



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**JUDICIAL REVIEW NO. 2 OF 2020**

**IN THE MATTER OF AN APPLICATION BY LINET MAGAMBO FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
(MANDAMUS)**

**-AND-**

**IN THE MATTER OF THE GOVERNMENT PROCEEDINGS ACT S.2(4)**

**-AND-**

**IN THE MATTER OF ORDER 22 AND 29 OF THE CIVIL PROCEDURE ACT CAP 21**

**-AND-**

**IN THE MATTER OF ORDER 53(1) OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER EXECUTION OF A DECREE OF KSHS. 1,769,602.00**

**AND**

**IN THE MATTER OF ARTICLES 1(1) (2), 2(1)(2), 10(1)(B), 20(1), 21(1), 23(1), 27(1), 28, 73, 156 AND 165 OF THE  
CONSTITUTION OF KENYA, 2020**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**THE COUNTY SECRETARY MIGORI COUNTY**

**THE CHIEF OFFICER FINANCE**

**MIGORI COUNTY GOVERNMENT.....RESPONDENTS**

LINET MAGAMBO.....APPLICANT (Ex-parte)

**JUDGMENT**

This is a Judicial Review application in which the exparte applicant, **Linet Magambo**, seeks:-

**(a) an order of Mandamus to issue against the Respondents herein namely The County Secretary Migori and The Chief Officer Finance Migori County, to compel them to proceed and pay out the decretal sum of Kshs. 2,265,090/= being General damages, costs and interest in Migori CMCC No. 2075 of 2015, whose judgment was delivered on 17/10/2017 and it continues to attract interest at court rates.**

**b) That the court be pleased to set a timeline and/or duration within which the respondents will settle the decretal sum with interest accruing until the date of payment.**

**c) That the applicant be at liberty to apply to this court for all necessary and/or consequent orders that this Hon. Court may deem fit and just to grant in the circumstances.**

**d) Costs of the application.**

The application is premised on the grounds found on the face of the Chamber Summons application and the verifying affidavit of Linet Magambo dated 6/1/2020, a further Affidavit dated 27/8/2020 and the Statement of facts dated 31/1/2010. The exparte applicant's case is that she obtained judgment in Migori **CMCC NO. 2075 of 2015, Linet Magambo =vs= Migori County Government and Richard Ogoye** for Kshs. 1,612,120 and costs were assessed at Kshs. 157,482/=. The same may not have been satisfied by Migori County Government.

The respondents did not file any response to this application though duly served and they instructed Odhiambo Oranga Advocate who filed Notice of Appointment. The court gave directions that the application be disposed of by way of written submissions. The firm of Sam Onyango Advocate filed submissions on behalf of the applicant on 27/8/2020.

Briefly, the applicant's case is that the applicant obtained judgment, decree and certificate of costs against the County Government of Migori. A certificate of order against the Respondents was issued on 19/11/2019 and duly served on the respondents' counsel on 13/1/2020, but the respondents have refused and or ignored to settle the same and this prompted the applicant to seek leave of the court to commence these Judicial Review proceedings to compel the respondents to pay the applicant.

I have duly considered the application and the submissions of the exparte applicant. The respondents are officers of Migori County Government. Migori County is established as one of the counties in Kenya under Article 6 of the Constitution and 1<sup>st</sup> schedule of the Constitution. Execution of decrees against the Government is not undertaken as in the ordinary civil cases but must be in accordance with Provisions of the Government Proceedings Act. Though the Government Proceedings Act does not specifically recognize Counties as Governments, it is now conceded that Kenya has two levels of governments at the National level and County Governments level. This was aptly put by J. Odunga in **Republic =vs= AG and another exparte Stephen Wanyee Roki (2016) eKLR** when he considered the applicability of the Government Proceedings Act. He said at paragraph 20-21:-

**“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 alteration, adaptation, qualification and exceptions necessary to bring it into conformity with this Constitution. 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 the 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.”**

Guided by the above decision, the Government Proceedings Act does apply to execution of decrees against the County Government.

The office of the County Secretary is established under Section 44 (1) of the County Government Act which provides as follows:-

**“Section 44 (1) of the County Government Acts 2012, There is established for each county the office of the County Secretary who shall be secretary to the County Executive Committee.**

**Section 44 (3) provides for the function of the County Secretary as follows;**

- a) Be the head of the county public service;**
- b) Be responsible for arranging the business, and keeping the minutes, of the county executive committee subject to the directions of executive committee;**
- c) Convey the decision of the county executive committee to the appropriate persons or authorities; and**
- d) Perform any other functions as directed by the county executive committee.”**

Section 45 of the County Government Act establishes the office of the County officer of Finance which provides as follows;

**“ (1) the Governor shall-**

**a) Nominate qualified and experienced county chief officers from among persons competitively sourced and recommended by the County Public Service Board; and**

**b) With the approval of the county assembly, appoint county chief officers;**

**(2) The office of a county chief officer shall be an office in the county public service;**

**(3) A county chief officer shall be responsible to the respective county executive committee member for the administration of a county department as provided under section 46;**

**(4) The county chief officer shall be the authorized officer in respect of the exercise of the delegated power.”**

The Respondents are in charge of the operations of the Public service and the treasury respectively.

The function of the two officers were considered by J. Nyamweya in **Republic vs= County Secretary Nairobi City County and 3 others ex parte Koceyo Advocate (2020) eKLR**. The judge stated this :-

**“Section 44 of the County Government Act in this respect establishes the office of the County Secretary who is secretary to the County Executive Committee, and is answerable for the operations of the County Executive, and whose functions include being head of the county public service, Section 103 of the functions include being head of the county public service. Section 103 of the Public Finance Management Act No. 18 of 2012 also establishes the County Treasury responsible for finance and fiscal matters. Under Section 103 (3) of the Act, the County Executive Committee Member for Finance is the head of Treasury, and is thus the responsible for finance matters in the County.**

**This Court therefore finds that arising for these provisions, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are jointly responsible for the satisfaction of Court orders and decrees on payment of money owed by the Nairobi City County by virtue of their roles and functions. In addition, the decretal sum due from the Respondents in the present applications has not been disputed, and the Applicant in this respect annexed copies of the judgments and decrees awarded in the various cases that are the subject of this application. The Applicant also annexed copies of the Certificates of Costs issued in its favour, after taxation of its Bills of Costs in the various suits.”**

As held in the above cited case, the respondents are properly sued as they deal with satisfaction of court decrees on behalf of the

County Government.

It is settled law that before an order of mandamus is issued, an applicant must abide by the procedure in Section 21 of Government Proceedings Act and Order 29 Civil Procedure Rules. Section 21 of the Government Proceedings 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 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.”*

The reason why this strict Procedure is followed was explained by the Court of Appeal in *Kisya Investments Ltd vs AG (2005) 1 KLR 74*. The court said: -

*“Order 28, rules 2(1)(a), (2) and (4) of the Civil Procedure Rules subject themselves to the provisions of the Government Proceedings Act which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of justice, the courts are bound to apply the law as it exists. Many a times such application may indeed not attain that goal due to the effect of the said laws. On the question of abuse of the process of the court, the application of any written law cannot amount to an abuse of the process of the court however much its effect is harsh or even undesirable.... History and rationale of Government’s immunity from execution arises from the following:- Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i). The raising of revenue- (by taxation or borrowing); (ii). its expenditure; and (iii). The audit of public accounts. The satisfaction of decrees or judgements is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government’s expenditure. It is for this reason that section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorized by statute, and any unauthorized payment may be recovered. SEE HALSBURY’S LAWS OF ENGLAND 4<sup>TH</sup> EDN VOL. 11 PARA 970, 971 AND 1370. As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. SEE AUCKLAND*

***HARBOUR BOARD VS. R (1924) AC 318, 326.*** The second situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the ministry of Finance, Treasury, Comptroller and Auditor General etc. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their “own” funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer’s hammer. No Government can possibly survive such an onslaught. The Government and therefore the state operations will ground to a halt and paralysed and soon the Government will not only be bankrupt but it’s Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the Law that prohibits execution against and attachment of the Government assets and property.”

In **Permanent Secretary Office of the President, Ministry of Internal Security & Another ex parte NASSIR MWANDIHI (2014) e KLR** J Odunga observed that the procedures in seeking an order of mandamus under Government Proceedings Act are strictly complied with respect to issuance of certificate of costs and certificate of order against the Government.

Justice Odunga echoed the **Kisya Investments** case (supra) that the elaborate procedure is meant to give adequate notice to the Government to make arrangements to satisfy the decree and that it is not meant to relieve the Government of its obligations to satisfy the decrees and orders of the court.

In this case, I have earlier noted that in the further affidavit of the applicant, the decree and the certificate of order were served on the respondents on the 13<sup>th</sup> January 2020, and an affidavit regarding service was sworn by Aggrey Ongiri, the processer server. The Respondents’ instructed counsel, one Odhiambo Oronga Advocate who filled notice of appointment but never filed any reply to contest this application.

Whether an order of mandamus can lie; The scope of an order of mandamus was discussed in the decision of **Republic =vs= Kenya National Examination Counsel ex parte Gathenji & Others, (1997) eKLR** where it was held,

*“The next issue we must deal is this ; what is the scope and efficacy of an order of mandamus”*

*The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from 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.”*

In the instant case the applicant has demonstrated that she has a judgment against the County Government of Migori which the Respondents have failed to satisfy and it is only fair that the Respondents be compelled to perform their duty and pay the applicant.

In view of my analysis above, I am satisfied that the applicant has made a case for the grant of an order of mandamus and I hereby grant the same in terms of prayer (a) and (d) of the notice of motion dated 10/2/2020.

**DATED, SIGNED and DELIVERED at MIGORI this 14<sup>th</sup> day of December 2020**

**R. WENDOH**

**JUDGE**

**Judgment delivered in open court and in the presence of: -**

**Ms. Okota for Applicant**

**Ms. Nyauke & Josephine Court Assistant**



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