



**Republic v County Executive committee Member Finance & Economic Affairs Nairobi
City County & 2 others; Professor Ojienda & Associates (Exparte) (Application
57 of 2024) [2024] KEHC 13710 (KLR) (Judicial Review) (4 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION 57 OF 2024
J NGAAH, J
NOVEMBER 4, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY EXECUTIVE COMMITTEE MEMBER FINANCE& ECONOMIC
AFFAIRS NAIROBI CITY COUNTY 1ST RESPONDENT**

COUNTY SECRETARY 2ND RESPONDENT

**CHIEF OFFICER, FINANCE/COUNTY TREASURER NAIROBI CITY
COUNTY 3RD RESPONDENT**

AND

PROFESSOR OJIENDA & ASSOCIATES EXPARTE

JUDGMENT

1. The application before court is a motion dated 13 May 2024 in which the applicant seeks, in the main, an order for mandamus against the respondents. The prayer for this order has been phrased as follows:

“1. That an Order of Mandamus be issued compelling the Respondents to pay to the Applicant forthwith and without delay, the decretal sum delineated hereunder together with the accrued interest until payment in full, that is to say;

Particulars

Principal sum.....Kshs. 1,980,000.00/=



Interest at 14% p.a from 11/5/2021
to 4/4/2024).....Kshs. 804,259.73/=

Court collection fees and
Further costs.....Kshs. 2,000.00/=

Total.Kshs. 2,789,259.73/=”

2. Besides asking for costs, the applicant has also prayed for the order that a notice be issued against the respondents for them to show cause why they should not be cited for contempt of court orders if they default in paying the amount sought. The application is expressed to be brought under Order 53 Rule 3 of the Civil Procedure Rules and is based on a statutory statement dated 8 May 2024 and an affidavit verifying the facts relied upon sworn on even date by Prof. Tom Ojienda.

The applicant is a firm of advocates and Professor Ojienda has introduced himself in his affidavit as the managing partner of this firm.

3. According to Professor Ojienda, his firm filed an advocate/client bill of costs dated 27 April 2021. The bill was for the costs incurred when he represented the County Government of Nairobi’s predecessor in High Court Civil Case No. 384 of 2012; Kenya Airports Authority versus City Council of Nairobi. By a ruling rendered by the taxing officer on 16 August, 2021, the bill was taxed at Kshs. 1,980,000/=.
4. On 24 August 2023, the taxing officer issued a certificate of taxation for the taxed amount. Due to the respondents’ failure to settle the amount specified in the certificate of taxation, the applicant filed an application seeking for judgment against the respondents in the sum of Kshs. 1,980,000/=. The applicant also sought for interest from the date of filing the bill of costs till payment in full. On 20 November 2023, the applicant successfully obtained a judgment as sought in the application.
5. The applicant then extracted a decree and a certificate of order against government respectively dated 3 April 2024 and 4 April 2024. These documents were served upon the respondents but to date, the decretal amount as stated in the certificate of order against government has not been settled.

It is for this reason that the applicant has moved this Honourable court for the order of mandamus to compel the respondents to pay the applicant.

6. The respondents opposed the application and filed a replying affidavit sworn by Ms. Asha Abdi who has sworn that she is the Chief Officer, Finance of the County Government of Nairobi. Ms. Abdi does not deny that the applicant offered his service to the client or that the latter owes the applicant the amount claimed. According to her:

“...the respondents have not ignored, circumvented or refused to satisfy the decretal sum in question since they have only learnt of the said orders through the current application dated 14th May, 2024.”

7. She has also sworn that any liability or expenditure incurred against the County Government of Nairobi can only be defrayed from the monies provided by the National Government. But the National Government has not adequate funds to settle the outstanding debts including the applicant’s claim. According to Ms. Abdi, the applicant’s claim shall be factored in the County Government’s current financial year and that the respondents are ready to settle the decree once an allocation for it has been made, approved and passed by the County Assembly.



8. Ms. Abdi has been advised by her advocates on record, which advice she verily believe to be true, that the order of mandamus ought to be directed at the responsible accounting officer in the County Government. Accordingly, the inclusion of the County Secretary, who is not the accounting officer, in these proceedings is a misjoinder.
9. It is not in doubt that execution or attachment of property is one of the ways through which decrees or orders are enforced. But the Government is protected from such process of execution or attachment or other similar process in enforcement of decrees or orders. This protection is encapsulated in section 21 of the *Government Proceedings Act*, in particular, section 21(4) thereof. That section 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. In the face of this protection from execution or attachment, the only available route open to the applicant is to compel the County Government of Nairobi's accounting officer 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 in 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 public 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. Ms. Abdi has admitted that the County Government is aware of the applicant's claim and, as a matter of fact, it does not dispute the claim. This demonstrates that the County Government of Nairobi was served with certificate of order against the Government. In any case, none of the respondents has denied having been served with the certificate of order against government.
14. Besides service of the certificate of order against the Government, it is not contested that the applicant has complied with the rest of the conditions prescribed in section 21 of the *Government Proceedings Act*. To be precise, there is no evidence that the applicant defaulted in any other step prescribed under this provision of the law as to disentitle it to the order of mandamus.



15. In defence of the County Secretary, Ms. Abdi has sworn that County Secretary is not the accounting officer of the County Government of Nairobi. She has invoked the provisions of section 148 of the *Public Finance Management Act* cap.412A according to which the County Executive Committee Member in charge of Finance is designated as the officer responsible for designating accounting officers in a County Government. Apart from denying that the County Secretary is not such an accounting officer, so designated, she has not disputed that she and the 1st respondent are designated accounting officers.
16. A demand for payment having been made and the respondents having failed to pay, no other evidence is required to demonstrate that the respondents have failed to perform a public duty with which they are charged under section 21(3) of the *Government Proceedings Act*. A mandamus order would properly issue in such circumstances.
17. I must hasten to add that Section 21(3) of the Act makes no provision for exceptions under which the accounting officer may be excused from his obligation to settle the certificate of order against government. It follows that lack of budgetary allocation for settlement of outstanding decrees such as the applicant's is not a sufficient reason to deny the applicant the judicial review relief of mandamus. In any case, Ms. Abdi has stated on oath that a provision for the settlement of the applicant's decree was to be made in the current financial year. If that is the case, there is no reason why settlement of the decree should be withheld any longer.
18. Accordingly, I allow the applicant's application to the extent that the order of mandamus is hereby granted compelling the respondents, jointly or severally, to pay the applicant in terms of the certificate of order against the government issued on 4 April 2024. The applicant will also have costs of the application. It is so ordered.

SIGNED, DATED AND POSTED ON THE CTS ON 4 NOVEMBER 2024.

NGAAH JAIRUS

JUDGE

