



Republic v County Government of Kwale; Charpenel Enterprises Limited (Exparte) (Judicial Review Application 020 of 2021) [2021] KEHC 200 (KLR) (9 November 2021) (Judgment)

Neutral citation: [2021] KEHC 200 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION 020 OF 2021
JM MATIVO, J
NOVEMBER 9, 2021**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF KWALE RESPONDENT

AND

CHARPENEL ENTERPRISES LIMITED EXPARTE

JUDGMENT

1. Pursuant to the leave of this court granted on 19th April 2021, the applicant moved this court by way of Notice of Motion dated 27th April 2021 expressed under the provisions of Order 53 Rules 3 of the *Civil Procedure Rules, 2010*, sections 1A, 1B and 2A of the *Civil Procedure Act*,¹ sections 8 & 9 of the [Law Reform Act](#)² and all the enabling provisions of the law seeking an order of Mandamus to compel the Respondent to pay the decretal sum and costs ordered in Kwale Civil Suit No. 566 of 2016 delivered on 28th January 2020 amounting to Kshs. 3,079,025/= plus accrued interests. The applicant also prays that any other consequential and or incidental relief be made to meet the ends of justice. Lastly, the applicant prays for costs to be provided for. The core ground in support of the application is that despite being served with the decree, the Respondent has not paid the decretal sum.
2. The Respondent filed a Replying affidavit sworn by a one Kevin Dzumo dated 24th May 2021. The substance of the application is that the proceedings in the lower court are live because the Respondent has a pending application seeking to reinstate its application dated 2nd March 2021 seeking to set aside the ex parte judgment. Additionally, the Respondent averred that the applicant never complied

¹ Cap 21, Laws of Kenya.

² Cap 26, Laws of Kenya.



- with the provisions of section 21 of the Government Proceedings Act³ hence these proceedings are incompetent.
3. Confronted with the above response, vide an application dated 19th July 2021, the applicant applied to file a supplementary affidavit annexing the Certificate of Order for Costs Against the Government and an order that the supplementary affidavit and the annexed affidavit be deemed to be properly on record after the requisite fees has been paid. On 7th October 2021, the parties recorded a consent allowing the applicant to file the supplementary affidavit within 7 days and to serve together with submissions. The Respondent was also granted leave to file a further affidavit if need be together with submissions within 14 days from the date of service. Pursuant to the said consent, the applicant filed the supplementary affidavit of Jackson Ruitiari Munene dated 19th October 2021 annexing the Certificate of Order Against the County Government and the Certificate of Order for Costs Against the County Government.
 4. The substantive application was canvassed by way of written submissions. The applicant's counsel filed submissions dated 19th October 2021 and pointed out that the applicant annexed the Certificate of Order Against the County Government and the Certificate of Order for Costs Against the County Government are attached to the Supplementary Affidavit and that the said documents were duly served. He cited *Republic v County Secretary, County Government of Meru & 2 others ex parte Andrew Wachira*⁴ which cited previous decisions for the proposition that the purpose of the writ of mandamus is to remedy the defects of justice. Also, he cited *Republic v Alfred Koroso*⁵ which inter alia under scored the fact that even though the law prohibits execution against the government, the court cannot allow a successful litigant to sit on a barren decree.
 5. The Respondent's counsel's submission was four-fold. One, that the instant application is pre-mature for want of compliance with the mandatory provisions of section 21 of the Government Proceedings Act⁶ and Order 29 of the Civil Procedure Rules, 2010. He cited *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza*,⁷ *Republic v Permanent Secretary, Office of the President, Ministry of Internal Security & another ex parte Nassir Mwandishi*⁸ and *Republic v County Secretary, County Government of Mombasa & 2 others ex parte Samuel Mutemi t/a Tudor Paradise*⁹ all of which underscored the need to comply with the mandatory provisions of section 21 of the Government Proceedings Act.¹⁰ He argued that the applicant only obtained the Certificate of Order Against the Government after the Respondent cited the omission in its response to the application, hence, the applicant instituted these proceedings prior to complying with the said provisions. He also cited *East African Glassware Mart Limited v County*

³ Cap 40, Laws of Kenya.

⁴ {2021} e KLR.

⁵ {2013} e KLR

⁶ Cap 40, Laws of Kenya.

⁷ {2012} e KLR.

⁸ {2014} e KLR.

⁹ {2021} e KLR.

¹⁰ Cap 40, Laws of Kenya.



*Secretary, County Government of Mombasa & 3 others*¹¹ which faulted the applicant for failing to comply with the above statutory requirements. He submitted that section 21 is a conditional precedent and not a mere technicality.

6. Two, he submitted that upon complying with the said provisions, there must be demand for payment before an order of mandamus can issue and cited *Republic v Permanent Secretary, Office of the President, Ministry of Internal Security & another ex parte Nassir Mwandibi*.¹²
7. Third, counsel cited *Republic v County Secretary, County Government of Mombasa & 2 others ex parte Samuel Mutemi t/a Tudor Paradise*¹³ which held that judicial review applications are mainly brought against the person who is bound by the law to comply with the orders sought and took issue with the fact that the accounting officer has not been named in the application. Fourth, he submitted that the judgment is under challenge in the lower court, hence, permitting the orders sought would be prejudicial to the Respondent's case in the lower court.
8. Section 21 of the Government Proceedings Act¹⁴ provides 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

¹¹ {2020} e KLR.

¹² {2014} e KLR.

¹³ {2021} e KLR.

¹⁴ Ibid.



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.

9. The above section has been the subject of interpretation by our superior courts. In *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza*¹⁵ the High Court expressed itself as follows: -

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon....” [Emphasis mine].

10. Order 29 Rule 3 of the Civil Procedure Rules, 2010 provides for the application for a certificate under section 21 of the Government Proceedings Act¹⁶ in the following words:

“Any application for a certificate under section 21 of the Government Proceedings Act (which relates to satisfaction of orders against the Government) shall be made to a registrar

¹⁵ {2012} e KLR.

¹⁶ Cap 40, Laws of Kenya.



or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and such certificate shall be in one of form Nos. 22 and 23 of Appendix A with such variation as circumstances may require.”

11. As was held in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza (supra)*, the Certificate of Order against the Government is not only a requirement but it is also a condition precedent to the satisfaction or enforcement of decrees issued against the Government. Section 21 of the Government Proceedings Act¹⁷ provides that the Certificate of Order against the Government should be issued by the court after the expiry of 21 days from the date of entry of the judgment. Once the Certificate of Order against the Government is served, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereto.
12. The applicability of section 21 of the Government Proceedings Act¹⁸ to County Governments is not in doubt. Section 21 (5) provides that:- 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.
13. There is no dispute that the Certificate of Order Against the Government was not obtained and served as required. The applicant’s position as I understand it is that it obtained it during the pendency of this application and with leave of the court, it filed a supplementary affidavit annexing the documents. The key question is whether by so doing the applicant complied with the above provisions. The applicant’s application will now turn on the question whether by obtaining leave as aforesaid and introducing the documents by way of supplementary affidavit cures the defect.
14. A reading of section 21 leaves no doubt that it lays down a clear procedure which must be followed. True, the applicant was by consent granted leave to file a supplementary affidavit to introduce the said documents which they did. But that it how far it goes. The law says the Certificate must be served before the obligation to pay can arise. The hurdle the applicant faces is that he sought an order that the documents be deemed to properly on record. I find it useful to refer to the Southern African case of *Firestone South Africa (Pty) Ltd v Genticuro AG*¹⁹ in which the court made some general observations about the rules for interpreting a Court's judgment or order. It stated: -

“...the basic principles applicable to the construction of documents also apply to the construction of a Court's judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the

¹⁷ Ibid.

¹⁸ Cap 40, Laws of Kenya.

¹⁹ 1977 (4) SA 298 (A) Trollip JA



extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it....”

It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment.”

15. The applicant did not pray for an order that the Certificate of Order Against the County Government be deemed to be properly served as contemplated in section 21. That omission makes the essential difference. It means that the consent did not cure the omission. As the law stands, the Respondent cannot be compelled to pay the decretal sum before the pre-requisites are met.

16. Even if I were to accept that the consent cured the omission, there is yet another hurdle. The Respondent states that there is a pending application in the lower court seeking to upset the judgment now being enforced. This position has not been controverted. This court cannot unleash a writ of mandamus to compel payment when the judgment sought to be enforced is under attack. Such a scenario would render the application pending in the lower court otiose, something a court of law cannot knowingly do. In any event, allowing the application before me during the pendency of the Respondent's application in the lower court would be a direct affront to section 21 (3) of the Government Proceedings Act and in particular the proviso thereto which reads: -

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.

17. The import of the failure to comply with section 21 and the pending application in the lower court create a hurdle for the applicant to qualify for mandamus. It means that the applicant has failed to satisfy the very first test for mandamus to issue, which is the existence of a duty to pay. My reading of section is that it is peremptory for the Certificate of Order against the Government to be served before an enforcement action such as the mandamus sought in this application is sought. In *Republic v County Secretary, Nairobi City County & Another ex parte Tom Ojienda & Associates*²⁰ I discussed in detail the 8 tests for granting an order of Mandamus which were set out in *Apotex Inc. v Canada (Attorney General)*²¹ citing *Dragan v Canada (Minister of Citizenship and Immigration)*²² which are:
There must be a public legal duty to act;

- a. The duty must be owed to the Applicants;
- b. There must be a clear right to the performance of that duty, meaning that:
 - i. The Applicants have satisfied all conditions precedent; and
 - ii. There must have been:
 - a. A prior demand for performance;

²⁰ {2019} e KLR.

²¹ 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

²² 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233).



- b. reasonable time to comply with the demand, unless there was outright refusal; and
 - c. An express refusal, or an implied refusal through unreasonable delay;
- c. No other adequate remedy is available to the Applicants;
 - d. The Order sought must be of some practical value or effect;
 - e. There is no equitable bar to the relief sought;
 - f. On a balance of convenience, mandamus should lie.
18. Applying the above tests to the facts of this case, I find that the first requirement is that there must be a public legal duty to act. This duty cannot arise before the legal prerequisites are met. Closely tied to this first test is the requirement for an applicant to satisfy all conditions precedent. My reading of the law is that compliance with section 21 of the Government Proceedings Act²³ is a condition precedent. It follows that the writ of mandamus cannot issue in the circumstances of this case, so, the applicant's application is fit for dismissal. Accordingly, I dismiss the applicant's application dated 27th April 2021 with costs to the Respondents.

Orders accordingly

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 9TH DAY OF NOVEMBER 2021.

JOHN M. MATIVO

JUDGE

²³ Cap 40, Laws of Kenya.

