



Republic v County Government of Turkana & another; Public Service Commission (Interested Party); Koech (Exparte Applicant) (Judicial Review 4A of 2023) [2024] KEELRC 1965 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1965 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
JUDICIAL REVIEW 4A OF 2023**

**HS WASILWA, J
JULY 30, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY GOVERNMENT OF TURKANA 1ST RESPONDENT

THE COUNTY SECRETARY, TURKANA COUNTY 2ND RESPONDENT

AND

PUBLIC SERVICE COMMISSION INTERESTED PARTY

AND

JOSEPH KIPRONO KOECH EXPARTE APPLICANT

JUDGMENT

1. Pursuant to leave granted by this Court on 17th October, 023, the Ex parte Applicant filed the Substantive motion on 2nd November, 2023, seeking for the following Reliefs;
 - a. That this Honourable Court be pleased to issue an order of mandamus compelling the 1st and 2nd Respondents to comply with the orders of the Court issued in Nairobi ELRC Misc. E101 of 2022: Joseph Kiprono Koech –V- County Government of Turkana & Another and the directive by the Public Service Commission to release all the Ex parte Applicant’s withheld salary and allowances from 1st March, 2013 to 31st December, 2016 amounting to Kshs. 9,308, 352 together with interest of 14% p.a accrued thereto from 1st March, 2013 till payment in full.
 - b. That this Honourable Court be pleased to make an order as to costs.



- c. That this honorable court be pleased to make any such or further orders as it may deem necessary to grant in the interest of justice.
2. The Application herein is supported by the grounds on the face of the Application and the supporting affidavit of the ex parte Applicant sworn on 30th October, 2023. In the Affidavit, the ex-parte Applicant states that he was an employee of the County Government of Turkana, retained as the interim Chief Finance Officer until his suspension.
3. That he filed a case in this court serialized as Nakuru ELRC Cause No. 92 of 2014: Joseph Kiprono Koech –v- County Government Of Turkana & Another, which upon determination, the Court ordered his reinstatement without loss of benefit, as well as payment of all withheld salaries and allowances within 14 days, failure of which the same would accrue interest at 14% pa from 1st March 2013 till payment in full.
4. It is averred that the Court also directed the Ex – parte Applicant to compute the sum of money, file and serve the same upon the 1st Respondent for recording the quantum, which computation was done and the final quantum was recorded as Kshs 9,308,352, which decree to that effect was extracted on 17th October 2014.
5. Subsequently, the Ex Parte Applicant filed an application seeking for adoption of the computed sum of Kshs 9,308,352 and for leave to execute the decree against the County Government of Turkana in Nairobi ELRC MISC. Application No. E101 of 2022; Joseph Kiprono Koech Vs County Government of Turkana and another.
6. The Court allowed his Application and he extracted the Order of the Court which was issued on 21st September, 2022 directing the 1st Respondent to pay him Kshs. 9,308,352 together with interest at 14% p.a from 1st March, 2013 until payment in full and granting him leave to execute against the property of the County Government of Turkana.
7. That the said Orders were served upon the Respondents and demand was issued for the payment of the decretal sum. However, despite several follow ups, demands and requests to have the Respondents release his salary, allowances and accrues interest, the Respondents refused to release them in full and continues defying the court’s Judgment.
8. That the refusal to pay the ex parte applicant his entitlement and defiance of the Court Order amount to unfair administrative action.
9. The ex-parte Applicant, states that he is apprehensive that the Respondent defiance will persist if this Honourable Court does not intervene and remedy the situation.
10. It is contended that unless the orders sought therein are granted, the ex-parte Applicant will continue suffering loss as he has waited to enjoy the fruits of the Judgment since 2014, and he has unfortunately been unable to do so, 9 years down the line.
11. That it is in the interest of justice that the ex-parte Applicant is granted the judicial review order of mandamus compelling the Respondents to pay the amounts as directed by the court.
12. The application is opposed by the Respondents who filed a replying affidavit sworn by Peter Eripete on 2nd April, 2024. In the affidavit, the Respondent stated that the Ex parte Applicant indeed obtained judgment in his favour in Nakuru ELRC No. 92 of 2014 for payment of withheld salary and allowances from the date of suspension to the date of judgement. Additionally, that he was tasked by the Court to compute the amount owing for the purposes of recording the quantum.



13. Following the said direction, computation was done and recorded in Court on 5th December, 2014 where the ex parte Applicant was to be paid withheld salaries and allowances and all damages of Kshs 4,726, 109 together with party & party costs of Kshs 529,000, assessed on 10th December, 2014, all summing up to Kshs 5,255,109.
14. Subsequently, the Ex parte Applicant's then advocates, M/S Mongeri and Company Advocates wrote to the Respondent, Advocates M/S Rachier & Amollo Advocates demanding the sum of Kshs 5,225,109, being the General damages of Kshs 4,726,109 and Party and Party costs of Kshs 529,000.
15. Upon being served with computation and demand, the Respondent paid the said amount in full, through their advocates, Rachier & Amollo Advocate to the ex parte Applicant advocate, M/s Mongeri and Co Advocates via Account number 0272021640 held in Barclays Bank, Nakuru West Branch and a confirmation letter drawn by County Chief Officer on 20th January, 2015, confirming that payment had been effected.
16. It is stated that subsequently, on 19th June, 2015, the Ex parte Applicant was advised to report to office immediately for deployment and duty assignment. Further that he was reinstated to the payroll, posted to the ministry of finance and planning and paid all his salary arrears up to May, 2015 that were still outstanding.
17. After payment was effected, the Respondent received a letter from the ex parte Applicant complaining that in his payment, the arrears for the month of June, 2014 was not included and upon following up with the payroll Management section, the Respondent established that, whereas the the County Public Service Human Resource Manual requires that an employee on suspension receives a quarter of their basic salary and full house allowance, the Ex parte Applicant earned his full salary from July, 2013 to November, 2013 and then from December, 2013 to June, 2015 when the suspension was lifted. Moreover, that as per the HR Manual, an employee on suspension was not allowed to leave the duty station without permission, however that the ex-parte Applicant was away throughout this period, even after the suspension was lifted.
18. It is stated further that during computation, the Ex parte Applicant had claimed an automatic annual increment, yet under the HR Manual, the same was pegged on performance and could be deferred depending on the budgetary allocations as assessed by the Accounting officer. Further that he had also included safari allowance which was not due considering that he was not at work during the said period. Moreover, that the airtime pay calculated was not warranted in light of the fact that he was on suspension and not making any calls for the Respondent.
19. The deponent stated that despite reinstating the ex parte applicant and deploying him to the ministry of finance, he failed to report to his work station on allegation that he was not provided with a desk to work from. He was then re-deployed to the ministry of pastoral economies and fisheries where he worked from 11th November, 2015 and thereafter after deserted work, forcing the county to stop his December, 2015 salaries.
20. He states that he learnt latter that the ex parte applicant was working for Kenyatta University and then moved to the Council of Governor office. It was until 14th October, 2016, that the county received official communication from the Principal Secretary, Ministry of Devolution that the ex parte applicant had been transferred from Turkana County Government to the National Government.
21. The deponent reiterated that they have paid the ex parte Applicant all his dues up to 30th November, 2014 as directed by the Court as such, there was nothing owing to the ex parte Applicant to warrant the filling of this JR proceedings.



22. In conclusion, it was stated that the judgement which the ex parte Applicant seeks to enforce in this Judicial Review Proceedings is more than 8 years old, hence time barred by Limitation of Actions that prescribes six months' limitation period for institution of JR proceedings seeking an Order of mandamus.
23. The Application was canvassed by written submissions. However, the Ex parte Applicant did not file submissions.

Respondents' Submissions

24. The Respondents identified three issues for determination; whether the Ex parte applicant has any valid claim against the Respondent capable of being enforced by Judicial review, whether the applicant is entitled to the order of Mandamus as prayed for in the Application and whether the Court can grant of an order of certiorari upon lapse of the statutory period of six months prescribed under section 9 of the *Law Reform Act*.
25. On the first issue, the Respondents submitted that parties are bound by their pleadings. That the Ex parte Applicant has been paid all the arrears owing to him pursuant to the Court order issued by Radido J on 5th December, 2014, following the consent of the parties dated 7th November, 2014. Moreover, that the figure of Kshs 5,255,109 was confirmed by the ex parte Applicant Advocates by their demand letter of 10th December, 2014.
26. It was argued that the Ex-parte applicant confirmed in paragraph 4 of his supplementary affidavit at leave stage, to have received full decretal sum but conveniently mislead the Court by making alleged underpayment calculation and seeking for enforcement of the said Judgment In Nairobi ELRC Misc. Application No. 101 of 2022, when the said Decretal sum had been paid in full.
27. It was argued that the Court on 17th October, 2014 directed the Applicant to compute his dues owing, which was done and the parties appeared before this Court (Radido J) on 5th December, 2014 and recorded a consent on the amount owing which was adopted by the Court and a final decree extracted, thus the only issue pending was execution of the said decree. Subsequently, that the Respondent executed the decree issued by this Court in full, thus nothing was owing to the ex parte Applicant after payment of the decretal sum
28. The Respondent argued that the ex parte Applicant stated in paragraph 8 of his supporting affidavit that he was directed by the Principal Secretary, Ministry of Devolution and ASALS vide the letter of 10th November, 2022 to calculate his claim and share with the County Public Service Board, which he calculated at Kshs 9,308,352, but when the Respondent refused to pay the said amount, he lodged Nairobi Misc. Application No. 101 of 2020 and obtained Orders that he is now seeking enforcement.
29. On that basis, the Respondent invited this Court to determine whether the Orders issued by the Court in Nairobi Misc. Application No. 101 of 2022 can be enforced by way of Mandamus before this Court, when the decretal sum had already been paid in full. It was argued that the orders by the Public Service Board, were in conflict with the Order of this Court, as such the Application in Nairobi Misc. Application No. 101 of 2022 was re judicata and the Court ought not have issued Order, when the matter was heard and concluded by this Court.
30. The Respondent submitted that they did not participate in the proceedings in the PSC and the Nairobi Miscellaneous Application, yet this court is now asked to compel the Respondent to double pay the Ex parte Applicant money by an order which was irregularly obtained and against the law. Moreover, that the said MISC. application No. 101 of 2022 was not pegged on any suit, yet final orders were issued. Therefore, that since final decree was issued in ELRC Nakuru Cause No. 92 of 2014 and decretal



sum paid in full, the subsequently Nairobi Misc. Application Number 101 20122 is not a judgement recognized in law hence incapable of enforcement by way of mandamus. Moreover, that it is curious that the Misc. Application was filed in Nairobi without any suit file and not in the same cause herein in Nakuru, which the law envisions as the court that will handle enforcement mechanisms.

31. On whether the Applicant is entitled to the Order of Mandamus as prayed for in the Application, it was submitted that it is not in dispute that an Order of mandamus can only be granted against a public body to compel it to perform a public duty which is imposed on a person or body by statute where that person or body have failed to perform the duty to the detriment of a party who has legal right to expect that duty to be performed. In support of this, he relied on the case of Republic Vs *Kenya National Examination Council Ex parte Gathenji & Others Civil Appeal No. 266 of 1996* which court held that:-

“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... 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”

32. It was argued that whereas the Ex parte Applicant is seeking to be paid dues as directed by the Court in Nairobi Misc. Application No. 101 of 2022 and the Public Service Board, the Procedure for execution of Order and decrees against the Government is provide for under section 21 of the *Government Proceedings Act*, which was not followed by the Ex parte Applicant. To support this, he relied on the case of Michael Wachiongo Baragu V County Government of Kirinyaga[2019] eklr, where the Court held that:-

“It is explicit from my reading of the above provisions of the law that for this Honourable Court to issue an order of mandamus to compel the respondent herein to comply with the order of 6th February 1995, the applicant must first proof that he had complied with the provisions of Section 21 of the *Government Proceedings Act*. There is no evidence adduced that the applicant applied to the Registrar of the subordinate Court to be issued with the certificate of order against the County Government Of Kirinyaga as required under Section 21 of the *Government Proceedings Act* as read with Order 29 Rule 3 of the Civil Procedure Rules, 2010. It is my view that it is only on the basis of the certificate of order against the County Government that the respondent herein would be able to satisfy the Court order of 6th February 1995 and where none has been applied and issued by the Registrar or the subordinate Court, the said Court order cannot be granted. I also note that there is also no proof of service of either the said certificate or the Court order issued on 6th February 1995 upon the respondent or Kirinyaga County Council which is her predecessor in SRMCC No. 59/1990. The respondent has been enjoined in the instant application for purposes of satisfying the orders of the subordinate Court issued against the defunct Kirinyaga County Council. There is equally no evidence that she was served with a notice or



a demand requiring her to comply with the said orders and failed and/or ignored to comply with the same.”

33. Similarly, that in the present proceedings, the ex parte Applicant has not adduced any evidence that he has applied for or obtained from the Registrar Certificate of Order against the County Government of Turkana. Therefore, that having failed to comply with the mandatory requirements of section 21 of the *Government Proceedings Act* as read with Order 29 Rule 3 of the Civil Procedure Rules, the Application is a non-starter and should be dismissed with costs.
34. In conclusion, the Respondent submitted that from the facts of this case, it is evident that the Ex parte Applicant is using the processes of the Court to unjustly enrich himself having already been paid all his dues as per the decree of the Court issued in Nakuru Cause No. 92 of 2014. Further that the Ex Parte Applicant has not satisfied the mandatory principles that are required for the Court to grant the Orders sought herein. Hence, the present Application is frivolous and an abuse of Court process and therefore should be dismissed in its entirety with costs.
35. I have examined the averments and submissions of the parties herein. It is true that this claim emanated from Nakuru ELRC Cause No. 92 of 2014. The JR application had been filed before the ELRC Nairobi. However, in ELRC Nairobi vide an order of this court (Hon. J. Rutto), the file was transferred to Nakuru for disposal.
36. The submission that the application was filed before a wrong court is thus overtaken by events.
37. The Respondent has also submitted that contrary to the applicant’s averments, they paid all that emanated from the decree and so owe the Respondent nothing more.
38. It is thus their contention that the Applicant has failed to follow the procedure of execution against a government entity and so the application should be disallowed.
39. This application emanates from the judgment of this court in ELRC Cause No. 92 of 2014 which judgment found that the applicant had been unlawfully suspended from employment and was therefore entitled to all withheld salaries and allowances with due annual increments including Kshs 60,000/= per month for extra responsibilities. The court also directed that all these be paid from the date of suspension till date of delivery of judgment which amounts the applicant was to calculate and serve the Respondents within 7 days of delivery of judgment.
40. The Applicant avers that he did the calculation and arrived at a figure of 4,726,109 which amount was adopted by the court and was subsequently paid to the applicant. The applicant avers that that is not the amount he is claiming.
41. The applicant avers that the court had also directed he should continue serving in office of Chief Finance Officer. It is his contention that having been reinstated to the office he was entitled to payment of his salary and allowances as prescribed in the registered CBA between his union and his employer which CBA became effective from 1st March 2013, which CBA recognized his entitlement to payment of Kshs 60,000/=over and above the salary and allowances.
42. The Applicant exhibited the said CBA in this application marked as JKK 3 and which shows the salary the applicant was entitled to within the period under review.
43. The applicant avers that the Respondent subjected him to a hostile working environment and he requested for a transfer to the National Government which transfer was granted vide the letter from the PSC annexure JKK – 3 dated 23/3/2016.



44. From the communication between the applicant and the PSC the applicant insisted that he had not been paid his salary and vide a letter of 24/8/2016 the PSC reinstated the fact that the applicant was entitled to be paid his withheld salary by the Respondent in compliance with the order of this court.
45. Despite this directive, it is clear that the Respondent didn't pay and this necessitated a filing of Nairobi ELRC Misc Application 101/2022 in which Hon. J. Kebira gave orders in favour of the Applicant adopting the orders of the PSC made on 23/3/2016 and 24/8/2016 directing the Respondent to pay 9,308,352 being withheld salaries and allowances to the applicant for the period between 1st March 2013 and 31st December 2016 plus interest at the rate of 14% per annual from 1/3/2013 until payment in full.
46. The applicant was granted leave to execute the decree against any property of the Respondent herein.
47. This JR application seeks the orders of this court wherein the applicant seeks to enforce the orders of the court from the Misc application where this court allowed the applicant to levy execution for the 9,308,352/= with interest.
48. The contention by the Respondent that the applicant has not followed due process in my view does not hold. I say so because the applicant has demonstrated that he is indeed owed by the Respondent and has the backing of the orders of this court which the Respondents are aware of having been part and parcel of the court process.
49. In my view the Respondents have only one option which is to pay and I find that the application herein is allowed and I grant orders of Mandamus as prayed directing as follows:
- a) An order of mandamus is issued compelling the 1st and 2nd Respondents to comply with the orders of the Court issued in Nairobi ELRC Misc. E101 of 2022: Joseph Kiprono Koech -V- County Government of Turkana & Another and the directive by the Public Service Commission to release all the Ex parte Applicant's withheld salary and allowances from 1st March, 2013 to 31st December, 2016 amounting to Kshs. 9,308, 352 together with interest of 14% p.a accrued thereto from 1st March, 2013 till payment in full.
 - b) That the Respondents will pay costs of this JR Application.

JUDGEMENT DELIVERED VIRTUALLY THIS 30TH DAY OF JULY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

N/A for parties

Court Assistant - Fred

