



Karanja & 154 others v Muigai Wainaina, Secretary, Nyandarua County Government & another (Judicial Review E007 of 2022) [2023] KEELRC 999 (KLR) (2 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 999 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
JUDICIAL REVIEW E007 OF 2022**

HS WASILWA, J

MAY 2, 2023

BETWEEN

PAUL WAINAINA KARANJA & 154 OTHERS APPLICANT

AND

**MUIGAI WAINAINA, SECRETARY, NYANDARUA COUNTY
GOVERNMENT 1ST RESPONDENT**

**DR. JAMES NDIRANGU KUNGU, SECRETARY NYANDARUA PUBLIC
SERVICE BOARD 2ND RESPONDENT**

JUDGMENT

1. On 24th January, 2023, this Court granted the applicants leave to apply for an Order of mandamus as sought in their chamber summons dated 16th December, 2022. Attached to the chamber summons is the substantive Notice of Motion which sought for the following Orders; -
 1. That an Order of Mandamus to move into this Honourable Court and compel the Respondent to pay Advocates taxed costs awarded and interest Accruing from 12th June, 2018 to the date of payment.
 2. That an order for costs of this Application be provided for.

Summary of Facts

2. The application is supported by the facts stated in the statutory statement and the supporting affidavit of Davidson Warutere Iregi, the Ex parte applicant herein.
3. The summary of facts in this application is that a suit had been filed by the Applicant against the Respondent, serialized as Nakuru ELRC Cause no. 433 of 2016, demanding the Respondent to



convert their employment to permanent and pensionable terms, which prayer was allowed by the Court.

4. On 12th June, 2018, the court awarded advocates costs of Kshs 337,800 together with interest. A certificate of costs was issued on 12.6.2018, which the Respondent was served but have not paid to date and has now accumulated interest of Kshs. 212,814.
5. Despite several demands and reminders, the Respondents have refused to pay the costs as awarded by the Court, necessitating the issuance of certificate of order against the Government which was also served on the Respondent for action to no avail.
6. It is stated that as it stands, the costs and interest now stands at Kshs 550,614, which he urged this Court to compel the Respondent to pay him.

Response.

7. The application is opposed by the Respondents who filed a replying affidavit deposed upon on the 20th February, 2023 by Muigai Wainaina, the County secretary and head of Public Service Board of Nyandarua County.
8. In his response, the affiant stated that contrary to the applicant's allegation, the certificate of costs was not issued on 12.6.2018, rather that it was issued on 24th February, 2023 and if any was issued prior to this, then the Respondents were not served with the same.
9. On the claim for outstanding costs of Kshs 337,800, the affiant stated that the County Budget for the year 2022/2023 was already passed and is currently being implemented as such the claim cannot be factored in the current financial year. Therefore, that as per the *Public Finance Management Act, 2012*, the said costs will be included in the next financial year 2023/2024.
10. The Respondent prayed for time to include these advocate's costs in the next financial year and argued that the application before court is premature, misguided and ought to be dismissed with costs.

Rejoinder.

11. By a supplementary affidavit filed on 11th April, 2023, the Applicants responded to the replying affidavit stating that the certified certificate of costs annexed to the replying affidavit which was issued on 24.2.2023, clearly states that the certificate of costs was issued on 12.6.2018. Further that a certificate of Order for costs against the Government was issued on 16.4.2019. Therefore, that the Applicant's application is merited and should be allowed by this Court and urged the court to compel the Respondent to make the said payment which is long overdue.
12. The Application was disposed of by written submissions with the both parties filling submissions on 11th April, 2023.

Applicants Submissions.

13. The Applicants submitted that they served the Respondent with the taxed costs and subsequent certificate for costs against Government as soon as they were issued but the Respondent has refused to pay the taxed costs despite service. He urged this Court to compel the Respondent to pay the said costs as it ordered, to ensure its orders are complied with at all times. In this they relied on the case of *Miguna Miguna v Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of*



National Government & 8 others [2018] eKLR, where the Court relied on the case of B vs. Attorney General [2004] 1 KLR 431 that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

14. The also relied on the case of Greenwood Printers & Stationers Ltd v Independent Electoral and Boundaries Commission [2022] eKLR, where the Court relied on Republic Vs Permanent Secretary Ministry of State for Provincial Administration and internal Security Exparte Fredrick Manoah Igunza [2012] eKLR, Githua J stated;

“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.”

15. On that basis, it was submitted that since the advocates costs are not disputed, the Respondents are obligated to pay the taxed costs and being that the Applicant have followed the proper procedure in seeking for their rightful dues, the Application ought to be allowed as prayed.

Respondents' Submissions.

16. The Respondents submitted on three issues; whether the certificate of costs meets the legal threshold of a certified copy, whether the certificate of costs was served and whether the applicants are entitled to costs and interest claimed.
17. On the first issue it was submitted that the certificate of costs annexed to the Respondent's replying affidavit does not meet the threshold of a certified copy and or secondary evidence as contemplated



under section 66, 68 and 83 of the Evidence Act. In this they relied on the case of Re estate of Charles Ndegwa Kiragu Alias Ndegwa Kiragu –Deceased [2016] eKLR where the Court cited the case of In Lee vs Tambag that held that;-

“Before a party is allowed to adduce secondary evidence to prove contents of the original, the party must prove the following:- (i) the existence or due execution of the original; (ii) the loss and destruction of the original or the reason for its non-production in court; and (iii) on the part of the party, the absence of bad faith to which unavailability of the original can be attributed. The correct order of proof is as follows; existence, execution, loss, and contents. A photocopy may not be produced without accounting for the original.”

18. The Respondent then defined what a certified copy is according to Cambridge dictionary and stated that- it is copy of a document that can be used instead of the original once, because an official has checked it and formally approved it as a true and accurate copy by signing it.
19. Accordingly, it was submitted that if the certified copy attached is legal, then it must reflect the original copy which must be bearing the same date of issue being 24th February, 2023. So that in absence of any other certificate of costs, the one exhibited herein stands.
20. On the second issue, it was submitted that the certificate of costs, was extracted and issued on 24th February, 2023 and was therefore not served earlier to the Respondents as alleged or at all for the Respondents to act on it. In this they relied on the case of Maggy Agulo Construction Co Ltd V Ministry of Public Health & others [2020] eKLR, where the Court relied on the case of Republic v County Secretary Migori County Government & another [2019] eKLR, which held that; -

“Once a party obtains the Certificate of Order and the Certificate of Costs, in the event the Certificate of Costs is obtained separately, together with the Decree, then such a party must satisfy the Court of service of those documents upon the party named in the Certificates. In this case there is neither evidence of issuance of the Certificates nor service thereof on the Respondents or their Advocates.”
21. Similarly, that the Applicant have not provided any evidence on alleged service of the certificate of costs or any subsequent process to urge this Court to issue the Orders sought. He added that save for the certificate of costs of 24.2.2023, the Respondent has not received any certificate of costs to enable it act on.
22. On costs, it was submitted that the taxed costs of Kshs 337,800 is not disputed and the same will be considered in the coming financial year, 2023/2024. On interest allegedly accrued, the Respondents submitted that since no evidence has been tabled before court to affirm the allegation that a certificate of costs was extracted and served, the costs remained as per the certificate of costs extracted on 24.2.2023 and the claimed interest is inapplicable in the circumstances.
23. The Respondents in conclusion, submitted that the application herein is pre-mature, misguided, misleading and should be dismissed with costs to the Respondents.
24. I have examined the averments and submissions of the parties herein.
25. From the submissions herein the applicant has established that indeed he was indeed issued with a Certificate of Cost which is APP DW1 signed on 16.4.2019 by the Deputy Registrar, ELRC for costs of 337,800/=.
26. There is no indication that this amount has since been paid.



27. There is however no evidence annexed by the applicants that the same was served upon the respondents therein.
28. In the circumstances of this case, whereas I find the costs due payable, on the issue of interest, I find that this can only be levied upon the respondents being notified of the same.
29. That being the case, I find that costs are payable with interest with effect from the date of filing this application.
30. The respondents will pay costs of this application.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 2ND DAY OF MAY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Warutere for Applicant – present

Muthoni for Respondent – present

Court Assistant - Fred

