



**Republic v County Government of Garissa & another; Omar & another
 (Exparte Applicants) (Judicial Review Miscellaneous Application
 E001 of 2023) [2024] KEELC 5724 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5724 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT GARISSA
 JUDICIAL REVIEW MISCELLANEOUS APPLICATION E001 OF 2023**

JM MUTUNGI, J

JULY 25, 2024

**IN THE MATTER OF THE COUNTY GOVERNMENT OF GARISSA & THE COUNTY
 EXECUTIVE COMMITTEE IN CHARGE OF LAND HOUSING & PHYSICAL PLANNING**

AND

IN THE MATTER GOVERNMENT PROCEEDING ACT, CAP 40, LAWS OF KENYA

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY GOVERNMENT OF GARISSA 1ST RESPONDENT

**THE COUNTY EXECUTIVE COMMITTEE IN CHARGE OF LANDS HOUSING
 & PHYSICAL PLANNING 2ND RESPONDENT**

AND

ADEN OSMAN OMAR EXPARTE APPLICANT

HAMDİ KALMEY EXPARTE APPLICANT

JUDGMENT

1. The Applicants commenced these Judicial Review proceedings by way of an Ex-parte Chamber Summon dated 4th August 2023 leave to institute Judicial Review proceedings was granted and, the Applicants filed a Notice of Motion dated 16th October 2023, seeking the following orders:

1. That this Honourable Court do grant the Applicants, Aden Osman Omar And Hamdi Kalmey Muhumed, an order of mandamus directed to the 1st and 2nd Respondents, compelling the Respondents to comply with the decree against the County Government of Garissa and



the County Executive Committee member in charge of Lands Housing and Physical Planning issued on 14th September 2017 issuing a permanent injunction restraining the Defendants their agents and/or agents from selling transferring Plot No. Garissa/1628 to a Third Party and/or in any other way interfere with the Plaintiffs' quiet enjoyment and/or use of the said plot and the release of the Plaintiffs' fencing post pulled down and taken to the Defendant's yard.

2. That this Honourable Court be pleased to order the County Government of Garissa and the County Executive Committee Member in charge of Lands Housing and Physical Planning to comply with the decree of the Court issued on 14th September 2017 to its fulfilment.
 3. That this Honourable Court be pleased to issue an order of mandamus compelling the OCS Garissa Police Station to ensure that the Respondents comply with prayers 1 and 2.
 4. That the costs of this application be paid for by the 1st and 2nd Respondents in any event.
2. The Application is predicated upon the Supporting Affidavit sworn by Aden Osman Omar and Hamdi Kalmey Muhumed. The Applicants state that through Civil Suit No. 34 of 2011, they sought and were granted a permanent injunction by the Lower Court on 16th April, 2015. The injunction prevented the County Council of Garissa from interfering with their possession of plot No. Garissa/1628. Additionally, they state that though the order of injunction was issued on 14th September, 2017, in their favour, the Respondents on 7th March, 2023 forcibly halted construction activities on their property, demolished existing structures, and removed fencing posts and construction materials, blatantly disregarding the Court's orders. They argue that this action by the Respondents represents a continued effort to undermine their rights to build on, and peacefully enjoy their property. The Applicants therefore prays that this Court grants them the orders as sought.
 3. The Applicants' filed their submissions dated 22nd April, 2024, arguing that the Respondents had not adhered to the order issued on 14th September, 2023. They requested that an order of mandamus be issued to compel the Respondents to obey the Lower Court's orders. To support their submissions, the Applicants relied on the following cases Republic v Kenya National Examination Council Ex parte Gathenji and 9 Others [1997] eKLR, and Republic v Attorney General & Another ex-parte Stephen Wanyee Roki [2016] eKLR.

Analysis And Determination

4. The circumstances under which Judicial Review orders of Mandamus are issued were discussed in the Case of Republic v Kenya National Examinations Council exparte Gathenji and 9 Others, [1997] e KLR. The Court of Appeal held as follows in regards to an order of mandamus:

“The next issue we must deal with is this: What is the scope and efficacy of an Order Of Mandamus? Once again we turn to Halsbury's Law Of England, 4th Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says:-

“The order of Mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation 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 the defects of Justice and accordingly it will issue, to the end that Justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”



At paragraph 90 headed “the mandate” it is stated:

“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 leaves discretion as to the mode of performing the duty in the hands 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.”

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

5. I have considered the Ex-parte Applicant’s pleadings and their submissions, and I am also guided by the holding of the Court of Appeal on the nature of the remedy of mandamus in its decision in Republic v Kenya National Examinations Council exparte Gathenji and 9 Others, [1997] e KLR. The said Court held as follows in this regard:

“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. vs. Canada (Attorney General) and was also discussed in Dragan vs. Canada (Minister of Citizenship and Immigration). The eight factors that must be present for the writ to be issued 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.
6. Undoubtedly, the Ex-parte Applicants herein sued the defunct County Government of Garissa in the Chief Magistrate’s Court and later amended their pleadings to substitute it with its’ successors, the County Government of Garissa and the 2nd Respondent, at Garissa vide Civil Case No. 34 of 2011. In the suit before the Magistrate’s Court, the Exparte Applicant prayed for the following orders:-
1. A permanent injunction restraining the Defendant, their Servants, and/or agents from constructing or using any portion thereof denying the Plaintiff’s access thereto, transferring



plot No. Garissa/1628 to any Third Party and in any other way interfering with the Plaintiffs' quiet enjoyment and/or use of the said plot.

2. The release of the fencing posts pulled down and taken to the Defendants land.
3. Costs of the suit.
7. In the suit, Judgment was rendered in favour of the Plaintiffs against the Defendants, the Respondents in this matter, on 16th April, 2015. The Presiding Magistrate observed that despite the Defendants submitting a statement of defense to contest the Plaintiff's allegations, they failed to present their case at the hearing. Consequently, their absence left the Plaintiff's claims unchallenged. The Magistrate concluded that the Plaintiffs had successfully established their case and accordingly ruled in their favour. Following this decision, a decree was issued on 14th September, 2017.
8. The issues, therefore, that require to be determined are first, whether the Respondents are under a public duty and obligation to satisfy the orders issued in favour of the ex parte Applicant in the said Judgment, and secondly, if so, whether the Exparte Applicant is entitled to the relief he seeks in these proceedings.
9. Section 21 of the [Government Proceedings Act](#) provides as follows as regards the requirements to be met in the enforcement of orders as against Government organs in civil proceedings:

“(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.

- (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.”

10. Odunga J. (as he then was) in the Case of Republic v Attorney General & another ex-parte Stephen Wanyee Roki [2016] eKLR held as follows in regard the application of the [Government Proceedings Act](#) to County Governments:

“20 Although the provisions of the [Government Proceedings Act](#) do not expressly refer to County Governments, section 7 of the Sixth Schedule to [the Constitution](#) (Transitional And Consequential Provisions) provides that:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

21. It follows that the provisions of the [Government Proceedings Act](#), a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with [the Constitution](#). One such construction would be the reality that Government is now at two levels and Article 189(1)(a) of [the Constitution](#) requires that the Constitutional status and institutions of government at both the National and County levels be respected. In my view such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to execution proceedings.”

11. As to whether the Respondents herein are under a duty to comply with the order issued by the Lower Court, an order of Mandamus is normally issued when an officer or an authority by compulsion of law or statute is required to perform a duty, and that duty, despite demand in writing, has not been performed. Execution proceedings against a Government or Public Authority under the [Government Proceedings Act](#) can only be as against the Accounting Officer or Chief Officer of the said Government or Authority, who is under a statutory duty to satisfy a Judgment made by the Court against that body. The 2nd Respondent in the instant case, the Officer in charge of the 1st Respondents Lands, Housing and Physical Planning Ministry and hence the Personal responsible to ensure compliance with the Lower Court’s order the subject in these proceedings.
12. The Court in the Case of Republic v The Attorney General & Another ex parte James Alfred Koroso [2013] eKLR held as follows;

“...in the present case the Exparte Applicant has no other option of realising the fruits of his 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 realised. Unless something is done he will forever be left baby-sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the 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 Judgment due to roadblocks placed on their paths by actions or inactions of Public Officers.”

13. In this case, the Exparte Applicants have moved this Court to compel the satisfaction of a Judgment already decreed in their favour by a competent Court of Law. In the premises, I find that the Ex parte



Applicant's Notice of Motion dated 16th October 2023 is merited. I accordingly enter Judgment in favour of the Applicants in the following terms:-

1. An order of Mandamus is hereby directed to the 1st and 2nd Respondents be and is hereby issued, compelling the Respondents to comply with the Decree issued in Garissa CM's Court Civil Case No. 34 of 2011 issued on 14th September, 2017 restraining the Defendants their agents and/or agents by way of permanent injunction from selling, transferring plot No. Garissa/1628 to a Third Party and/or in any other way interfere with the Plaintiffs' quiet enjoyment and/or use of the said plot and the release of the Plaintiff's fencing posts pulled down and taken to the Defendant's yard.
2. That the County Government of Garissa and the County Executive Committee Member in charge of Lands Housing and Physical Planning to comply with the decree of the Court issued on 14th September 2017 unconditionally.
3. The Respondents are ordered to pay the Applicants the costs of the application.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 25TH DAY OF JULY 2024.

J. M. MUTUNGI

ELC - JUDGE

