



**Republic v Managing Director Kenya Railways Corporation & another; Ochieng & another (Exparte Applicants) (Environment and Land Judicial Review Case E001 of 2023) [2024] KEELC 17 (KLR) (18 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 17 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023  
SO OKONG'O, J  
JANUARY 18, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE MANAGING DIRECTOR KENYA RAILWAYS CORPORATION .... 1<sup>ST</sup>  
RESPONDENT**

**THE PRINCIPAL SECRETARY MINISTRY OF INTERIOR OF  
COORDINATION OF NATIONAL GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**AMINA ACHIENG' OCHIENG ..... EXPARTE APPLICANT**

**TILAPIA BEACH RESORT LIMITED ..... EXPARTE APPLICANT**

**JUDGMENT**

1. On 24<sup>th</sup> February 2022, this court (Ombwayo J) entered judgment in Kisumu ELC Suit No. 40 of 2019, Amina Achieng' Ochieng' & Another v Kenya Ports Authority & 3 Others (hereinafter referred to only as the "civil suit") for the ex-parte applicants against Kenya Railways Corporation, County Government of Kisumu and Attorney General (hereinafter referred to only as the "defendants in the civil suit") jointly and severally as follows;
  - (a) For the 1<sup>st</sup> ex-parte applicant: Kshs. 27,000,000/- together with interest from the date of filing the suit until payment in full and the costs of the suit.
  - (b) For the 2<sup>nd</sup> ex-parte applicant: Kshs. 49,873,366/- together with interest from the date of filing the suit until payment in full and the costs of the suit.



2. On 28<sup>th</sup> September 2022, the ex-parte applicants' costs were assessed by the taxing officer at Kshs. 963,543.33. On 5<sup>th</sup> October 2022, a certificate of costs against the government was issued by the court for a sum of Kshs. 108,330,011.33 together with interest from 24<sup>th</sup> October 2019 until payment in full plus costs of the suit as assessed by the taxing officer on 28<sup>th</sup> September 2022.
3. What is now before me is a Notice of Motion application dated 12<sup>th</sup> October 2023 brought on 26<sup>th</sup> October 2023 by the ex-parte applicants (hereinafter referred to only as "the applicants") seeking an order of mandamus to compel the Managing Director Kenya Railways Corporation, and the Principal Secretary Ministry of Interior and Coordination of National Government (hereinafter referred to only as "the respondents") to forthwith pay to the applicants a sum of Kshs. 76,873,366/- plus costs and interest at court rates making an aggregate total of Kshs. 117,233,983/- as at 17<sup>th</sup> July 2023 being the amount that was awarded to the applicants by this court in the aforesaid judgment delivered on 24<sup>th</sup> February 2022 and the subsequent decree issued on 5<sup>th</sup> April 2022 against among others, Kenya Railways Corporation and the Attorney General (the defendants in the civil suit). The application has been brought pursuant to the leave that was granted by Asati J on 28<sup>th</sup> September 2023 in ELCPJR No. E001 of 2023, *Amina Achieng' Ochieng' & Another v The Managing Director Kenya Railways Corporation & 2 Others* (hereinafter referred to as "the leave application"). The application has been brought on the grounds set out on the face thereof, the statutory statement dated 18<sup>th</sup> July 2023 and a verifying affidavit sworn by the 1<sup>st</sup> applicant on the same date filed in support of the application for leave. The application is also supported by a supporting affidavit of the 1<sup>st</sup> applicant sworn on 12<sup>th</sup> October 2023.
4. In summary, the application has been brought on the grounds that the decree of this court in the civil suit has remained unsettled. The applicants have averred that the conditional stay of execution that was granted to the defendants in the civil suit on 28<sup>th</sup> March 2023 lapsed when the defendants in the civil suit failed to comply with the conditions that were imposed by the court. The applicants have averred that the Managing Director of Kenya Railways Corporation (the 1<sup>st</sup> respondent) is the accounting officer of Kenya Railways Corporation under the *Kenya Railways Corporation Act*, Chapter 397 Laws of Kenya while the Principal Secretary, Ministry of Interior and Coordination of National Government is the accounting officer of the said Ministry under whose docket Kenya Police Service that was found liable in the civil suit falls. The applicants have averred that the decree of the court in the civil suit and the certificate of costs against the government were served upon the respondents under the provisions of Section 21 of the *Government Proceedings Act*, Chapter 40 Laws of Kenya. The applicants have averred that the respondents as the accounting officers of the 2<sup>nd</sup> and 4<sup>th</sup> defendants in the civil suit have a public duty to settle the decretal amount due to the applicants from the said defendants that stood at Kshs. 117,233,983/- as at 17<sup>th</sup> July 2023. The applicants have averred that the respondents have failed and/or refused to settle the said outstanding amount.
5. The application was served upon the respondents but they did not respond to the same. When the application came up for hearing on 22<sup>nd</sup> November 2023, the advocate for the applicants urged the court to allow the same as unopposed. I have considered the application together with the statutory statement, verifying affidavit and supporting affidavit filed in support thereof. Section 88 of *Kenya Railways Corporation Act*, Chapter 397 Laws of Kenya provides as follows:
  - "Notwithstanding anything to the contrary in any law—
    - (a) where any judgment or order has been obtained against the Corporation, no execution or attachment, or process in the nature thereof, shall be issued against the Corporation or against any immovable property of the



Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery, fixtures or fittings; but the Managing Director shall, without delay, cause to be paid out of the revenue of the Corporation such amounts as may, by the judgment or order, be awarded against the Corporation to the person entitled thereto;

- (b) no immovable property of the Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery, fixtures or fittings shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the Managing Director.”

6. Section 21 of the *Government Proceedings Act*, Chapter 40 Laws of Kenya which deals with the satisfaction of orders against the government provides as follows:

1. “Where in any civil proceedings by or against the government or any 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 21 days from the date of the order or, in case the order provides for the payment of costs and the costs are required to be taxed, at any time after the costs have been taxed, whichever is the latter, issue to that person a certificate in the prescribed form containing the 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 any costs, the certificate are(sic) state the amount 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 orders are 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 modification, apply to any civil proceeding by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.”

7. The applicants have contended that the respondents who are the accounting officers of the 2<sup>nd</sup> and 4<sup>th</sup> defendants in the civil suit and who have the statutory obligation under section 88 of the *Kenya*



Railways Act and Section 21 of the Government Proceedings Act to settle the decretal amount due to the applicants have refused and/or neglected to do so.

8. In Halsbury's Laws of England, 4<sup>th</sup> Edition Volume 1 at page 111 paragraphs 89 and 90, the authors have explained the nature and mandate of an order of mandamus as follows:

The order of mandamus is of most extensive remedial nature and is in the form a command issuing from the High Court of justice, directed to any person, cooperation 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 defect of justice (and accordingly it will issue, to the end that justice may be done, in all cases where there is specific legal right and there no specific legal remedy for enforcing that right) and it may issue in cases where although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual. 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 leave discretion as to the mode of performing the duty in the hand 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.”

9. In Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the court explained the principle pronounced in the foregoing passage from Halsbury's Laws of England as follows:

They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of person by a statute and where that person or body of persons has failed to perform the duties to the detriment of a party who has a legal right to expect the duty to be performed.”

10. It is not in dispute that the applicant obtained a judgment against the Defendants in the civil suit for a total sum of Kshs. 76,873,366/- plus costs and interest from the date of filing suit. It is also not in dispute that the execution of the said judgment has not been stayed and that as far as the Attorney General (the 4<sup>th</sup> defendant) is concerned, the applicants have complied with the provisions of Section 21 of the Government Proceedings Act. It follows therefore that the respondents who are the accounting officers of the 2<sup>nd</sup> and 4<sup>th</sup> defendants in the civil suit have a duty and an obligation to settle the decretal amount that was awarded to the applicants in the civil suit.
11. The foregoing findings in favour of the applicants notwithstanding, the applicants' application is not for granting. I have noted two procedural flaws in the application one of which renders the application incompetent. The first flaw is the decision by the applicants to file this application as a new suit instead of filing the same in the same file in which leave to bring judicial review was granted by Asati J on 28<sup>th</sup> September 2023. I have perused the said file in which leave was granted. I have noted that the application for leave was served and was heard inter partes. The application was contested by the 1<sup>st</sup> respondent herein through the firm of Tom Mutei Advocates. In the present application, the applicants purported to file a new suit and to serve the parties directly even the 1<sup>st</sup> respondent who had already appointed the firm of Tom Mutei Advocates to act for him in the matter. It is not surprising therefore that the application was not defended by any of the respondents. If the present application had been filed in the same suit in which leave was granted, the applicants would have served the application upon the 1<sup>st</sup> respondent through their advocates who were already on record in the matter. I find the procedure adopted by the applicants of filing a Judicial Review application as a separate suit



distinct from the application in which leave to bring the application was granted irregular. The decision by the applicants to serve the application upon the 1<sup>st</sup> respondent directly instead of effecting service upon him through the firm of Tom Mutei Advocates was similarly irregular. These irregularities were however not fatal to the application and the same could be cured with appropriate directions.

12. The irregularity which I find fatal to the application is the filing of the application outside the period that was granted by Asati J. As mentioned earlier, the present application was brought pursuant to the leave that was granted by Asati J on 28<sup>th</sup> September 2023. While granting the said leave, Asati J directed that the judicial review application be filed and served within 21 days from the date of the order. The present application although dated 12<sup>th</sup> October 2023 was not filed until 26<sup>th</sup> October 2023. The application was therefore filed outside the 21 days that was granted by the court while granting leave. It is my finding that the leave that was granted to the applicants by Asati J on 28<sup>th</sup> September 2023 lapsed on 19<sup>th</sup> October 2023 when the applicants failed to file the judicial review application in respect of which the said leave was granted. The applicants' application that was filed on 26<sup>th</sup> October 2023; 7 days after the expiry of the said leave was therefore filed without leave and as such incompetent and bad in law.

### **Conclusion**

13. Due to the foregoing, I find the applicants' Notice of Motion application dated 12<sup>th</sup> October 2023 incompetent. The application is struck out with costs to be in the cause.

**DELIVERED AND DATED AT KISUMU ON THIS 18<sup>TH</sup> DAY OF JANUARY 2024**

**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through microsoft teams video conferencing platform in the presence of:

N/A for the Applicant

Mr. Mutei for the 1<sup>st</sup> Respondent

N/A for the 2<sup>nd</sup> Respondent

Ms. J Omondi-Court Assistant

