



Republic v County Secretary, Homabay County Government of Homa Bay & 7 others & 2 others; Mangrose Security Services Limited (Exparte Applicant) (Judicial Review E002 of 2023) [2024] KEHC 11773 (KLR) (1 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11773 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
JUDICIAL REVIEW E002 OF 2023
KW KIARIE, J
OCTOBER 1, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY SECRETARY, HOMABAY COUNTY GOVERNMENT OF HOMA BAY
& 7 OTHERS 1ST RESPONDENT**

**CECM, FINANCE AND ECONOMIC PLANNING, HOMA BAY COUNTY
GOVERNMENT 2ND RESPONDENT**

HOMA BAY COUNTY GOVERNMENT 3RD RESPONDENT

AND

MANGROSE SECURITY SERVICES LIMITED EXPARTE APPLICANT

RULING

1. The respondents herein raised a preliminary objection dated the 10th day of June 2024 premised on the following grounds:
 - a. That the entire application dated the 24th of June 2024 is an insult to the rules of procedure, and the same ought to be struck out with costs.
 - b. That the application is incompetent, fatally and incurably defective for failure to obtain the certificate of costs and certificate of order against the government contrary to section 21 of the *Government Proceedings Act*.
2. The preliminary objection was opposed because:
 - a. That the respondents have partially satisfied the decree.



- b. The court should look at the substance rather than the form.
3. A preliminary objection must be on a point of law and nothing more. This was clearly stated in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. On page 700, paragraphs D-F, Law JA, as he then was, stated:

“....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

4. Section 21(1) of the [Government Proceedings Act](#) provides as follows:

“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.

While subsection 3 provides as follows:

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:”

5. The provisions of the abovementioned section were intended to ensure that the Government was not caught unaware of the demand to satisfy decrees and, more importantly, to allow for the preparation of the payments considering the lengthy procedures for making payments by the government. They were not meant to frustrate the settlement of decrees.
6. In the instant case, the applicant has averred that the respondent has made part payments. They could only have done so after they were aware of the decree.
7. Section 21 of the [Government Proceedings Act](#) has been the subject of court decisions. One such a decision is [Patrick Mukono Kisilu t/a Mutomo Kanda General Agencies v County Government of Kitui](#) [2021] eKLR. In this case, Judge R.K Limo said:

21. Aside from the above findings, it is now settled that any provision of law that hinders the right to access justice under Article 48 is bad law, and to that extent, Section 13A of the [Government Proceedings](#)



Act is unconstitutional. In the case of Kenya Bus Service Ltd & Anor. v Minister for Transport & 2 Others [2012], the court held as follows: -

“The provisions for demanding [prior notice before suing the Government is justified on the basis that the government is a large organization with extensive activities and fluid staff, and it is necessary for it to be given the opportunity to investigate claims laid against it and decide whether to settle or contest liability taking into account the public expense. While the objectives are laudable, the effect of mandatory notice provisions cause hardship to ordinary claimants. I am, of course, aware that pre-litigation protocols, for example, Order 3 Rule 2 of the Civil Procedure Rules, require that notice be given before action is commenced. Still, the penalty Rules, require that notice be given before action is commenced. Still, the penalty for non-compliance is not to lose the right to agitate the cause of action but to be denied costs incurred in causing the matter to proceed to action.

Viewed against the prism of the Constitution, it also becomes evident that Section 13A of the GP provides no independent to access to justice. Where the state is at the front, left, and centre of the citizen’s life, the law should not impose hurdles on the accountability of the Government through the Courts. An analysis of the various reports from the Commonwealth, which I have cited, clearly demonstrates that the requirement for notice, particularly where it is strictly enforced as a mandatory requirement, diminishes the ability of the citizen to seek relief against the government. It is my finding, therefore, that Section 13A of the Government Proceedings Act as a mandatory requirement violates the provisions of Article 48.”

8. The upshot of the preceding analysis is that the preliminary objection lacks merit. The same is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 1ST DAY OF OCTOBER 2024

KIARIE WAWERU KIARIE

JUDGE

