



Republic v Chief Officer, Department of Transport and Infrastructure, County Government of Vihiga; Mohasom Limited (Exparte Applicant) (Judicial Review Application E001 of 2022) [2023] KEHC 20801 (KLR) (24 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20801 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
JUDICIAL REVIEW APPLICATION E001 OF 2022**

JN KAMAU, J

JULY 24, 2023

BETWEEN

REPUBLIC APPLICANT

AND

**THE CHIEF OFFICER, DEPARTMENT OF TRANSPORT AND
INFRASTRUCTURE, COUNTY GOVERNMENT OF VIHIGA .. RESPONDENT**

AND

MOHASOM LIMITED EXPARTE APPLICANT

RULING

INTRODUCTION

1. In its Notice of Motion dated 22nd February 2022 and filed on 23rd February 2022, the Ex parte Applicant herein sought that an order of mandamus be issued to compel the Respondent herein to pay it the sum of Kshs 7, 950, 133.75 together with interest with effect from January 2016 and costs totalling Kshs 13, 888,939/= as at 13th September 2021, being the decretal sum and costs awarded and found payable to it in Vihiga CMCC No 121 of 2019 Mohasom Limited v The County Government of Vihiga plus interest at court's rates with effect from January 2016 till payment in full (sic).
2. Mohamed H. Isaak, a Director of the Ex parte Applicant swore a Verifying Affidavit on 9th February 2022 in support of the said application. He also filed a Further Affidavit on 16th September 2022.
3. The Ex parte Applicant explained that in the year 2016, the Respondent awarded it a contract for the construction of a bridge. The Respondent paid it part of the agreed contract sum leaving a balance of Kshs 7, 591,615/=.



4. It filed Vihiga CMCC No 121 of 2019 (Supra) claiming the said balance together with interest at court rates with effect from January 2016. On November 17, 2020, judgment was entered in its favour for the sum of Kshs 7, 591,615/= together with interest from January 2016. Together with costs which were assessed at Kshs 363,212/=, the sum that was due as at September 13, 2021 was Kshs 13, 888,939/=.
5. However, the respondent failed to pay the said sum which continued to accrue interest which the ex parte applicant stated had resulted in an injustice. It therefore sought a judicial review order of mandamus be issued against the respondent to compel it to satisfy the said Judgment.
6. On July 1, 2022, it obtained a Certificate of Order against the Government in Vihiga CMCC No 121 of 2019 (supra) in compliance with the [Government Proceedings Act](#) which it served upon the Respondent herein on July 4, 2022.
7. The Respondent did not file any response to the present application and/or Written Submissions despite having been given sufficient time to do so. On March 1, 2023, this court declined to grant it an adjournment to file the said documents. Notably, on January 25, 2023, Musyoka J who was at the time handling this matter directed that no further indulgence would be extended to it.
8. This court thus reserved a Ruling date of the present application on the basis of the Ex parte Applicant's Written Submissions that were dated October 18, 2022 and filed on October 31, 2022.

Legal Analysis

9. The ex parte applicant submitted that the only way a decree for payment could be enforced against the Respondent herein was by way of the issue of the writ of mandamus compelling the Accounting Officer in the relevant department to pay the decretal sum as the government was protected from execution of its property by attachment under section 21(4) of the [Government Proceedings Act](#).
10. It asserted that a Certificate of Order against Government and a Certificate of Order for Costs against the Government was issued by the court and served upon the County Government of Vihiga through the Office of the County Attorney as seen in the Further affidavit that was sworn by Mohamed Isaak on September 16, 2022 and the annexed Affidavit of Service that was sworn by a process server. It was its case that it had met the threshold and/or satisfied the condition for being granted the orders it had sought and thus urged this court to grant the same.
11. In this regard, it placed reliance on the cases of [Republic vs Chief Officer Department of Trade, Industry, Tourism and Entrepreneurship County Government of Vihiga & another ex-parte Gaceon Kenya Limited](#) [2020] eKLR and [Republic vs County Secretary, County Government of Mombasa & 2 others ex parte Samuel Muteei t/a Tudor Paradise](#) [2021] eKLR where the courts therein granted an order of mandamus having been satisfied that the legal requirements for issuance of the said order had been met.
12. Section 21(1) of the [Government Proceedings Act](#) cap 40 (Laws of Kenya) provides that:-

“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.”

13. Section 21 (3) of the said *Government Proceedings Act* further stipulates that:-

“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.”

14. As Githua J held in the case of *Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* [2012] eKLR, once a government was sued in a civil matter, it became a party just like any other person and did not enjoy any special privileges.
15. In the present case, the court noted that the Ex parte Applicant served the Respondent with the Certificate of Order against the Government and a Certificate of Order of Costs against the Government both dated July 1, 2022 on 4th of July 2022.
16. Indeed, the aforesaid Certificate of Order against the Government and the Certificate of Costs against the Government were duly acknowledged by the Office of the County Attorney in Vihiga as was evidenced by its official stamp on all documents.
17. The respondent lost an opportunity to explain why it had not satisfied the decree more than a year after it was issued when it failed to file any response to the present application. There was therefore no cogent and/or plausible reason to explain why it did not honour the judgment that was entered against it in favour of the ex parte applicant herein.
18. Notably, an entity that fails to carry out its constitutional and statutory mandate does so at its detriment and cannot defeat a lawful claim that has been made against the government.
19. As the ex parte applicant was barred from executing against the government to recover its monies without first complying with the law, it had no option but to apply for an order for mandamus against the Respondent herein. Indeed, unless the order herein was granted, it would be left with an unexecuted decree. It would be a travesty of justice if it was not granted the order it had sought for the reason that it offered services to a government entity. Refusal to grant such an order in a clear case such as this one would be tantamount to assisting a government entity gain an unfair advantage over its own citizen. This state of affairs is completely frowned upon by Chapter Six (6) of the *Constitution* of Kenya, 2010 which calls for promotion of public confidence by acting with integrity, bringing honour to the nation and dignity to all public offices.



Disposition

20. For the foregoing reasons, the upshot of this court's decision was that the ex parte applicant's Notice of Motion application dated February 22, 2022 and filed on February 23, 2022, was merited and the same be and is hereby allowed in terms of Prayer No (a) therein to the effect that an order of mandamus be and is hereby issued against the respondent herein to pay the ex parte applicant herein the sum of Kshs 13,888,939/= together with interest thereon at court rates from 14th September 2021 until payment in full. Indeed, the sum of Kshs 7,950,133.75 had already accrued interest from January 2016 to September 13, 2021 and hence the sum of Kshs 13,888,939/= could not accrue interest from January 2016 as the ex parte applicant herein had sought herein as the same would amount to unjust enrichment. The respondent will bear the ex parte applicant's costs of the proceedings herein.
21. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF JULY 2023

J. KAMAU

JUDGE

