



Republic v County Secretary, the County Government of Mombasa & 2 others; Kalenga (Exparte Applicant); County Government of Mombasa (Interested Party) (Judicial Review Application E018 of 2023) [2025] KEHC 2898 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2898 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E018 OF 2023**

OA SEWE, J

FEBRUARY 27, 2025

IN THE MATTER OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

AND

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012

IN THE MATTER OF MOMBASA CHIEF MAGISTRATE’S COURT CIVIL SUIT NO. 1119 OF 2012 BENARD K. KALENGA V THE COUNTY GOVERNMENT OF MOMBASA

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY SECRETARY, THE COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

THE EXECUTIVE COMMITTEE MEMBER FOR FINANCE, THE COUNTY GOVERNMENT OF MOMBASA 2ND RESPONDENT

THE CHIEF OFFICER, THE COUNTY GOVERNMENT OF MOMBASA 3RD RESPONDENT

AND

BERNARD K KALENGA EXPARTE APPLICANT

AND

THE COUNTY GOVERNMENT OF MOMBASA INTERESTED PARTY



JUDGMENT

1. The ex parte applicant, Benard K. Kalenga, (hereinafter, “the applicant”) filed the Notice of Motion dated 11th December 2023 seeking orders that:
 - (a) The Court be pleased to issue a writ of mandamus against the County Secretary, the County Executive Committee Member for Finance and the Chief Officer of the County Government of Mombasa, compelling them to forthwith satisfy the decree issued in Mombasa Chief Magistrate’s Civil Suit No. 1119 of 2012: Benard K. Kalenga v The County Government of Mombasa.
 - (b) The costs of the application be borne by the respondents.
2. The application was premised on the grounds that the Chief Magistrate, Mombasa, issued a decree against the County Government of Mombasa, the Interested Party herein, in Mombasa CMCC No. 1119 of 2012; and that thereafter, a Certificate of Order was issued and served on the respondents. They further contended that the respondents have failed, refused and/or ignored the said decree, yet they are mandated by law to ensure prompt payment.
3. In his Supporting Affidavit sworn on 11th December 2023, the applicant deposed that the total sum due under the said decree Kshs. 2,088,527/=, comprising the principal amount of Kshs. 1,154,500/=, interest of Kshs. 692,400/= and certified costs plus interest thereon of Kshs. 241,627/=. The applicant annexed to his affidavit, copies of the Decree and Certificate of Order Against the Government, among other documents and prayed that the orders sought by him be granted as prayed.
4. In response to the application, the respondents filed Grounds of Opposition dated 5th February 2024. Their basic contention was that the application offends Section 21 of the [Government Proceedings Act](#) and is inconsistent with Order 29 of the Civil Procedure Rules. The respondents further contended that:
 - (a) That the 1st Respondent is not the head of the treasury and should therefore be discharged from these proceedings.
 - (b) That neither the judgment nor decree was served on the respondents as the primary proceedings were being handled by an external advocate who had not communicated the same.
 - (c) That the application is unfounded, frivolous and vexatious and a waste of the Court’s time.
5. The application was canvassed by way of written submissions, pursuant to the directions given herein on 5th February 2024. Consequently, the applicant filed undated written submissions in which he expounded the applicable law and quoted extensively from the cases of Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security, Ex Parte Fredrick Manoah Egunza [2015] eKLR, Republic v County Secretary, County Government of Mombasa & 2 others, Ex Parte Samuel Mutemi T/A Tudor Paradise [2021] eKLR and Shah v Attorney General (No. 3) [1970] EA 543 to demonstrate that he has fully complied with Section 21 of the [Government Proceedings Act](#), Chapter 40 of the Laws of Kenya and is therefore deserving of an order of Mandamus.
6. On the question as to who is the Accounting Officer of a County Government, the applicant made reference to Council of Governors & others v The Senate [2015] eKLR as well as Republic v County Government of Kitui, Ex Parte Fairplan Systems Limited [2022] eKLR, among other decisions, to demonstrate that the two respondents bear the responsibility for payment for purposes of Section 21



- of the *Government Proceedings Act*. Thus, the applicant urged the Court to find that it has complied with the legal requirements for the issuance of an enforcement order against the Government; and that an order of Mandamus is the most appropriate order to issue under the circumstances.
7. In response to the applicant's written submissions, the respondents relied on their written submissions dated 23rd May 2024. They proposed the following two issues for determination:
 - (a) Whether the ex parte applicant has fulfilled the requirements as per Section 21 of the *Government Proceedings Act*.
 - (b) Whether the County Secretary is an accounting officer for purposes of matters relating to finance.
 8. On whether the applicant has fulfilled the requirements of Section 21 of the *Government Proceedings Act*, the respondents submitted that, for the applicant to succeed, he needed to demonstrate:
 - (a) That a prior demand for performance had been made;
 - (b) That reasonable time to comply with the demand had been given, unless there was outright refusal; and
 - (c) An express or implied refusal through unreasonable delay.
 9. In the respondents' submission, the applicant failed to prove that the Accounting Officer was served with the Certificate of Order Against the Government, Decree or Certificate of Taxation. They relied on Republic v County Secretary, Nairobi City County & another, Ex Parte Tom Ojienda & Associates [2019] eKLR to buttress their assertion that, in the instant matter, there is no proof at all that a prior demand for payment was made or that there has been unreasonable delay to comply therewith.
 10. On the authority of Abdalla A. Hassan v County Government of Mombasa [2020] eKLR, the respondents submitted that Mandamus is a discretionary remedy which the Court may refuse to grant even when the requisite grounds for it exist. They added that the Court had to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining.
 11. On whether the County Secretary is an accounting officer, the respondents placed reliance on Sections 103 and 104 of the *Public Finance Management Act*, No. 18 of 2012, which establish and set out the responsibilities and powers of a County Treasury. In their view, the County Secretary has no role when it comes to matters regarding finances. They relied on Republic v County Secretary, Nairobi City County & another, Ex Parte Mohamed Tariq Khan [2017] eKLR for the proposition that it would be improper and irregular to have the County Secretary and the Chief Officer Finance compelled to pay in the circumstances. They accordingly prayed for the dismissal of the Notice of Motion dated 11th December 2023 with costs.
 12. In the light of the foregoing, the following issues arise for determination:
 - (a) Whether the County Secretary is an Accounting Officer of the County Government of Mombasa.
 - (b) Whether the applicant has satisfied the requirements of Section 21 of the *Government Proceedings Act* as read with Order 29 of the Civil Procedure Rules; and,
 - (c) Whether the orders sought ought to issue.



A. On whether the County Secretary is a proper party to these proceedings:

13. Section 21 of the [Government Proceedings Act](#) provides:

- (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 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.

- (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.

14. The question to pose then, is who is the Accounting Officer for the County Government of Mombasa? In this regard, Section 103 of the [Public Finance Management Act](#), provides:

- (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 financial and fiscal matters.



- (3) The County Executive Committee member for finance shall be the head of the County Treasury.
15. From the foregoing provision, it is plain that the Accounting Officer is the County Executive Committee Member for Finance, unless otherwise demonstrated. I find succor in the decision reached in *Republic v County Secretary, Nairobi City County & Chief Officer, Finance/Nairobi City County Treasurer ex-parte Mohamed Tariq Khan (supra)* in which the court held: -
8. It must however be remembered always that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In this case the Respondent ought to have been the Accounting Officer who is the County Executive Member for Finance.
9. However, as this is merely a misjoinder the same ought not to be fatal to the application though the Court may in exercise of its discretion deny the applicant, even if successful, costs of the application. An issue as to the effect of misjoinder in judicial proceedings was the subject of determination in *Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005* in which the Court of Appeal stated:
- “Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.
[Emphasis added].
10. This was the position adopted in *Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute Nairobi H.C. Misc. Appl. No. 594 of 2002 [2003] KLR 582*, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation. This position is even more relevant to proceedings in the nature of judicial review which are neither criminal nor civil and particularly in application for mandamus where what is sought is the enforcement of a decree against the respondent not in his personal capacity but in his official capacity. In such circumstances, the respondent is simply being compelled to facilitate the payment as opposed to imposing personal liability.
11. It is therefore my view that whereas misjoinder or non-joinder may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed where the substance of the reliefs sought can still be realised notwithstanding the irregularity.
12. Article 159(2)(d) of *the Constitution* enjoins this Court to administer justice without undue regard to technicalities of procedure, as long as the rules of natural justice are adhered to. At the end of the day the entity which is bound to settle the decree is the County Government and not the said officer in his personal capacity.
16. I am in full agreement. It is manifest therefore that, although the County Secretary and the Chief Officer, Finance, were wrongly impleaded, that of itself, is not fatal to the suit.



B. Whether the applicant has satisfied the requirements of Section 21 of the Government Proceedings Act as read with Order 29 of the Civil Procedure Rules:

17. The respondents were of the posturing that the applicant has not served the accounting officer with a Certificate of Order against the government as required under Section 21 of the Government Proceedings Act. For its full tenor and effect Sub-sections (1) and (2) of the Government Proceedings Act are hereby reiterated:

(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 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.

(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:

18. Order 29 Rule 3 of the Civil Procedure Rules, is also pertinent as it outlines the process for applying for a certificate under Section 21 of the Government Proceedings Act, stating as follows:

“Any application for a certificate under section 21 of the Government Proceedings Act (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and such certificate shall be in one of form Nos. 22 and 23 of Appendix A with such variation as circumstances may require.”

19. In connection with the above provisions, it was held in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza* (supra) that:

“...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....”

20. I have keenly scrutinized the documents annexed by the applicant and noted that the Certificate of Order against the Government dated 29th May 2023 was exhibited as annexure “B”. The said Certificate was served on the respondents and an Affidavit of Service to that effect was produced as annexure “D”. The affidavit was sworn by one Joseph Wamweya Ngugi on the 2nd June 2023 and it shows that service was done on the 2nd June 2023. I am therefore satisfied that the applicant complied with the provisions of Section 21 of the Government Proceedings Act. In particular, the applicant has demonstrated that:
- (a) A prior demand for payment had been made;
 - (b) Reasonable time to comply with the demand had been given; and
 - (c) There is implied refusal to pay through unreasonable delay.

C. On whether the orders sought ought to issue:

21. Needless to say, that Mandamus is a relief under Judicial Review available to litigants under Article 23(3)(f) of the Constitution and Order 53 of the Civil Procedure Rules. It is particularly efficacious in situations where a Decree or Certificate of Costs has been issued against the Government. This was well-explicated by Hon. Githua, J. in Republic V Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza (Miscellaneous Application 31 of 2012) [2012] KEHC 1643 (KLR) (25 September 2012), as follows:

“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...”

22. In Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another [2018] eKLR, Hon. Mativo, J. (as he then was) held: -

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), and, was also discussed in Dragan vs. Canada (Minister of Citizenship and Immigration). 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.
23. Similarly, in the case of Republic v the Attorney General & Another, Ex parte James Alfred Keroso [2013] eKLR the court held that: -

“...Unless something is done, he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of *the Constitution* which enjoins the state to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya...”

24. In the result, it is my finding that the application dated 11th December 2023 has merit and is allowed. Orders are hereby granted in respect thereof as follows:
- (a) An order of Mandamus be and is hereby issued directed to the County Executive Committee Member of Finance to pay to the Ex parte Applicant the sum of Kshs. 2,088,927.20 being the decretal amount in Mombasa CMCC Civil Suit No. 1119 of 2012.
 - (b) The costs of the application are hereby awarded to the applicant to be borne by the Interested Party.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY 2025

OLGA SEWE

JUDGE

