



Republic v County Secretary, Nairobi City County & another; Tom Ojienda & Associates (Exparte) (Judicial Review E1096 of 2020) [2023] KEHC 23737 (KLR) (Judicial Review) (13 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E1096 OF 2020
JM CHIGITI, J
OCTOBER 13, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**THE COUNTY SECRETARY, NAIROBI CITY COUNTY 1ST RESPONDENT
CHIEF OFFICER, FINANCE/COUNTY TREASURER NAIROBI CITY
COUNTY 2ND RESPONDENT**

AND

PROF TOM OJIENDA & ASSOCIATES EXPARTE

JUDGMENT

1. The ex-parte Applicant herein, has moved this Court through an Application brought by way of a Notice of Motion dated 24th June, 2022 and seeks the following orders-
 - a. That an order of mandamus be issued and the same be directed to County Secretary and the Chief Officer, Finance/County Treasurer, Nairobi City County.
 - b. That the County Secretary, Chief Officer, Finance/County Treasurer shall comply by paying the Applicant within seven (7) days the sum of Kshs.1,247,508.70/= being the decretal sum and accrued interest in respect of High Court Misc. JR Application No. E1096 OF 2020.
 - c. That the County Secretary, Chief Officer, Finance/ County Treasurer Nairobi City County shall in addition pay to the Applicant further interest on the said sum of Kshs. 1,247,508.70/ = at the rate of 14 % p.a from the 20th January, 2020 until payment in full.



- d. That in default, notice to show cause do issue against the County Secretary, Chief Officer, Finance/County Treasurer Nairobi City County for them to show cause why they should not be cited for contempt of court
- e. That the cost of this application be provided for.

Background

2. The said application is supported by a supporting affidavit sworn on 24th June, 2022 by Prof. Tom Ojienda (SC).
3. The deponent explained that after having represented Nairobi City County in JR. MISC. APP. No.431 of 2012, Republic-vs- Nairobi City County & Wachira Nderitu, the Exparte Applicant filed an Advocate-client Bill of cost dated 3rd October, 2017 seeking to recover legal fees from its Client, Nairobi City County.
4. Consequently, the foresaid Bill was taxed by the Deputy Registrar at Kshs. 1,097,418= through a Ruling delivered on 24th May, 2018.
5. The ex-parte Applicant has since extracted a Certificate of Order on 20th January, 2020 wherein the Respondent was ordered to pay the Applicant the following sum:

Cost as in decree Kshs. 1,097,418/=

Interest at 12% per annum from 28th November, 2018 to 17th January, 2020 - Kshs. 150,090.70/=

Total - Kshs. 1,247,508.70/=

6. The Respondents were served with the Certificate of Order and still refused to settle the outstanding sums in utter disregard to the said Order. This therefore prompted the Applicant to institute mandamus proceedings against the Respondents in a bid to recover the sums owing and due to it.
7. The Applicant was granted leave to file mandamus and therefore put in its current Application seeking an order of mandamus.
8. The Applicant argues that in the instances when an order of mandamus can issue to compel public servants to perform their statutory duties, we cite the case of Republic v County Secretary Nairobi City County & 3 Others; Koceyo & Co. Advocates (Ex-parte), (2020) eKLR, where the court held that it is the obligation of Government in conjunction with Treasury to ensure that funds are allocated towards the settlement of liabilities owed by the Government.
9. An order of mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty, compel a public duty and controls procedural delays and the same was held in the case of County Secretary Nairobi City County & Another Ex-parte Samson Masaba Munikah T/A Munikah & Company Advocates, (2019) eKLR.
10. In the case of Republic vs Kenya National Examinations Council exparte Gathenii and 9 Others, [1997] e KLR. The said Court held as follows in this regard:

“The next issue we must deal with is this: 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: - 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.”

11. Therefore, the foresaid principle means 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.
12. That there being no justification from the Respondents for not settling the ex parte Applicant's outstanding fees, the ex parte Applicant's rights are being prejudiced by the actions and/or inaction of the Respondents.
13. Indeed, the Respondent's refusal to pay the decretal sum is prejudicial, oppressive, unreasonable, ultra vires and unlawful (b) whether the Respondents are under a legal duty and obligation to pay the sums certified in the various certificate of costs and partial decree issued in favour of the ex parte Applicant.
14. The question as to who is the accounting officer of a county government was dealt with in Council of Governors & Others v The Senate Petition No 413 Of 2014 [2015] eKLR where the court expressed itself as follows:

“The Petitioners have also sought the interpretation of the term ‘Accounting Officer’. In that regard, Article 226 of *the Constitution* provides:

- (1) Act of Parliament shall provide for:
 - (a)
 - (b) The designation of an accounting officer in every public entity at the national and county level of government.
- (2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

15. National public entity is accountable to the management, and the accounting officer of Pursuant to this provision, Parliament enacted the *Public Finance Management Act*. The appointment and designation of a County Government Accounting Officer Section 44 of the *County Governments Act* No 17 of 2012 pronounces itself on appointment of the County Secretary. Sub section 3 of the same outlines the duties of a County Secretary as follows:
 1. Be the head of the county public service;
 2. Be responsible for arranging the business, and keeping the minutes, of the county executive committee subject to the directions of executive committee;
 3. Convey the decision of the executive committee to the appropriate;
 4. Perform any other functions as directed by the county executive committee."
16. Section 103 of the *Public Finance Management Act* No 18 of 2012 establishes the County Treasury comprising of the County Executive Member of Finance, the Chief Officer and the department of the County Treasury responsible for finance and fiscal matters.



17. From the foregoing it is clear that the inclusion of the 1st and 2nd Respondent in these proceedings is rightful as judicial review applications are mainly brought against the person who is bound by the law to comply with the orders sought.
18. They further rely on the case of *Solo Worldwide Inter-enterprises vs County Secretary Nairobi County and Another* (2016) eKLR, for the position that the person who had the overall financial obligation for the purpose of the affairs of the county government must be the county executive in charge of finance and unless he shows otherwise, he is the one under the obligation to pay funds in the capacity as the accounting officer. Further, that jurisprudence on the subject of the order of mandamus demands that where there is a breach of public duty or power, the Court must compel the public authority to perform the duty imposed by statute.
19. The procedure in section 21 of the *Government Proceedings Act* is not meant to relieve the Respondents from meeting their legal and statutory obligation to satisfy decrees and orders of the Court, and its main purpose is to notify the Respondents of the debt is due to and for them to facilitate payment of the same.
20. The *Government Proceedings Act* in this respect imposes a statutory duty on the Respondents to satisfy the decretal sums due to the ex-parte Applicant upon compliance with the procedure set out therein, and not upon the availability of funds.
21. To allow the performance of these duties dependent on the availability and/or provision of funding would in effect make the duties discretionary, and allow the Respondents to decide if and when to undertake duties which are in their nature mandatory.
22. No such exemption is provided by law. In any event the lack of funding to pay the decretal sum does not extinguish the existence and nature of the Respondent's duties, and only affects the mode of performance of that duties.
23. The issue whether the lack of budgetary allocation can absolve the Respondent of its duty to pay the decretal sum was discussed in the case of *Republic vs Principal Secretary, Ministry of Defence & Another ex parte David Gitau Njau & 9 Others*, (supra), and I am in this regard in agreement with the holding by Odunga J. when the learned Judge stated as follows:

“In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat.”
24. In other words, financial difficulty is comes to determining the mode of settlement of a decree but is not a basis for decreed by the Court. It is also not in dispute that the Ex Parte Applicant served demand letters dated 29th January, 2020 and 10th June 2020 on the Respondents demanding for payment, which letters went unanswered. The Applicant gave the Respondents reasonable time to comply but they still failed to comply
25. Further, the Applicant extracted a Certificate of Order dated 20th January 2020 as required by the Law and still served the same on the Respondents in due time. The demand letters are clearly annexed in the Applicant's Application for leave to file Judicial Review Orders dated 4th September, 2020.



Analysis and determination:

Issue for determination:

Whether an Order of Mandamus is fit to be issued against the Respondents therein.

26. Upon considered the evidence and the arguments advanced by the Ex parte Applicant herein I find that the issue for determination is whether the Applicant has satisfied the conditions precedent to warrant the orders of this court.

27. Section 21 of the *Government Proceedings Act* before receiving an Order of Mandamus. Section 21 of the 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.”

28. The Act under Section 21 (3) provides as follows;

“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.”

29. The Court in the case of Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR held 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.”

30. These statutory provisions have the effect of requiring the accounting officer for the appropriate government department to fulfill any judgments obtained against that agency even though the government is not subject to the typical legal mechanisms of enforcing judgments.
31. I satisfied that the Applicant has complied with Section 21 of the [Government Proceedings Act](#) and the Applicant has fulfilled the conditions as set out in the case of The Court of Appeal in the case of Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) eKLR explained the applicable principles for an order of mandamus to issue as follows:

“The next issue we must deal with is this: 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.”

32. 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.”



33. 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....’

Order:

34. An order of mandamus is hereby issued and directed to County Secretary and the Chief Officer, Finance/County Treasurer, Nairobi City County.
35. The County Secretary, Chief Officer, Finance/County Treasurer shall comply by paying the Applicant within sixty (60) days the sum of Kshs.1,247,508.70/= being the decretal sum and accrued interest in respect of High Court Misc. JR Application No. E1096 OF 2020.
36. The County Secretary, Chief Officer, Finance/ County Treasurer Nairobi City County shall in addition pay to the Applicant further interest on the said sum of Kshs. 1,247,508.70/= at the rate of 14 % p.a from the 20th January, 2020 until payment in full.
37. In default, notice to show cause do issue against the County Secretary, Chief Officer, Finance/County Treasurer Nairobi City County for them to show cause why they should not be cited for contempt of court
38. Cost.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 13TH DAY OF OCTOBER 2023.

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JCHIGITI (SC)
JUDGE

