



**Republic v Attorney General & another; Yang (Exparte) (Application E067 of 2022)
[2024] KEHC 13896 (KLR) (Judicial Review) (3 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13896 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E067 OF 2022
J NGAAH, J
NOVEMBER 3, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND
RESPONDENT**

AND

ZELIANG YANG EXPARTE

JUDGMENT

1. Before court is the applicant’s motion dated 19 July 2022 seeking the following orders:

- “1. An order of Mandamus compelling the 1st and 2nd Respondent(sic) to pay to the Applicant the sun of Kshs. 530,433.00 with interest thereon at the rate of 12% per annum from 9th January, 2019 in terms of the Certificate of Order against the Government issued on 20th February, 2019 until payment in full arising from Milimani CMCC No. 3364 of 2006 Zeliang Yang Versus Attorney General.
- 2. That the Honourable Court be pleased to give further orders and directions it may deem fit and just;
- 3. That Costs of the application be provided for.”



2. The application is based on a statutory statement dated 17 November 2024 and an affidavit verifying the facts relied upon sworn on even date by Mr. Amos Wandago, an advocate of this Honourable Court and who is on record for the applicant.
3. According to the learned counsel, on 19 April, 2017 the court entered judgment in favour of the Applicant for a sum of Kshs.182, 596.00 plus costs and interest. The judgment was obtained in Nairobi Chief Magistrates Court Civil Case No. 3364 of 2006; a suit that was filed against the Attorney General by an insurance company, in the name of its insured, under the doctrine of subrogation, to recover its outlay.
4. On 20 February, 2019 the Honourable Court issued a certificate of order against the government in the sum of Kshs.530, 433.00 inclusive of the decretal sum, taxed costs and interest. The certificate of order against the government was served upon the Attorney General on 13 March, 2019.
5. Despite service, the Attorney General has failed, refused and/or neglected to pay contrary to of Article 47 of Constitution and Section 7(2) (i) of the *Fair Administrative Action Act*, 2015 which guarantees expeditious, reasonable and efficient administrative action. The learned counsel deposes that the Attorney General has failed to discharge the duty imposed him by the *Government Proceedings Act*, Cap 40.
6. The Attorney General opposed the application and to that end filed grounds of objection. According to the Attorney General, the application offends Section 21 of the *Government Proceedings Act*, cap 40. It is contended that the Attorney General is wrongly joined in the proceedings as he is not the Accounting Officer of the Independent Electoral and Boundaries Commission. The motion is also said to be fatally defective as it contains prayers that were not sought in the summons for leave.
7. In the submissions filed on behalf of the applicant, counsel for the applicant has reiterated what is contained in the affidavit verifying the facts relied upon. Further, although this is not apparent on the face of the application, counsel has submitted that the application is premised on the provisions of section 8 and 9 of the *Law Reform Act*, cap. 26; section 3A of the *Civil Procedure Act*, cap.21; and, Order 53 Rule 1 and 2 of the Civil Procedure Rules.
8. It has been submitted on behalf of the applicant that under Article 156 (4) (b) of *the Constitution*, the Attorney General represents the National Government in court or in any other legal proceedings to which the National Government is a party, other than criminal proceedings and, since he was served with the certificate of order against the government and the decree, he cannot dispute the relief sought by the applicant.
9. In any event, the Attorney General has in the past sought time to settle the judgment. The applicant has relied on the case of Republic v County Secretary, The County Executive Committee for Finance, Chief Officer, The County Government of Mombasa (Interested Party) (Judicial Review application 032 of 2021) (2022) KEHC 28 (KLR) 28 January 2022 (Judgment) where the court apparently allowed an application similar to the one before court, since the applicant in that case held a valid decree that had not been overturned or set aside.
10. It was also held in that case that all the applicant needed to prove was that the certificate of order against government had been served and that there was an express or implied refusal to pay the judgment amount. For the same argument, the applicant relied on Republic-Vs-Attorney General & Another; ex parte Application Mike Maina Kamau (2020) eKLR and Republic-Vs-Generali & Another; Nyaboga (Exparte) (Application 55 of 2019) {2019} KEHC 10769 (KLR).



11. In response to the submissions by the applicant, the Attorney General submitted that section 21 of the *Government Proceedings Act* has its foundation in the Crown Proceedings Act, 1947 (Section 37) of England which embraces the notion that any payment by Government must be covered by some appropriation. Parliament, it is urged, is jealousy of its control over public expenditure and that no ministry or department of government has any funds available at all times to satisfy decrees or judgments.
12. While existence of claims and decrees may be known to government ministries and departments, the Ministry of Finance and Treasury have to be notified of the same so that payment is arranged for or provisions made in the government expenditure.
13. The Attorney General relied on Republic v Attorney General Ex partes Miriam Wairimu Wambugu & another (2021) eKLR where the court held that when the Government is sued in a civil action through its legal representative it becomes a party just like any other party defending a civil suit and when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges against its liability to pay except on the manner of execution of the decree.
14. Under Section 21(4) of the *Government Proceedings Act*, decrees against the Government can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount. It is urged that the only condition for enforcement of payment by the Government is service of the Certificate of order against Government upon the Attorney General.
15. Even then, the Attorney General is not liable to stratify the decree because under Article 156(4) of *the Constitution*, the Attorney General is only the legal representative of the Government and not a party against whom execution should issue. In this submission, the Attorney General relied on the case of Republic v Attorney General & Another; ex parte Orbit Chemicals Limited (2017) eKLR where it was held that it is the accounting officer of the relevant government department that is obliged to satisfy the decree notwithstanding the fact that the said officer was not a party to the proceedings in which the decree was obtained and that the only defendant in those proceedings was the Attorney General. For the same submission, the applicant relied on the case of Republic v Attorney General; ex parte, Miriam Wairimu Wambugu & Another (2021) eKLR.
16. The Attorney General has also submitted that the application is fatally defective because the prayers sought in the motion are not the same prayers for which leave was granted. To be precise, In the application for leave, the applicant sought to institute the substantive motion against the 1st respondent only. Yet in the subsequent motion which is the suit before court, the applicant seeks an order of mandamus against both the 1st and 2nd respondents.
17. No doubt, one of the ways through which decrees or orders are enforced is, of course, execution or attachment. However, as both the learned counsel for the applicant and for the respondents agree, 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(4) 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.

18. In the face of this protection from execution or attachment, the only available route open to the applicant is to compel “the Accounting Officer for the Government department concerned” 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.

19. 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.”

20. And with particular reference to public officers who 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.)”

21. Turning back to the applicant’s application, copies of the judgment and decree exhibited in support of the application for leave show that the applicant obtained judgment the Attorney General in Milimani Chief Magistrates Court Civil Case No. 3364 of 2006. The Attorney General was the only defendant in that suit.

22. The little I gather from the judgment is that the applicant’s suit was a material damage claim arising out of a road traffic accident in which the applicant’s vehicle registration no. KAR 576 Y collided with the defendant’s vehicle registration No. GK A983 J. The defendant was adjudged to have been 100% liable for the accident.

23. The inclusion of the Independent Electoral and Boundaries Commission to these proceedings as the 2nd respondent would suggest that the motor vehicle registration no. GK A983 J was the Commission’s vehicle and not that of the Attorney General or of the Attorney General’s office. The Attorney General must have been sued as a representative of the National Government under Article 156(4) (b). This Article reads as follows:

(4) The Attorney-General—

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings;

24. I cannot see any other reason why the applicant should have joined the Independent Electoral and Boundaries Commission to this application as the 2nd respondent. Proceeding on the presumption that the Commission was the owner of the vehicle whose driver was found to be culpable, the next question is whether, the Attorney General would be a proper party in such an application the purport of which is to satisfy or enforce settlement of the decree that was obtained in the Chief Magistrates Court.

25. The answer is in the negative because, as noted, under section 21(3) of the *Government Proceedings Act* if the order (in this case the decree) sought to be enforced provides for the payment of any money by way of damages or otherwise, or of any costs, as is the case in the instant application, the person responsible to make the payment is the Accounting Officer for the Government department concerned.



26. The Accounting Officer of the Independent Electoral and Boundaries Commission is not the Attorney General but the secretary to the Commission. This is clear from section 10(7)(c) of the *Independent Electoral and Boundaries Commission Act* cap. 7C. This section reads as follows:
- (7) The secretary shall be—
- (c) the accounting officer of the Commission;
27. It follows that the only party who ought to have been joined to this suit as the respondent is the secretary of the Commission. Under section 13(1)(b), the Commission can sue and be sued in its own name but it would not be a necessary party to proceedings to enforce settlement of the decree.
28. In the ultimate the applicant's application fails because of misjoinder and non-joinder. In view of section 21(3) of the *Government Proceedings Act* as read with section 10(7) (c) of the *Independent Electoral and Boundaries Commission Act*, none of the respondents can be compelled to pay the amount due to the applicant.
29. For the foregoing reasons, the applicant's application is dismissed. I make no orders as to costs for the reason that the decree remains outstanding. It is so ordered.

SIGNED, DATED AND POSTED ON THE CTS ON 3 NOVEMBER 2024

Ngaah Jairus

JUDGE

