



Republic v County Secretary Narok County Government & 3 others; Mwavali (Exparte Applicant) (Judicial Review E002 of 2023) [2024] KEHC 5408 (KLR) (29 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5408 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
JUDICIAL REVIEW E002 OF 2023**

**F GIKONYO, J
APRIL 29, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY SECRETARY NAROK COUNTY GOVERNMENT ... 1ST
RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE & ECONOMIC
PLANNING NAROK COUNTY GOVERNMENT 2ND RESPONDENT**

**CHIEF OFFICER FINANCE & ECONOMIC PLANNING NAROK COUNTY
GOVERNMENT 3RD RESPONDENT**

NAROK COUNTY GOVERNMENT 4TH RESPONDENT

AND

WYCLIFFE ODARI MWAVALI EXPARTE APPLICANT

JUDGMENT

1. Before this court for determination is the Ex parte applicant’s Notice of Motion dated 20/07/2023 seeking the following orders;
 - i. That this honourable court be pleased to issue an order of mandamus compelling the respondents herein to satisfy the decretal sum of Kshs. 25,898,707/= in Narok High Court Civil Case No. 2 of 2021 and accrued interest thereon at the court rate from 16/03/2023 until payment in full.
 - ii. That the costs of this application be provided for.



2. The application is based on the grounds set out in the application and the supporting affidavit of Wycliffe Odari Mwavali sworn on 20/07/2023.
3. The applicant continues to suffer despite having litigated in narok high court civil case no. 2 of 2021 for 10 years since the matter started in the high court at Kericho on 23/01/2023.
4. The ex parte applicant argues that in the interest of justice, the respondents be compelled to satisfy the decretal sum and accrued interest thereon at the court rate from 16/03/2023 when the judgment was delivered until payment in full.
5. The ex parte applicant contends that the respondents would not be prejudiced by an order compelling them to satisfy the decretal sum.
6. The ex parte applicant contends that unless an order of mandamus is granted the ex parte applicant will be greatly prejudiced from enjoying the fruits of judgment and costs awarded to him by this court on 16/03/2023.

Respondent's response

7. The respondents have opposed the application vide replying affidavit sworn on 06/11/2023 by John Mayiani Tuya. the respondents deponed that the ex parte applicant had not sought leave from this court under the law before filing the instant application.
8. The respondents contend that the ex parte applicant has not satisfied the condition precedent stipulated in sections 21(1) and (2) of the *Government Proceedings Act*. The applicant has not obtained a certificate of order against the government for a decretal amount. Instead, all that has been attached is a decree and proof of service of the same. if at all a certificate order was obtained there is no proof of service.
9. The respondents requested for an opportunity to audit their books before making payments due to several claims lodged against them.
10. The respondents contend that the ex parte applicant has not satisfied the conditions set by the law to be granted an order of mandamus and as such the application is premature and should be dismissed with costs.

Background of this case

11. The ex-parte applicant was severely injured in an accident that occurred on 25/08/2011 and left for dead by the roadside. Good Samaritans took the ex-parte applicant to the hospital. The driver of the accident vehicle reported a non-injury accident. A proper report was made at Bomet police station a year later after the ex-parte applicant was released from the hospital.
12. The matter was filed at Kericho and later transferred to narok by consent of the parties. The ex parte applicant prosecuted his case vide Narok High Court civil case no. 2 of 2021 between the years 2014 and 2017 before Lady Justice Meoli. The county government after failing to prosecute its case entered consent judgment on 20/11/2017. The county government then refused to pay the amount agreed by the parties and had the consent judgment set aside. This court decided to hear the matter afresh.
13. On 16/03/2023 this court delivered its judgment in favour of the ex parte applicant against the 4th respondent. The ex-parte applicant was awarded a sum of Kshs. 25,898,707/= and costs of the suit. The decree of the same was issued on 26/04/2023. The decree was served upon the 4th respondent on 30/05/2023.



14. The ex parte applicant has alleged that the 4th respondent has not satisfied the decree despite being served.
15. The 4th respondent filed an application for a stay of execution of the judgment in favour of the applicant on or about 12/06/2023 but the high court in Naivasha declined to entertain the application and awarded the ex parte applicant further costs.

Directions of the court

16. The application was canvassed by way of written submissions. The ex-parte applicant has filed. The respondents have not filed.

The ex parte applicant's submissions

17. The ex parte applicant submitted that the issue, in this case, is the duty to pay a debt already decreed by a competent court of law to be due and payable by the county government to the ex parte applicant. Therefore, it is in the interest of justice that the respondents be compelled to satisfy the decretal sum of kshs. 25,898,707/= in narok high court civil case no. 2 of 2021 and accrued interest thereon at the court rate from 16/03/2023 when the judgment was delivered until payment in full.
18. The ex parte applicant submitted that he is deserving of the orders sought. He urged this court that the application dated 20/07/2023 is merited and the same be allowed in its entirety as prayed with costs to the ex parte applicant.
19. The ex parte applicant has relied on the cases of Republic V Kenya National Examination Council Ex parte Githenji And 9 Others, Republic Vs The Attorney General & Nother Ex parte James Alfred Koroso, Republic Vs Permanent Secretary Ministry Of State For Provincial Administration And Internal Security [2012], Section 103 Of The *Public Finance Management Act* No. 18 Of 2012, Republic Vs Principal Secretary Ministry Of Defense & Another Ex parte David Giatu Njau & 9 Others, High Court Judicial Review Miscellaneous Application No. 44 Of 2012 Between; Republic Vs The Attorney General & Another Ex parte James Alfred Koroso.

Analysis And Determination

20. This court has considered the ex parte Applicant's application, supporting affidavit, replying affidavit, and the ex parte applicant's submissions. This court is guided by the holding of the Court of Appeal on the nature of the remedy of mandamus in its decision in Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others, [1997] e KLR , that:

“... What is the scope and efficacy of an Order Of Mandamus” Once again we turn to Halsbury's Law Of England, 4th Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says: -

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”



At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean” They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed....”

21. The requirements for an order of mandamus to issue were further explained by Mativo J (as he then was). in *Republic vs Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another* [2018] eKLR as follows:

“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)*, [23] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. [24] 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

22. It is not in dispute that judgment was entered in favour of the Ex parte Applicants and against the County Government of Naok in Narok Civil case No. 2 of 2021. It is not also in dispute that the decree therein has not been satisfied.
23. The question is whether the court should compel the County Government of Narok through an order of mandamus to satisfy the decree.



Issues

24. The legal issues appertaining to the issuance of an order of mandamus are to do with: i) the Respondent's public duty and obligation to satisfy the decree; and ii) whether the ex parte Applicant is entitled to the relief he seeks.

Duty to pay

25. Section 21 of the *Government Proceedings Act* provides for requirements necessary in the payment of, and the duty to satisfy money decrees in civil proceedings by the government as follows:

- (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.”
26. After any order (including an order for costs) is made by a court in favour of any person against the Government, the court shall, on an application in that behalf made by or on behalf of the decree-holder at any time after the expiration of twenty-one days from the date of the order or taxation of costs, issue to that person a certificate in the prescribed form containing particulars of the order. This is what is commonly known as certificate of order.
27. This special procedure is a legal tool which serves a useful purpose and recognizes; on the one hand, the right of the decree-holder to the satisfaction of the decree; and on the other, the obligation of the



government to satisfy the decree, yet, considering the functioning of government especially in public financial management and expenditure of public funds, to yield strict accountability on the use of public funds.

28. As an existing law, the importance of the provision should be seen within the main objects of public finance management to ensure that; i) public finances are managed at both the national and county levels of government in accordance with the principles set out in *the Constitution*; and ii) public officers who are given responsibility for managing public finances are accountable to the public for the management of those funds through Parliament and County Assemblies. See section 3 of the *Public Finance Management Act*.
29. In that thinking, caution is advised not to quickly diminish or write-off the efficacious utility of section 21 of the Civil Procedure Rules on perceived 'special treatment' of government as a party in a suit. The constitutional and legal principles on Public Finance Management; and responsibilities for and accountability by government-national and county- thereto, should inform the important debate on this subject.
30. Narok County is one of the Counties established by Article 6 of *the Constitution* and the First Schedule to *the Constitution* and is constitutionally recognized as a distinct government level of government by the said Article. In addition, the definition of "Government" in the *Government Proceedings Act* refers to the "Government of Kenya". In this respect, this court adopts the holding by Odunga J. in *Republic v Attorney General & another ex-parte Stephen Wanyee Roki* [2016] eKLR as regards the application of the *Government Proceedings Act* to County Governments:

“20 Although the provisions of the *Government Proceedings Act* do not expressly refer to County Governments, section 7 of the Sixth Schedule to *the Constitution* (Transitional and Consequential Provisions) provides that:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

21. It follows that the provisions of the *Government Proceedings Act*, a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with *the Constitution*. One such construction would be the reality that Government is now at two levels and Article 189(1)(a) of *the Constitution* requires that the Constitutional status and institutions of government at both the National and County levels be respected. In my view such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to execution proceedings.”
31. The Respondent herein is under a duty to pay the decretal sum herein. However, the respondent has argued that, the county government is obliged to adhere to budget requirements to pay such debts from public funds. They stated that a certificate of order was not issued, to the ex parte applicant, yet, it is the legal tool that invokes public financial processes and systems towards satisfaction of the decree.
32. Certificate of order has not been issued in these proceedings.
33. Mandamus is normally issued when an officer or an authority by compulsion of law or statute is required to perform a duty, and that duty, despite demand in writing, has not been performed.
34. Mandamus is one of the methods of execution against government. However, it is appropriate, and in line with the submissions by the respondent, that the Ex parte applicant obtains and serves certificate



of order upon the respondent first requiring payment of the decretal sum. And, if the decretal sum is not paid as per the law, the Ex parte applicant is at liberty to seek for an order of mandamus.

35. To avoid any further delay, the court hereby issues a certificate of order, to be drawn in accordance with the prescribed form.
36. Given the result of the case, each party shall bear own costs.
37. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 29TH DAY OF APRIL, 2024.

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HON. F. GIKONYO M.

JUDGE

In the presence of:

Kiprono for Ms. Muigai for Ex parte Applicant

Osongo for Maina Ngaruiya Respondent

Mr. Otolo - C/A

