



**Republic v Attorney General & another; Small Wonder Limited (Exparte)
 (Environment and Land Judicial Review Miscellaneous Application
 3 of 2022) [2023] KEELC 15702 (KLR) (20 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15702 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT MALINDI
 ENVIRONMENT AND LAND JUDICIAL REVIEW
 MISCELLANEOUS APPLICATION 3 OF 2022
 MAO ODENY, J
 FEBRUARY 20, 2023
 IN THE MATTER OF: AN APPLICATION FOR THE
 JUDICIAL REVIEW ORDERS OF MANDAMUS**

BETWEEN

REPUBLIC APPLICANT

AND

**THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT
 THE PRINCIPAL SECRETARY, MINISTRY OF LANDS AND PHYSICAL
 PLANNING 2ND RESPONDENT**

AND

SMALL WONDER LIMITED EXPARTE

JUDGMENT

1. By a Chamber Summons dated January 20, 2022 the *ex parte* applicant sought for the following orders;
 - a. That this honourable court be and hereby pleased to issue an order of *mandamus* compelling the Principal Secretary Ministry of lands and planning, Dr Nicholas Muraguri, CBS or any other officer appointed to occupy the office of Principal Secretary, Ministry of Lands and Physical Planning to pay or settle Kshs 332,817,175.60 being the sum of the decretal amount and costs payable pursuant to the decree issued by this honourable court on 8/02/2019



in Malindi ELC 270 of 2017 (Formerly Nairobi HCCC 918 of 2022) Small Wonder Limited V The Honourable Attorney General; and

- b. The Respondents be ordered to bear the costs of this suit.
2. The application is premised on the sworn affidavit of Renato Pieia a director of the *ex parte* Applicant company who deponed that the *ex parte* Applicant was the registered owner of plot No 644 comprised in Grant No CR 20175 measuring approximately 8.677 hectares which property was taken away by the Commissioner of Lands and converted to the Registered Land registration scheme which the Commissioner then allotted third parties to the exclusion of the *ex parte* Applicant.
3. The *ex parte* Applicant stated that it commenced civil proceedings in Malindi ELC No 270 of 2016 (Formerly Milimani HCCC No 918 of 2002) *Small Wonder Limited v Attorney General* seeking a declaration that its rights to the said property had been infringed, general damages, special damages, exemplary damages, interests and costs of this suit.
4. It was the Applicant's case that a Judgment was delivered by this Honourable court on February 8, 2019 against the Respondents herein and the *ex parte* Applicant was awarded Kshs 325,000,000/-, special damages of Kshs 1,457,063/- and costs of the suit.
5. The Applicant stated that soon after judgment was delivered, it obtained a copy of the judgment, decree and certificate of order against the government dated March 19, 2019 which were served upon the Respondents. Further, the *ex parte* Applicant had party and party costs taxed by the Deputy Registrar at Kshs 6,360,112.60/- and a certificate of costs was also served upon the Respondents and despite numerous reminders, the Respondents have deliberately failed to pay the damages and costs without any explanation thus the instant application.
6. The Respondents filed grounds of opposition dated March 4, 2022 stating that the application is fatally defective, incompetent and bad in law in that the *ex parte* Applicant has not presented the proper documents to make a claim for payment of the stated decretal amount and has not exhausted the procedure required by law. Further that the *ex parte* Applicant has not complied with Section 21 of the *Government Proceedings Act*, Cap 40.
7. Counsel agreed to canvas the application vide written submissions which were duly filed.
8. Counsel for the *ex parte* Applicant submitted that the 1st Respondent was sued as the Chief Legal Adviser to the National government and the officer required to represent the National government in court or other legal proceedings to which the National government is a party under Article 156 (4) of the *Constitution*.
9. Counsel relied on the case of *Republic v Attorney General & Another ex parte James Alfred Koroso* Nairobi HC JR Misc Application No 44 of 2012 [2013] eKLR. Counsel also stated that even if the 1st Respondent was wrongly joined in these proceedings; such misjoinder does not go into the root or substance of these proceedings.
10. Mr. Wambua submitted the *ex parte* Applicant has complied with the provisions of Section 21 of the *Government Proceedings Act* having obtained the decree issued by this court and a certificate of order against the government.
11. On the issue of costs, counsel submitted that the court has the discretion to determine who should bear the costs of a suit and that in this case the Respondents should bear the costs of these proceedings since this suit was filed as a result of the 2nd Respondent's failure to comply with its statutory duty to comply with the decree of the court.



12. Counsel for the Respondents submitted that the decree holder has been serving different certificate of costs with different decretal sum figures without explanation as to the variance.
13. Mr. Ojwang submitted that the judgment and decree of this Honourable are not disputed and that what is disputed is the procedure by which the *ex parte* Applicant is following to claim the amount owed.

Analysis and Determination

14. The issues for determination are whether the *ex parte* Applicant has complied with the provisions of the [Government Proceedings Act](#) and who should bear the costs of these proceedings?
15. In the case of [Republic v County Secretary Migori County Government & another](#) [2019] eKLR the Court held: -

“in dealing with the application I have to address my mind to the procedure to be followed in execution of money decrees against government. It is settled that before an order of *mandamus* is issued the elaborate procedure provided for under Section 21 of the [Government Proceedings Act](#), Cap. 40 of the Laws of Kenya (hereinafter referred to as ‘the Act’) and Order 29 of the Civil Procedure Rules must be strictly complied with.”

16. Section 21 (1) of the [Act](#) provides: -

“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.”

17. Further Section 21 (3) of the said [Act](#) provides:

“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.”



18. In the case of *Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza* [2012] eKLR the court held that: -

“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.”

19. I have considered the documents annexed to the *ex parte* Applicant’s supporting affidavit sworn on January 20, 2022 and I am satisfied that the *ex parte* Applicant has met the requirements of section 21 of the *Government Proceedings Act*, and is consistent with Order 29 of the *Civil Procedure Rules 2010*.
20. The applicant has demonstrated that he has a judgment against the 2nd respondent which the respondents have failed to satisfy and it is only fair that the Respondents be compelled to perform their duty and pay the *ex parte* applicant together with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF FEBRUARY, 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this judgment has been delivered online to the last known email address thereby waiving order 21 [1] of the *Civil Procedure Rules*.

