



Republic v Chief Executive Officer (KENHA) & 2 others; Kabuito Contractors Limited (Exparte Applicant) (Judicial Review Miscellaneous Application 338 of 2019) [2023] KEHC 19889 (KLR) (Judicial Review) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19889 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 338 OF 2019**

JM CHIGITI, J

JULY 6, 2023

BETWEEN

REPUBLIC APPLICANT

AND

CHIEF EXECUTIVE OFFICER (KENHA) 1ST RESPONDENT

CABINET SECRETARY, TREASURY 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

KABUITO CONTRACTORS LIMITED EXPARTE APPLICANT

JUDGMENT

Brief Background

1. The *Ex Parte* Applicant moved the court through an Amended Notice of Motion dated 10th June 2021 seeking the following orders;
 1. That an order of *Mandamus* do issue compelling the Principal Secretary in the Ministry of Devolution to pay the *Ex Parte* Applicant the sum of Kshs. 3,170,908,263.25 plus interest as ordered in the judgment dated 25th May, 2018.
 2. That in default of compliance with the court orders, the Respondents be cited for contempt and each of them be committed to civil jail for a period not exceeding six (6) months.
 3. That costs of this application be provided for.



2. The Application is supported by a statutory statement and the verifying affidavit dated 25th November, 2019 sworn by Mr. Amip Rajendra Patel on behalf of the *Ex Parte* Applicant.
3. In a judgement, delivered on 25th May 2018 in High court Civil suit no. 284 of 2008 - Milimani Law courts Kabuito Contractors limited v The Hon. Attorney General, the 3rd Respondent herein was ordered to pay the *Ex Parte* Applicant herein Kenya Shillings 3,170,908,263.25/= as well as interest until full payment of the same.
4. The Applicant avers that the said office has refused/failed and neglected to comply with the Judgments of the court.
5. The Applicant relies on the case of *Japheth Nzila Muangi v Kenya Safari Lodges & Hotels Ltd.* (2008) eKLR which stated that “It is trite law that ordinarily a judgement binds the parties to it.”
6. Therefore, the Honourable Attorney General, being a representative of the Government and the Principal Secretary to the National Treasury, being the representative head of the finance department of the Government are bound to settle the terms and orders of the delivered judgement.
7. The Applicant relies on Order 42, Rule 6 of the *Civil Procedure Rules*, which states that: “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except where there is an order of stay.”
8. In line with Section 21(1) of the *Government Proceedings Act*, the Applicant obtained a certificate of taxation of costs dated 6th September, 2019 and thereafter a certified court decree dated 24th September, 2019.
9. Section 21(3) of the *Government Proceedings Act* further states that once the certificate of costs is provided, the accounting officer for the Government department concerned shall pay the person entitled the entire amount together with interest as ordered.
10. The Applicant contends that the Principal Secretary in the National treasury has failed to settle the claim necessitating this Application.
11. The Applicant relied on the case of *Republic v Attorney General & Another Ex Parte the Standard Limited & Baraza Limited* [2018] eKLR which cited; Githua, J in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza* 2012 eKLR where she expressed herself 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” [Emphasis mine].

12. The Applicant contends that the Attorney General has to pay the *Ex Parte* /Applicant herein through the Ministry of finance and this cannot be on condition that the same is placed in the budget of Government expenditure as it is not. A condition given under the Government Proceedings Act and under this cited case above.
13. The Applicant further stated that *Mandamus* is the only recourse left relying on the case of Republic v Attorney General & another Ex Parte the Standard Limited & Baraza Limited [2018] eKLR.
14. The Applicant submitted that the Principal Secretary to the National Treasury, cannot exclude himself from these proceedings as he is in charge of satisfying this court decree from the powers bestowed unto him being a responsible accounting officer of the Treasury.
15. The *Ex Parte* Applicant avers that he has no other option of realizing the fruits of his judgement since he is barred from executing against the Government apart from *Mandamus* .
16. The Applicant also relies on the Halsbury’s Law of England, 4th Edition. Vol. 7 p. 111 para 89 which states:-

“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.”

The 1st Respondent’s Case

17. In opposing the Applicants Application, the 1st Respondent filed a replying affidavit dated 21st October 2021 and submissions dated 20th February 2023.
18. The 1st Respondent further contends that the *Ex Parte* Applicant has in its pleadings averred that the alleged Contract entered into on 14th March 1997 between the Applicant and the Government of Kenya through the Ministry of Local Government was for the periodic maintenance and rehabilitation



of roads within the Central Business District which do not fall within the jurisdiction of the 1st Respondent in so far as maintenance and rehabilitation of roads is concerned since they do not fall within the ambit of national roads.

19. The 1st Respondent further avers that in no way could the rehabilitation and emergency repairs conducted on the various roads within the Central Business District of Nairobi City referred to by the *Ex Parte* Applicant be vested on or transferred to the 1st Respondent or its predecessor.
20. In any event the 1st Respondent was not a party to the suit being HCCC No. 284 of 2008, Kabuto Contractor Limited v The Honourable Attorney General.
21. The 1st Respondent contends that the pleadings, the evidence in this matter and the evidence tendered by the *Ex Parte* Applicant do not support the pleadings. It is unfathomable how the execution proceedings could be levelled against an entity that has never been a party to the suit that gave rise to the instant Judicial Review proceedings.
22. The 1st Respondent submits that the Amended Notice of Motion Application dated 10th June, 2021 and the Submissions by the *Ex Parte* Applicant dated October 2021 do not lay any claim/nexus or seek any orders against the 1st Respondent, that is, the Kenya National Highways Authority (KeNHA) and the 1st Respondent is not a necessary party to the instant Judicial Review proceedings.
23. The 1st Respondent submits that the instant Judicial Review proceedings ought to be dismissed with costs as they are against the express provisions of Section 67 (a) of the *Kenya Roads Act*, Cap 408 of the Laws of Kenya which provides that, "where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty;
 - a) the action or legal proceeding shall not be commenced against the Authority until at least One (1) Month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the Plaintiff or his agent."
24. The 1st Respondent submits that, no such Notice has ever been served upon the 1st Respondent and any execution commenced as this, even if were lawfully liable as against the Authority, would be premature, illegal and totally out of order and statutory procedure.

ANALYSIS AND DETERMINATION

25. I have taken into account the application, the grounds in support, the arguments made by the parties, the affidavits on record as well as submissions by counsel.
26. In the case of *Amon v Raphael Tuck & Sons Ltd* (1956) 1 All ER 273 and cited with approval in the case of *Pizza Harvest Limited v Felix Midigo* (2013) eKLR, the learned Judge, at Paragraphs 286-287, opined as follows:

“What makes a person a necessary party? It is not of course, merely that he has relevant evidence give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may advance them adequately... the Court might often think it convenient or desirable that some of such persons should be hard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to



hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party”.

27. The 1st Respondent submitted that neither the Amended Notice of Motion Application dated 10th June, 2021 nor the Submissions by the *Ex Parte* Applicant dated 5th October, 2021 lay any claim/nexus or seeks any orders as against the 1st Respondent.
28. From the evidence tendered by the 1st Respondent and their submissions, I am in agreement with the 1st Respondent that it is not a necessary party to these judicial review proceedings and for that reason alone, the proceedings herein as against it ought to be dismissed with costs which I so hold.
29. The Cabinet Secretary, Treasury and Principal Secretary in the Ministry of Devolution are two very distinct office bearers.
30. This court cannot issue an order against a person who has not been sued. If the Applicant intended to seek orders against the Principal Secretary in the Ministry of Devolution, then he should have sued the said Principle Secretary in the Ministry of Devolution and not another entity.
31. The nature of the orders sought are very drastic. It involves a huge amount of money. The *Ex Parte* Applicant does not tell the court that there was a challenge suing Principal Secretary in the Ministry of Devolution. The Applicant does not inform the court why it did not seek any reliefs from the Cabinet Secretary, Treasury who it sued.
32. Granting orders in the Amended Notice of Motion dated 10th June 2021 as sought against the Principal Secretary in the Ministry of Devolution will amount to a violation of the Principal Secretary rights under Article 50 of the [Constitution](#) which guarantees all the right to fair hearing.
33. To grant the orders as sought against Principal Secretary in the Ministry of Devolution would amount to a breach of the rules of natural justice wherein the Principal Secretary will be condemned to pay such a colossal sum of money notwithstanding the fact that he was not given an opportunity to present their case. This court must not countenance that kind of spirit and I so hold.
34. Article 47 (1) of the [Constitution](#) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
35. Further, Article 47 (2) provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
36. In the Amended Notice of Motion dated 10th June 2021, the Applicant has moved the court for judicial review orders which are within the fair administrative action threshold.
37. This court has a duty to protect, promote and fulfil and I so do the rights of all including the Principal Secretary in the Ministry of devolution under Article 3 (1) of the [Constitution](#) which provides that every person has an obligation to respect, uphold and defend this Constitution which I hereby do .
38. Article 50(1) of the [Constitution](#) provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
39. In the case of *Apex Finance International Limited and Another v Kenya Anti-Corruption Commission* NKU HC JR No. 64 of 2011[2012] eKLR, the court cited a decision of the Supreme Court of Nigeria,



Goodwill and Trust Investment Ltd and Another v. Witt and Bush Ltd Nigerian SC 266/2005 which captured the fundamental nature of the issue of capacity. The court observed that:

“It is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed, the parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and, “where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.”

40. In arriving at my findings herein, this court is also guided by the Supreme Court Case of [Dickson Ngugi Ngugi v Commissioner of Lands](#) S.C Petition No. 9 of 2019 [2019] eKLR

“(36) Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non iudice and amounts to a nullity because, as Nyarangi, JA famously said in the locus classicus, *Owners of the Motor Vessel “Lillian S” v Caltex Oil, (Kenya) Ltd* [1989] KLR 1, “jurisdiction is everything. Without it, a court has no power to make one more step”.

(37) It is, therefore a basic rule of procedure that jurisdiction must exist when the proceedings are initiated. Because the question of jurisdiction is so fundamental, a limitation on the authority of the court, it can be raised at any stage of the proceedings by any party or even by the court suo motu. As a matter of practice, this Court has a duty of jurisdictional inquiry to satisfy itself that it is properly seized of any matter before it.

(38) It is a settled legal proposition that conferment of jurisdiction is a legislative function and it can only be conferred by the [Constitution](#) or statute. It cannot be conferred by judicial craft. See *Samuel Kamau Macharia & Another v Kenya commercial Bank & 2 Others*, SC Application No. 2 of 2011; [2012] eKLR. Nor can parties, by consent confer on a court power it does not have.

41. The Applicant has sued Cabinet Secretary, Treasury as the 2nd Respondent while the relief sought is an order of *Mandamus* compelling the Principal Secretary in the Ministry of Devolution to pay the *Ex Parte* Applicant the sum of Kshs. 3,170,908,263.25 plus interest as ordered in the judgment dated 25th May, 2018.

42. This court cannot exercise its discretion in a fair and public hearing in a case where the case is against a party who has not been sued. This court cannot issue orders against Principal Secretary in the Ministry of devolution without affording him an opportunity to present his Defence.

43. To grant the reliefs sought against Principal Secretary in the Ministry of devolution will amount to a violation of the rules of natural justice and offend Section 7(1) of The [Fair Administrative Action Act](#) which provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to– (a) a court in accordance with section 8; or (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.



44. I am further guided by the Court of Appeal decision in *Independent Electoral and Boundaries Commission & v Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002* where Adereji, JSC expressed himself thus on the importance and place of pleadings:-

“it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the of the pleadings goes to no issue and must be disregarded...”

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enable parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

45. The Applicant has not sought any orders against the Attorney General in the Amended Notice of Motion dated 10th June 2021.

46. Article 47 (1) of the *Constitution* provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

47. Article 47 (2) provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Disposition

48. The Court finds that the Applicant has not laid any claim or nexus to seek any orders as against the 1st Respondent, the Kenya National Highways Authority (KeNHA).

49. Section 7(1) of the *Fair Administrative Action Act* stipulates that a court or tribunal under subsection (1) may review an administrative action or decision, if the person who made the decision denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case; a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; and the action or decision was procedurally unfair.

50. To make a decision or issue adverse orders against the 2nd Respondent will amount to an illegality and the same will be procedurally unfair 2nd Respondent given that no orders have been sought against the 2nd Respondent.

51. The *Ex Parte* Applicant did not seek any reliefs against the Hon. Attorney General. This court cannot move itself to grant orders against a party in vain.

Order

This Amended Notice of Motion dated 10th June 2021 is hereby struck out with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JULY, 2023.

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JOHN CHIGITI (SC)

JUDGE

