



Republic v County Secretary, County Government of Busia & 2 others; Antaf Company Limited (Exparte) (Judicial Review E004 of 2023) [2024] KEHC 5000 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5000 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
JUDICIAL REVIEW E004 OF 2023
WM MUSYOKA, J
MAY 16, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

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

**THE COUNTY EXECUTIVE MEMBER, FINANCE ICT & ECONOMIC
PLANNING,COUNTY GOVERNMENT OF BUSIA 2ND RESPONDENT**

**THE CHIEF OFFICER, FINANCE ICT & ECONOMIC PLANNING, COUNTY
GOVERNMENT OF BUSIA 3RD RESPONDENT**

AND

ANTAF COMPANY LIMITED EXPARTE

JUDGMENT

1. These Judicial Review proceedings were initiated on 20th November 2023, under certificate of urgency, by way of an *ex parte* chamber summons, of even date, for leave to file a Motion for a *mandamus* order, directed at the 3 respondents, to satisfy a decree, in Busia CMCCC No 14 of 2019, together with costs and interests.
2. The *ex parte* application was placed before me, on 21st November 2023, and I granted the leave sought, and directed that the substantive Motion be filed within 21 days.
3. The Motion, was filed as directed, on 27th November 2023, bearing an even date. It is supported by what is described as a verifying affidavit, sworn on 27th November 2023. The substantive Motion should not be supported by any fresh affidavit, for, according to Order 53 rule 4 of the [Civil Procedure Rules](#), the said Motion should be served together with the statement and the verifying affidavits filed



at the leave stage. So, the affidavit of 27th November 2023 is misplaced, and I shall consider the merits of the application based on the statement and the affidavit filed in court on 20th November 2023.

4. According to the statement, dated 20th November 2023, the *ex parte* applicant obtained a judgement in Busia CMCCC No 14 of 2019, after the respondents failed to enter appearance, upon being served with the process in that matter. A decree was subsequently extracted and served, but the respondents failed to satisfy the same. It was on that basis that the *mandamus* order is being sought. The affidavit verifying the statement was sworn on 20th November 2023, by an employee of the *ex parte* applicant. It attaches copies of the processes filed and extracted from the record in Busia CMCCC No 14 of 2019, being the plaint, affidavit of service of the plaint, request for judgement, entry of judgement, bill of costs, assessment notice, the letter that served the decree, and a demand notice and related letters.
5. The respondents were served with the Motion, and they entered appearance, on 29th November 2023. They did not file any response to the application.
6. The application was canvassed by way of written submissions, filed only by the *ex parte* applicant. In the submissions, the *ex parte* applicant argues only one ground, whether the decree and certificate of order against Government had been satisfied. *Republic v Attorney General & another ex parte James Alfred Koroso* [2013] eKLR (Odunga, J) is cited.
7. The processes of levying execution of court decrees and orders, as set out in the *Civil Procedure Act and Rules*, are not available against the Government. Proceedings against Government are governed by the *Government Proceedings Act*, Cap 40, Laws of Kenya, in terms of how to initiate them, and what to do after a decree is obtained. The requirement is that, upon a decree or order being obtained against the Government, the party, desiring to have it satisfied or complied with, ought to obtain, from the court, a certificate of order against Government, which should then be served. Government, in the context of the *Government Proceedings Act*, includes the County Government.
8. The law on satisfaction of orders and decrees against Government is section 21 of the *Government Proceedings Act*. It is section 21(1) which requires extraction of the certificate of order against Government from the court record. Section 21(2) requires service of that certificate on the Attorney General. Section 21(2) should be read together with section 21(5), with respect to decrees and orders against a County Government. It is section 21(3) which directs the Accounting Officer, for the Government department concerned, to pay, to the person entitled or to his advocate, the amount appearing by that certificate. It is section 21(4) which decrees that no execution or attachment, or any other process of that kind, should be issued by court, for enforcement of payment by the Government of any money or costs decreed or ordered by a court against it.
9. The accounting instrument, for the purposes of Government operations, that unlocks payment of money from Government, in satisfaction of a court order or decree, is the certificate of order against Government. This document is critical. Without it, the process of payment cannot be unlocked. Any person desiring to be paid by Government, on account of a decree or order made against it, must first obtain the said certificate. That certificate must then be served on the Attorney General, in case the decree or order is against the National Government, or the County Attorney, where the order or decree is against a County Government. The Government should be expected to settle or satisfy the decree only upon being notified of the same, through that certificate being served upon the relevant officer, in accordance with the law. See *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* [2012] eKLR (Githua, J).
10. *mandamus* is available where a statutory or public duty exists, and it issues to enforce that duty. See *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others* [1997]



eKLR (Omolo, Tunoi & Shah, JJA). The duty, on the part of Government, with respect to court orders and decrees, to pay or settle a court decree or order, accrues, not upon the order or decree being passed, but upon the accounting document, known as certificate of order against Government, being served on the relevant Government official. *Mandamus* can only be obtained on the strength of service of the said certificate, for it is upon that service that the duty to act accrues.

11. The question in this case then is, whether the duty to pay had accrued. The answer to that question would depend on whether a certificate of order against Government was obtained, and, if it was, whether it was served on the relevant Government functionary.
12. My perusal of the affidavit, sworn on 20th November 2023, reveals that a certificate of order against Government, in this case the respondents herein, was obtained from the trial court, and was issued on 17th December 2019. The said certificate is a court instrument, in the same footing with a summons, notice, order or decree. Such court instruments are served upon the concerned parties, through a court process server, either personally, or through substituted service. I see no affidavit of service of the said certificate of order against Government, annexed to the affidavit of 20th November 2023. What I see are letters, purporting to forward the same, dated 23rd May 2022, 13th June 2022 and 30th August 2022. Court process is not served upon or furnished to parties by ordinary post. There is a due process for that purpose. There is no evidence that that due process was followed in this case.
13. As due process was not followed, to bring the existence of the decree, in Busia CMCCC No 14 of 2019, to the knowledge of the respondents herein, the duty upon them, to satisfy that decree, did not accrue, and there is, therefore, no basis upon which a *mandamus* order can issue against them. See [Kungu v County Government of Nairobi](#) [2024] KEHC 3265 (KLR)(Chigiti, J).
14. In view of finding and holding in paragraph 12, here above, I hereby, accordingly dismiss the Motion dated 27th November 2023. There shall be no order on costs.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 16TH DAY OF MAY 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant. Advocates

Mr. Anwar, instructed by Anwar & Company, Advocates for the *ex parte* applicant.

Mr. Wambura, instructed by the County Attorney, for the respondents.

