



**Republic v Rivatex East Africa Limited; King Investments Management Company Limited (Exparte Applicant) (Judicial Review Application E008 of 2024) [2024] KEHC 11872 (KLR) (7 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11872 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
JUDICIAL REVIEW APPLICATION E008 OF 2024  
RN NYAKUNDI, J  
OCTOBER 7, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**RIVATEX EAST AFRICA LIMITED ..... RESPONDENT**

**AND**

**KING INVESTMENTS MANAGEMENT COMPANY LIMITED .... EXPARTE APPLICANT**

**RULING**

1. What is before this court is an Ex Parte Application by the ex-parte applicant dated 10/06/2024 seeking the following orders;
  - i. Spent
  - ii. An order of Mandamus to compel the Respondent to provide an irrevocable letter of credit to the applicant’s bank as provided in Clause 6 of the Contract in compliance with Order (b) and (c) of the Judgment in Eldoret HCCC NO. 17 OF 2020 Kings Investments Management Co. Ltd v Rivatex East Africa Ltd.
  - iii. Costs of the Application be provided for.
2. The Application is premised on the grounds on the face of it and the contents of the affidavit sworn in support of the same.



3. The Respondent opposed the Application vide a Grounds of Opposition dated 10<sup>th</sup> June 2024. Additionally, the respondent filed a Replying Affidavit dated 15/08/2024 in opposition to the Application.

### **Applicant's Case**

4. The Applicant contends that the Applicant filed HCCC No. 17 of 2020 seeking for the following orders;
  - i. A declaration that the letter of cancellation dated 26/03/2020 cancelling the Contract for supply and delivery of Polyester and Viscose Fibres Tender No. REAL/38/2019-2020 from the Defendant to the Plaintiff is unlawful, irregular, unprocedural and therefore null and void ab initio.
  - ii. That this Honourable court be pleased to grant an order for specific performance compelling the Defendant to provide an Irrevocable Letter of Credit to the Applicant's Bank as provided in Clause 6 of the contract;
  - iii. General damages for breach of contract;
  - iv. Special damages;
  - v. Cost of the suit be in the cause
  - vi. Interests in (c), (d) and (e) above.
5. The matter proceeded to full hearing and was determined. The court delivered its judgment in favour of the Ex-parte Applicant on 17.05.2023 and the Respondent did not file and or prefer an Appeal as against the Judgment. The Exparte-Applicant obtained the Certificate of Order against the Government from the Court and served the same as against the Respondent on 15.03.2024 and further served it upon the Honourable Attorney General on 18.03.2024.
6. Counsel urged that the Respondent being knowledgeable of the said Judgement and having been served with Certificate of Order against the Government and the Decree, has failed neglected and or declined to comply with the Decree and the Judgment. He cited Section 21 of [Government Proceedings Act](#) and Section 21 (3) of the said Act on the provisions relating to execution against the government. Additionally, he cited the case of [Republic v Kenya National Examinations Council Ex Parte Gathenji & 8 Others](#) Civil Appeal No 234 of 1996, and the case of [Republic v County Secretary, Narok County Government & another Ex parte SEC & M Company Limited](#) [2022] eKLR on the same issue of mandamus.
7. Counsel urged that in the present case, the Ex parte Applicant moves this Court to compel the satisfaction of a judgment already decreed in its favour by a competent Court of law. The applicant has produced the Letter that was served upon the Attorney General together with the Certificate of Order/ Costs against the Government and the Decree, email prints out showing evidence that the same was also served upon the Respondents and its Advocates on record and thus complied with the provisions of Section 21 of the [Government Proceedings Act](#).
8. Counsel urged the court to come in aid of the Ex-parte Applicant not only to ensure satisfaction of the fruits of the Judgment but also to protect the integrity of the court by ensuring obedience of the Judgment and Court Orders. He cited the case of [Republic v County Government of Kitui Ex Parte Fairplan Systems Limited](#) [2022] eKLR in support of this submission and urged that the application be allowed with costs.



## Respondent's case

9. Learned counsel for the respondent filed submissions dated 15<sup>th</sup> August 2024. He submitted that the Respondent has filed a Notice of Appeal dated 21<sup>st</sup> February 2024, challenging the ruling issued on 14<sup>th</sup> February 2024. The ruling dismissed the Respondent's contention that the irrevocable letter of credit should only be issued upon the Applicant providing the requisite security as required under the contract.
10. The Respondent filed an application for stay pending appeal before the Court and the Court issued interim orders of stay pending the hearing and determination of the Respondent's appeal. These stay orders effectively halt any actions or obligations related to the execution of the judgment, including the issuance of the letter of credit, until the appeal is determined.
11. Counsel cited the decision of *RWW v EKW* [2019] eKLR on the purpose of stay of execution and urged that the issuance of an order of Mandamus cannot proceed when there are interim stay orders in place, as doing so would undermine the effect of the stay and render the pending appeal futile. The purpose of the stay orders is to maintain the status quo and prevent the execution of any actions that may affect the subject matter of the appeal. Issuing a Mandamus order while a stay is in place would pre-empt the appellate process, contradict the court's own orders, and lead to an unjust result.
12. Counsel submitted that Mandamus is an extraordinary remedy that should not be granted when there is a pending appeal on the same issue. Further, that Mandamus is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either.
13. Counsel cited Order 53 Rule 3 of the *Civil Procedure Rules 2010* and the case of *Raila Odinga & 6 Others v Nairobi City Council Nairobi* HCCC No. 899 of 1993; (1990-1994) EA 482 and *R v Kenya National Examinations Council Ex-Parte Gathenji & Others* [1997] on the issuance of Mandamus. Further, he urged that the application for Mandamus is premature and cannot be granted while the interim stay orders remain in force. The Applicant must await the outcome of the appeal before seeking any further orders regarding the enforcement of the Judgment.
14. Counsel urged that the issuance of the irrevocable letter of credit is a contractual obligation under Clause 6 of the tender agreement. The same contract provides that the letter of credit is to be issued only after the Applicant has provided the required security. The Applicant has not complied with this crucial condition precedent. Further, that mandamus is not a tool to be wielded to alter or override the express terms of a contract. Such an action would be a judicial overreach, undermining the sanctity of contractual agreements, and injecting uncertainty into legal and business transactions. Respecting the express terms of a contract maintains the legal principle of contractual autonomy and ensures that our legal system functions predictably and fairly. He reiterated that Mandamus cannot be used to compel a party to act in contravention of express contractual terms. He stated that courts cannot rewrite contracts and cited the case of *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR in support of these submissions.
15. Counsel submitted that the Ex-Parte Applicant has adequate alternative legal remedies for enforcing the judgment in Eldoret HCCC No. 17 of 2020, including the ordinary civil execution processes under the Civil Procedure Rules. Given the availability of these remedies, the application for Mandamus is premature and unjustified. He stated that Rivatex East Africa Ltd, is a government-owned corporation funded by public resources. Issuing an irrevocable letter of credit without the requisite security would



expose public funds to unnecessary risk and would violate Article 201 of the Constitution of Kenya 2010, which mandates prudent and responsible use of public resources. Counsel urged the court to dismiss the application.

### **Analysis & Determination**

16. The issues arising for determination are;
- i. Whether there is a pending appeal on the judgment and decree in Eldoret HCCC No. 17 of 2020
  - ii. Whether the orders for Mandamus should issue in the circumstances

### **Whether there is a pending appeal on the judgment and decree in Eldoret HCCC No. 17 of 2020**

17. The respondent contends that there is a pending appeal against the judgment and decree in Eldoret HCCC no. 17 of 2020. In fact, in his grounds of opposition, counsel has stated that the Notice is dated 14<sup>th</sup> February 2024. In the replying affidavit to the application there is no mention of this appeal. Further, the respondent has not adduced any evidence that there is a pending appeal. How, then, is this court supposed to establish whether there is an appeal pending or not? The Grounds of Opposition and replying affidavit were filed on 15<sup>th</sup> August 2024. The respondent filed to provide proof of this Notice of Appeal. Additionally, counsel submitted that there were stay orders issued against the ruling of this court issued on 14<sup>th</sup> February 2024. The Respondent has not stated the date the interim orders were issued or provided the court with a copy of these alleged orders. Therefore, as the respondents have not provided proof of the Notice of Appeal or interim orders, the court can only conclude that there are none. Parties are bound by their pleadings and therefore, as per the respondent's pleadings, there is no proof that there is an appeal.

### **Whether the orders for Mandamus should issue in the circumstances**

18. The Court of Appeal in the case of Republic v Kenya National Examinations Council ex parte Gathenji & Others, (1997) eKLR explained the applicable principles for an order of mandamus to issue as follows:

“The next issue we must deal with is this: What is the scope and efficacy of an order of mandamus? Once again we turn to Halsbury's Law Of England, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, 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.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of



performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel 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....”

19. The requirements for an order of mandamus to issue were further explained by Mativo J. in *Republic v Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another* [2018] eKLR as follows:

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in *Apotex Inc. v Canada (Attorney General)*, and, was also discussed in *Dragan v Canada (Minister of Citizenship and Immigration)*. The eight factors that must be present for the writ to issue are:-

- (i) There must be a public legal duty to act;
- (ii) The duty must be owed to the Applicants;
- (iii) There must be a clear right to the performance of that duty, meaning that:
  - a. The Applicants have satisfied all conditions precedent; and
  - b. There must have been:
    - i. A prior demand for performance;
    - ii. A reasonable time to comply with the demand, unless there was outright refusal; and
    - iii. An express refusal, or an implied refusal through unreasonable delay;
    - iv. No other adequate remedy is available to the Applicants;
    - v. The Order sought must be of some practical value or effect;
    - vi. There is no equitable bar to the relief sought;
    - vii. On a balance of convenience, mandamus should lie

### **Whether there is a public legal duty to act**

20. An order of mandamus is normally issued when an officer or an authority by compulsion of law or statute is required to perform a duty, and that duty, despite demand in writing, has not been performed. Execution proceedings against a government or public authority under the *Government Proceedings Act* can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body. The duty in this particular instance, is to satisfy the judgment of the court.



21. Notably, the respondent seems to be contradicting itself on the issue of whether it is a public body. On one part, the respondent contends that there are alternative remedies that can be pursued such as execution while it knows very well that execution cannot issue against a government institution as it would a private body.
22. Counsel admits that it is a government owned corporation only when it suits the position that it would be contrary to public policy but suggests a remedy that is not available to the applicant when it is convenient to raise it. It is not in dispute that there is a judgment against the respondent. As it is government owned, it has a statutory duty to satisfy the judgment of the court.

### **Whether there is a duty owed to the Applicants**

The applicants are the plaintiffs in the judgment in Eldoret HCC No. 17 of 2020. The judgment was issued in their favour. Therefore, the respondents, by virtue of being the defendants, owe a duty to the Applicant to satisfy the judgment.

### **Whether there was prior demand for performance**

23. Section 21 of the *Government Proceedings Act* in this regard provides as follows as regards the requirements to be met in the enforcement of orders as against Government organs in civil proceedings:

“(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.”

24. The applicant has obtained a Certificate of order against the Government and served it against the Respondent on 15<sup>th</sup> May 2024. The same was also served upon the Office of the Attorney General on 18<sup>th</sup> May 2024. The same was annexed to the verifying affidavit in support of the application. There was also proof of service annexed to the affidavit.
25. The Application was filed on 10<sup>th</sup> June 2024 and the respondent failed to comply with the demand from the date of judgment and up until the date it was served with the Certificate of order. As the respondent is a government owned institutions, there is no other adequate remedy available to the applicants.
26. As to whether the order is of practical value, the respondents appear to prosecute an appeal in their response as they repeatedly return to the issue of the issuance of the irrevocable letter of credit, urging that the court is rewriting the contract. Notably, the reasons for cancellation of contract that resulted in the suit had nothing to do with the letter of credit. It is my considered view that that is an issue for the alleged appeal which this court cannot delve into.
27. At this juncture, the court is merely to determine whether the order for mandamus is to issue. Ideally, as the orders issued were for specific performance, if the respondent is intent on complying to the orders of the court, all that is required is to request for the applicant to comply with the provision of security in order for it to provide the letter of credit as per the terms of the contract. The court has not restricted the respondent from doing this despite the claims of ‘rewriting the terms of the contract’. It is evident, from the repeated mention of the issue of the issuance of the letter of credit to the applicant and the security to the respondent that it is a term of the contract the respondent deems crucial. It is also clear that the respondent does not intend to comply as it has sought to delay the process and shelter under the claim that the absence of the letter makes the contract unenforceable.
28. The court cannot dictate every step of compliance to a contract. To this point, there is no evidence that it has requested the applicant to provide the security in accordance with the terms of the contract to enable compliance. This is despite the alarm raised at the risk alleged to arise from the failure to provide security.
29. The Applicant in this matter, has shown that there resides in it a legal right, demanding the performance of a legal duty by the respondent to settle the terms of the decree arising out of the judgement of this court. It is also clear that the Applicant has applied for this prerogative writ of mandamus in good faith and not with any ulterior or oblique motive. The judgement debtor being substantially a legal entity under the public enterprise there is no alternative remedy from which the decree can be satisfied for the benefit of the Applicant.
30. There is evidence that a genuine demand has been made by the Applicant to the respondent to satisfy the judgement and decree issued by this court. This court is therefore clothed with jurisdiction to exercise discretion to grant this constitutional remedy of mandamus to command the governmental or semi -governmental body in the nature of its public duty to enforce a decree of the court as premised in this petition.



31. It is trite law that the prerogative remedy for mandamus in our legal system has long provided the normal means of enforcing the performance of public duties vested in public authorities or bodies of all kinds and the respondent here is no exception. This remedy applies in equal measure on the application of a private litigant as well as by one public body /institution against another. In the instant case, the Applicant has a locus standi to institute a petition before a court of law to step in circumstances where the exercise of the respondent's power has been improper and unlawful in failing to meet the terms of the decree which continues to subsist over time. This remedy therefore prime function is to compel into action the respondent to make good the payment owed to the Applicant.
32. In granting this order in favour of the Applicant, I draw inspiration from the guiding principles as summed up in Halsbury's Laws of England Vo. ix 744 para 1269 " The writ of mandamus is a high prerogative writ of a most extensive remedial nature, and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior court, 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 supply defects of justice, and accordingly it will issue to the end that justice may e done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right and it may issue in cases where although there is an alternative legal remedy, yet such mode or redress is less convenient, beneficial and effectual".
33. From the instant application the following interrogatories have been answered in the affirmative. (a) That the Applicant has a clear and specific right to the relief demanded by it against the respondent. (b) There is a duty imposed by law on the respondent to satisfy the judgement debt as precisely framed in the judgement and the decree of this court. (c) This duty imposed upon the respondent is of an imperative ministerial character involving no judgement or discretion to be exercised in one way or another or some kind of balancing Act. (d) The Applicant happens to have no any other remedy save the prerogative mandamus.
34. The framework of law on the writ of mandamus in relation to this Application, whichever way one looks at the frontiers of the contractual rights as between the Applicant and the Respondent, it is appropriate, for the enforcement of the decree of this court be granted as the most suitable in protecting the legal rights of the Applicant. There is need to protect the interests of the public, like the Applicant in this case from the powers given to public bodies or authorities to ensure that they did not limit or affect the rights and liabilities of the citizens or any other organization, entity or company which by its legal existence, enters into a binding contractual covenant for supply of goods and services. Hence this was the factual matrix of this case prompting such a duty vested with the respondent culminating in the issuance of the writ of mandamus.
35. It is my considered view that the application meets the threshold for orders of Mandamus to issue. It follows that the application succeeds in its entirety. I hereby order as follows;
- i. An order of Mandamus hereby issued to compel the Respondent to provide an irrevocable letter of credit to the applicant's bank as provided in Clause 6 of the Contract in compliance with Order (b) and (c) of the Judgment in Eldoret HCCC No. 17 OF 2020 Kings Investments Management Co. Ltd v Rivatex East Africa Ltd.
  - ii. For the purpose of enforcing the decree of this court, it is fair and just that the defined decretal sum be settled whichever way by the Respondent in favour of the Applicant to meet the essence of enforcement of judgement deeply rooted in lur legal system and ranked as a fundamental principle of justice.
  - iii. The Respondent shall bear the costs of the Application



**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 7<sup>TH</sup> DAY OF OCTOBER 2024**

In the Presence of

Mr. Kavita Advocate for the Applicant

M/s Waweru Advocate for Katwa for the Respondent

.....

**R. NYAKUNDI**

**JUDGE**

