Marigi v Governor, Kajiado County (Civil Appeal 144 of 2019)
[2025] KECA 523 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 523 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 144 OF 2019

K M'INOTI, FA OCHIENG & WK KORIR, JJA

MARCH 21, 2025

BETWEEN

GABRIEL GACHIGO MARIGI ..... APPELLANT

AND

GOVERNOR, KAJIADO COUNTY ..... RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Kajiado (Nyakundi, J.) dated 7th February 2018inJR Mis. App. No. 14B of 2016)

JUDGMENT

1. On 17th February 2018, the High Court of Kenya at Kajiado (Nyakundi, J.) dismissed an application by the appellant, Gabriel Gachigo Marigi, for an order of mandamus to compel the respondent, the Governor of Kajiado County, to pay to him the sum of Kshs.1, 554,005, being the decretal amount, costs and interest awarded to him by the Chief Magistrates Court at Machakos.

2. The High Court found that the respondent was not a party to the suit before the subordinate court and had not been afforded an opportunity to be heard. The court directed each party to bear its own costs.

3. The appellant was aggrieved and after lodging a notice of appeal on 14th February 2018, preferred the present appeal in which he faults the learned judge for, among others, misapprehending the application before him, ignoring the fact that the respondent had neither applied to set aside the said judgment, nor appealed against the same, and for exercising his discretion injudiciously.

4. The brief background to the appeal is as follows. On 2nd September 2011, the appellant filed Case No. 736 of 2011 in the Chief Magistrates Court at Machakos against the County Council of Olkejuado, which both parties agree is the predecessor of the respondent, and one Seki ole Salaone. The appellant pleaded that he was the allottee of Plot No. 1010- Res-Ilbissil T. Centre (the suit property) which he had fenced and constructed thereon a water reservoir and a pit latrine. He further pleaded that in a bid to develop the suit property, he had deposited thereon building materials. It was the appellant's further

averment that in June 2009, the respondent's predecessor hired villagers who, unlawfully and without any colour of right, trespassed into the suit property and damaged the properties thereon.

5. The appellant prayed for Kshs 956,000.00, costs, interest, and an injunction to stop the respondent's predecessor or its agents from trespassing into the suit property. The respondent's predecessor and ole Salaone did not filed defences to the suit and as a result, it proceeded ex parte and by a judgment dated 6th February 2014, the appellant was awarded Kshs 956,000, costs and interest. Neither the respondent's predecessor nor ole Salaone appealed, but there is an application on record to set aside the ex parte judgment, which from the pronouncements of the High Court, does not appear to have been heard and determined.

6. On 20th November 2014 the appellant applied to the High Court of Kenya at Kajiado for an order of mandamus to compel the respondent to pay the decretal amount, interest and costs, which by then amounted to a total of Kshs. 1, 554,005. The application was based on the grounds that the appellant had in his favour a decree which the respondent's predecessor had failed or neglected to satisfy.

7. The respondent opposed the application vide a replying affidavit sworn by its County Secretary, Dr. Kennedy ole Kerei on 14th July 2017. The respondent contended that the ex parte judgment was irregular; that it had not been served with summons to enter appearance; and that it had been denied an opportunity to be heard. The respondent further disputed the service alleged by the appellant and indicated that it was applying to set aside the judgment. The respondent also argued that the relationship between the respondent and ole Salaone was not disclosed and from the evidence on record, the appellant had not proved the alleged destruction of his property on the suit property.

8. Nyakundi, J. heard the application, and by a judgment dated 7th February 2018, dismissed the same and directed each party to bear their own costs. Although the learned judge appreciated that the appellant had what ex facie looked like a regular judgment from the lower court, he was not persuaded to exercise his discretion in favour of the appellant and award him an order of mandamus. The learned judge found that the proceedings in the subordinate court were ex parte and that before him, the respondent had raised valid issues of violation of the rules of natural justice. He further held that the respondent was not a party to the proceedings that culminated in the judgment and that it ought to be given an opportunity to respond to the appellant's claim. Lastly, the learned judge noted that the appellant lodged his claim in his capacity as allottee of the suit property and wondered whether, without title to the suit property, the appellant could have sustained the claim.

9. The appellant was aggrieved and lodged this appeal based on 12 grounds of appeal. However, in his written submissions dated 21st October 2020, the appellant's counsel compressed all the grounds of appeal into one issue only, namely, whether the High Court erred by dismissing the application for an order of mandamus to compel the respondent to pay the decretal amount awarded to the appellant.

10. The appellant submitted that the High Court erred in entertaining the respondent's contention that it was not served with summons to enter appearance and was not aware of the existence of the suit, while there was sufficient evidence on record to show that the respondent was duly served, but failed to enter appearance. Relying on the appellant's Supplementary Affidavit sworn on 13th August 2017, counsel submitted that the respondent was duly served with summons to enter appearance but failed to respond, as a result of which the hearing of the suit proceeded ex parte after the subordinate court satisfied itself that the respondent was duly served.

11. It was counsel's contention that before the ex parte hearing on 17th October 2013, the respondent was duly served with a hearing notice, which was hand-delivered to its office and received by its legal officer,

a Mr. Keffa, who acknowledged service by stamping a copy of the hearing notice, which the appellant exhibited. Despite service, the appellant did not attend the hearing.

12. In a bid to demonstrate that the respondent was aware of the suit, the appellant cited a demand letter dated 13th June 2013 which was received by the respondent on 14th June 2013. It was contended that after service of summons to enter appearance and failure by the respondent to appear, the respondent was served with pretrial documents and a notice of mention for 23rd August 2013. Once again, the respondent did not attend the mention.

13. After the ex parte hearing on 17th October 2013, the respondent was once more served with a notice of mention which it acknowledged on 19th December 2013, notifying it that the suit would be mentioned to confirm that the parties had filed their submissions and to enable the court give a date for delivery of judgement. Like before, the respondent did not attend the Court.

14. The appellant further submitted that after judgment was delivered on 6th February 2024, the respondent was served with notice of entry of judgment on 28th May 2014 as well as the decree and certificate of costs, service of which the appellant acknowledged by means of a stamp.

15. It was the respondent's further submission that even after learning of the ex parte judgment, the respondent did not file any application in the trial court to set aside the judgment. The application was filed belatedly after the appellant applied for an order of mandamus. In the circumstances, it was contended that the High Court erred by treating the application before it as an appeal from the judgment of the trial court or an application to set aside that judgement.

16. The appellant cited the decisions of the High Court in Republic v Attorney General & another exparte James Alfred Koroso [2013] KEHC 90 (KLR); Republic v Town Clerk, Kisumu Municipality, ex parte East African Engineering Consultants [2007] KEHC 147 (KLR) and Republic v Permanent Secretary, Ministry of State for Provincial Administration & Internal Security ex parte Fredrick Manoah Egunza [2012] eKLR in support of the proposition that a decree holder against the Government cannot execute the decree and that his only remedy is to apply for an order of mandamus to compel payment. Further, that the responsible public officer has a duty under *the Constitution* to pay the decree in furtherance of the decree holder's right of access to justice guaranteed by *the Constitution*.

17. It was the appellant's further contention that he had fully complied with section 21(3) of the *Government Proceedings Act* and that, in view of the evidence on record which showed that the respondent was fully aware of the suit and the judgment, the High Court erred in refusing to grant the order of mandamus.

18. For the foregoing reasons, the appellant urged the Court to allow the appeal, set aside the impugned judgment of the High Court, and substitute therefor an order allowing the application for mandamus.

19. Neither the respondent, nor its counsel turned up for the hearing, although the respondent was duly served with a notice of hearing on 7th October 2024. The respondent also did not file any submissions notwithstanding directions by the Court to that effect. We further note from the record that the hearing of this appeal was adjourned on 10th June 2024 because the parties had not filed their submissions. That appears to be an oversight as far as the appellant is concerned because he had filed his submissions way back in October 2020. Be that as it may, there were no submissions on the record from the respondent.

20. We have anxiously considered this appeal. We agree with the appellant that the central issue in the appeal is whether the High Court erred in the circumstances of this case, by declining to grant an order of mandamus to compel the respondent to settle the decree in favour the appellant.

21. As of the date of the impugned judgment of the High Court, it is trite that the appellant had a judgment in his favour, which had not been set aside by the subordinate court or appealed to the High Court. The only issue before the High Court was whether it should issue an order of mandamus to compel the respondent to pay the decree in the appellant's favour.

22. Having carefully read the judgment of the High Court, we do not agree with the appellant that the High Court treated the application for an order of mandamus like an application to set aside the judgment of the subordinate court or like an appeal from the said judgment. The learned judge was acutely aware that he had before him what looked like a regular judgment. This is quite clear from the manner in which he expressed himself, as follows:

> " In my view, the applicant seems to have a well- founded case against the respondent...This court is not in a position to interrogate the merits of the impugned judgment at this stage whereas the ex- parte applicant may be in possession of a valid judgement."

23. At the time the High Court heard the application, the respondent had on record an application to set aside the ex parte judgment. That application was also referred to in the respondent's replying affidavit in answer to the application for an order of mandamus. It was in those circumstances that the learned judge felt that the respondent needed to be given an opportunity to prosecute the application to set aside the judgment. Once more, this is made crystal clear in the following passages of the judgment of the High Court:

> The broad approach I take of this matter is the requirement of natural justice that the respondent counsel has raised in respect to the proceedings before the trial court. It is not in dispute that the judgement in CMCC 736 of 2014 was obtained ex- parte... The respondent who was not a party in the lower court case should be given a fair opportunity to put forward an explanation on the claim by the applicant. It may be that the respondent has no genuine grounds to attack the ex-parte judgment but in my opinion the principle of natural justice (require) that a fair opportunity must be given to him to contradict or affirm any statement of claim in the suit.

24. Thus, as is patently clear, the High Court found that although the appellant had ex facie a valid judgment that could be enforced by an order of mandamus, in the circumstances of the case, where the judgment was obtained ex parte and the respondent had a pending application to set it aside, it would not be proper to issue an order of mandamus to enforce a judgment that may otherwise be set aside by the trial court. In the circumstances, the High Court granted the respondent an opportunity to first prosecute its application to set aside the ex parte judgment.

25. It is trite that whether or not to issue a judicial review order like an order of mandamus, is at the discretion of the Court. Indeed, in R. v Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, Lord Goddard, CJ. emphasised the discretionary nature of the remedy of mandamus in these famous words:

> " It is important to remember that mandamus is neither a writ of course nor a writ of right."

26. In this jurisdiction the courts have reiterated the same position. Thus for example, in Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya [2019] eKLR, the High Court held as follows:

> " The grant of the orders or Certiorari, Mandamus and Prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought."

27. Earlier in Sanghani Investment Ltd v Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354 the same Court held as follows in a judicial review application involving an order of certiorari:

> " ...it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being a discretionary remedy will only issue if it will serve some purpose... The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles..."

28. Equally, in Republic v Chairman Co-operative Tribunal & 8 Others ex parte Konza Ranching [2014] KEHC 6400 (KLR), the same court held:

> " It is now trite that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles."

(See also Republic v Betting Control and Licensing Board & another ex parte Outdoor Advertising Association of Kenya [2019] eKLR and Republic v Kenya Revenue Authority ex parte Kingsway Tyres and Automart Ltd [2015] eKLR.)

29. The principles that guide this Court in deciding whether or not to interfere with a decision of the High Court made in exercise of discretion are well settled. In United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A 898, Madan J.A (as he then was) explained the Court's approach as follows: -

> " The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

30. In the exercise of his discretion, the learned judge declined to grant an order of mandamus. The reason for exercising discretion in that manner are readily apparent from the record. The learned judge took into account that the judgment that the appellant sought to enforce was an ex parte judgement and that the respondent had applied to set the same aside. The learned judge, in deference to the rules of natural justice, opted to give the respondent an opportunity to agitate the application to set aside the ex parte judgment. In our view, in the circumstances of this case the learned judge cannot be faulted for exercising his discretion in the manner he did.

31. We are also not persuaded that, in any event, the learned judge could have validly granted the order of mandamus, granted the manner in which the appellant had framed the judicial review application. In his application, the appellant sought an order of mandamus to compel the respondent, the Governor of Kajiado County, to settle the decree.

32. Section 21 of the *Government Proceedings Act* provides how orders obtained against the Government are to be settled. That provision specially places the duty to pay a decree against the Government upon the Accounting Officer. Section 21(3) provides as follows:

> (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 suspended, and if the certificate has not been issued may order any such direction to be inserted therein." (Emphasis added).

33. In 2015, section 21 of the *Government Proceedings Act* was amended by section 2 of the Government Proceedings (Amendment) *Act No. 35 of 2015* which added sub-clause (5) to section 21, which now provides as follows:

> "(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." (Emphasis added).

34. Thus, in both the National and County Government, the responsibility or duty to pay a degree against the Government is vested in the Accounting Officer. The fundamental question then becomes whether the Governor is the Accounting Officer for the County. In our perception, the answer is an emphatic no.

35. Article 226 (1) (b) of *the Constitution* requires in mandatory terms that an Act of Parliament must designate an accounting officer in every public entity at the National and County levels of Government. In that regard, section 103 of the *Public Finance Management Act*, No. 8 of 2012 establishes County Treasuries and specifically section 103(3) provides that the County Executive Committee member for finance shall be the head of the County Treasury. For all intents and purposes, the accounting officer for the County is the County Executive Committee member for finance, and not the Governor.

36. The following decisions of the High Court are to the same effect. Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County ex parte Stanley Muturi [2018] eKLR; Republic v The County Secretary, Mombasa County Government & Another (JR App No. 375 of 2018); Republic v County Executive Committee Member, Built Environment & Urban Planning Sector, County Government of Nairobi & 2 others ex parte Waas Enterprises [2023] KEHC 25954 (KLR).

37. An order of mandamus can only issue and be directed against the bearer of a legal duty. Under the relevant statute, the bearer of the duty to pay a decree against the County Government is the County Executive Committee member for finance. The appellant's application sought to compel payment of the decree by a person who in law did not bear that duty. Such an ordered could not have issued.

38. For all the foregoing reasons, we are not persuaded that there is any basis for interfering with the decision of the High Court. However, we are conscious that the appellant has a decree in his favour, which has not yet been set aside or appealed. We are also concerned that the respondent has not demonstrated keenness to progress this matter to its logical conclusion. In the circumstances, the following are the orders that best commends themselves to us in this appeal:

i. This appeal is hereby dismissed;

ii. the respondent shall prosecute its application to set aside the *ex parte* judgment within sixty (60) days from the date of this judgment;

iii. depending on the outcome of the said application, or in the event of the respondent's failure to prosecute the application, the appellant shall be at liberty to file a proper and competent application for enforcement of the judgment in its favour;

iv we make no orders on costs because the respondent did not appear to defend the appeal; and

v the appellant shall serve a copy of this judgment upon the respondent and its counsel within seven days of the judgment.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

K. M'INOTI

JUDGE OF APPEAL

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F. OCHIENG

JUDGE OF APPEAL

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W. KORIR

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.