



REPUBLIC OF KENYA



KENYA LAW
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Republic v County Government of Mombasa & 3 others; Gulam (Exparte Applicant) (Judicial Review Application E001 of 2024) [2024] KEELRC 13445 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13445 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E001 OF 2024**

AK NZEI, J

DECEMBER 17, 2024

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY
FOR ORDERS OF JUDICIAL REVIEW (ORDER OF MANDAMUS)**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

**SECTION 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26
LAWS OF KENYA AND THE CIVIL PROCEDURE ACT CHAPTER**

21 LAWS OF KENYA

AND

**IN THE MATTER OF MOMBASA ELRC NO. 397 OF 2018
DR. ADIL HUSSAIN GULAM VS MOMBASA COUNTY CHIEF
OFFICER MEDICAL SERVICES, MEDICAL SUPERINTENDANT
LIKONI SUBCOUNTY HOSPITAL AND COUNTY GOVERNMENT
OF MOMBASA**

AND

**N THE MATTER OF THE DECISION AND/OR JUDGMENT OF
THE EMPLOYMENT AND LABOUR RELATION COURT IN
MOMBASA CAUSE NO. 397 OF 2018**

AND

IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT

BETWEEN



REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

COUNTY CHIEF OFFICER FINANCE 2ND RESPONDENT

MOMBASA COUNTY CHIEF OFFICER MEDICAL SERVICES 3RD
RESPONDENT

MEDICAL SUPERINTENDENT LIKONI SUB COUNTY HOSPITAL 4TH
RESPONDENT

AND

DR ADIL HUSSAIN GULAM EXPARTE APPLICANT

RULING

1. The application before me is the Ex-Parte Applicant's Amended Notice of Motion dated 2nd May, 2024. The Ex-Parte Applicant, Dr. Adil Hussain Gulam, seeks the foregoing orders:-
 - a. That this court do grant the Applicant Judicial Review Orders of Mandamus to compel the Respondents herein to pay the sum decreed by the Employment and Labour Relations Court in Mombasa ELRC Cause No. 397 of 2018 (Dr. Adil Hussain Gulam – vs – Mombasa County Chief Officer, Medical Services & 2 Others), as per the Certificate of Order Against the Government issued on 25th August, 2023, and continuing to accrue interest.
 - b. That costs be in the cause.
2. The application is predicated on the Ex-Parte Applicant's affidavit sworn on 2nd May, 2024; vide which the Ex-Parte Applicant reiterates the facts stated in the statement of facts dated 22nd February, 2024. In the said affidavit (sworn in support of the Notice of Motion herein as originally filed), the Ex-Parte applicant depones:-
 - a. that the Ex-parte Applicant instituted Mombasa ELRC Case No. 397 of 2018 against the Respondents herein, and that upon full trial, Judgment was entered in favour of the Ex-Parte Applicant on 17th January, 2022 for Kshs.2,232,615/=, costs of the suit and interest.
 - b. that the Respondents have refused, failed, ignored and/or neglected to honour the decree, despite a certificate of order against the Government having been served upon them.
 - c. that the Respondents have unreasonably denied the Ex-Parte Applicant the opportunity to enjoy the fruits of his Judgment; despite requests by Counsel for the parties herein.
3. The application is opposed by the Respondent(s) vide a statement of grounds of opposition dated 22nd May, 2024; which raises one ground of opposition; being that the application offends Section 103 of the *Public Finance Management Act* 2012.
4. Both sides filed written submissions for and against the application pursuant to the Court's directions in that regard. It was submitted on behalf of the Ex-Parte Applicant that having filed grounds of opposition and no replying affidavit, the facts on which the Judicial Review proceedings herein are anchored have not been disputed, hence the orders sought ought to issue. Counsel for the Ex-Parte



Applicant cited the case of Wilfred Nyaundi Konosi T/A Konosi & Advocates – vs – John Lokorio [2015] eKLR where the court stated as follows:-

“In Mareka & Co. Advocates – vs – Invesco Assurance Co. Ltd [2015], Judge Mabeya held that grounds of opposition address only issues of law and no more.

13. In the absence of rebuttal of the averments in the supporting affidavit, it means that the Respondent has no plausible claim against the applicant . . .”

5. The Ex-Parte Applicant also cited the case of Republic – v – County Government of Kiambu – Ex-Parte Laban J Macharia Muiruri [2021] eKLR where the court stated as follows:-

“ 13. As to whether the Respondent herein is under a duty to pay the subject decretal sum, 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 a public authority under Government Proceedings Act can only be 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.”

6. On the other hand, it was submitted on behalf of the Respondents that the application offends Section 103(3) of the Public Finance Management Act 2012, in that in his amended application, the Ex-Parte Applicant cited the County Chief Officer Finance, County Chief Officer Medical Services and Medical Superintendent Likoni Sub County Hospital as the accounting officers.

7. Counsel for the Respondents cited Section 103 of the Public Finance Management Act 2012 as follows;

“(1) There is established for each county government an entity to be known as County Treasury.

(2) The County Treasury shall comprise:-

- a. the County Executive Committee Member for Finance.
- b. the Chief Officer, and
- c. the department or departments of the County Treasury responsible for finance or fiscal matters.

(3) The County Executive Committee Member for Finance shall be the head of the County Treasury.”

8. Counsel for the Respondents submitted that the correct person to look to regarding the payment in issue is the County Executive Committee Member for Finance.

9. It is clear from the foregoing that the application herein is not opposed. All that the Respondents are saying is that the proper accounting officer, the County Executive Committee Member for Finance, has not been enjoined in the application before the Court.

10. I have noted that documents annexed to the Ex-Parte Applicant’s supporting affidavit include copies of this Court’s Judgment in Mombasa ELRC Cause No. 397 of 2018, the Court’s decree, a certificate of order against the government and an IFMIS Supplier Definition Form; duly filled by the Ex-parte Applicant’s Advocates on record and forwarded to the Respondents vide the said Advocate’s letter



dated 5th September, 2023. Service of the aforesaid documents on the Respondents is not disputed, and the Respondents have not disputed the validity of any of the said documents.

11. The 2nd Respondent (the County Chief Officer for Finance) is, by dint of Section 103(2) of the *Public Finance Management Act* 2012, a member of the County Treasury for Mombasa County, whose head is the County Executive Committee Member for Finance. The 2nd Respondent did not deny service of the aforesaid documents on the County Treasury, or knowledge by the County Treasury of the duty to pay the sum decreed in Mombasa ELRC Cause No. 397 of 2018 (Adil Hussain Gulam – vs – County Government of Mombasa & 2 Others). No reason has been given by the Respondents, and in particular the 2nd Respondent who is a member of the County Treasury, why the decreed sum has never been paid to the Ex-Parte Applicant, who holds a valid court decree against the Respondents.

12. It was stated as follows in the case of Republic – vs – Permanent Secretary Ministry of State for Provincial Administration and Internal Security [2012] eKLR:-

“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 have 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 . . .”

13. The Respondents have graciously submitted and demonstrated that the accounting officer in the County Government of Mombasa is the County Executive Committee Member for Finance.

14. The Ex-Parte Applicant’s Amended Notice of Motion dated 2nd May, 2024 is hereby allowed in the following terms:-

- a. An order of mandamus is hereby issued compelling Mombasa County Executive Committee Member for Finance to pay to the Ex-Parte Applicant the sum decreed in Mombasa ELRC Cause No. 397 of 2018 (Dr. Adil Hussain Gulam – vs – Mombasa County Chief Officer Medical Services & 2 Others), which stood at Kshs.2,925,924.05 on 25th August, 2023 as per the Certificate of Order against the Government issued on 25th August, 2023, and continuing to accrue interest.
- b. The Orders contained in this Ruling shall be extracted and served on the aforementioned accounting officer, and an affidavit of service shall be filed in court
- c. Each party shall bear its own costs of the application.

15. It is to be noted that non-compliance with an order of mandamus amounts to contempt of court.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER 2024

AGNES KITIKU NZEI

JUDGE

ORDER



This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Applicant

.....Respondent

