



Masara & another v County Government of Nairobi (Environment and Land Judicial Review Case E004 of 2022) [2024] KEELC 1287 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1287 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E004 OF 2022**

OA ANGOTE, J

MARCH 7, 2024

**IN THE MATTER OF: AN APPLICATION FOR
MANDAMUS**

AND

**IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW
REFORM ACT, SECTION 21(4) OF
THE GOVERNMENT PROCEEDINGS
ACT AND ALL ENABLING
PROVISIONS OF LAW**

BETWEEN

NAFTAL OKWANYO MASARA 1ST APPLICANT

JANE MASARA 2ND APPLICANT

AND

COUNTY GOVERNMENT OF NAIROBI RESPONDENT

JUDGMENT

1. Before the Court for determination is the *ex parte* Applicants' Further Amended Notice of Motion dated 11th October 2023 brought under Order 8 Rule 1, Order 53 Rules 1, 3 and 4 of the [Civil Procedure Rules 2010](#) and Sections 8 and 9 of the [Law Reform Act](#). The *ex parte* Applicants are seeking for orders that:
 - a. The Court be pleased to grant the *ex parte* Applicants an order of *mandamus* directed at the Respondent's Finance and Economic Planning Executive and Chief Officer namely Halk and



Waqo compelling him/her to forthwith and without delay cause to be paid to the *ex parte* Applicants the decretal sum of Kshs 9,916,116 as ordered by the Court on 7th December 2020.

- b. The Court be pleased to substitute the former Respondent's Finance and Economic Planning Executive Officer one Allan Igambi with the Respondent's current officer namely Asha Abdi.
 - c. The Court do issue any further orders or directions on any terms as the interest of justice may require.
 - d. Costs of the case be provided for.
2. The application is based on several grounds and a 'further further supporting affidavit' sworn by the 1st *ex parte* Applicant, Naftal Okwanyo Masara, who deponed that he and the 2nd *ex parte* Applicant filed a civil suit on 30th April 2010.
 3. The 1st *Ex parte* Applicant deponed that the civil suit was heard and determined by Lady Justice Bor declaring the actions of the Respondent of interfering with the construction on the *ex parte* Applicants' land unlawful and that they were awarded a sum of Kshs 3,750,500 with interest at 24% p.a with effect from 3rd July 2010 until payment in full.
 4. The deponent averred that despite all efforts to have the decretal sum (which now stands at Kshs 9,916,116) settled, the Respondent has failed/neglected to act on the same. The Respondent did not file any response.
 5. The *ex parte* Applicants filed submissions on 8th October 2023. Relying on Section 21(4) of the *Government Proceedings Act* and the cases of *Republic v Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants*[2007] 2 EA 441 and *The District Commissioner Kiambu v R and others Ex Parte Ethan Njau* Civil Appeal No 2 of 1960 [1960] EA 109, the *ex parte* Applicants submitted that while execution proceedings cannot be executed against the Government, the accounting officer in the relevant Government agency is obligated to satisfy decrees made by the Court against their department.
 6. It was submitted that the *ex parte* Applicants have complied with all the requirements with regard to issuance of the certificate of costs, giving sufficient notice and making a demand of payment but the Respondent has not complied.
 7. In conclusion, it was submitted that the reliefs sought should be granted as the application was not opposed.

Analysis and determination

8. The *ex parte* Applicants are seeking payment of the decretal sum from the Respondent which is a County Government. Section 21 of the *Government Proceedings Act* provides 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, 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:

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:

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.”

9. In the case of *Republic v Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & another* [2018] eKLR Mativo J, as he was then, held as follows:

“*Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Apotex Inc. v Canada (Attorney General)*, [23] and, was also discussed in *Dragan v Canada (Minister of Citizenship and Immigration)*. [24] The eight factors that must be present for the writ to issue are:-

- (i) There must be a public legal duty to act;
- (ii) The duty must be owed to the Applicants;
- (iii) There must be a clear right to the performance of that duty, meaning that:
 - a. The Applicants have satisfied all conditions precedent; and
 - b. There must have been:
 - I. A prior demand for performance;
 - II. A reasonable time to comply with the demand, unless there was outright refusal; and
 - III. An express refusal, or an implied refusal through unreasonable delay;
- (iv) No other adequate remedy is available to the Applicants;
- (v) The Order sought must be of some practical value or effect;



- (vi) There is no equitable bar to the relief sought;
- (vii) On a balance of convenience, *mandamus* should lie.”

10. In the case of *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte, Fredrick Manoah Egunza* [2012] eKLR, Githua J stated 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.”

- 11. From the foregoing, it is clear that the *ex parte* Applicants are within their rights in seeking for an order of *mandamus*. They obtained a monetary decree against the Respondent. Since the Respondent is a Government body, the only way to enforce the decree is through an order of *mandamus* directed at the accounting officer of the relevant Government body.
- 12. The *ex parte* Applicants taxed their costs and have a certificate of costs issued on 26th November 2021. On 29th November 2021, the *ex parte* Applicants’ advocate wrote to the Chief Legal Officer of the Respondent and attached the decree.
- 13. While Section 21 of the *Government Proceedings Act* requires that the certificate of costs is served on the Attorney General, I am satisfied that requirement was met when it was served on the Chief Legal Officer in view of the structure of the National and County Governments. The *ex parte* Applicants therefore fulfilled the conditions precedent for the grant of an order of *mandamus* in the circumstances of this case.
- 14. In view of the foregoing, I am satisfied that the *ex parte* Applicants are entitled to an order of *mandamus* compelling the accounting officer of the Respondent to pay the decretal sum.



15. The Ex parte Applicants are also entitled to an order substituting the former Finance and Economic Planning Executive Officer with the current one.
16. For those reasons, the application dated 11th October, 2023 is allowed as follows:
 - a. An order of *mandamus* be and is hereby directed at the Respondent's Finance and Economic Executive and Chief Officer compelling them to forthwith and without delay cause to be paid to the *ex parte* Applicants the decretal sum of Kshs 9,916,116, together with the accrued interest as ordered by the Court on 7th December 2020.
 - b. The Respondents to pay the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 7TH DAY OF MARCH, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Karika for Kihara for Applicant

Ms Esami for Nyamu for Respondent

Court Assistant - Tracy

