



**Abetter v County Government of Busia & 2 others (Environment & Land Case 12 of 2016) [2024] KEELC 13869 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13869 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 12 OF 2016**

**BN OLAO, J  
DECEMBER 19, 2024**

**BETWEEN**

**JOE DAVID ABETTER ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF BUSIA ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF OFFICER – FINANCE COUNTY GOVERNMENT OF  
BUSIA ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER, LANDS HOUSING  
AND URBAN DEVELOPMENT, COUNTY GOVERNMENT OF  
BUSIA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

- One of the most reprehensible acts that a Government can do is to steal from it’s own people. It is criminal, immoral and unjust for a Government to seize the assets of innocent persons, convert such property to their own use while its officials do not even bat an eyelid and have so far fought all attempts to cite them for contempt. The result of such conduct, in this case, is that every time JOE DAVID ABETTER (the Applicant/Decree Holder herein) passes by the MATAYOS HEALTH CENTRE in BUSIA he is torn between shedding tears of joy that his contribution to the community in MATAYOS had led to the establishment of that medical facility or shedding tears of sadness that the then MUNICIPAL COUNCIL of BUSIA, the precursor of the COUNTY GOVERNMENT OF BUSIA (the Respondent/Judgment Debtor), took his land in 2011, agreed to pay him a consideration of Kshs.3,500,000.00, constructed a Health Centre thereon and has refused to compensate him or to vacate therefrom. And all this is happening in the face of a judgment against which no appeal was filed. Talk of man’s inhumanity to man. This is a sad case of a Government’s inhumanity to man.



2. The Applicant/Decree Holder is the registered proprietor of the land parcel NO BUKHAYO/MATAYOS/3644 (the suit land). In 2011, the then MUNICIPAL COUNCIL OF BUSIA agreed to purchase it at a consideration of Kshs.3,500,000.00 for purposes of putting up MATAYOS HEALTH CENTRE. Having done so, however, they reneged on the agreement prompting him to file this suit against the Respondent/Judgment Debtor on 12<sup>th</sup> February 2016 seeking their eviction therefrom unless he is paid the agreed sum of Kshs.3,500,000.00 in full.
3. The Respondent/Judgment Debtor filed a defence in which it described the suit as having been brought in bad faith, incompetent and that it be struck out with costs.
4. The suit was heard by KANIARUJ who, vide a judgment delivered on 19<sup>th</sup> April 2018, found in favour of the Applicant/Decree Holder and ordered the Respondent/Judgment Debtor to compensate him or vacate the suit land. The Respondent/Judgment Debtor promptly filed a Notice of Appeal on 24<sup>th</sup> April 2018. No appeal appears to have been filed or if it was, none has been brought to the attention of this Court. Costs were taxed at Kshs.165,0150.00 and a Decree was extracted. That Decree is yet to be satisfied and the suit land is now valued at Kshs.57,000,000.00.
5. By a Notice of Motion dated 25<sup>th</sup> June 2021, the Applicant/Decree Holder sought an order that the COUNTY SECRETARY BUSIA COUNTY GOVERNMENT and the CHIEF OFFICE MINISTRY OF HEALTH BUSIA COUNTY GOVERNMENT be committed to civil jail for failing to comply with this Court's order to vacate the suit land or pay the sum of Kshs.57,000,000.00. Further, that the Applicant/Decree Holder be provided with security to re-occupy the suit land. That application was opposed. By a ruling delivered on 4<sup>th</sup> August 2022, OMOLLO J found that the application was premature as it should have been preceded with an order of mandamus because the law does not allow execution against the Government unless an order of mandamus has been obtained. The application was accordingly struck out with costs.
6. I now have before me for determination, the Applicant/Decree Holder's Notice of Motion dated 27<sup>th</sup> May 2024. The same is premised under the provisions of Section 5 of the *Judicature Act*, Sections 1A, 1B, 3, and 63(e) of the *Civil Procedure Act* and Article 159(2) (d) of *the Constitution*. The Applicant/Decree Holder seeks the following orders:
  1. Spent.
  2. That the County Executive Committee Member Finance, Busia County and the County Executive Committee Member Lands, Housing and Urban Development Busia do appear in the Court on 4<sup>th</sup> June 2024 to show cause why each should not be committed to civil jail for contempt of Court and in execution of this Court's Decree.
  3. That this Honourable Court do make any such orders as appropriate in the circumstances of the case but not limited to committing them to civil jail only.
  - {4. That costs of this application be provided for.
7. The application is anchored on the grounds set out therein and is supported by the Applicant/Decree Holder's affidavit of even date.
8. The Applicant/Decree Holder's grievance is that he has a Decree from this Court which has not been implemented due to the Respondent/Judgment Debtor's failure to honour it. He has named the County Executive Committee Member Finance and the County Executive Committee Member Lands, Housing and Urban Development as the 1<sup>st</sup> and 2<sup>nd</sup> contemnors respectively. That the Decree was issued way back in April 2018 and despite the budgeting and allocation of funds to settle the



said Decree and a consent entered into in January 2024 whereby the Applicant/Decree Holder was to be paid the sum of Kshs.7,000,000.00 instead of Kshs.49,000,000.00, the said sum is yet to be disbursed. The Applicant/Decree Holder continues to suffer while the Respondent/Judgment Debtor is enjoying the suit land.

9. Annexed to the application are the following documents:
  1. Copy of the Decree.
  2. Copy of a letter dated 2<sup>nd</sup> February 2024 from the Judgment Debtor/Respondent's Attorney and addressed to the 1<sup>st</sup> and 2<sup>nd</sup> contemnors advising payment of the sum of Kshs.7,000,000.00 to the Applicant/Decree Holder.
10. The application is opposed and PETER ODIMA the 2<sup>nd</sup> contemnor filed a replying affidavit dated 4<sup>th</sup> June 2024 in which he has averred, inter alia, that indeed the parties herein had agreed to pursue an amicable settlement over the dispute and the Applicant/Decree Holder voluntarily allowed the Respondent/Judgment Debtor to remain in occupation of the suit land. The Respondent/Judgment Debtor still has the goodwill to continue with the engagement. It is not therefore true that the Court order has been disobeyed.
11. The 2<sup>nd</sup> Contemnor went on to swear another replying affidavit dated 26<sup>th</sup> September 2024 and which is headed AMENDED REPLYING AFFIDAVIT. The law is that an affidavit is evidence. It is not a pleading which is amenable to amendment under Order 8 of the Civil Procedure Rules. What the 2<sup>nd</sup> Contemnor ought to have done was to file a supplementary affidavit but not an amended affidavit. The amended replying affidavit is accordingly struck out from the record.
12. I have considered the Notice of Motion dated 27<sup>th</sup> May 2024, the rival affidavit and annexures thereto as well as the submissions by MR OKUTTA as instructed by the firm of OUMA-OKUTTA & ASSOCIATES ADVOCATES for the Applicant/Decree Holder and by MR WAMBURA legal counsel for the Respondent/Judgment Debtor and contemnors.
13. It is common ground that the Applicant/Decree Holder has a Decree in his favour issued way back in 2019. By his judgment delivered on 19<sup>th</sup> April 2018, KANIARU J ordered the Respondent/Judgment Debtor to compensate the Applicant/Decree Holder for the value of the suit land or vacate the said land. The current value of the suit land has been assessed at Kshs.49,000,000.00 and the parties have reached a consent that the Applicant/Decree Holder be paid the sum of Kshs.7,000,000.00. Costs have been taxed in the sum of Kshs.165,015.00. Regrettably the Decree is yet to be satisfied as at the time of delivering this ruling which is 6 years down the line.
14. This Court notes, however, that by a similar application dated 25<sup>th</sup> June 2021, the Applicant/Decree Holder sought similar orders for the citing for contempt and committal to civil jail of the County Secretary Busia as well as the Chief Officer of Health for failing to pay the Applicant/Decree Holder the sum of Kshs.57,000,000.00 in settlement of the Decree herein. That application was struck out by OMOLLO J vide a ruling delivered on 4<sup>th</sup> August 2022. The Judge was guided by the decision in R.V. OTIENO KAJWANG & ANOTHER EXPARTE MUHUMED SIRAT NBI H.C.C. MISC APPLICATION NO 316 of 2008 wherein ODUNGA J (as he then was) said citing Section 21(4) of the *Government Proceedings Act*:

“The above provision clearly bars individual liability for orders of payment by the Government, Government Department or Government Officer and further bars execution or attachment against the Government. It is my view that where the Government is found



to be liable in civil proceedings, the only mode of realizing the fruits of judgment is by way of an order of mandamus ...” Emphasis mine.

Section 24 (1) of the *Government Proceedings Act* states that:

“Save as provided in this section, no execution or attachment process in the nature thereof shall be issued out of any Court for enforcing payment by the Government of any money or costs, 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.”

And although the provisions of the *Government Proceedings Act* do not expressly refer to the County Government, it is clear from Section 7 of the Sixth Schedule to *the Constitution* (Transition and Consequential Provisions), that the term Government refers to both the National and County Governments. Therefore, execution proceeding at both levels of Government are governed by the provision of the *Government Proceedings Act*. But that is only as regards Civil or Criminal proceedings.

15. What then was the route which the Applicant/Decree Holder ought to have taken in pursuing this claim? The answer was provided by the Court of Appeal in the case of *Five Star Agencies Ltd & Another -v- National Commission & Others Civil Appeal No E290 & 328 Of 2023* (consolidated) 2024 KECA 439 (KLR) where the Court having considered the provisions of Orders 23 Rule 1, Order 29 Rule 2 (C) of the Civil Procedure Rules as well as Sections 21 (3) and (4) of the *Government Proceedings Act* said:

“Having stated the foregoing, and since Decrees will from time be issued against the Government, what then is the option available to a party who holds a Decree against the Government? The only remedy available to such a person is to institute proceedings and seek an order of Mandamus to compel the Government to settle the Decree in question.” Emphasis mine

The Court then went on to cite several other cases including Attorney General & Another Ex-parte Alfred Koroso 2013 Eklr, R V Attorney General & Another Ex-parte Stephen Wanye Rokil 2016 Eklr And Also R V County Secretary Nairobi City County & Another Ex-parte Wachira Nderitu Ngugi & Co. Advocates 2016 eKLR.

16. The Court then proceeded to add as follows at paragraph 91:

“It is clear beyond any peradventure that the procedure to be followed in execution against the Government is to seek an order of Mandamus to compel the relevant person in the Government to settle the Decree in question.” Emphasis mine.

It is clear, therefore, that the Applicant/Decree Holder having approached this Court by way of a plaint, the remedy sought is not available to him.

17. It is also clear that this application is res judicata. A similar application was struck out by OMOLLO J vide a ruling delivered on 4<sup>th</sup> August 2022 against which no appeal was filed. This application is therefore for striking out. Res judicata applies both to suits and applications – Uhuru Highway Development Ltd -v- Central Bank Of Kenya & Others C.A. CIVIL APPLICATION NO 36 of 1996.
18. The above notwithstanding, the Judgement Debtor/Respondent has clearly treated the Applicant/Decree Holder in a very inhuman way. What it has done is tantamount to stealing from its own taxpayer. The law should be used as an enabler of justice. It should not be used as an impediment to



justice. The Decree herein is not in dispute. I also note that vide a letter dated 12<sup>th</sup> September 2023, the Respondent/Decree Holder's Attorney advised it as follows:

“RE: Matayos Land Busia Elc Case No 12 Of 2016 – Joe Abetter -v- County Government Of Busia.

I refer to our telephone conversation on 11<sup>th</sup> September 2023, further to our letter of 14<sup>th</sup> September 2023. We advise that once a decision has been taken to compensate the Plaintiff in line with the options given by the Court in the Decree, you should first undertake valuation of the land (undeveloped) which should be the basis of the compensation amounts.

Hon. Innocent Enoce Omboko

County Attorney

County Government Of Busia.”

One would have imagined that the contents of this letter would have pricked the conscience of the leadership of the Respondent/Judgment Debtor to pay the Applicant/Decree Holder what is due to him. It is unfortunate that one year down the line, following that advise, the debt remains un-paid. While the law deprives this Court of the powers to make any coercive orders against the Respondent/Judgment Debtor or contemnors as sought, I would like to believe that those who run the affairs of the Respondent/Judgment Debtor have a conscience and a heart of mercy. I hope they will look kindly towards the Applicant/Decree Holder and settle his debt.

19. On the issue of costs, the Respondent/Judgment Debtor is not deserving any given the manner in which they have treated and continue to treat the Applicant/Decree Holder.
20. The up-shot of all the above is that the Notice of Motion dated 27<sup>th</sup> May 2024 is struck out with no orders as to costs.

**BOAZ N. OLAO**

**JUDGE**

**19<sup>TH</sup> DECEMBER 2024**

**RULING DATED, SIGNED AND DELIVERED BY WAY OR ELECTRONIC MAIL ON THIS 19<sup>TH</sup> DAY OF DECEMBER 2024.**

**BOAZ N. OLAO**

**JUDGE**

**19<sup>TH</sup> DECEMBER 2024**

