



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**JUDICIAL REVIEW APPLICATION NO. E014 OF 2021**

**IN THE MATTER OF AN APPLICATION BY LUCY ATIENO MATENGO FOR AN ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTIONS 8 & 9 OF THE LAW REFORM ACT, ORDER 53 OF THE CIVIL PROCEDURE RULES AND RULE 7 (2) OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016**

**AND**

**IN THE MATTER OF JUDGMENT IN KISUMU ELRC CAUSE NO. 282 OF 2018-LUCY ATIENO MATENGO V COUNTY PUBLIC SERVICE BOARD, KISUMU COUNTY**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY EXECUTIVE MEMBER FOR FINANCE & ECONOMIC  
PLANNING OF THE COUNTY**

**GOVERNMENT OF KISUMU.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY PUBLIC SERVICE BOARD OF THE COUNTY**

**GOVERNMENT OF KISUMU .....2<sup>ND</sup> RESPONDENT**

**AND**

**LUCY ATIENO MATENGO.....EX PARTE APPLICANT**

**JUDGMENT**

1. This Judgment relates to a Judicial Review Application dated 15<sup>th</sup> September, 2021, brought pursuant to Section 8 and 9 of the Law Reform Act, Cap.26, Order 53 Rule 3 of the Civil Procedure Rules and Rule 7(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

2. The Applicant seeks:

i. An order of Mandamus to compel the Respondents to pay the Ex-parte Applicant **Kshs. 2,539,120/-** as ordered by the court in a Judgment delivered on the 7<sup>th</sup> April, 2021 in **Kisumu ELRC Cause No.282 of 2018- Lucy Atieno Matengo V County Public Service Board, Kisumu County.**

ii. An order that costs of the application be borne by the Respondents

3. The application is premised on the grounds set out on the face of the application, the crux of which is that Hon. Justice Radido delivered Judgment in Kisumu ELRC Cause No.282 of 2018- Lucy Atieno Matengo V County Public Service Board, Kisumu County, wherein he ordered the 2<sup>nd</sup> Respondent to pay the Ex-parte Applicant Kshs. 2,539,120/-, which sum, the 1<sup>st</sup> Respondent has refused to pay in breach of

the court order.

4. The Applicant avers that there is no stay of execution or appeal pending against the said Judgment and that the decision by the Respondents not to pay the Ex-parte Applicant as ordered by the court is in bad faith, irrational, unreasonable and an illegality.
5. The Applicant avers that it is in the interest of justice, fair and expedient in all circumstances of the case that the application be allowed.
6. The application came up for hearing on 19<sup>th</sup> October, 2021. The Respondents did not appear for the hearing and neither did they file a reply in opposition to the application.
7. The Counsel for the Ex-parte Applicant argued that he served the application upon the Respondents on 20<sup>th</sup> September, 2021 and that a return of service together with stamped copies of the application have been filed in court as evidence of service.
8. The Ex-parte Applicant through her counsel urged the court to allow the application as prayed on the grounds on the face of the application and for reason that the application is not opposed.
9. The Judgment subject of the application has been produced as well as a demand letter dated 8<sup>th</sup> June, 2021, directed at the County Executive Member for Finance and Economic Planning of the County Government of Kisumu.

#### **Determination**

10. Section 21 of the Government Proceedings Act, Cap. 40 of the Laws of Kenya, provides an elaborate procedure to be followed in execution of money decrees against government and by extension, county governments. The Section provides as follows in regard to such execution:

***“21(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 required 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.***

***(5) This 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.***

11. It is now settled that before a court issues an order of Mandamus in execution of money decrees against government, the elaborate procedure provided under Section 21 of the Government Proceedings Act and Order 29 of the Civil Procedure Rules, must strictly be adhered to by the party applying for the order. Odunga, J. In the case of ***Permanent Secretary Office of the President Ministry of Internal Security & Another ex parte Nassir Mwachhihi (2014) eKLR*** had this to say on such executions:

***“ . . . . .It must be remembered that an application for an order of Mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the Government Proceedings Act have been complied with in respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for Mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of Mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order...”***

12. It is therefore clear to this court, that for a party to justify the granting of an order of Mandamus such as the one in the instant application, he must show that he has complied with the provisions of Section 21 of the Government Proceedings Act. This law demands strict compliance without which such an order cannot issue.

13. The judicial review application herein, was accompanied with the Judgment subject of the application together with a demand letter directed at the County Executive Committee Member for Finance and economic planning of the county government of Kisumu. The record does not bear a Decree and certificate of costs drawn pursuant to that Judgment and neither was a certificate of order produced before this court. Order 29 Rule 3 of the Civil Procedure Rules provides a procedure for obtaining the Certificate of order for purposes of execution.

14. The law further demands that once a party obtains the Decree and the Certificate of Order, the same must be served upon the party named in the Certificates. The record before this court does not bear evidence of service of the Decree, Certificate of Costs and the Certificate of Order.

15. The court finds and holds that the Ex parte Applicant has not adhered to the requirements of the law, for an order of Mandamus to be availed. The Notice of Motion application dated 15<sup>th</sup> September, 2021 is premature and is hereby dismissed.

16. The application was unopposed, for this reason, I make no orders as to costs.

17. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**CHRISTINE N. BAARI**

**JUDGE**

**APPEARANCE:**

**MR. KIPRONO FOR THE APPLICANT**

**N/A FOR THE RESPONDENTS**

**MS. CHRISTINE OMOLLO – C/A**