



**Republic v County Government of Mandera & 3 others; AHMED (Exparte) (Judicial Review E002 of 2022) [2023] KEHC 22689 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22689 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
JUDICIAL REVIEW E002 OF 2022  
JN ONYIEGO, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE COUNTY GOVERNMENT OF MANDERA ..... 1<sup>ST</sup> RESPONDENT**

**THE CECM FOR ROADS, PUBLIC WORKS & TRANSPORT, MANDERA  
COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**THE CECM FOR FINANCE MANDERA COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**THE CHIEF OFFICER FINANCE MANDERA COUNTY ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**ABDULAHI SHEIK ABDULAHI SHEIK AHMED ..... EXPARTE**

**RULING**

1. The applicant brought judicial review proceedings herein seeking an order of mandamus to compel the respondents to pay the decretal amount owed as a result of a judgment delivered on October 22, 2020 between the applicant and the respondents in Civil Case No 12 of 2020 at the Mandera Law Courts.
2. As a result, by a notice of motion dated November 30, 2022, the applicant sought for the following orders that:
  - i. An order of mandamus do issue against the respondents jointly and severally compelling them to pay the applicant the decretal debt herein in the sum of Kenya shillings Four Million, Eight Hundred Sixty - Four Thousand, Two Hundred and Fifty (Kes 4, 864,250) delivered on October 22, 2020.



- ii. That the respondents be condemned to bear the costs of this application.
3. The application was premised on the grounds on its face and supported by the annexed affidavit of Abdullahi Sheikh Ahmed. The core grounds were that the the applicant filed a plaint against the respondents dated July 20, 2020 at Mandera Law Courts and the same was determined pursuant to the judgment of Hon PW Wasike (SRM) delivered on October 22, 2020. The respondents were served with a decree and certificate of costs vide a letter dated March 2, 2021; a certificate order was also served on the respondents on September 1, 2021. That the applicant has made numerous attempts to have the respondents settle the said sum in vain and as a result therefore, it became apparent that unless compelled by an order of this court, the respondents would remain uncommitted to settling the debt.
4. The firm of Duwane & Wethow Advocates for the respondents opposed the application via a replying affidavit by Billow Issack Hassan and sworn on January 18, 2023 deponing that he is the county Secretary of the 1<sup>st</sup> respondent's County Government. That the application is premature and was brought to defeat justice as the applicant was on a mission to enrich himself unjustly at the expense of the tax payers. That the respondent had filed an application for stay on September 13, 2021 which was yet to be determined. It was stated that the trial court reached a determination without any defence and/or response from the respondents as the failure to put in defence was an honest mistake occasioned by the former county secretary of the 1<sup>st</sup> respondent.
5. It was averred that the applicant did not serve the respondents with certificate of order and therefore, the applicant could not execute the decree under such circumstances. That in any event, any liability and/or expenditure incurred against the respondents could only be defrayed from moneys provided for by the budget of the 1<sup>st</sup> respondent which is a public fund and such a payment would be detrimental to the interest of prudent use of public funds. The respondents thus urged this court to dismiss the application as the same was an abuse of the court process.
6. When the matter came up for hearing, directions were taken that the same be canvassed by way of written submissions. The applicant submitted that the respondents have wilfully disobeyed the court order and did not make any attempt to pay the applicant his dues as ordered by the court. That the respondents did not deny that the amount ordered to be paid had remained unsatisfied since they were duly served with a decree and certificate of order.
7. It was argued that the respondents were given sufficient time to comply with the demand but completely refused to comply. To that end, reliance was placed on the case of *Permanent Secretary Office of the President Ministry of Internal Security & another ex parte Nassir Mwandibhi* (2014) eKLR to underscore the relevance of the process under section 21 of the *Government Proceedings Act*.
8. The applicant contended that unless the mandamus order sought is issued, the applicant shall be unable to enjoy the fruits of his judgment. The applicant relied on the case of *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security* (2012) where the court was persuaded to issue a mandamus order to compel the accounting officer concerned to pay the sums specified in the order to the person entitled. This court was therefore urged to allow the prayers sought as the applicant had satisfied the grounds for issuance of an order for mandamus.
9. The respondents submitted that there were no sufficient grounds disclosed for the grant of the order of mandamus for enforcement of a default judgment. The respondents relied on the case of *Republic v Jomo Kenyatta University of Agriculture and Technology ex parte Elijah Kamau Mwangi* [2021] eKLR to underscore circumstances when a court can issue an order of mandamus. It was contended that given that the applicant did not serve the respondents a certificate of order contrary to the provisions of section 21 of the *Government Proceedings Act* the order sought could not apply; To support the same



position, reference was made *inter alia* to the case of *R v attorney General & 2 Others ex parte Nelson Keroko Marwa* [2021] eKLR, where it was observed that it was outright that the legal requirements before the issuance of the order of mandamus had not been met in this case.

10. Further, the respondents contended that any liability and expenditure incurred against the respondents could only be defrayed from moneys provided by the budget of the 1<sup>st</sup> respondent which is a public fund and such payment would be detrimental to the interest of prudent use of public funds. To stress the same, the respondents relied on the case of *Institute for social accountability & Another v National Assembly & 3 Others & 5 Others* (Petition 1 of 2018) [2022] 39 (KLR) where the court underscored the importance of ensuring that public funds are not wasted or abused. In the end, this court was urged to refer this matter back to Manderu Magistrate's Court for a retrial of the claim herein so that all parties are accorded a fair opportunity to be heard and the case be determined on its own merits. The respondents further prayed that the application herein be dismissed with costs as the same was an abuse of the court's process.
11. I have considered the application and response thereof. The issue for determination is whether an Order of Mandamus should issue as prayed in the applicant's application.
12. It is settled law that before an order of mandamus is issued, an Applicant must abide by the procedure in Section 21 of *Government Proceedings Act* which 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.”

13. Section 21 (3) of the said Act on the other hand provides:

“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. The circumstances under which judicial review order of mandamus are issued were discussed in the case of *Republic v Kenya National Examinations Council Ex Parte Gatbenji & 8 Others* Civil Appeal No 234 of 1996, where the Court of Appeal 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.”

15. In this case, the applicant moved this Court to compel the satisfaction of a judgment already decreed in his favour by a competent Court of law. The applicant demonstrated by way of evidence compliance with the provisions of Section 21 of the *Government Proceedings Act*. The Respondents did not give any satisfactory reason as to why the decree had not been fulfilled almost two years later and instead, argued that they were not served with the Certificate of Order against Government by the applicant as is required by law.
16. A cursory look at the application and affidavit filed, and specifically, the letter by the applicant to the respondent dated March 2, 2021 enclosed therein was a copy of the relevant decree, Certificate of order against the Government and Certificate of taxation of the judgment entered in favour of the applicant. That letter was duly stamped as received by the Ministry of Roads, Transport and Public Works of the 1<sup>st</sup> respondent. Suffice it to note that the letter was a demand letter which clearly stated that in default of payment, execution proceedings would be instituted by way of attachment of movable property. Of importance to note, the respondents were less candid in denying that the certificate of order was not served yet the evidence in the record showed the contrary. It is in reference to the material before this court that the court notes that indeed, the respondents were served.
17. It is not lost to the court that the respondents filed an application dated September 9, 2021 for orders inter alia to set aside the interlocutory judgment entered on October 22, 2020 and further to stay execution of the decree and any further proceedings pending the hearing and final determination of the said application. Whereas the respondents have the inalienable right to pursue a review of the said judgment by the trial court [ See article 50 (2) (q) of the *constitution*]; the fact of the matter is that there was no proof of any orders of stay issued or any attempt by the respondents to prosecute the matter since its filing.
18. The decree herein is therefore due and payable and there is indeed default. The applicant cannot within the law execute the decree against the respondents other than through the procedure spelt out under Section 21 of the *Government Proceedings Act*.



19. It is trite that a successful litigant must enjoy the fruits of his judgment. In the case of *Republic vs The Attorney General & Another ex parte James Alfred Koroso* (2013) eKLR the court held as follows;

“...in the present case the *ex parte* applicant has no other option of realising 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 realised. 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.”

20. In the premises, I am satisfied that the applicant has made a case for the grant of an order of mandamus and I hereby grant the same in terms of prayer (1) of the Notice of Motion dated November 30, 2022. The applicant will also have costs of this application.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 22<sup>ND</sup> DAY OF SEPTEMBER 22, 2023.**

**J.N. ONYIEGO**

**JUDGE**

