



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Independent Electoral and Boundaries Commission; Kombe (Exparte) (Judicial Review Application E176 of 2022) [2023] KEHC 20097 (KLR) (Judicial Review) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20097 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW APPLICATION E176 OF 2022  
JM CHIGITI, J  
JULY 14, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ..... RESPONDENT**

**AND**

**FAITH TUMAINI KOMBE ..... EXPARTE**

**RULING**

**Brief Background**

1. The Application before this Court is the Applicant's Notice of Motion application dated 5<sup>th</sup> December, 2022 brought under Order 53 Rule 3(1) of the *Civil Procedure Rules*.
2. The application seeks the following orders;
  1. An Order of *Mandamus* directed to compel the Chief Executive Officer of the Independent Electoral and Boundaries Commission to pay the applicant the costs of the suit amounting to Kenya Shillings Eight Hundred and Sixty-Seven Thousand Nine Hundred and Fifty-Four [ksh 867,954/=] only being the party and party costs with interest at court rates till payment in full.
  2. Costs of the application be provided for;
  3. Such further and other reliefs that the honorable court may deem just and expedient to grant in the interest of justice.



3. The Application is supported by a Statutory Statement dated 6<sup>th</sup> October, 2022 and a Verifying Affidavit sworn by Sylvester Mukele Ngacho on 9<sup>th</sup> October,2022.
4. The Applicant's case is that the court in its judgement delivered on 4<sup>th</sup> May, 2018 allowed the *Ex parte* Applicant's appeal no 5 of 2018 with costs and one of the parties aggrieved appealed to the Court of Appeal and subsequently to the Supreme Court. Both appeals were both dismissed.
5. The applicant filed her party and party bill of costs on 27<sup>th</sup> January,2021 which was taxed on 6<sup>th</sup> July,2021 and allowed against the Respondent at the sum of Kenya Shillings Eight Hundred and Sixty-Seven Thousand [ksh 867,954/=].
6. Subsequently a demand letter was served upon the Respondent on 23<sup>rd</sup> September,2021 seeking compliance of the Court's decree.
7. The Respondent has not lodged an appeal against the decision of the taxing master and as such the actions and inactions on its part according to the Applicant amounts to contempt.
8. The Respondent did not file any response to the Application that is before the court as evidenced by the Affidavit of Service sworn on 7<sup>th</sup> December,2022 by Samuel Mutua Wambua.
9. The *Ex Parte* Applicant filed written submissions dated 17<sup>th</sup> January,2022 in which two issues were raised for determination and these are whether the applicant is entitled to the orders sought and the issue of costs.
10. On the first issue The *Ex parte* Applicant relies Section 10 of the [Independent Electoral and Boundaries Act](#) on the Secretary of the Commission, Section 13 of the same Act on Legal Personality of the Commission and Section 21 of the [Government Proceedings Act](#) on execution against the Government and Section 107,108 and 109 of the [Evidence Act](#) on Burden of Proof, Incidence of burden and Proof of particular fact respectively.
11. The case of [Republic v Secretary to the IEBC & 2 others Ex parte Omari Wanjiku Esba](#) [2020] eKLR is referred to on the Order of *Mandamus* and the case of [Republic v Chief Executive Officer, Independent Electoral & Boundaries Commission & another Ex parte M' Anyiri Hannington Gitaari](#) [2016] eKLR on when the Order can issue.
12. It is the *Ex parte* Applicant's submission that by dint of Section 10 (7) of the [Independent Electoral and Boundaries Commission Act](#), the Secretary to the commission being the Chief Executive Officer and accounting officer of the Respondent has the mandate, duty and responsibility to pay the applicant the costs awarded to her and assessed by this Honourable Court.
13. The *Ex parte* Applicant also submits that this is the appropriate case where an order of *mandamus* should be issued against the Secretary of the Respondent who is also its Chief Executive Officer and Accounting Officer since there is no other available mechanism to the Applicant to enable her enjoy the fruits of her judgment through the payment of the costs awarded to her against the Respondent.
14. It is the Applicant's submission that this honourable court has the jurisdiction to grant an appropriate relief taking into account the circumstances of this matter in compliance with Article 23 of [the Constitution](#) on the authority of Courts to uphold and enforce the Bill Rights.
15. On the issue of costs, the *Ex parte* Applicant refers to Section 27 of the [Civil Procedure Act](#) on costs and further submits that there being no good reason to order otherwise, the *Ex parte* Applicant being the successful party before this Honourable court should be awarded costs.



## Analysis and Determination.

16. From the foregoing the issues for determination are whether the Respondent has a legal duty to satisfy the decree subject of these proceedings and whether the *Ex Parte* Applicant has satisfied the conditions precedent to warrant the orders of this court.
17. It has not been contended that indeed there is a valid court order pending fulfilment by the Respondent herein. The *Government Proceedings Act* under Section 21 provides for satisfaction of orders against the Government. It states 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 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.”

18. Section 21 (3) continues to state 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.”

19. 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, 4<sup>th</sup> 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.”

20. 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.”

21. The decree yet to be fulfilled was issued on 8<sup>th</sup> May,2018 and was served by the firm of Mukele Ngacho & Company Advocates *vide* a letter dated 23<sup>rd</sup> September,2021 addressed to the Executive Officer of the Respondent together with the Certificate of Taxation dated 21<sup>st</sup> July,2021.
22. However, there is no evidence of the *Ex parte* Applicant having served a Certificate of Order Against Government upon the Respondent as required under Section 21 of the *Government Proceedings Act*.
23. The Court in the case of *Republic v Chief Executive Officer Independent Electoral and Boundaries Commission Ex-Parte Office Technologies Limited* [2016] eKLR held as follows;

“12. The next issue is whether the orders sought herein can issue against the Respondent herein. As rightly held in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza* (*supra*):

“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.”



**Disposition:**

24. Having established that no Certificate of Order Against Government was served upon the Respondent herein the *Ex parte* Applicant's application dated 5<sup>th</sup> December, 2022 lacks merit.

**Order**

1. In the result I dismiss the Notice of Motion application dated 5<sup>th</sup> December, 2022 with no orders as to costs.
2. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF JULY 2023**

.....

**J. CHIGITI (SC)**

**JUDGE**

