



Republic v County Secretary, County Government of Taita Taveta & 2 others; Madzayo Mrima & Jadi Advocates (Exparte Applicant) (Judicial Review E002 of 2022) [2023] KEHC 21040 (KLR) (18 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21040 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
JUDICIAL REVIEW E002 OF 2022
OA SEWE, J
JULY 18, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**THE COUNTY SECRETARY, COUNTY GOVERNMENT OF TAITA
TAVETA 1ST RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER FOR FINANCE, TAITA
TAVETA 2ND RESPONDENT**

COUNTY GOVERNMENT OF TAITA TAVETA 3RD RESPONDENT

AND

MADZAYO MRIMA & JADI ADVOCATES EXPARTE APPLICANT

JUDGMENT

1. Upon being granted leave, the ex parte applicant, Madzayo Mrima & Jadi Advocates (hereinafter, “the applicant”) filed the Notice of Motion dated 10th August 2022 under Sections 8 and 9 of the [Law Reform Act](#), Chapter 26 of the Laws of Kenya; and Order 53 Rule 1(1) of the Civil Procedure Rules for orders that:
 - (a) An Order of Mandamus do issue to compel the respondents to pay the decretal sum of Kshs. 864,104.22 in satisfaction of the Certificates of Costs issued by the Deputy Registrar on the 25th April 2022 in Voi High Court Advocate-Client Bill of Costs as taxed in respect of:
 - (i) Misc. Civil Application No. E15 of 2021- Kshs. 105,442.50
 - (ii) Misc. Civil Application No. E16 of 2021- Kshs. 138,714.90



- (iii) Misc. Civil Application No. E17 of 2021- Kshs. 122,146.50
- (iv) Misc. Civil Application No. E18 of 2021- Kshs. 127,038.00
- (v) Misc. Civil Application No. E19 of 2021- Kshs. 214,612.32
- (vi) Misc. Civil Application No. E20 of 2021- Kshs. 129,150.00

- (b) That the costs of the application be borne by the respondents.
2. The application was premised on the grounds that between the years 2008 and 2010, the applicant represented the defunct Municipal Council of Voi in various matters to their logical conclusion at the Principal Magistrates Court in Voi; and that upon the promulgation of *the Constitution* of Kenya, 2010, the 4th respondent took over the duties, assets and liabilities of the defunct Municipal Council of Voi but has ignored, refused and or made no effort to settle the fee notes raised by the applicant. The applicant thereafter proceeded to have their Bills of Costs taxed in Voi High Court Miscellaneous Civil Applications Nos. E15 of 2021, E16 of 2021, E17 of 2021, E18 of 2021, E19 of 2021 and E20 of 2021, and Certificates of Taxation issued by the Deputy Registrar in the total sum of Kshs. 864,104.22; which amount remains outstanding, due and owing to date.
 3. The applicant further averred that it is the duty of the 1st, 2nd and 3rd respondents to facilitate the payment of the outstanding sums, but that they have deliberately failed to exercise their statutory duty; and therefore that unless compelled by the Court, they will persist in their refusal to settle the decretal sum. The applicant asserted that it has no other option of realizing the fruits of the said Certificates of Costs apart from the orders sought herein.
 4. The application was premised on the affidavit of Mr. George Kittu, Advocate, sworn on 10th August 2022 to which he annexed copies of the subject Certificates of Costs.
 5. In opposition to the application, the respondents relied on the Replying Affidavit sworn by Liverson Mghendi, in his capacity as the County Secretary. He averred that this suit is premature for failure to comply with the provisions of Section 21 of the *Government Proceedings Act* as read with Order 29 Rule 3 of the Civil Procedure Rules. He pointed out that, in these proceedings no certificate or order against the County Government of Taita Taveta was served as by law required. He accordingly prayed for the dismissal of the substantive Judicial Review application.
 6. Directions were thereafter given on 22nd September 2022 that the application be canvassed by way of written submissions. To that end, counsel for the applicant, Mr. Kittu, filed his written submission on 4th October 2022. He proposed a single issue for determination, namely, whether the applicant is deserving of the orders sought. He submitted that, whereas execution proceedings as are known in law are not available against the Government, the accounting officer for the Government Department concerned is nevertheless under a statutory duty to satisfy a decree made by the court against that department. He relied on Section 21 of the *Government Proceedings Act* and the cases of Republic v County Secretary, Nairobi City County & 3 Others, Ex Parte Koceyo & Co. Advocates [2020] eKLR and Republic v The County Government of Embu & 2 Others, Ex Parte Manyonge Wanyama & Associates Advocates [2019] eKLR in urging the Court to allow the application and grant the orders sought.
 7. On behalf of the respondent, Mr. Muliro relied on his written submissions filed on 6th October 2022. He proposed the following issues for determination:
 - (a) Whether the 1st respondent is a necessary party to these proceedings;



- (b) Whether the applicant has satisfied the requirements of Section 21 of the *Government Proceedings Act* as read with Order 29 of the Civil Procedure Rules; and,
- (c) Whether the application is merited.
8. According to Mr. Muliro, since the 1st respondent is not the accounting officer of the 4th respondent, he is under no obligation to make any payment. He relied on Section 44 of the *County Governments Act*, 2012 and the cases of Republic v County Secretary, County Government of Mombasa & 2 Others, Ex Parte Samuel Mutemi t/a Tudor Paradise [2021] eKLR and Republic v County Secretary Migori County Government & Another [2018] eKLR in this regard.
9. As to whether the applicant has satisfied the requirements of Section 21 of the *Government Proceedings Act*, counsel asserted that before a court issues an order of Mandamus, it must be satisfied that the provisions of the *Government Proceedings Act* have been complied with in terms of issuance and service of a Certificate of Order and/or a Certificate of Costs against the Government. Mr. Muliro relied on Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security, Ex Parte Fredrick Manoah Egunza [2012] eKLR and Republic v Permanent Secretary Office of the President, Ministry of Internal Security & Another, Ex Parte Nassir Mwandihhi [2014] eKLR.
10. It was further the submission of Mr. Muliro that, granted that the prerequisites of Section 21 of the *Government Proceedings Act* are yet to be complied with, there is no duty on the part of the respondent to pay the sums alleged to be due to the applicant. He relied on Republic v Permanent Secretary Office of the President, Ministry of Internal Security & Another, Ex Parte Nassir Mwandihhi (supra) and Republic v County Government of Kwale; Charpenel Enterprises Limited (Ex Parte) (Judicial Review Application 020 of 2021) [2021] KEHC (9 November 2021) Judgment, and prayed for the dismissal of the application with costs.
11. I have given careful consideration to the substantive Judicial Review application dated 10th August 2022 together with the affidavits filed in respect thereof. I have similarly taken into account the written submissions filed by learned counsel for the parties. Needless to say that Mandamus is a relief available to litigants under Article 23(3)(f) of *the Constitution* and Order 53 of the Civil Procedure Rules. Its scope was well explicated in Halsbury's Laws of England, 4th Edition, Volume 1 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...”
12. The remedy is particularly efficacious in situations where a decree or Certificate of Costs has been issued against the Government. This was well-explicated by Hon. Githua, J. in Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security, Ex Parte Fredrick Manoah Egunza (supra) thus:
- “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](#).

13. Nevertheless, an elaborate procedure has been set out, not only under Section 21 of the [Government Proceedings Act](#), but also under Order 29 Rule 3 of the Civil Procedure Rules for compliance before an order of Mandamus can issue. For instance, Section 21 of the [Government Proceedings Act](#), stipulates thus in Sub-Sections (1) and (2):

“

- “(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.

- (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.”

14. Further to the foregoing, Subsections (3) and (4) of Section 21 of the [Government Proceedings Act](#) state:

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- “(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.”

15. Moreover, Order 29 Rules 2 (2) of the Civil Procedure provide:

No order against the Government may be made under—



- a. Order 14, rule 4 (Impounding of documents);
 - (b) Order 22 (Execution of decrees and orders);
 - (d) Order 23 (Attachment of debts);
 - (d) Order 40 (Injunctions); and
 - (e) Order 41 (Appointment of receiver).
16. That the aforesaid provisions apply to County Governments such as the 4th respondent is not in doubt, for Subsection (5) of Section 21 is explicit that:

“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.”

17. The rationale for this stringent procedure was well captured in *Kisya Investments Ltd v Attorney General & Another* [2005] 1 KLR 74 thus:

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 reason 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 authorised by statute, and any unauthorised payment may be recovered. See Halsbury’s Laws 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, 1947 (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 judgements. 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 judgement 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 judgements 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 its 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.” (also see Republic v Permanent Secretary Office of the President Ministry of Internal Security & Another, Ex Parte Nassir Mwandishi, supra)

18. That said, the key issue to consider before engaging in a merit consideration of the application is whether the aforementioned prerequisite was satisfied by the applicant and the simple answer to that question is no, as no such certificate as envisaged under Section 21(1) was exhibited by the applicant. In Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security, Ex Parte Fredrick Manoah Egunza (supra), it was held:

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

19. It is plain from the foregoing that the Certificate of Costs envisaged under the above provisions is not the Certificate of Taxation, but a Certificate “in the prescribed form” for purposes of the particular provision. There is absolutely no indication that any such certificate was taken out or served on the 4th respondent as required. In the premises, it would follow that the application is premature and is therefore for striking out.
20. In the result, it is hereby ordered that the Notice of Motion dated 10th August 2022, having been prematurely filed, be and is hereby struck out with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18TH DAY OF JULY 2023

OLGA SEWE

JUDGE

