



Republic v Governor of Kericho County & another; Ng'eno (Exparte) (Judicial Review Application E003 of 2023) [2024] KEELRC 989 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 989 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
JUDICIAL REVIEW APPLICATION E003 OF 2023**

HS WASILWA, J

MAY 2, 2024

**IN THE MATTER OF AN APPLICATION FOR
JUDICIAL REVIEW ORDERS OF MANDAMUS**

AND

IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT, CAP 26

AND

**IN THE MATTER OF SECTION 12 OF THE EMPLOYMENT
AND LABOUR RELATIONS COURT ACT, CAP 234B**

AND

**IN THE MATTER OF RULE 7 OF THE EMPLOYMENT AND
LABOUR RELATIONS COURT PROCEDURE RULES, 2016**

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC APPLICANT

AND

H.E THE GOVERNOR OF KERICHO COUNTY 1ST RESPONDENT

COUNTY GOVERNMENT OF KERICHO 2ND RESPONDENT

AND

ARCH. NICHOLAS NG'ENO EXPARTE



JUDGMENT

1. By leave of Court granted to the Ex parte Applicant on 25th September, 2023, the Ex parte Applicant filed the Notice of Motion dated 26th September, 2023 on 28th September, 2023, expressed under Order 53 rule 1 of the Civil Procedure Rules, as read with Rule 7 of the Employment and Labour Relations Court Procedure Rules, 2016, seeking for the following Orders; -
 1. An order of mandamus directed to the respondents to pay to the ex-parte applicant the sum of Kshs. 8, 394, 500/= being the damages awarded and Kshs. 1,678,900 being interest accrued in the Employment and Labour Relations Court Petition No. 2 of 2020 at Kericho with Kshs. 491, 971/= being the certified costs, do issue.
 2. THAT the costs of the application be awarded to the ex-parte applicant.
2. The basis upon which the Application is made is that Judgment was entered on 7th July, 2021, in favour of the ex-parte Applicant in Kericho ELRC Petition No. 2 of 2020 as the court found that the ex-parte applicant had proved his claim for unfair removal from office.
3. That the Respondent appealed the trial court case and filed stay of execution of the judgment and the decree at the Court of Appeal at Nakuru vide Notice of Motion dated 12th August, 2021 and the same was dismissed vide the ruling dated 16th December, 2022.
4. Since the stay of execution was not allowed, the Applicant herein sought for certificate of costs which was issued and a certificate of order against the Government issued by consent of advocates for both parties on 21st June, 2023.
5. Subsequently, the respondents were served through Court service as provided for under Rule 11 of the Employment and Labour Relations Court (Procedure) Rules, 2016.
6. The demand notice was then made but the respondents have refused and continue to refuse to carry out the aforesaid public duty to make the said payment, to the ex-parte applicant in the sum of Kshs. 8,394,500 being damages awarded, Kshs. 1,678,900 being interest accrued and Kshs. 491,971 being certificate of costs awarded.
7. It is stated that the respondents are under a public duty to make the said payment to the ex-parte applicant and are unlawfully neglecting or refusing to do so.
8. The ex parte Applicant contends that the respondents have acted and continue to act in excess of the powers in refusing to carry out the aforesaid public duties and to make the said payment to the ex-parte applicant.
9. That the Respondents have wrongly abdicated or abandoned their duties and powers in failing to pay the ex-parte applicant.
10. The ex parte applicant maintained that there is no other remedy that exist in law that can compel the Respondents to carry out their duty of paying him his decretal award except by this JR proceeding.
11. The Application is opposed by the Respondents who filed a replying affidavit sworn on 30th November, 2023 by Joel K Bett, the County secretary of the 2nd Respondent.
12. The affiant stated that it is not in dispute that judgement was entered in favour of the ex-parte Applicant. However, that Part IV of the [Government Proceedings Act](#) Cap 40 Laws of Kenya gives a clear



guideline on execution of judgements against both the National and County Governments, which guidelines were not followed by the Applicant in executing their judgement.

13. He stated that the ex parte Applicant did not meet the conditions precedent to the satisfaction or enforcement of decrees against the Government pursuant to section 21(1) and (2) of the [Government Proceedings Act](#).
14. It is also stated that no evidence was tendered in support of the Application herein. Therefore, that the orders sought cannot stand and the Application cannot be granted.
15. In a rejoinder relayed through the further affidavit sworn on 1st February, 2024, the ex parte Applicant stated that he complied with the said provisions of section 21 of the [Government Proceedings Act](#), because he waited for 21 days to elapse after the last order for payment was made in the matter on the 6th January, 2022 being the taxed party and party costs and filed his application on the 11th April, 2023.
16. He stated that he obtained the order issuing the certificate against the County Government which was granted on the in May, 2022 by Justice David Nderitu, pursuant to a Consent order entered by his advocate and the respondents advocates before the Judge.
17. He stated that on the 21st June, 2023 the Deputy Registrar issued the certificate directing the County Secretary of the County Government of Kericho to pay the sum of Kshs. 8,394,500. That the Court also issued a certificate of order for costs directing the County Secretary of the County Government of Kericho to pay the sum of Kshs. 491,970 being the costs awarded and taxed on 6th January, 2022 to the petitioner pursuant to the ruling of the 6th January, 2022. Further that the Certificate to pay the judgment and the party and party costs were embodied in one order issued, signed and sealed by the Deputy Registrar on the 21st June, 2023.
18. The affiant stated that this Order constituting the certificate for both payments was duly served his advocates upon the County Attorney of the County Government of Kericho by being sent vide G4S Kenya Ltd Courier Services on the 29th June, 2023.
19. He stated that since the certificate of Order made was done by consent of the parties, the Respondent had knowledge, which in law supersedes personal service.
20. Finally, that in this matter the order meets the purpose of the certificate and any deviations from the prescribed form no. 22 of Appendix A to the Civil Procedure Rules, 2010 can be cured by section 72 of the [Interpretation and General Provisions Act](#), Cap. 2 and Article 159 of [the Constitution](#) of Kenya, 2010.
21. He thus prayed for the Application to be allowed as prayed.
22. The Application was canvassed by written submissions.

Ex parte Applicant's Submissions.

23. The ex parte Applicant submitted that he is the decree holder in Kericho ELRC Petition No. 2 of 2020 in which the court on 7th July, 2021 found in his favour as against the respondents because he had proved his claim for unfair removal from office as the County Executive Committee Member in charge of Lands, Housing and Physical Planning of the 2nd respondent and an award of damages and costs was entered in his favour as against the respondents. The respondents being aggrieved by the decree of the superior court unsuccessfully applied for a stay of execution of the judgment and the decree to the Court of Appeal at Nakuru which motion was dismissed vide a ruling dated 16th December, 2022. The ex - parte applicant made an application for a certificate of order against the County Government and



the respondents through their advocate not being averse to the motion allowed the same by consent of the parties on 21st June, 2023. The court subsequently issued the certificate of order against the County Government. Hence the ex - parte applicant has now brought the motion to compel the respondents who are under a public duty to make the said payment to him but have unlawfully neglected to do so and therefore urged this Court to allow the Application as prayed. To support this, they relied on the case of Republic V Town Clerk of Webuye County Council and Another, HCCC No. 448 of 2006 wherein Majanja J. addressed the importance of the Court in ensuring that the right of a successful litigant to enjoy the fruits of his judgment observed as follows:-

“...A decree holder’s right to enjoy the fruits of his judgment must, not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of *the Constitution* particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant’s right of access to justice protected under Article 48 of *the Constitution*.”

24. Accordingly, he urged this Court to disallow the respondents’ objection to the motion being that the ex - parte applicant has not complied with section 21 (1) and (2) of the *Government Proceedings Act*, Cap. 40.
25. The Ex parte Applicant also relied on the case of Republic V Attorney General ; Ex parte ;Samson Lumadede Shivaji [2019] eKLR where the Court held that :-

“ 15. The respondent also opined that the applicant did not comply with the requirement to facilitate payment of the said decree. By a further affidavit by applicant’s counsel, a certificate of order for costs was annexed. It shows the same was prepared on the 4.9.2015 and it indicated the decretal sum of Ksh 315,695/= plus accrued interest from the judgment date and costs payable of Ksh 76,003/=. The applicant complied with - Section 21 of the said Act which states as follows: (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, or 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.”



26. On that basis, the ex parte applicant submitted that he has made out a case demonstrating that the Respondents have wrongly abdicated and abandoned their duties and powers in failing to pay him his decretal sum.

27. The ex parte Applicant further relied on the case of Republic Vs Kenya National Examination Council ex-parte Gathenji & 8 Others [1997]eKLR in which the Court of Appeal stated from the Halsbury's Law of England, 4th Edn Vol. 7 pg 111 para 89 states as follows:-

“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. 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.”

28. The Ex parte Applicant also submitted that there is no other remedy exists in law to compel the respondents to carry out their aforesaid duty and no other remedy is available to compel or obtain payment of the aforesaid sum. In this, they relied on the case of Republic Vs The Attorney Genral & Another Ex parte James Alfred Koroso, where Odunga J as he then was rendered himself;

“in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of *the Constitution* which enjoins the State to ensure access to justice for all persons.”

29. It was submitted that this Court is guided by the duty to do justice without undue regard to technicalities of procedure as stated under section 72 of the *Interpretation and General Provisions Act*, Article 159(2)(d) of *the Constitution* and reiterated by the case of Kenya Ports Authority V Kenya Power & Lighting Co. Limited [2012] eKLR in which Justice Mwongo stated with regard to procedural technicalities that:-

“Combining the meaning of these words, “procedural technicalities” may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under the law. This may not be an all-encompassing definition, but I think people generally associate procedural technicalities with annoying structures and rules which hinder the achievement of substantial justice.”

30. To buttress its arguments., the ex parte applicant relied on the case of Republic Vs County Secretary, County Government of Mombasa & 2 others Ex :-arte Samuel Mutemi t/a Tudor Paradise [2021] eKLR in which Justice Ogola in granting an application for mandamus observed;

“If anything the decree is being enforced against the office and not personally upon the holder of the said office, no personal liability is to be suffered by any individual person. The Respondents have not disputed the fact that judgement was entered against them in the lower court matter and no appeal of review is pending before court over the same. The



court notes that no effort has also been made to settle the decree. Further in *Microsoft Corporation v Mitsumi Garage Ltd & Another Nairobi - HCCC No. 810 of 2001; [2001] 2 EA 460*, it was observed that: “Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the suit. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances, the court should rise to its calling to do justice by saving the proceedings in issue.”

31. In conclusion, the ex parte Applicant urged this Court to allow the Application herein with costs.

Respondents’ Submissions

32. The Respondent on the other had submitted on two issues; whether the Applicant satisfied the prerequisite requirements of execution of decrees against the Government and whether the orders sought by the ex parte applicant should issue as against the Respondents.

33. On the first issue, it was submitted that the procedure of execution of decrees against the Government is laid down in Section 21 of the *Government Proceedings Act* as they are not done in the ordinary way of execution of ordinary civil cases. He added that, it is compulsory for any party seeking to execute against the government to also comply with Order 29 of the Civil Procedure Rules which requires for service upon the Attorney General which is meant to give notice to the Government to make arrangements to satisfy the decree. Therefore, that the technical procedure for in the *Government Proceedings Act* 21 (1) and (2) is a substantive requirement, which must be complied with failure to which execution of decrees upon the government cannot suffice. To support this, they relied on the case of *Republic vs. County Secretary Migori County Government & another [2019] eKLR*, where the court averred that;-

“I need not re-emphasize the need for strict compliance with Section 21 of the Act being the law of the land. In this matter I can gather from the record that a Decree and a Certificate of Costs in the suit was drawn and issued. I did not set my eyes on any Certificate of Order. There is a specific procedure on how the Certificate of Order required under the Act is obtained. The procedure is contained in Order 29 of the Civil Procedure Rules. Under Rule 3 thereof the application is made to the Deputy Registrar in the High Court or to the court in the subordinate court. The format of the Certificate of Order is provided in Appendix A Form No. 22 of the Civil Procedure Rules. Form No. 23 provides the format for a Certificate of Costs in the event it is separately issued. Once a party obtains the Certificate of Order and the Certificate of Costs, in the event the Certificate of Costs is obtained separately, together with the Decree, then such a party must satisfy the Court of service of those documents upon the party named in the Certificates. In this case there is neither evidence of issuance of the Certificates nor service thereof on the Respondents or their Advocates.”

34. Similarly, that in this case the ex-parte Applicant alleges to have effected service upon the County Attorney; Kericho County and annexes a G4S receipt as proof of service, when the County Attorney is not mandated by statute to satisfy a judgment and also that the courier receipt without a delivery note is not conclusive evidence that service was effected. To support this argument, the Respondents



relied on the case of Republic Vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza, where the Court held that:-

“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.”

35. The Respondent submitted that the ex parte Applicant has annexed judgement, decree and certificate of costs but has failed to produce a copy of Certificate of Order against Government as required under Order 29 Rule 3 of the Civil Procedure Rules. As such, no such certificate was served on the AG to notify them of the said payment, therefore that being in violation of the strict procedure under the law, the Respondents cannot be blamed for non-payment. To support this, the Respondents relied on the case of Musa Tapem v Principal Secretary Ministry of Interior & Coordination of National Government & another [2021] eKLR, where the court struck out a similar application for failing to comply with the provisions of Section 21 of the Government Proceedings Act.
36. Based on the foregoing, it was submitted for the Respondents that having established that the ex parte Applicant has not satisfied the pre-requisite requirements to warrant the execution of decrees against the Respondents, the Applicant is not entitled to the Orders sought.
37. The Respondent also took an issue on how the said Order of Mandamus was coined and stated that the officer who is directed to pay is the accounting officer as such a blanket order of Mandamus sought by the ex parte Applicant herein should not be issued. In this they relied on the case of Republic V Kenya National Examination Council Ex parte Gathenji & Others [1997] eKLR explained the applicable principles for an order of mandamus to issue as follows:

“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.”
38. Accordingly, that from the the foregoing, it is apparent that execution proceedings against a government or public authority can only be as against the accounting officer of the said government or authority, who is under a statutory duty to satisfy a Judgment made by the Court against that body. Further that it is settled law that before a Mandamus Order is issued, the Applicant must satisfy the procedure set out in section 21 of the Government Proceedings Act as read together with Order 29 of the Civil Procedure Rules.
39. In conclusion, the Respondents urged this Court to dismiss the Application herein.
40. I have examined all the averments and submissions of the parties herein. There is no dispute that judgement was entered against the respondents by court in Kericho Petition No. 2 of 2020 following



entry of judgement, pursuant to a consent of the parties, a certificate against the Respondents was issued by Hon. Judge Nderitu in May, 2022.

41. A certificate was later issued by the Deputy Registrar directing the County Secretary of Respondent to pay Ksh 8,394,500/=.
42. A certificate for costs directing payment of Ksh 491,970/= by the Respondent was also issued.
43. Despite the respondents averring that the procedure under the Government Proceedings Act was not followed, it is my finding that the Respondents have had knowledge of this claim. They have participated in a consent to extract a certificate against them with costs.
44. In the circumstances of the case, it is my finding that the applicants have established their application which is warranted and is accordingly allowed in terms of prayer 1 and 2 of the application.

JUDGEMENT DELIVERED VIRTUALLY ON THIS 2ND DAY OF MAY, 2024.

HELLEN WASILWA

JUDGE

In the presence of: -

Mrs Lumuba holding brief Miss Wachira for Respondent – Present

Wambua Kigamwa for Claimant – Present

Court Assistant - Fred

