



**Republic v County Secretary, County Government of Narok & another;
British Pharmaceuticals Limited (Exparte) (Judicial Review Cause
E001 of 2023) [2024] KEHC 14256 (KLR) (18 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14256 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
JUDICIAL REVIEW CAUSE E001 OF 2023**

F GIKONYO, J

NOVEMBER 18, 2024

**IN THE MATTER OF CIVIL APPEAL NO. E020 OF 2020 -COUNTY
GOVERNMENT OF NAROK VS BRITISH PHARMACEUTICALS
LIMITED FOR JUDICIAL REVIEW ORDER OF MANDAMUS**

AND

ORDERS 22, 59 AND 53 OF THE CIVIL PROCEDURE RULES

AND

SECTION 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

SECTION 21 OF THE GOVERNMENT PROCEEDINGS ACT CAP 40 LAWS OF KENYA

AND

SECTION 11(1) OF THE FAIR ADMINISTRATION ACTION ACT, 2015

AND

**IN THE MATTER OF ARTICLES 1(1), 2(1), 10(1)(B), 20(1),
23, 47 AND 165 OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY SECRETARY, COUNTY GOVERNMENT OF NAROK 1ST
RESPONDENT**

**NAROK CEC, MEMBER FOR FINANCE AND ECONOMIC
PLANNING 2ND RESPONDENT**



AND
BRITISH PHARMACEUTICALS LIMITED EXPARTE

JUDGMENT

Mandamus to compel payment in execution of decree

1. The ex parte applicant was granted leave by the court on 04/07/2023, to apply for judicial review of mandamus to compel the respondent to pay Kshs. 10,636,300.80 being the decretal amount and costs owed to the ex-parte applicant.

The application

2. Pursuant to the said leave, the Ex parte applicant filed the Notice of Motion dated 10/07/2023 applying for, inter alia, an order of mandamus to compel payment of the decree herein.
3. The Motion is supported by the grounds set out in the application and the supporting affidavit of DAYANAND K. POOJARI sworn on 10/07/2023.
4. The ex parte applicant is the decree-holder in two Civil cases; Civil Appeal No. E020 of 2020; County Government of Narok Vs British Pharmaceuticals Limited and narok CMCC No. 99 of 2017; British Pharmaceuticals Limited Vs County Government of Narok in which it was awarded damages and costs amounting to Kshs. 10, 636,300.80/=.
5. The ex parte applicant extracted a certificate of order against the government on 30/05/2023 and served it upon the respondent on 31/05/2023.
6. The ex parte applicant has demanded from the respondent payment of the sum of Kshs. 10,636,300.80/= in vain, and the respondent's secretary has failed, ignored, and/or neglected to pay as by law required.
7. Hence, this application seeking an order of mandamus to compel the respondents to pay the decretal sum in execution of the decree herein.

Replying affidavit

8. The respondents opposed the application vide replying affidavit sworn by the Ag. County Secretary of Narok county government, John Mayiani Tuya on 09/08/2023.
9. The respondents contend that the certificate of order was not served upon the county government of Narok until 05/06/2023.
10. The deponent averred that the county government has been in the process of reconciling its financial records by way of a financial audit to determine any outstanding liabilities that the county government owes to different service providers as well as what steps to take regarding the outstanding liabilities.
11. The deponent argued that the application is premature and the respondents should be afforded time to put their house in order by auditing its books and reconciliation of its records.

Directions of the court

12. The application was canvassed by way of written submissions.



The Ex-Applicant's Submissions.

13. The ex-parte applicant submitted that no proper explanation has been given as to why they are yet to satisfy the lawful judgments and decree of the court. According to the ex parte applicant, the decretal sum is a debt due and payable as an order of the court and is not subject to fact-finding through an audit inquiry as alleged by the respondent. In any event, the respondents have merely alleged that an audit is taking place without any documentary proof thereof and the relevant timelines for the audit. The ex parte applicant urged that, the office of the auditor general is mandated to audit the accounts of the county governments within 6 months of each financial year yet it has been over a year since filing of the replying affidavit which made averments on audit. The ex parte applicant relied on articles 229(4) of *the constitution* of Kenya, 2010, and Republic V County Secretary Nairobi County & Another Ex Parte Applicant: Park Towers Limited [2015] eKLR.
14. The ex parte applicant submitted that the contention that the certificate of order was served upon the respondents on 05/06/2023 and not 30/05/2023 is neither here nor there and does not dispute service of the certificate of order was lawfully effected upon the respondents which they acknowledged.

The Respondents' submissions

15. The respondents submitted that it is of paramount importance that the respondents be afforded more time to put their house in order before such extensive orders sought by the ex-parte applicant are made against them. The respondents contend that the respondents have not at any particular time implied that they intend to not honour the decree. The ex parte has not met all the requirements for the orders of mandamus to be issued. The respondents relied on Republic Vs Principal Secretary, Ministry of Internal Security & Another Ex Parte Schon Noorani & Another [2018] eKLR.
16. The respondents submitted that the ex-parte applicant has failed to satisfy the requirements needed for the orders sought to be granted. Therefore, the application dated 10/07/2023 should be dismissed for being without merit and premature with costs awarded to the respondents.

ANALYSIS AND DETERMINATION

17. This court has considered the ex parte Applicant's application, the supporting affidavit thereof, the replying affidavit, and the rival parties' submissions. The main issues is based on;
 - i. Whether the respondent bears and owes a statutory duty to pay to the ex parte applicant the sum owing, which it has failed to perform despite demand for its performance.

Remedy of mandamus: Nature, scope, purpose and efficacy

18. The Court of Appeal in Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others, [1997] e KLR deciphered the nature, scope, purpose and efficacy of the remedy of mandamus citing relevant excerpts from HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 as set out below:
19. '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.' HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89



20. ‘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.’ (ibid)
21. Para 90- “the mandate”: “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.” Ibid.
22. The court of appeal posed and answered the question: ‘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....’ Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others, (supra)
23. A successful application for an order of mandamus should prove: -
 - (i) Existence of a public legal duty to act;
 - (ii) The duty was owed to the Applicants;
 - (iii) 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

Republic vs Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another [2018] eKLR

Public duty and failure to perform it

24. Are the Respondents under a public duty and obligation to satisfy the orders issued in favour of the ex parte Applicants?
25. A lawful decree has been issued against the County Government of Narok. The county government is, therefore, a judgment debtor with a legal obligation to satisfy the decree.
26. However, Section 21 of the *Government Proceedings Act* provides for enforcement of orders as against Government organs in civil proceedings, and inter alia, places the statutory duty to satisfy decrees



- of the court against a government or public authority upon the accounting officer of the concerned government department or organ.
27. Therefore, once the procedure thereof is followed; ‘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’ s.21(3) of GPA.
 28. See Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) eKLR.
 29. It is not disputed that judgment was entered in favor of the ex parte Applicant in Narok CMCC No. 99 of 2017 and HCCA No. E020 of 2020 as against the Respondent. The ex parte Applicant annexed a copy of the Certificate of Order issued in its favor against the Respondent, for the decretal amount as per decree dated 02/05/2023 of Kshs. 9,680,115.80/= inclusive of taxed costs as per the certificate of costs dated 02/05/2023 at Kshs 511,989.00 and the certificate of taxation by the deputy registrar dated 28/02/2023 at Kshs. 444,196.00/=making a total of Kshs. 10,636,300.80/=. The ex parte Applicants also adduced evidence to show that they made demands and requests for payment which were ignored by the Respondent.
 30. Evidence show that, the relevant certificate of order of the sum due for payment were served upon the respondent and demand for payment of the decretal sum was made in vain; making, the failure by the accounting officer of the respondent to pay the decretal sum in the certificate of order, a subject for an order of mandamus to compel performance of the duty to pay by the accounting officer of the respondent.
 31. The court notes that an order for committal to civil jail has also been sought. At this juncture, it is important to state that, disobedience of an order of mandamus, like any order of the court, invites penal sanctions. This general penal notice is impressed in every court order and is sufficient; rather than anticipating default and ordering anticipatory committal of the 2nd respondent to civil jail for 6 months in default of payment; which is tantamount to imposing a serious criminal sanction without following due process.

Conclusion and orders

32. It appears-from the submissions- that the respondents need time to put their house in order. The process of budgeting and funding for county governments is governed by the law on public financial management, making the request for time to be reasonable. The request will be considered in the ultimate disposition of this application.
33. In the premises, this court finds that the ex parte Applicant’s Notice of Motion dated 10/07/2023 is merited and is granted to the extent of the specific orders made below:
 - i. An order of mandamus is hereby issued compelling the Respondents to, within 60 (sixty) days, pay the ex parte Applicant, the sum of Kshs. 10,636,300.80/=:, being the decretal sum and costs awarded to the ex parte Applicant in Narok CMCC No. 99 of 2017 and Narok HCCA No. E020 of 2020.
 - ii. The ex-parte Applicant shall have the costs of the Notice of Motion dated 10/07/2023.

Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 18TH DAY OF NOVEMBER, 2024.



F. GIKONYO M

JUDGE

In the presence of: -

Ochieng h/b for Oyatta for Ex parte applicant

Osongo for respondent

Otolo C/A

