



Republic v County Secretary, The County Government of Bungoma & 5 others; Kenya County Government Workers Union Bungoma County Branch (Ex parte Applicant) (Judicial Review E001 of 2022) [2022] KEELRC 3869 (KLR) (7 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 3869 (KLR)

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
JUDICIAL REVIEW E001 OF 2022**

JW KELI, J

JULY 7, 2022

N THE MATTER OF: ORDERS 53 OF THE CIVIL PROCEDURE RULES

**IN THE MATTER OF: AN APPLICATION BY KENYA COUNTY
GOVERNMENT WORKERS UNION BUNGOMA COUNTY BRANCH FOR
JUDICIAL REVIEW ORDERS OF MANDAMUS.**

**IN THE MATTER OF: A JUDGEMENT DELIVERED ON 13TH MAY 2020 IN
FAVOUR OF THE EX PARTE APPLICANT IN BUNGOMA EMPLOYMENT
AND LABOUR RELATIONS COURT CONSTITUTIONAL PETITION NO. 1
OF 2019 AS AGAINST THE BUNGOMA COUNTY PUBLIC SERVICE
BOARD AND COUNTY GOVERNMENT OF BUNGOMA.**

**IN THE MATTER OF: THE TRANSITION TO DEVOLVED GOVERNMENT
ACT NO. 1 OF 2012**

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT

**IN THE MATTER OF: THE COUNTY GOVERNMENT PUBLIC FINANCE
MANAGEMENT ACT**

IN THE MATTER OF: THE SECTION 8 & 9 OF THE LAW REFORM ACT

**IN THE MATTER OF: SECTION 23 (3) (E) OF THE INTERPRETATION
AND GENERAL PROVISIONS ACT, CAP 2 LAWS OF KENYA**

BETWEEN

REPUBLIC APPLICANT

AND



**COUNTY SECRETARY, THE COUNTY GOVERNMENT OF
BUNGOMA 1ST RESPONDENT**

SECRETARY COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

**COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE COUNTY
GOVERNMENT OF BUNGOMA 3RD RESPONDENT**

**THE CHIEF OFFICER IN CHARGE OF FINANCE COUNTY GOVERNMENT
OF BUNGOMA 4TH RESPONDENT**

**THE GOVERNOR, COUNTY GOVERNMENT OF BUNGOMA 5TH
RESPONDENT**

COUNTY GOVERNMENT OF BUNGOMA 6TH RESPONDENT

AND

**KENYA COUNTY GOVERNMENT WORKERS UNION BUNGOMA COUNTY
BRANCH EXPARTE APPLICANT**

JUDGMENT

1. Pursuant to leave of the Court granted on the March 22, 2022, the *Ex parte* Applicant moved this court by way of Notice of Motion Application dated March 25, 2022, brought under Order 53 Rule 3 of the *Civil Procedure Rules* and Section 8 and 9 of the *Law Reforms Act* seeking:-
 - a. An order of Mandamus be issued compelling the Respondents to comply with the decree issued in the Bungoma Employment and Labour Relations Court Constitutional Petition No 1 of 2019 delivered on May 5, 2020 in the following terms: -
 - i. The court do hereby declare that the continued employment of the listed 463 grievant / members of the Petitioner by the Respondents on the casual basis is a violation of Section 5, 35 and 37 of the *Employment Act* Cap 11 of 2007 and violates Articles 27,28,41 and 232 of the *Constitution* of Kenya 2010.
 - ii. The Court do hereby directs the Respondent to place all the affected employees, referenced to above on payroll and apply to each one of them the minimum terms and conditions of service as provided under parts 11,111,IV, V and VI of the *Employment Act* No 11 OF 2007.
 - iii. The Respondents be and hereby ordered to compute file and pay arrears salary due and owing to all the grievants named in the Petition under their employment within 60 days.
 - iv. Cost of this petition do follow the event.”.
 - v. That the above orders made in favour of the Petitioner /Decree holder pursuant of the said Judgement together with costs which have been assessed and certified by the court at Kshs 303,710/- is due for execution and payable on the said order and costs for 30th day of October 2020 until the date of payment and full execution”
2. The costs of the suit be born by the Respondents.



3. The Application is premised on the following grounds:-
 - a. The Respondents having been served with Decree, Certificate of costs, demand notices and several reminders and certificate of order of costs have deliberately refused to honour orders of the Court 3 year down the road since the decree was issued.
4. That the Respondents being the County Government as well as Government Officers respectively are immune to normal execution save by way of mandamus proceedings.
5. That the *ex parte* Applicant's members that are 463 members are suffering because of the stiff nakedness of the Respondents, that they have not received any single cent from the Respondents and it is in the interest of justice that the Order of Mandamus be issued.

The Respondents' Response

6. The Respondents were served but only the 2nd Respondent entered appearance through the law firm of Nyikulu Shifwoka & Co Advocates and filed a replying affidavit sworn by Makata S Joseph, its Secretary on the May 11, 2022.
7. The 2nd Respondent avers that it was notified of the decree issued in Bungoma ELRC Petition No 1 of 2019 a matter which it was unaware of and its presentation. (The Court notes from the judgment of the court dated May 13, 2020, the 2nd Respondent was the 1st Respondent in the Petition and the Respondents were represented by Mr Orlando in the suit. Their defence is also reflected in the judgment).
8. The 2nd Respondent avers that it was notified of the decree vide letter dated June 16, 2020 and upon deliberations wrote to the counsel for *Ex parte* Applicant providing a road map on how to proceed with the compliance of the court order ('MSJ - 1'). That the Advocates for the Decree -Holder responded protesting the suggested road map and instead insisting on their preferred approach to compliance ('MSJ 3'). That the response created an impasse.
9. That the emergence of Corona virus disease led to down scaling of most non – essential services and functions of government, all efforts towards addressing the impasse and complying with the Court Order were thwarted all eventuality beyond the control of the Board. The affidavit states upon return to normally the Board had a meeting with the Representative of the union and agreed the way forward in intended compliance. That the CEC finance and economic planning has indicated there is only funds to employ on permanent basis 80 vacancies and not 463 who have no budgetary allocation.
10. That while it is the role of the County Public Service Board to recruit staff for the County Government of Bungoma the same is undertaken with other agencies of the County Government to ensure seamless operation between employment and allocation of financial resources. In essence, the 2nd Respondent attributes the non- compliance with the Court Order to lack of budgetary allocation. That budgetary allocation and management of payroll is under the County Government.
11. The 2nd Respondent calls for phased absorption into the County Public Service.
12. The 2 Respondent opinies that the order sought being equitable it would be against the principles of equity and the law in the Order being issued against such party as the 2nd Respondent and in such circumstances that present an undue hardship in performance without the complementarity of other organs of the County Government as presented in 1st, 3rd, 4th, 5th and 6th Respondents.



13. The Application is canvassed by way of written submissions. The *Ex parte* Applicant's written submissions are dated April 27, 2022 and filed in court on the April 27, 2022. The 2nd Respondents written submissions are dated May 11, 2022 and filed in court on the May 11, 2022.

Determination

Whether the application for judicial review is meritorious.

14. The facts under the Application are not in dispute to effect that the *ex parte* Applicant is a Decree Holder of a court Order directing the employment of 463 casuals who are its members on permanent and pensionable basis. It is not in dispute that the said Decree has not been complied with going by the affidavit of the Secretary of the 2nd Respondent filed in response to the application.

15. The Application seeks the order of Mandamus to compel compliance with the Decree of the court by the Respondents.

What is the nature of the order of Mandamus?

16. The order is described in decision by Mativo J in *Republic Vs Principal Secretary, Ministry of Internal Security & another Ex parte Schon Noorani & another* (2018) eKLR as follows:- "2) mandamus is a judicial command requiring the performance of a specified duty which has not been performed (26) Mandamus is employed to compel performance, when refused, of ministerial duty, this its chief use. It is also employed to compel action, when refused, in matters involving Judgment and discretion but not to direct the exercise for judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either. The Jurisdiction of court in the Judicial Review application is limited. Judicial review is about the decision-making process and not the merit of the decision.'

17. The Courts agrees with the position taken by Justice Mativo (*supra*) at paragraph 11 that the role of the court in Judicial review is supervisory. It is not an appeal. In exercise of Judicial review jurisdiction this court cannot purport to review or upset the decision rendered by court of equal jurisdiction.

18. The 2nd Respondent raises grounds which invite the court to review the merit of the decision of court on basis of hardship of budgetary allocation. Contrary to averment of the 2nd Respondent, the Bungoma County Public Service Board was the 1st Respondent in the suit hence had opportunity to raise issue of budgetary allocation issues and the stated hardship in compliance with the orders. The 2nd Respondent did not apply for review of the judgment or even appeal. I decline the invitation to consider the said alleged reasons for the non- compliance with the lawful order of the court under this application.

Whether the *ex parte* Applicant has established grounds for this court to issue order of mandamus

19. The *ex parte* Applicant has submitted that the Respondents are County Government and its officials hence the execution under the *Civil Procedure Rules* does not apply. The *ex parte* Applicant relied on the case of *Republic vs County Government of Nairobi & 2 others* to the effect that execution of decrees against government must be in accordance with the provision of the *Government procedure Act* with Section 21 (4) of the Act prohibiting execution /attachment against government for reinforcement of payment of any money or costs.

20. The *ex parte* Applicant further submits on the question whether the County Government is the Government for the purposes of the *Government proceedings Act* and relies on the decision of Odinga



J in *Republic vs Ag & Another Ex parte Stephen Wanyee Rule* (2016) eKLR where the Judge found the County Government through not provided for expressly under the *Government proceedings Act*, Section 7 of the Sixth schedule to the *Constitution* applies and the Act should be construed to apply to the two types of governments in Kenya.

21. Section 21 of the *Government Proceedings Act* lays the procedure for execution against Government in summary being the decree holder to make application anytime after the expiration of 21 days from the date of the order or after costs have been taxed for issuance of certificate in the prescribed form containing the particulars of the order provided that if the court so directs, a separate certificate shall be issued with respect of the costs ordered to be paid to the Applicant. Section 21 (3) of the Act provides that if the order provides for payment of any money or otherwise or of any costs the certificate shall state the amount so payable and the accounting officer for the government department concerned shall pay the person entitled or to his advocate the amount appearing in the certificate to be due to him together with interest, if any lawfully due thereon.
22. The *ex parte* Applicant avers that the Respondents were served with the decree orders, certificate of cost and certificate of costs against the government. The decree and certificate of order against the County Government under order 29 Rule 3 *Civil Procedure Rules* (cap 21) dated February 17, 2022 was received by the County Government of Bungoma on February 23, 2022 and the service is also admitted by the 2nd Respondent.

Who is then the accounting officer of the County Government.

23. In *Council of Governors & others vs The Senate* Petition No 413 of 2014 -2015 eKLR the court relied on the provisions of Section 148 of the *Public Finance Management Act* and held that the Governor under Section 30 (3) (f) of the *County Government Act* is the Chief Executive officer and the buck stops with him (or her) in the Management of County Resources.
24. The *ex parte* Applicant submits all the Respondents are properly joined in the Application and are responsible for compliance with the decree of the court. The court notes the respondents in the suit leading to the Decree were the 2nd Respondent and 6th Respondent only. The other respondents in the instant suit are officials of the Respondents.
25. The 2nd Respondent submits that the application has not met the requirement of administrative unfairness and illegality and/ or outright and deliberate contravention of the law. The Court holds that mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty including compliances with court orders.
26. The court is persuaded by the decision of Mativo J (*supra*) cited by 2nd Respondent where in paragraph 24 agreed with the test of mandamus as set out in *Apotex Inc vs Canada(Attorney General)* (23) the court set out the 8 factors that must be present for the wright of mandamus to issue being:-
 - 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 the duty, meaning that:-
 - a. The Applicants have satisfied all conditions precedent, and
 - b. There must have been a prior demand for performance. – An express refusal or implied refusal through unreasonable day
 - c. No other adequate remedy is available to the Applicants



- d. The order sought must be of some practical value or effect .
- e. There is no equitable bar to the relief sought
- f. On a balance of convenience, mandamus must lies”

27. In the instant case the Respondent owed a public duty to the *ex parte* Applicant to comply with the court Decree Order. This has not been denied. Instead the 2nd Respondent has advanced reasons which are not helpful in the Application. The court finds that the *ex parte* Applicant has satisfied all the conditions precedent as set out in the *Apotex inc. Case (supra)* and also under the Government Proceedings Act . The *Ex parte* Applicant served upon the County Government the decree order and the Certificate order as required by the law. The *Ex parte* Applicant made demand for compliance. All these are not denied. The certificate was served on February 28, 2022. There is non-compliance despite reasonable notice. The 2nd Respondent has admitted to non-compliance and appears to pass the burden to the County Government for non – availability of budgetary allocation.

28. The County Government was a party to the suit and despite service with the Application did not file response. The court finds express refusal to comply with the decree of court.

29. The court finds that there is no alternative adequate remedy available to the *ex parte* Applicant. It is not possible to execute against Government. The order sought is of practical value and effect. There is no equitable bar to the relief sought and it is evident that on balance of probabilities the Order of Mandamus should lie.

30. On the test of reasonable notice, the Decree Order was issued on the May 13, 2022 and served on June 2, 2022. The Certificate of Order against Government was issued the February 17, 2022, various correspondences or compliance were exchanged in 2020 . No payment was done or compliance on the placement on payroll. The Respondent did not appeal or file for review of the judgment by Justice Nderi Nduma.

31. The court finds there has been reasonable notice and willful refusal to comply. The Respondent did not attempt even to comply with one of the orders under the decree.

32. The 2nd Respondent submits that the Order of Mandamus cannot issue as there is no willful refusal on or implied and or unreasonable delay. The court already found that the *ex parte* Applicant met the criteria for grant of the Order of Mandamus having met conditions precedent to the issuance of the order and further the court finds implied refusal to comply with the court order.

Final Orders

33. In view of my determination and findings herein above, the conclusion is that the Application dated March 25, 2022, is merited. I allow the Application and order that:-

- a. An order of Mandamus be and is hereby issued directed to the Respondents to comply with the decree issued in the Bungoma Employment and Labour Relations Court Constitutional Petition No 1 of 2019 delivered on May 13, 2020 in the following terms:-
 - i. The Court do hereby declare that the continued employment of the listed 463 grievant/members of the Petitioner by the Respondent on the casual basis is a violation of Section 5,35 and 37 of *Employment Act* Cap 11 of 2007 and violates article 27,28,41 and 232 of the *Constitution* of Kenya.



- ii. The court do hereby direct the Respondents to place all the affected employees, referred to above on payroll and apply to each one of them the minimum terms and conditions of service as provided under parts II,III,IV,V and VI of the Employment Act 11 of 2007.
- iii. The Respondents be and are hereby ordered to compute, file and pay arrears salary due and owing to all the grievants, named in this Petition under their employment within 60 days.
- iv. Costs of this Petition do follow the event
- v. That the above orders made in favour of the Petitioner/Decree holder in pursuance of the said Judgement together with costs which have been assessed and certified by the court at Ksh 303,710/- is due for execution and payable on the said orders and costs from the 30th day of October, 2020 until the date of payment and full execution ...”.
- vi. That the costs of the suit be born by the Respondents.

34 Orders accordingly.

SIGNED, DATED AND DELIVERED AT BUNGOMA THIS 7TH DAY OF JULY, 2022

J W KELI

JUDGE.

In the Presence of :-

Court Assistant : Brenda Wesonga

For Ex parte Applicant:- Mr. Wamalwa Advocate

2nd Respondent: - Mr. Shifwoka Advocate

