1) above, the Honourable Court be and is hereby pleased to personally summon the 4th Respondent and commit him/her to serve civil jail for a period of one (1) year without the option of a fine for being in contempt of this Honourable Court's Orders.
3. That costs of this Application be provided for.
4. That such further and other reliefs that this Court may deem just and expedient to grant.”

2. The application is supported by a Statutory Statement and Verifying Affidavit both of which are dated 12th August, 2021.

3. The Ex parte Applicants' case as deponed by Mercy K. Wambua who swears to be the Chief Executive Officer of the 1st Applicant is that the parents to the 2nd and 3rd Applicants herein disclosed here that their sons had been missing since the 1st June, 2016 and that they believed that they were at the time being held by Administration Police Officers who are the servants of the 3rd Respondent.

4. The parents to the 2nd and 3rd Applicants and witnesses are said to have recorded statements at the Kabete Police Station though some of the witnesses were intimidated. It is also deponed that the police at the DCIO had refused to cooperate with the parents by refusing to pick their calls and whenever they could visit the offices, they were informed that investigations were ongoing.

5. This prompted the parents to make a complaint to Independent Police Oversight Authority (IPOA) but so far, no progress was made. The 1st Applicant opted to file Constitutional Petition No. 311 of 2016 on behalf of the 2nd and 3rd Applicant pursuant to Article 22 (2) (a) and (c) of the Constitution, seeking orders of habeas corpus for the production of the 2nd and 3rd Applicants who were arrested by Administration Police Officers on 1st June 2016.

6. The Applicants it is deponed prayed for the following specific orders;

- “ v. A declaration that the right to petition for an order of habeas corpus is guaranteed under Article 25(d) and cannot be limited.
- vi. An order of habeas corpus directed at the respondents to immediately produce the persons and/ or bodies of the 2nd and 3rd petitioners before a court of law.



- vii. An order of compensation and reparation for the violation of the fundamental rights of the 2nd and 3rd petitioners as provided for and guaranteed under the [Constitution](#).
 - viii. Costs of the Petition.”
7. The Court in its Judgment delivered on 13th April,2018 by Justice Edward M. Muriithi is said to have ordered as follows;
- i. The Petitioner's Petition herein for an order of habeas corpus is declined as there was no evidence that the Respondents presently had custody of the 2nd and 3rd Petitioners.
 - ii. On a balance of probabilities to a standard of proof appropriate to the serious allegation of deliberate disappearance of a person, the Court finds that the 2nd and 3rd petitioners were on the 1stJune,2016 arrested by Administration Police Officers Benson Simiyu Makhoha, Simon Mbau Muriithi and Kennedy Mburu Njoro and thereafter disappeared in unclear circumstances, which must be investigated and appropriate action taken in the circumstances.
 - iii. The 3rd Respondent shall pay on behalf of the National Police Service of the Government of Kenya Ksh.5,000,000/= each for the two petitioners - the 2nd and 3rd petitioners - to be paid to petitioners' respective mothers, Beatrice Kajairo and Sarah Khadi Muyera — as compensation for breach of the petitioners' rights Article 29 of the [Constitution](#) against deprivation of freedom arbitrarily and without just cause, and detention without trial upon arrest by the Administration Police Officers.
 - iv. A Judicial Review Order of Mandamus will issue to the 3rd Respondent Inspector General of Police directing him to carry out their constitutional and statutory function of investigation of crime under Article 245 of the [Constitution](#), and section 24 (e) of the [National Police Service Act](#), and to the 2nd Respondent Director of Public Prosecution thereafter to consider the results of the investigation and to prosecute persons found culpable for any offence.
 - v. For avoidance of doubt and in deference to the 2nd Respondent DPP's independence, authority and discretion under Articles 157 (10) and (11) of the [Constitution](#) to consider whether or not any prosecution is in the public interest and interests of the administration of justice, the Court does not make any orders for the prosecution of any person implicated in these proceedings.
 - vi. The costs of the Petition shall be paid by the 3rd Respondent to the Petitioners.
8. The Respondents are accused of failing to comply with the said orders to date.
9. The 1st Respondent in opposition to the application filed grounds of opposition dated 15th October,2021 in which it raises the grounds as follows;
- 1. That the Respondent has filed a notice of appeal dated 14th May 2018 in respect of the judgment from which the application herein arises.
 - 2. That the Respondent has also filed an application for stay of execution of the orders arising out of the judgment in High Court Constitutional Petition no. 311 of 2016 at the Court of Appeal, being Civil Appeal No. E341 of 2021, *Attorney-General v Law Society of Kenya*.
 - 3. That it is just that the court allow that the matter be heard by the Court of Appeal prior to hearing the application herein.”



10. The Ex parte Applicants also filed written submissions dated 20th January,2023 in which one issue for determination is raised and that is whether the Orders sought by the Applicants in the Application dated 27th August,2021 should be granted?
11. It is the Applicants' submission that the loss of one's child without a trace is something one should not go through let alone having the loss enforced by security personnel. Further that the continued and blatant disregard of this Honourable Court's Orders in as far as the instant matter is concerned has not only continued to worsen the Applicants' parent's misery but is also evidence of the Respondents lack of respect for judicial authority.
12. The Applicants also submit that it is imperative for government agencies to obey Court orders as this ensures the proper functioning of the judicial system and the protection of individual rights. The Applicants also submit that the Court's orders are still in force as they are yet to be set aside and further that the concept of the rule of law is heavily reliant on the obedience of court. In support of this arguments the case of *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others* [2017] eKLR is quoted.
13. It is also the Ex parte Applicants' submission that the law provides for enforcement mechanisms meant to ensure that contemnors are made to obey Court orders and more specifically that the law provides a manner in which the Honourable Court can reiterate the seriousness of obedience of Court Orders compelling the contemnors to obey them. To buttress this argument, the case of *Republic v Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya* HCMCA No. 13 of 2008 is cited.
14. The Applicants humbly submit that the Court should rely on section 5 of the *Judicature Act* which grants this Honourable Court the authority to ensure that its orders are not treated with contempt and disdain. The section provides as follows;

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”
15. The cases of *Samuel M.N.Mweru & Others v National Land Commission & 2 Others* [2020] eKLR is cited on disobedience of court orders.

Analysis and Determination

16. I have considered the arguments advanced by the parties herein and the issue for determination is whether the orders sought are merited.
17. Under what circumstances is an order for mandamus merited? The Court of Appeal in the case of *Republic v Kenya National Examinations Council Ex Parte Gathenji & 8 Others* Civil Appeal No 234 of 1996, cited with approval, *Halsbury's Law of England*, 4th Edition. Vol. 7 p. 111 para 89 thus:

“The order of mandamus is of most extensive remedial nature and is in form, of 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.”...These principles mean 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.”

18. The Court in the case of *Republic v The Attorney General & Another ex parte James Alfred Koroso* (2013) eKLR held as follows;

“... in the present case the ex parte applicant has no other option of realizing 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 realized. 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.”

19. It is not in dispute that there is a subsisting order of the Court delivered on 13th April, 2018 and a decree issued on 21st June, 2021 that is yet to be satisfied by the Respondents.

20. Section 21 of the *Government Proceedings Act* before receiving an Order of Mandamus. Section 21 of the *Act* provides:

“(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.”

21. The Act under Section 21 (3) provides as follows;

“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.”

22. The Court in the case of *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza* [2012] eKLR held as follows;

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*. 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.

This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.”

23. These statutory provisions have the effect of requiring the accounting officer for the appropriate government department to fulfill any judgments obtained against that agency even though the government is not subject to the typical legal mechanisms of enforcing judgments.

Disposition:

24. This court has had due regard of what is produced before the court by the Applicants and there is no evidence of service of the Judgment, decree or Certificate of Order against Government having been served on the Respondents as is required under the law. The court notes that in a letter dated 21st July, 2022 from the firm of Omondi Ogutu & Associates to the Deputy Registrar Judicial Review Division the Applicants seek to be furnished with a Certificate of Order against Government but it is not clear if the same was issued or even served upon the Respondents.
25. The Applicant has not complied with the requisite procedure under Section 21 of the Government Proceedings Act in that the Applicant did not file a Certificate of Order against the Government.
26. Further to this, The Applicant did not file a Statutory Statement of Fact as provided for under Order 53 or the *Civil procedure rules*.



27. The failure by the Ex parte Applicants to serve the Respondents with the aforementioned statutory documents renders the application before this court incompetent.
28. These are not the kind of technicalities that can be cured by invoking Article 159 of The Constitution. The omissions are incurable and fatal.

Order:

29 The 27th August 2021 dated is hereby struck out. I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE 2023

J. CHIGITI (SC)

JUDGE

