



**Republic v County Government of Homa Bay; Amayo (Exparte) (Judicial Review E021 of 2024) [2024] KEELRC 2676 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2676 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
JUDICIAL REVIEW E021 OF 2024  
NZIOKI WA MAKAU, J  
OCTOBER 24, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE COUNTY GOVERNMENT OF HOMA BAY ..... RESPONDENT**

**AND**

**EMMA AMAYO ..... EXPARTE**

**RULING**

1. The Court has before it the Notice of Motion dated 21<sup>st</sup> June 2024, through which the ex-parte Applicant seeks the following orders:
  - a) The Honourable Court be pleased to grant an order of Mandamus against the Chief Finance Officer of the County Government of Homa Bay compelling him/her to pay the decretal amount together with costs and interest arising from Homa Bay Chief Magistrate's Court Employment Cause No. 5 of 2019.
  - b) The costs of the Application be awarded to the ex parte Applicant.
2. The application is premised on the grounds set out on the face of the Notice of Motion, Statement Accompanying Summons and the annexed Verifying Affidavit of Emma Amayo. In brief, these point to a judgment having been delivered in favour of the ex parte Applicant who now has brought the proceedings herein.
3. The application is opposed vide Grounds of Opposition dated 26<sup>th</sup> June 2024. The Grounds in effect are that, the application is not merited, that the application has not demonstrated in any way why this Court should exercise discretion and grant orders in favour of the ex parte Applicant.



4. The application was to be disposed of by way of written submissions. The ex parte Applicant submitted that the Government Proceedings Act at section 21(1) and (2) lays out the procedure for execution against the Government as follows: (

“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.

5. The ex parte Applicant submits that in the case of Permanent Secretary Office of The President, Ministry of Internal Security & another Ex-parte Nassir Mwandihhi [2014] eKLR, Odunga J. (as he then was) held that:-

“The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court.”

6. The ex parte Applicant submitted that the plethora of legal precedent is that she has demonstrated that she has a judgment and decree against the County Government of Homa Bay which the Respondent has failed to satisfy despite service with decree, certificate of cost and certificate of order of judgment and cost against the government on 20<sup>th</sup> November 2023. It is submitted that it is only fair that the Respondent be compelled to perform its duty and pay the ex parte Applicant. The ex parte Applicant submitted that after the introduction of devolution, Act No. 35 of 2015 introduced an amendment under section 2 subsection 5 thereof which was to the following effect:

‘(5) The 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’

7. The ex parte Applicant submits that by dint of this amendment means therefore a County Government is in respect of execution treated in the same manner as the National Government. She thus urges the grant of orders in her favour as sought in her motion.

8. The Respondent on its part submits that the requirements for an order of mandamus were explained by Mativo J. (as he then was) in Republic v Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & another [2018] eKLR as follows:

“29. 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),[23] and, was also discussed in Dragan vs. 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."

9. The Respondent herein submits that it has not refused to pay the aforementioned cost as claimed by the ex-parte Applicant. The Respondent submits the demand for payment of the aforementioned costs was made known to the Respondent on or about 20<sup>th</sup> November 2023. It is submitted that it equally common knowledge that the Respondent herein operates within a budget, which budget factors in the various debts owed by the Respondent to various persons and organizations/institution. The Respondent submits that the County funds from which this debt ought to be paid has to be budgeted for and appropriated by the County Assembly. The Respondent submits its financial year began on 1<sup>st</sup> July 2023 and ends on 30<sup>th</sup> June 2024. It is submitted that funds budgeted for during this time were already earmarked for various activities and paying of already known debts. It is submitted that in the instant case, the ex-parte Applicant's costs arose on or about 20<sup>th</sup> November 2023. The same had not yet been factored into the Respondent's budget. The Respondent has therefore not refused and/or declined to pay the aforementioned costs as claimed, rather it shall settle the same once the same has been budgeted for and appropriated by the Respondent's County Assembly. It was asserted that reasonable time was not granted to the Respondent to comply with the order for payment of the costs. The Respondent submitted that the ex-parte Applicant has not fulfilled the requirements warranting the granting of an order of mandamus. The Respondent therefore prays that this Honourable Court dismiss the instant application with costs to the Respondent and grant the Respondent reasonable time within which to comply with the order requiring payment.



10. The Court has considered the submissions of parties as well as the pleadings in coming to this decision. The power to grant the order of mandamus is discretionary. The power is to be exercised where conditions precedent to their grant is met. As correctly pointed out by the Respondent, the grounds for grant are:
- (i) There must be a public legal duty to act;
  - (ii) The duty must be owed to the Applicant;
  - (iii) There must be a clear right to the performance of that duty
  - (iv) No other adequate remedy is available to the Applicant;
  - (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.
  - (viii) There has been express or implied refusal to comply.
11. It is not denied that there is a decree of court that is to be satisfied by the Respondent – this satisfies the duty to act paradigm of the 8 point test. It is also not denied that the Respondent was made aware of the same, demand has been made and payment sought – this meets the second aspect where there is a duty owed to the Applicant. It is also not denied that the decree has not been satisfied and that the Respondent in answer to the claims by the Applicant asserts that its funds are subject to budgeting and appropriation by the County Assembly. There is a satisfaction of the third and fourth limbs of the test. It is trite that the financial year runs from 1<sup>st</sup> July to 30<sup>th</sup> June of the succeeding year. In the case before me, the demand was made circa November 2023 meaning if the argument of the Respondent holds, a budgetary allocation would have been made in the 2024/2025 financial year meaning it would have been budgeted for in the financial year that begun on 1<sup>st</sup> July 2024. This meets the fifth and sixth limbs as the Applicant is owed a relief that is equitable. I have had to consider whether there has been express refusal to comply as this is one of the key aspects of the conditions precedent to grant of mandamus. This is to meet the requirement of convenience for an order of mandamus to lie. In this case an express or implied refusal is discerned as the Respondent neither asserts the item has been budgeted for nor provisioned for payment on contingency. As such, it is my finding that grounds do exist and have been established by the ex parte Applicant for the grant of the order compelling the payment.
12. The above is clear that the Court is persuaded that it is proper to grant an order of Mandamus against the Chief Finance Officer of the County Government of Homa Bay compelling the said officer to pay the decretal amount together with costs and interest arising from Homa Bay Chief Magistrate's Court Employment Cause No. 5 of 2019 – Emma Amayo v County Government of Homa Bay. The ex parte Applicant shall also have the costs of this motion.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER 2024**

**Nzioki wa Makau**

**JUDGE**

