



Republic v Independent Electoral and Boundaries Commission; Scanad Kenya Limited (Exparte) (Judicial Review Miscellaneous Application E186 of 2021) [2022] KEHC 12946 (KLR) (Judicial Review) (15 September 2022) (Ruling)

Neutral citation: [2022] KEHC 12946 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E186 OF 2021
AK NDUNG'U, J
SEPTEMBER 15, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION RESPONDENT**

AND

SCANAD KENYA LIMITED EXPARTE

RULING

1. The *ex parte* Applicant (hereinafter “the Applicant”) moved this court *vide* a notice of motion application dated December 6, 2021 seeking the following orders:
 1. An order of Mandamus to compel the Respondent to pay the *ex parte* Applicant the sum of KES 248,042,665.12 being the decretal amount together with interest at the rate of 12% per annum from the date of award until payment in full.
 2. In default, notice to show cause do issue against the Respondent and its Principal officers to show cause why they should not be cited for contempt.
 3. Costs of and incidental to this Application be borne by the Respondent.
2. The application is founded on the grounds set out on the face therein, the Statutory Statement dated December 2, 2021 and the Verifying Affidavit sworn by Jimmy Mnene on even date. The



Applicants' case is that on April 26, 2021, this Honourable Court allowed the Applicant's application dated July 27, 2020 and entered judgment on admission against the Respondent for the sum of KES 245,002,620.12 inclusive of value added tax together with costs and interests at Court rates. Thereafter, on August 10, 2021 the Honourable Deputy Registrar taxed the Applicant's Party and Party Bill of Costs dated May 11, 2021 at KES 3,040,045.00.

3. Therefore, the total decretal sum due from the Judgment Debtor is KES 248,042,665.12 which remains unpaid to date. Despite demanding for payment of the said sum of KES 248,042,665.12 from the Respondent on August 11, 2021 the Respondent has deliberately failed, refused and/or declined to satisfy the decree. Indeed, it was contended that the Respondent's deliberate non-payment of the decretal sum is a mockery of this Honourable Court's orders and an illegal and unjustifiable affront to the Applicant's constitutional right of access to justice.
4. The application is also supported by the Applicant's written submissions dated January 27, 2022. Counsel submitted that the Respondent is shielded from civil execution by the provisions of section 13 (2) of the *Independent Electoral and Boundaries Commission Act*, Act No 9 of 2011 as read together with the *Government Proceedings Act* and Order 29 Rule 2(b) of the *Civil Procedure Rules*, Chapter 21 Laws of Kenya. However, the threshold for granting an order of mandamus where a court decree has not been satisfied is: - a judgment was made against the Respondent and a decree duly issued; the Respondent is aware of the Judgment and Decree / amounts payable; and the Respondent has failed, refused and /or declined to pay the amount. It was therefore argued that the application is merited since the Applicant had satisfied the test above.
5. In conclusion, counsel submitted that the Applicant successfully prosecuted a suit against the Respondent in HCOMM E085 of 2020, obtained a decree and Certificate of Costs which the Respondent has declined to satisfy and this Honourable Court should thereby grant the judicial review remedies sought.

Respondent's Case

6. In response to the application, the Respondent filed a Replying Affidavit sworn by Douglas Kipruto Bargorett on April 14, 2022. The deponent is an Advocate of the High Court of Kenya and in conduct of the matter on behalf of the Respondent. He admitted that on April 26, 2021, the court in Milimani Civil Case No E085 of 2020 *Scanad Kenya Limited v Independent Electoral and Boundaries Commission* entered judgment in favour of the Applicant and awarded KES 245,002,620.12 inclusive of value added tax, together with costs and interests at court rates. However, the Respondent relies on funds from the National Treasury to meet its expenses which funds are budgeted for in advance and must be approved by the Parliament and the National Treasury.
7. That upon the issuance of the judgment, the Respondent sought funds from the National Treasury to settle the claim and is awaiting response from the National Treasury on the request for funds. It is therefore evident that the delay in settling the decretal amount is not the creation of the Commission but is only due to lack of funds and non-funding from the National Treasury. They therefore sought to be granted reasonable time by this Honourable court to enable them continue engaging the National Treasury and committed to settling the amount owed as soon as it was allocated funds as sought.
8. In the circumstances, counsel urged that this application was unnecessary as the Respondent has demonstrated that it has taken reasonable steps to secure funds from the National Treasury to settle the decree save that the request is yet to be honoured by the National Treasury. Accordingly, he urged that there is no compelling ground to issue the orders sought by the Applicant and the application should be dismissed with costs to the Respondent.



9. In a rebuttal, the Applicant filed a Supplementary Affidavit sworn by Jimmy Mnene on May 5, 2022. He deponed that the judgment for the sum was issued on April 26, 2021 before the start of the 2022 Financial Year on 1st July and should therefore have been budgeted for and paid as no challenge to date was preferred against the judgment. Further, that a perusal of the letter dated November 13, 2019 authored by the Respondent indicates that as early as that date, the Respondent had assured the Applicant that it was engaging the National Treasury concerning the payment of pending bills and it is therefore mischievous for the Respondent to now claim that it had not budgeted for the sum.
10. It was further his deposition that section 21(3) of the Government Proceedings Act requires an accounting officer to settle decretal sums and payment under the said Act is not conditional on budgetary allocation. In their view, the Replying Affidavit does not demonstrate any reasonable steps taken by the Respondent to ensure that the Respondent is paid the sum. It was therefore urged that the application be allowed as prayed.

Analysis and Determination

11. I have considered the pleadings filed by the Applicant and the Respondents and the issue for determination is whether the Applicant has satisfied the conditions precedent to warrant the orders sought.
12. It is settled law that before an order of mandamus is issued against the Government, an applicant must abide by the procedure in Section 21 of Government Proceedings Act which 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.”

13. Section 21 (3) of the said Act on the other hand 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.”



14. Githua, J in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza* [2012] eKLR while dealing with the said provisions expressed herself as follows:

“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.”

15. The effect of these provisions is that whereas execution proceedings as are known to law are not available against the Government, the accounting officer for the Government department concerned is nevertheless under a statutory duty to satisfy a judgment made by the court against that department.
16. There is on record copies of the ruling dated April 26, 2021, a decree dated August 24, 2021, a Certificate of Costs dated August 16, 2021, a demand letter dated August 11, 2021 all annexed to the Applicant’s Verifying Affidavit sworn on December 2, 2021 and a letter dated November 13, 2019 annexed to the Applicant’s Supplementary Affidavit sworn on May 5, 2022. However, I do not see a Certificate of Order against the Government on record and/or evidence of service of the same.
17. Under section 21 of the *Government Proceedings Act*, execution of money decrees against government, which includes county government, should be through the process set out in that provision. That requires that a certificate of order against government be obtained, and served on the Attorney General, who is expected to bring it to the attention of the relevant accounting officer of the government. The duty to pay only arises after such service, and execution proceedings, by way of mandamus, can only be undertaken thereafter.



18. To buttress the legal position, I take refuge in past decisions by our courts. In *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* [2012] eKLR, the court stated:

“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.”

19. In *Republic v County Secretary Migori County Government & another* [2019] eKLR, the court held:

“11. I need not re-emphasize the need for strict compliance with Section 21 of the *Act* being the law of the land. In this matter I can gather from the record that a Decree and a Certificate of Costs in the suit was drawn and issued. I did not set my eyes on any Certificate of Order. There is a specific procedure on how the Certificate of Order required under the Act is obtained. The procedure is contained in Order 29 of the *Civil Procedure Rules*. Under Rule 3 thereof the application is made to the Deputy Registrar in the High Court or to the court in the subordinate court. The format of the Certificate of Order is provided in Appendix A Form No. 22 of the *Civil Procedure Rules*. Form No. 23 provides the format for a Certificate of Costs in the event it is separately issued.

Once a party obtains the Certificate of Order and the Certificate of Costs, in the event the Certificate of Costs is obtained separately, together with the Decree, then such a party must satisfy the Court of service of those documents upon the party named in the Certificates. In this case there is neither evidence of issuance of the Certificates nor service thereof on the Respondents or their Advocates.”

20. While there is a consensus as regards the existence of a decree against the Respondent, an execution process against the government or its officials which sidesteps section 21 of the *Government Proceedings Act* as read with section 13 of the *Independent Electoral and Boundaries Commission Act* and Order 53 of the *Civil Procedure Rules* is deficient, irregular and illegal, and thus cannot stand.
21. Consequently, having failed to comply with the above provisions of the law, I find and hold that the application is not merited and is hereby dismissed. However, upon compliance with section 21 of the *Government Proceedings Act* as read with section 13 of the *Independent Electoral and Boundaries Commission Act* and Order 53 of the *Civil Procedure Rules*, the Applicant can approach this court for the necessary orders should need be. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF SEPTEMBER, 2022.

A. K. NDUNG’U

JUDGE

