



M.M. Kimuli & Company Advocates v County Government of Kitui (Miscellaneous Civil Application E064 of 2021) [2023] KEHC 23489 (KLR) (11 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
MISCELLANEOUS CIVIL APPLICATION E064 OF 2021**

RK LIMO, J

OCTOBER 11, 2023

**IN THE MATTER OF KITUI HIGH COURT INCOME TAX APPEAL
NO. 1 OF 2020: COUNTY GOVERNMENT OF KITUI VERSUS
COMMISSIONER OF DOMESTIC TAXES**

BETWEEN

M.M. KIMULI & COMPANY ADVOCATES APPLICANT

AND

COUNTY GOVERNMENT OF KITUI RESPONDENT

RULING

1. The County Government of Kitui, the applicant herein has moved this court through a Notice of Motion dated 2nd November, 2023.
2. The backdrop of this matter is an advocate/client bill of costs dated 20th September 2021 filed by the Respondent herein. A ruling on taxation of the Advocate-Client bill of Costs was made on 28th December, 2021 where by the bill was taxed at Kshs. 15,213,363. Subsequent to the taxation, the Respondent filed an application dated 15th September, 2022 seeking judgement against the Applicant for the unpaid legal fees. Parties appeared before the court on 1st November 2022 where Counsel for the Applicant informed the court that parties were engaged in negotiations to settle the matter. The negotiations appeared to have materialized and on 29th November, 2023 the Deputy Registrar allowed the Respondents application which at time remained unopposed. Following that the Respondent moved to execute by applying for Notices to Show Cause against the Applicant's Chief Officer John Makau Kimwele and the County Executive Committee Member (Treasurer) Peter Mwikya Kilonzo. The Notice to Show Cause was issued and scheduled for hearing on 4th July, 2023. On the material day, both officers failed to attend court and warrant of arrest were issued against them giving rise to the present application. They are now before this court seeking to discharge/set aside said warrants.



The application is premised under Section 1A, 1B & 3A of the [Civil Procedure Act](#) as well as Order 22 Rule 22, Order 29 Rule 2(2) (b) & Order 51 Rule 1 of the [Civil Procedure Rules](#) and Rule 11(4) of the [Advocates \(Remuneration Order\) Orders](#) sought are particularized as follows;

- i. That this application be certified as urgent and be heard ex parte, service thereof being dispensed with in the first instance(spent).
 - ii. That pending the inter parties hearing of this application, this Honourable Court be pleased to stay of execution of the warrants of arrest dated 6th July 2023 against Peter Mwikya Kilonza and John Makau Kimwele the CECM and Chief Officer, County Treasury of the Respondent/Applicant.
 - iii. That this Honourable Court be pleased to discharge and/or set aside the warrant of arrest dated 6th July, 2023 against the aforesaid officers of the Respondent/Applicant.
 - iv. That this Honourable Court be pleased to set aside the taxation order dated 28th December, 2021 and remit the matter back for taxation afresh, and/or in the alternative allow the Respondent/Applicant leave to lodge an objection out of time.
 - v. That costs of this application be provided for.
3. The application before Court is based on the following grounds listed on the face of the application namely: -
- a. That a decree was issued by this court on 10th March, 2023 decreasing that the applicant does pay the Respondent a total sum of Kshs. 15,213,363.
 - b. That the Respondent subsequently sought and obtained a Notice to Show Cause against the applicant under Order 22 Rule 31 of the [Civil Procedure Rule](#).
 - c. That this court later subsequently issued warrant of arrest against Peter Mwikya Kilonzo and John Makau Kimwele both of whom are Officers working for the applicant herein. The applicant contends that Section 38 of the [Civil Procedure Act](#) and Order 29(2) of the [Civil Procedure Rule](#) Prohibit Orders being issued against the Government and that in their view includes the applicant and the applicants.
 - d. The applicant contend that the warrants are irregular and a violation of the provisions of Section 133 of [County Government Act](#) and Section 21(4) of the [Government Proceeding Act](#) and Order 29 Rule 2 of the [Civil Procedure Rules](#).
 - e. The applicant views the warrants against its officers as a contravention of the law an irregularity and a nullity ab initio.
 - f. They also term execution as premature contending that the Respondent should have sought for Judicial Review Orders of mandamus to compel the applicant and its officers to pay.
 - g. That unless the reliefs sought are given they stand to suffer substantial loss which cannot be remedied by an award of damages as the execution has crippled the applicant's operations and discharge of essential services to the people of Kitui County.
 - h. That the County Executive Committee and Chief Officer Kitui County treasure's personal liberty are at stake as they face imprisonment.
 - i. That the taxing officer considered extraneous matters when taxing the advocate client bill of costs and made an award that was wrong in principle in their view.



- j. That the risk faced by the cited officers is imminent.
 - k. That it is in the interest of justice to allow this application.
4. The applicant has supported this application with an affidavit sworn by County Solicitor Timothy Kyalo Mwangi sworn on 2nd October, 2023. The deponent has majorly reiterated the above grounds adding that they have issues only on two items in the taxed costs and he points them out as getting up fees and Value Added Tax (V.A.T) charged on the total costs of legals instead of instructions fees only.
5. The applicant through Counsel has submitted that the taxation of the advocate-client bill of costs should be let aside and be remitted back for fresh taxation or alternatively time be extended for it to file lodge objection on the two cited items.
6. It contends that the delay in lodging the objection was brought about by the Change of County Administration after the General Elections.
7. The Respondent has opposed this application vide Grounds of Opposition dated 4th October, 2023 as follows: -
- i. That the prayer for stay or discharge of the warrants of arrest against the two officers cannot issue since the two officers have not made an application or explained why they did not attend court in honour of the notice to show cause.
 - ii. That from the exhibit marked TNK2 in the affidavit of Timothy Mwangi, it is clear that a notice to show cause was issued by this Honourable Court and received by the County Government of Kitui on 30th May, 2023. That the notice to show cause required the two officers, namely, Peter Mwikya Kilonzo and John Makau Kimwele to appear in Court on 4th July, 2023 to show why execution should not issue. Service of the Notice to show cause is therefore not disputed.
 - iii. That the two officers were duty bound to appear in court and to state their case whether or not the procedure adopted was illegal, wrongful or improper. That the notice to show cause effectively afforded the officers and the County Government of Kitui a chance to appear in court and state their case.
 - iv. That on the date scheduled for the hearing of the Notice to Show Cause, the two failed to attend court without any explanation or justification and that Honourable court issued warrants of arrest against the two officers for their failure to appear in court to show cause why execution should not issue. The issue of warrants of arrest is an ordinary natural consequence of the failure of a person to honour court's summons and no explanation is provided. That the warrants of arrest cannot, therefore be termed irregular.
 - v. That the arguments the County Government now makes about the propriety of the mode of execution ought to have been made in response to the notice to show cause. That anyone who fails to honour court summons is amenable to arrest regardless of status or place of work. That under Article 159(2) (a), this Honourable Court is enjoined to ensure that justice is done to all, irrespective of status. That anyone disregarding court summons will be brought to court under a warrant of arrest.
 - vi. That from the exhibits marked TMK3 and 4 in the affidavit of Timothy Mwangi, it is clear that the Applicant, the County Government of Kitui, had notice of the warrants of arrest which were issued on 6th July 2023. That no action was immediately taken in response to the warrants of arrest and no application was filed in court timeously. That the current application



comes too late in the day, over 5 months since the Notices to Show Cause were issued and three months since the warrants of arrest were issued. That if anything, the Respondent is an indolent litigant, undeserving of any discretionary orders from the court.

- vii. That the orders of issuing warrants of arrest granted on 4th July 2023 are legitimate orders of the court which ought to be complied with. That no appeal or application for review was filed against those orders and as such, they remain in force. That Court orders have the force of law and are supposed to be complied with whether inconvenient, illegal or improper.
 - viii. That the Notices to Show Cause and the Warrants of Arrest were directed at two individual officers, not the Applicant. That those officers were personally required to attend court. They did not. That they have also not provided any explanation for their failure to attend court as such, the warrants of arrest cannot be lifted without an explanation on the failure to attend court. That the County Government cannot make this application on behalf of its officers who have not even sworn affidavits. That in any event, the application filed in court does not attempt an explanation why the officers did not obey court summons. That a party who treats court summons with contempt, cannot seek the indulgence of the same court.
 - ix. That it is clear that despite being aware of the warrants of arrest, the two officers have not submitted themselves to this Honourable Court. That they have gone on with their business and the County Government has now only filed an application after this court issued summons to the Officer in Charge, Kitui Police Station to appear and explain why he has not arrested the two officers. That a party cannot be allowed to play hide and seek with the court process.
8. The respondent has justified the taxation of the advocate-client bill of costs, the issuance of decree and the mode of execution adopted on the following grounds;
- a. That the hearing was participatory and the County Government /Applicant was represented by counsel during the taxation process. The Ruling on the taxation was delivered on 28th December 2021 close to two years ago. No reference to the High Court was filed within the timelines required as such, a certificate of taxation was issued for the amount assessed.
 - b. That, the advocate moved the High Court through an application dated 15th September 2022 for the issue of a decree. That application was served upon the County Government/ Applicant and it was heard interpartes before the judge in the presence of counsel for the County Government/Applicant and that the judgment was entered against the County Government and a decree was subsequently issued. That at that time there was no application to set aside the award of the taxing master.
 - c. That the exhibit TKM1 in the applicant's supporting affidavit is a copy of the decree, issued on 10th March 2023 almost seven months before the current application was filed. The applicant had always been aware of this decree and the execution of that decree has not been stayed.
 - d. That no justification has been given for interfering with the decision of the taxing master and in any event, there has been too much delay in filing such an application.
9. The Respondent submits that it applied for decree which was granted on 22nd November, 2022 adding both parties were given a chance to be heard. He argues that the decree being an order from court required compliance and that it is not open for the applicant to suggest that it can only honour the obligation to pay if the order to pay is via mandamus. It argues that if execution by way of arrest and detention can issue following an order of mandamus, it can also issue following a Notice to Show Cause.



10. The Respondents submits that the amount decreed since December 2022 attracts an interests at the rate of 14% per annum translating to Kshs. 2,19,870 per year or Kshs. 177,489 per month. It does not see the prudence by the applicant to delay the settlement of the matter submitting that it is against the public interest to leave the amount unpaid and therefore to attract more interests.
11. Mr. Kimuli, faults the respondent for resorting to technicalities to avoid paying the debt. He further submits that the cited officers failed to appear in court and thereby left the Court with no option but to issue warrants of arrest. He submits that the two officers had a duty to obey the court summons whether they were issued wrongly or rightly. He contends that court summons cannot be issued in error.
12. It submits that the decision of a taxing master can only be challenged through a reference adding that none was filed in this instance. It argues that there is a judgement and decree in this matter which has not been challenged or set aside. He argues that on that basis alone this application should not be sustained.
13. He further argues that a Warrant of Arrest can only be lifted when an affected party comes to court and explains reasons for not heeding to the summons. He faults the two officers facing the warrant for failing to swear affidavits to explain why they never attended court when summoned to appear.
14. This court has considered this application and the response made. The issues coming out for determination in this matter are pertinent and this court has taken time brooding over them with a view to determining them.
15. There is no dispute that the Respondent has a judgment and a decree against the applicant and which judgement and decree has not been set aside.
16. The applicant does not dispute that it owes the applicant an amount taxed in Court by the Deputy Registrar being the legal fees arising from advocate-client engagement. What the applicant has raised is that the Respondent opted for an irregular mode of execution pointing out that the decree holder should have opted for an order of mandamus. On the other hand, the Respondents holds that the objection raised is a mere technicality because the bottom-line is that the applicant has an obligation to pay as ordered by the Court but has failed hence the execution. When one reads Article 159(d) of *the Constitution* of Kenya, the Provisions states that courts should be more inclined to the substance rather than mere technicalities. So the question posed is whether the choice of the mode of execution is a question of mere technicality.
17. The procedure of executing decrees against the government is provided for under Section 21 of the *Government Proceedings Act* it states; -

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 required 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.



1. 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.
2. 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
3. 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
4. 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.”

18. The *Civil Procedure Rules* further provides under Order 29 rule 2 as follows;

Civil proceedings by or against the Government shall take the same form as civil proceedings between subjects and shall, if no special form is applicable, take the form of a suit instituted by a plaintiff.”

The provisions of Order 9(2) (3) gives specific guidelines on the process to be followed in obtaining the certificate.

Certificate under section 21 of the *Government Proceedings Act*. It states: -

Any application for a certificate under section 21 of the *Government Proceedings Act* (Cap. 40) (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and such certificate shall be in one of Form Nos. 22 and 23 of Appendix A with such variations as circumstances may require.”

19. County Government are established under the first schedule of *the Constitution* of Kenya 2010. Flowing from the above provisions, it is pertinently clear that execution of decrees against the National and by extension County Government have a special procedure governed by the *Government Proceedings Act* (Cap 40). Although the Act does not specifically mention the County Government, it is common knowledge that *the Constitution* of Kenya 2010 recognizes that there are two levels of



Government in Kenya that is the National as well as the County Government. The provisions of Article 1(4) is clear about that.

The provisions of Section 21(5) of the *Civil Procedure Act* clearly stipulates that where one seeks satisfaction of a decree or order against the County Government, it is imperative to follow special procedure as stipulated above, unlike where one is executing against an individual.

20. In the case of *Republic versus Attorney General & Another Ex Parte Stephen Wanyee Roki* [2016] eKLR Odunga J (as he was then was) made the following observations which I find relevant here;

Although the provisions of the *Government Proceedings Act* do not expressly refer to County Government, Section 7 of the Sixth Schedule to *the Constitution* (Transition and Consequential Provisions) provides that; all law in force immediately before the effective date continues in force and shall be construed with an alteration, adaptation, qualification and exceptions necessary to being in conformity with this Constitution. It follows that the provisions of the *Government Proceedings Act*, a legal instrument enacted before the effective date must be construed with the alterations, adaptations qualification and exceptions necessary to bring conformity with *the Constitution*. One such construction would be the reality that the Government is now at two levels and Article 189 1(a) of *the Constitution* requires that the Constitutional status and institution of Government both at the National and County Levels be respected. In my view, such respect cannot be achieved unless both level of government is treated equally and one such area would be with respect to execution proceedings.”

21. It is imperative therefore, for a party seeking to execute against the government on both levels to proceed by first seeking a compelling order like mandamus via a Judicial Review. Before one seeks such a prerogative order against the State a party should comply with the provisions of Order 29 Rule 2(3) of the *Civil Procedure Rules*.
22. In this instance, the Respondents appear to have jumped the gun by proceedings with the execution without first obtaining a certificate as stipulated under Section 21 of *Government Proceedings Act*. He ought to have obtained a certificate of payment and serve it on the County Solicitor or any other attorney looking for the County Government because the duty to pay crystallizes upon such service. It is only if and when there is failure to take heed that a decree holder is then at liberty to seek for a compelling order.
23. The elaborate procedure provided above must have been informed by the realization that satisfying a court decree by a Government entity is an expenditure that must impact on the public funds held by the Government whose expenditure must be done prudently, transparently, and in an accountable manner. The accounting officer in a Government department must comply with elaborate procedures that ensures prudent use/expenditure of Public funds. It is on that basis that this court finds that the execution process and the attendant procedure requirements provided in law are not some mere technicalities. They are legal imperatives which must be followed for public good and order.
24. The importance to comply with legal requirement before enforcing decrees against the Government was also re-stated in *Republic versus Permanent Secretary Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza* [2012] eKLR when they made the following observations;

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 judgement. 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.”

25. The same position was re-emphasized in *Republic versus County Secretary Migori County Government and another* [2019] eKLR, where the Court states;

I need not re-emphasize the need for strict compliance with Section 21 of the Act being the law of the land. In this matter, I can gather from the record that a Decree and a Certificate of Costs in the suit was drawn and issued. I did not set my eyes on any Certificate of Order. There is a specific procedure on how the Certificate of Order required under the Act is obtained. The procedure is contained in Order 29 of the *Civil Procedure Rules*. Under Rule 3 thereof, the application is made to the Deputy Registrar in the High Court or to the court in the subordinate court. The format of the Certificate of Order is provided in Appendix A Form No. 22 of the *Civil Procedure Rules*. Form No. 23 provides the format for a Certificate of Costs in the event it is separately issued.

Once a party obtains the Certificate of Order and the Certificate of Costs, the event the Certificate of Costs is obtained separately, together with the Decree, then such a party must satisfy the court of service of those documents upon the party named in the certificates. In this case there is neither evidence of issuance of the Certificate nor service thereof on the Respondent or their Advocates.”

26. It is clear flowing from the above that the Respondent, despite the reluctance exhibited by the judgement debtor to pay, appears to have sidestepped or overstepped a crucial procedural step in the process of execution and by doing so, rendered the whole process of execution is premature.

27. I agree with the Respondent’s contention that the applicant’s cited officers had a duty to attend court once summoned and have no excuses of failing to turn up in or out failing to offer any explanation to explain their absence. They should have appeared in court and raise the issues now raised because obeying court summons is not optional. It is an obligation and a duty to foster and entrench the rule of law and good governance in our County and entire County.

28. I have also considered the prayer and reasons for extension of time to file objection to the taxation of the bill of costs by the taxing master.

The decision of the taxing master was delivered on 28th December, 2021 after hearing both parties in open court. The applicant was duly represented by Counsel and raised objections to some items and when the ruling was made on 28/12/2021 the applicant raised no objections and the proceedings shows that the applicant’s counsel made express representations in it on 1/12/2022 that they were involved in negotiations over payments of the taxed fees.

29. This court finds no explanation at all for the applicant to wake up after almost 2 years to say it now wishes to lodge objections out of time. The prayer is belated and at best an afterthought. I do not find any merit to extend time. Prayer 4 of the application therefore fails.

30. Before penning off, I must observe that the Respondent ought to have filed a replying affidavit expressing reasons for his opposition to this application. He should not have just filed grounds of



opposition and then include contested facts without swearing an affidavit. This observation is however made in obiter because, it has no bearing on the final decision in this matter.

31. In sum while I find that the applicant has raised a legitimate issue with the manner in which the Respondent went about in the execution, I find no basis to set aside a decision made by the taxing master on 28/12/2021. That the decision and the decree remain in place. The application dated 2.10.2023 therefore, only succeeds in terms of prayer 3. The warrants of arrest against the cited officers are hereby lifted. But given the conduct of the Applicant in this matter, I will not make any order as to costs.

DATED, SIGNED AND DELIVERED AT KITUI THIS 11TH DAY OF OCTOBER, 2023.

HON. JUSTICE R. LIMO-JUDGE

