



**Republic v The County Secretary –The County Government Of Taita Taveta & another
(Judicial Review 1 of 2021) [2020] KEHC 9217 (KLR) (10 June 2020) (Judgment)**

Neutral citation: [2020] KEHC 9217 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
JUDICIAL REVIEW 1 OF 2021
JO NYARANGI, J
JUNE 10, 2020**

BETWEEN

REPUBLIC APPLICANT

AND

**THE COUNTY SECRETARY –THE COUNTY GOVERNMENT OF TAITA
TAVETA RESPONDENT**

AND

DAIMA ENERGY SERVICES LIMITED EXPARTE

JUDGMENT

1. On diverse dates, Daima Energy Limited (hereafter the Exparte Applicant) entered into various contractual agreements with the County Government of Taita Taveta for the supply of solar lighting services covering various locations within the county. The first tender award was made on 12th June 2017 worth Kshs5,765,400. The 2nd and 3rd contracts were awarded on 28th June 2017 worth Kshs 3,544,800 and 979,600 respectively.
2. Subsequently, the exparte applicant discharged its obligation by supplying the contracted items and services hence a certificate of practical completion duly issued on 18th August 2017 by the relevant County Government department under whose docket the contract fell.
3. Upon request for payment, the County Government refused to honour the claim culminating to the institution of a suit against them for recovery of the said contractual sum vide Voi Chief Magistrate’s Court civil suit Number 3 of 2020. Having failed to enter appearance nor defence, exparte Judgment was subsequently entered for a principal sum of Kshs 9,899 and interest at Kshs 461, 953 making a total of Kshs10,360,953. A decree was thereof extracted on 20th January 2021 after issuing a certificate of costs.



4. An attempt to set aside the Exparte judgment entered on 18th January 2021 was thwarted on 2nd August 2021 when the trial court dismissed the application which had stayed the execution process on the interim basis on 19th April 2021.
5. The reluctance to honour the Judgment decree by the judgment debtor is what triggered the judicial review application the subject of this ruling. Vide a chamber summons dated 15th February 2021, the exparte applicant was granted leave to institute judicial review proceedings within 14 days. Consequently, on 1st March 2021, the exparte applicant filed a notice of motion dated 25th February 2021 seeking;

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2. That an order of Mandamus do issue directed to the County Secretary of Taita Taveta to settle and/or pay within a stipulated time the decretal amount in Voi CMCC No. 3 of 2020 totalling to Kshs 10,360,953 as at 21st January 2021 together with accruing interest till date of payment.
3. That Pursuant to prayer(a) and in default of so settling/paying the county secretary, county Government of Taita Taveta be committed to civil prison for a period of 6 months in default of settling /paying the decretal sum as sought in prayer (a) above.

Costs of this application be provided for

6. The application is premised on grounds stated on the face of it and an affidavit sworn on the 25th February 2021 by Evelyn Ongori the finance manager of the exparte applicant. It was deposed that having obtained a valid judgment against the County Government of Taita Taveta, and further, having made several demands for the respondent who is the accounting officer of the said government to honour payment but in vain, they had no option but to execute the same through a mandamus order and subsequently committal to civil jail in case of default.
7. As proof of the award of the said contracts, she attached notification of contract awards, completion certificate and judgment/decree. In reply, the respondent filed a replying affidavit sworn on 10th May 2021 by Liverson Mugendi the respondent herein claiming that the exparte judgment had been set aside on 19th April 2021 hence there was no basis for the judicial review orders.
8. When parties appeared before the duty judge on 10th May 2021 for directions, it was confirmed that indeed the respondent had obtained an exparte stay order on 19th April 2021 and that the application was yet to be determined interpartes. Consequently, the court stayed the proceedings herein to await the outcome of the stay application before the lower court. Finally, on 2nd August 2021, the trial court dismissed the application for stay and reinstated the exparte judgment. This was confirmed through a further affidavit sworn on 28th September 2021 by Julius Orenge Counsel for the Exparte applicant attaching the ruling of the trial court dismissing the application for stay.
9. Although the court gave the respondent sufficient time to file a further affidavit in response to the substantive application, none was filed. Subsequently, on 12th November 2021, parties agreed to file submissions to dispose the application. The applicant through the firm of Orenge and company advocates filed their submissions on 18th January 2022. However, the respondent did not file any. When the matter came for highlighting on 25th January 2021, the applicant opted to adopt the submissions in its entirety. Unfortunately, there was no appearance from the respondent's side.



10. Basically, Mr. Orenge merely restated the content contained in the affidavit in support of the application. He reproduced the facts of the case already alluded to herein above and urged the court to grant the orders.
11. I have considered the application herein which is technically not opposed and submissions by counsel for the applicant. The application herein is expressed to be brought under Order 53 rule 1 of the CPRS and section 8(1) of the law reform Act. Issues that arise for determination are;
 - a. whether the exparte applicant has established the grounds for this court to issue an order of Mandamus and
 - b. whether the respondent is guilty of contempt of the court order;
12. This court's authority to issue an order of judicial review in the nature of mandamus order is ordinarily geared towards compelling a public body/ institution or public officer to do what it or he or she is by law required or mandated to do but has declined or failed to do. It is a supervisory role or tool which is an equitable remedy provided under O53 and Sections 8 and 9 of the law reform Act. See Republic v National Employment Authority & 3 others Exparte Middle East Consultancy Services limited (2018) e KLR.
13. It is incumbent upon the applicant seeking such order to establish that the act complained of must have occurred at least not more than six months preceding the institution of the suit seeking a mandamus order; that the respondent is a public body or public officer who must have failed to execute a lawful action or duty bestowed upon it, him or her hence the need to be compelled to do it.
14. Circumstances under which judicial review order of mandamus can issue were succinctly set out by the Court of Appeal in Republic vs. Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996, where the Court of Appeal cited, with approval, Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89 thus:

“The order of mandamus is of 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. 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.”...These principles mean that an order of mandamus compels 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.”
15. In this case, there is no dispute that judgment was entered in favour of the exparte applicant. There is no doubt that there is no appeal pending. Equally, this application has not been challenged and therefore not opposed. It therefore follows that a successful party in any litigation must enjoy the fruits of his judgment. See Machira T/A Machira & Co. Advocates vs East African Standard(No.2)(2002)KLR 63



16. While dealing with a similar situation in the case of *Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza* [2012] eKLR the Hon. justice Githua expressed herself 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...”

17. In the instant case, the judgment debtor is the County Government and not the National government hence service of the order and a certificate of the order on the Attorney General does not apply. It is trite that courts do not issue orders in vain. Unless a court order is obeyed or honoured, its validity notwithstanding, it is meaningless. The dignity and authority of a court is determined or measured by obedience and respect to its orders. Therefore, the respondent cannot choose when to obey and not to obey.
18. There is no explanation offered why the respondent should not honour a lawful order from a court of law. The order which is valid was duly served, the terms are clear and unambiguous, there is refusal to obey and the refusal is deliberate. With these elements having been proved, the only remedy available is to compel the County Secretary Taita Taveta County Government through an order of Mandamus to honour the judgment decree entered vide Voi CMCC No. 3 of 2020 by paying the outstanding sum of kshs 10,360,953 together with interest at 12% per annum from the date the judgment / decree was entered in favour of the Exparte Applicant within 45 days.
19. Regarding the question of contempt proceedings, I find the same to be pre- mature. Contempt proceedings will be ripe in the event of non- payment within the stipulated time. As of now, the applicant would have to exercise patience. Concerning the issue of costs, the same shall follow the event. Accordingly, I am inclined to order that the respondent shall bear the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 10TH DAY OF JUNE 2022

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J.N. ONYIEGO
JUDGE

