



Republic v Vencensia Awino Kioge, Clerk County Assembly of Migori & Secretary, Migori County Assembly Service Board & another; Okong’o Wandago & Co Advocates (Exparte Applicant) (Judicial Review Application E020 of 2023) [2024] KEELRC 480 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 480 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW APPLICATION E020 OF 2023**

S RADIDO, J

FEBRUARY 14, 2024

BETWEEN

REPUBLIC APPLICANT

AND

VENCENSIA AWINO KIOGE, CLERK COUNTY ASSEMBLY OF MIGORI & SECRETARY, MIGORI COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT

MIGORI COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT

AND

OKONG’O WANDAGO & CO ADVOCATES EXPARTE APPLICANT

RULING

1. Through a Motion dated 14 December 2023, the firm of Okong’o Wandago & Co. Advocates seeks orders:

- (1) ...
- (2) Summons do issue to (1) Lilian Atieno Onyango, the Finance Director, County Assembly of Migori. (2) Vincensia Awino Kionge, Accounting Officer, Authorised Officer, Secretary of the County Assembly Service Board and Clerk of the County Assembly Migori, an organ of the County Government of Migori and (3) Members of the Migori County Assembly Service Board to attend Court and show cause why they should not be cited, punished and committed to civil jail for contempt of court for failing to failing to comply with the order of *mandamus*



dated 20th June 2023 issued by this Court in these proceedings and the decree of the court dated 19th January 2023 in Kisumu ELRC Miscellaneous Civil Application No. E023 of 2021.

- (3) That upon compliance with the Summons, and hearing the Respondents' mitigation, the Court be pleased to issue an order to cite and punish for contempt to civil jail (1) Lilian Atieno Onyango, the Finance Director, County Assembly of Migori. (2) Vincensia Awino Kionge, Accounting Officer, Authorised Officer, Secretary of the County Assembly Service Board and Clerk of the County Assembly Migori, an organ of the County Government of Migori and (3) Members of the Migori County Assembly Service Board for a period of six (6) months or any other period or sanction as this Court may deem fit and appropriate in the interest of justice for having wilfully and continuously disobeyed the order of *mandamus* issued by this Court on 20th June 2023 and served on them.
- (4) The said (1) Lilian Atieno Onyango, the Finance Director, County Assembly of Migori. (2) Vincensia Awino Kionge, Accounting Officer, Authorised Officer, Secretary of the County Assembly Service Board and Clerk of the County Assembly Migori, an organ of the County Government of Migori and (3) Members of the Migori County Assembly Service Board, the Respondents be denied audience before this Court until and unless they first purge their contempt by complying with the order of *mandamus* and paying to the applicant the sum of Ksh 781,820/- made up as follows-
 - (5)
 - (6) Costs of this application be provided for.
2. The firm of CO Obiero & Associates filed a Notice of Appointment to act for the Respondents on 21 January 2024, and the Clerk filed a replying affidavit on behalf of the Respondents on 23 January 2024.
3. Despite the firm of C. Obiero & Associates having come on record, one Brian Mboya, Advocate filed a Notice of Appointment to come on record for the Respondents on 25 January 2024.
4. The said Notice of Appointment being irregular (not a Notice of Change of Advocate), the Court expunges it from the record.
5. The Court took brief oral submissions from the parties on 30 January 2024.
6. The Court granted leave to the *ex-parte* applicant to commence judicial review orders against the County Assembly Service Board on 31 May 2023, and the substantive Motion seeking an order of *mandamus* was filed on 5 June 2023.
7. The Court issued an order of *mandamus* on 20 June 2023.
8. The Respondents opted not to participate in the Motion despite acknowledging service.
9. Thereafter, the *ex-parte* applicant caused an advocate/client Bill of Costs to be taxed and a Certificate of Costs was issued on 27 November 2023. A Certificate of Order for Costs against the County Assembly Service Board, Migori was issued on 15 May 2023.
10. The Respondents have not denied owing the *ex-parte* applicant the sums awarded. The explanation given for the failure to comply is lack of funds/budgetary allocations.
11. The Clerk and Accounting Officer of the Board urge the Court not to find them culpable because of reasons and circumstances beyond their control.



12. In *Hardi Enterprises Limited v County Secretary, Nairobi City County Government & 2 Ors* (Judicial Review Miscellaneous Application E015 of 2023) [2023] KEHC 27072 (KLR), the High Court was confronted with a near similar application. The Accounting Officer had raised a plea of lack of funds and budgetary constraints.

13. The High Court held:

The Respondents argument that they are unable to pay as a result of lack of a budgetary allocation has no place in Judicial review cases, and I dismiss that argument. This court is guided by the case of *Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waitihaka* [2019] eKLR where Odunga J. in his ruling of 12th February 2018 extensively dealt with the defence as follows:

“As regards lack of budgetary allocation, Githua, J in *Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* [2012] eKLR 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.”

14. This Court finds the holding persuasive and endorses it herein.

15. The Court of Appeal (Kiage JA) made obiter comments regarding these types of proceedings in *National Land Commission v Tom Ojienda & Associates; National Bank of Kenya & Ar (Garnishee)* (Civil Appeal E247 of 2022) [2023] KECA 1537 (KLR) where it stated:

One last comment I would make, while careful to avoid the merits, is that during the hearing of the appeal it emerged, as is clear from the transcript of our proceedings, that the appellant acknowledges that it received legal services from the 1st respondent. Indeed, its learned



counsel spoke of the work done by the respondent in glowing terms. It knows it owes and must pay the fees but its officers, under some strange phobia of “audit queries,” would rather await a court order before performing their duty-never mind that in the process the Kenyan public gets saddled with wholly avoidable and ever-burgeoning interest on those taxed costs. This is where courts might well consider themselves ill-used by litigants unwilling to do that which they must unless the courts speak. Now we have, as did the Superior Court below, and I would say no more.

16. There is in place an order of *mandamus* as well as Certificate of Costs and Certificate of Order against the government.

Conclusion and Orders

17. Flowing from the above, the Court directs that:
- i. Summons be issued to Lilian Atieno Onyango, the Finance Director, County Assembly of Migori and Vincensia Awino Kionge, Accounting Officer, Authorised Officer, Secretary of the County Assembly Service Board and Clerk of the County Assembly Migori to appear in this Court on 22 February 2024 to show cause why they should not be cited, punished and committed to civil jail for contempt of court for failing to comply with the order of *mandamus* dated 20 June 2023.
18. Costs to the *ex-parte* applicant.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 14TH DAY OF FEBRUARY 2024.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For *ex-parte* applicant Okong’o Wandago & Co. Advocates

For Respondents C.O. Obiero & Associates Advocates

Court Assistant Chemwolo

