



Republic v County Government of Kiambu & another; Kithi & Company Advocates (Exparte) (Application E039 of 2024) [2024] KEHC 14245 (KLR) (Judicial Review) (11 October 2024) (Judgment)

Neutral citation: [2024] KEHC 14245 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E039 OF 2024
J NGAAH, J
OCTOBER 11, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF KIAMBU 1ST RESPONDENT

**CHIEF FINANCE OFFICER COUNTY GOVERNMENT OF
KIAMBU 2ND RESPONDENT**

AND

KITHI & COMPANY ADVOCATES EXPARTE

JUDGMENT

1. The applicant’s application is a motion dated 18 April 2024 brought under Sections 8 and 9 of the *Law Reform Act*, cap. 26; Sections 1A, 1B and 3A of the *Civil Procedure Act*, cap. 21; Section 21 of the *Government Proceedings Act*, cap. 40; and, Order 53 of the Civil Procedure Rules, 2010. The applicant primarily seeks the order of mandamus the prayer of which has been couched in the following terms:
 - a. An order of Mandamus be issued compelling the County Government of Kiambu and the Chief Finance Officer, County Government of Kiambu (the Respondents herein) to pay the Ex-Parle Applicant the taxed costs of Kshs. 2,328,476.70 together with interest thereon, which is due to date on account of the Certificate of Taxation dated 29th May, 2023 in Nairobi H.C. J.R. Applen. No. E100 of 2021.”

The applicant has also sought for the costs of the suit.



2. According to the affidavit sworn on 9 April 2024 by Mr. George Kithi in support of the application and the statutory statement of even date, the applicant firm of advocates acted for the 1st respondent in this Honourable Court's Judicial Review Application No. 283 of 2015.
3. Upon conclusion of the case, the applicant filed, again in this Honourable Court, an Advocate - Client Bill of Costs, in Application No. E100 of 2021, seeking to recover its fees for services rendered. On 24 February 2022, the bill was taxed at Kenya Shillings Two Million Three Hundred Twenty-Eight Thousand, Four Hundred Seventy-Six and seventy cents. (Kshs. 2,328,476.70).
4. The applicant subsequently obtained the certificate of taxation and the certificate of order against government which he served upon the respondents but to date they have neglected, ignored or refused to settle the amount due hence the instant application.
5. In response to the application, Mr. William Kimani swore a replying affidavit in which he has introduced himself as the 1st respondent's chief finance officer. He has sworn that the delay in remitting the amount due to the applicant as represented in the in the Certificate of Taxation dated 29 May 2023 and the Certificate of Order against government dated 17 April 2024 has been occasioned by lack of sufficient funds.
6. Further, Mr. Kimani has described the debt as "a pending bill", which is among several other pending bills that the 1st respondent is grappling with. These pending bills are said to amount to Kshs. 3,700,000,000/- and they include bills that have accrued over the years. Priority in payment is given to those bills that have been pending for a longer period.
7. That notwithstanding, Mr. Kimani has sworn, payment of any pending bill has to undergo what he has described as "a rigorous procedure that begins with the verification exercise to ensure that it conforms to the financial prudence measures as outlined by the underlying legal provisions right through the examination, authorization and requisition of funds by the Controller of Budget".
8. With a lot of respect to the respondents, lack of sufficient funds and the 1st respondent's internal mechanisms for verification or even prioritisation of settlement of what it has called as 'pending bills' cannot be a sufficient reason why a certificate of order against government, issued by a court of competent jurisdiction, cannot be complied with. In my humble view, what Mr. Kimani has proffered as reasons for settlement of a debt which is admitted as due and owing are more of excuses which I hold are not tenable grounds against the applicant's application. It is inevitable, in these circumstances that a mandatory or mandamus order should ensue.
9. No doubt, one of the ways through which decrees or orders are enforced is, of course, execution or attachment. However, the Government is protected from such process of execution or other similar process in enforcement of decrees or orders by section 21 of the *Government Proceedings Act*, in particular, section 21(3) thereof. Section 21 reads as follows:

21. Satisfaction of orders against the Government

- (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.
- (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.
- (5) 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.

10. The County Government is protected from execution under section 21(4) as read with section 21(5). In the face of this protection from execution or attachment, the only available route open to the applicant is to compel the 2nd respondent to perform his statutory duty under section 21(3) of the Act and pay what has been decreed as due and owing to the applicant. In other words, only the order of mandamus would be the appropriate order under the circumstances.

11. According to Halsbury's Laws of England/Judicial Review (Volume 61 (2010) 5th Edition)/5. JUDICIAL Remedies/ (1) Introduction paragraph 689:

“A mandatory order is, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal requiring him, or them, to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty (See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL). The breach of duty may be a failure to exercise a discretion, or a failure to exercise it according to proper legal principles.”

This is reiterated in paragraph 703 which states:

“A mandatory order is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or it to do some particular thing specified in the order which appertains to his or its office and is in the nature of a public duty... the purpose of a mandatory order is to compel the performance of a public



duty, whether of an inferior court or tribunal to exercise its jurisdiction, or that of an administrative body to fulfil its public law obligations. It is a discretionary remedy.”

12. And with particular reference to public officers who, like in the instant case, fail to perform their duty, paragraph 706 is clear that a mandamus order may be issued to compel them to carry out the duty. It reads as follows:

706. Public duties by government officials.

If public officials or public bodies fail to perform any public duty with which they have been charged, a mandatory (mandamus) order may be made to compel them to carry out the duty (See *R v Metropolitan Police Comr, ex p Blackburn (No 3)* [1973] QB 241, [1973] 1 All ER 324, CA; *R v London Transport Executive, ex p GLC* [1983] QB 484, [1983] 2 All ER 262, DC.)”

13. The applicant has demonstrated that it extracted a certificate of order against government and that the same was duly served upon the respondents. It has not been suggested that the applicant defaulted in any step prescribed under section 21 of the Act as to disentitle it to the order of mandamus. In any event, the accounting officer on whose shoulder the burden to pay lies has acknowledged that he is aware that the amount specified in the certificate of order against Government has not been settled. As a matter of fact, the certificate of order against the government is among the documents that the respondents have exhibited to their own affidavit in acknowledgment of the outstanding debt.
14. A demand for payment having been made and the respondents having failed to pay, no other evidence is required to demonstrate that the 2nd respondent has failed to perform a public duty with which he is charged under section 21(3) of the *Government Proceedings Act*. A mandamus order would properly issue in such circumstances.
15. Accordingly, I hereby allow the applicant’s motion dated 18 April 2024 to the extent that an order of mandamus is hereby issued compelling the 2nd respondent to pay the applicant the sum of Kenya Shillings Two Million Three Hundred Twenty-Eight Thousand, Four Hundred Seventy-Six and seventy cents. (Kshs. 2,328,476.70) as stated in the certificate of order against government. The applicant will also have costs of the application. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 11 OCTOBER 2024

NGAAH JAIRUS

JUDGE

