

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

JUDICIAL REVIEW NO. E008 OF 2024

**IN THE MATTER OF: AN APPLICATION TO APPLY FOR JUDICIAL REVIEW
(MANDAMUS)**

AND

IN THE MATTER OF: THE GOVERNMENT PROCEEDINGS ACT S. (2) (4)

AND

IN THE MATTER OF: ORDER 22 AND 29 OF THE CPA, ACT CAP 21

AND

IN THE MATTER OF: ORDER 53 (1) OF THE CIVIL PROCEDURE RULES

AND

**IN THE MATTER OF: EXECUTION OF A DECREE FOR THE SUM OF KSH.
2,834,488.00 & COSTS OF KSH. 155,111.00 ONLY.**

AND

**IN THE MATTER OF: OGEMBO PRINCIPAL MAGISTRATE'S COURT CASE NO. 67
OF 2019: RONALD OMBASA VERSUS THE HON. ATTORNEY GENERAL**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE SOLICITOR GENERAL.....2ND RESPONDENT

AND

RONALD OMBASA.....EX PARTE APPLICANT

JUDGEMENT

1. Before me for determination is the notice of motion dated 4th April 2024 brought under Sections 8 and 9 of the Law Reform Act (Cap 26 of the Laws of Kenya) and Order 53 Rule 3 of the Civil Procedure Rules, 2010)

2. The applicant herein seeks orders that;

a) An order of Mandamus to issue against the Respondents herein namely; the Attorney General and the Solicitor General to compel them to proceed and pay out the Decretal sum of Kshs. 2,989,599.00/ only, being General damages and costs awarded the Judgment delivered on the 24th May, 2022 in Ogembo Principal Magistrate's Court Case No. 67 of 2019 (Ronald Ombasa versus The Hon. Attorney General & Another)

b) That the court be pleased to set a timeline and/or duration within which the Respondents will settle the Decretal sum with interest accruing until the date of payment.

c) That the applicant be at liberty to apply to this court for all necessary and/or consequent orders that this Honourable Court may deem fit and just to grant in the circumstances.

d) Costs of the application be provided for.

3. The application is based on and supported by the statement and verifying affidavit of Ronald Ombasa and on the grounds that: -

a) The ex parte Applicant herein filed a suit, the same being Ogembo Principal Magistrate's Court Case No. 67 of 2019: Ronald Ombasa versus The Hon. Attorney General.

b) Judgment was delivered on the 24th Day of May, 2022 wherein the said Plaintiff was allowed in favour of the Plaintiff was allowed. Among other orders, the ex parte Applicant herein was awarded the sum of Kenya Shillings Two Million Nine Hundred and Eight Nine Thousand Five Hundred and Ninety-Nine (Ksh. 2,989,599,00/-) only as General damages and costs of the Plaintiff.

c) The ex parte Applicant subsequently proceeded and filed his Bill of Costs which was taxed on the 21st day of June, 2022 and a Certificate of costs extracted and issued by the Executive Officer,

d) The Decree, Certificate of costs and Certificate of Satisfaction Order have since been duly served upon the Attorney General's offices, as required by Law.

e) Despite such service, the Respondents have blatantly refused and or declined to satisfy the aforesaid Decretal amount.

f) Owing to the above, it is apparent that the Respondents have deliberately refused and or ignored to settle the same hence the filing and or lodging of the instant Judicial Review proceedings.

g) It is thus necessary and or imperative for Orders sought herein be granted.

4. In his verifying affidavit the ex parte applicant deponed that the judgement was delivered in the said lower court matter on 24/5/2022 and was awarded damages of 2,989,599 .00 and the costs of the suit .the decree , certificate of costs and certificates of satisfaction order have since

been duly served to the respondents but they have refused and/ or and ignored to settle the decretal sum and hence he seeks an order for mandamus .

5. The respondent responded to the Application by way of the grounds of opposition dated 7.3.25 in which he challenged the application of the grounds that;

1. It offends the mandatory provisions of section 8 of the Office of the Attorney-General Act (Cap. 6A, Laws of Kenya) as read together with Section 4 (4) and Section 21 (4) of the Government Proceedings Act (Cap. 40, Laws of Kenya).

2. THAT the issuance of the orders sought in the Application is tantamount to granting execution orders against the Government contrary to the express provisions of Order 29, rule 2 (2) (b) of the Civil Procedure Rules, 2010.

3. THAT the Application is fatally defective, incurably bad in law and amounts to a complete abuse of the Court process.

4. THAT the Applicant is guilty of laches, indolence and failure to exercise due diligence which is inexcusable conduct that should not be entertained by this Honourable Court.

5. THAT the orders sought in the Application are misconceived, untenable and are not supported by factual evidence and/or the law.

The Respondents thus prayed that the said Application be dismissed with costs.

The applicant's submissions

6. The applicant in his submissions stated that he has followed the due procedure as provided for in the Government Proceedings Act.

8. Also, that procedure for execution of a decree against the County Government is spelt out under the provisions of Section 21 of the Government Proceedings Act and Order 2 of the Civil Procedure Rules.

Section 21 of the Government Proceedings Act provides thus;

"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."

9. He cited the case of Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012), the Court expressed itself thus;

"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."

10. Applying the above provisions to the instant case, it is notable that the ex parte Applicants have demonstrated inter alia, That there was a judgment delivered on 24th May, 2022 of Ksh. 2,834,488/= by the trial court That there is the party and party costs which was taxed on the 21st June, 2022 in the sum of Ksh. 155,111/ The Court issued a Certificate of Stated Costs on the 21 June, 2022. On the 1st March, 2024, the Honourable court issued a Certificate of Satisfaction Order in favour of the ex parte Applicants. The certificate of costs aforesaid was subsequently adopted as the Decree of the Court.

11. The exparte applicant further relied on the case of Republic v Trans Nzoia County Public Service Board & 2 others; Sifuna & Sifuna Advocates (Ex parte) (Judicial Review E011 of 2022) [2022] KEHC 17120 (KLR) (8 December 2022) (Judgment), while commenting on the process that ought to be followed while executing a Decree against a Government, the Court expressed itself thus;

"Before the Court issues such an order, there must be proof that the provisions of the Government Proceedings Act have been complied with in respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule."

12. It was also submitted that prior to the filing of the instant Judicial Review proceedings, the ex -parte Applicant had issued a demand to the relevant department at the Honourable Attorney General for payment of the Decretal amount. However, despite such service, the said demand never elicited any response. It thus follows that the ex parte applicants duly followed the procedure set down in the Law for execution against the Government and thus are entitled to the grant of the order of mandamus sought.

13. The respondents did not file any submissions at all.

Analysis

Whether this application has met the threshold for grant of orders sought.

14. The respondents objected to the proceedings on the ground that the application offends Section 8 of the Attorney General Act inter alia. The said section provides that; -

(1) No criminal proceeding or civil suit shall be brought against the Attorney-General, the Solicitor-General or a subordinate officer in respect of any proceeding in a court of law or in the course of discharging of the functions of the Attorney-General under the Constitution and this Act.

(2) No matter or thing done by the Attorney-General, the Solicitor-General or a subordinate officer shall, if the matter or thing is done in good faith for executing the functions, powers or duties of the Commission, render the Attorney-General, Solicitor-General or other subordinate officer personally liable to any action, claim or demand whatsoever.

14. The respondents have been sued in their official capacity and not personal capacity and thus the application is properly before this court, Section 21 of the Government Proceedings Act provides thus;

“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.”

14. Section 4 of the Government proceedings Act provides that;

(1) Subject to the provisions of this Act, the Government shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject—

(a) In respect of torts committed by its servants or agents;

(4) Any written law which negatives or limits the amount of the liability of any Government department or officer of the Government in respect of any tort committed by that department or officer shall, in the case of proceedings against the Government under this section in respect of a tort committed by that department or officer, apply in relation to the Government as it would have applied in relation to that department or officer if the proceedings against the Government had been proceedings against that department or officer.

15. In the case of *Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) (Supra)* it was held that Sections 21(1) and (2) of the Government Proceedings Act and Section 21(3) of the Act must be complied with before a decree holder can execute it against the Government. Also, in the case *Republic V Attorney General Exparte James Alfred Koroso JR 44/2012 Odunga J* (as he then was in the High Court) added his voice to the question of how a decrees against the Government can be executed to wit;

“...in the present case, the exparte applicant has no other option of realizing the fruits of this judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that he has been awarded is realized. 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 provisions of Article 48 of the Constitution which enjoins the state to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered, are held in trust for the people of Kenya and public officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his or her lawful rights which have been decreed by a court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution, Executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit...The institution of Judicial Review proceedings in the nature of mandamus cannot be equated with execution proceedings. In seeking an order of mandamus the applicant is seeking, not relief against the Government, but to compel a government official to do what the government, through Parliament, has directed him to do. The relief sought is not

execution or attachment or process in the nature thereof. It is not sought to make any person “individually liable for any order for any payment,” but merely to oblige a government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty case upon him by Parliament. The fact that an Accounting Officer is not distinct from the state of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his government employer. In mandamus cases it is recognized that when statutory duty is case upon a public officer in his official capacity and the duty is owed not to the state but to the public, any person having a sufficient legal interest in the performance of the duty may apply to the courts for an order of mandamus to enforce it. In other words, mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the state, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of the order of mandamus, his/her action amounts to insubordination and contempt of court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the court’s displeasure at the failure by a servant of the state to comply with the directive of the court given at the instance of the Republic employer of the concerned public officer and to uphold the dignity and authority of the court.”

In Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] e KLR, Githua J 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. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.”

16. The applicant has proved that he is a decree holder against the Government for the sum of Kshs2 989,599.00/= only being General damages and costs in Ogembo Principal Magistrate's Court Case No. 67 of 2019 in Judgment dated 24.5.22 - Ronald Ombasa versus The Hon. Attorney General, & the Solicitor General. Also, that he complied with all the statutory requirement for execution of judgment upon the Government under Section 21 of the Government proceedings Act by serving certificate of satisfaction of orders of the decretal sum and costs and the 7 days' notice on 5.3.24 as per the affidavit of service of Elijah Gikonge Nyangau filed herein dated 4.4.24.

17. The applicant has proved that the respondents have refused and or neglected to satisfy the said decree and his only remedy in law lies in an order for mandamus against the respondents.

18. I find merit in the application dated 4.4.24 and I allow the same as follows;

a) An order of Mandamus to issue against the Respondents in the sum of Kshs. 2,989,599.00/= with interest from the date of the lower court judgment till payment in full.

b) I award Costs of the application to the applicant.

T.A ODERA

JUDGE

1.12.25

Delivered Virtually Via Teams Platform in the Presence of:

Mr. Maronga holding brief for Mr. Gichana for the Applicant

N/A for Respondents