



**Republic v County Secretary, Nairobi City County & 3 others; Lued (A) Chemicals Limited (Exparte Applicant) (Judicial Review E155 of 2022) [2023] KEHC 21432 (KLR) (Judicial Review) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21432 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW E155 OF 2022  
JM CHIGITI, J  
JULY 28, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE COUNTY SECRETARY, NAIROBI CITY COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY EXECUTIVE MEMBER IN CHARGE OF FINANCE, NAIROBI CITY COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF OFFICER FINANCE AND ECONOMIC PLANNING, NAIROBI CITY COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**NAIROBI CITY COUNTY ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**LUED (A) CHEMICALS LIMITED ..... EXPARTE APPLICANT**

**JUDGMENT**

1. The Applicant herein filed an application by way of a Notice of Motion dated 2<sup>nd</sup> November 2022 seeking Orders:
  1. That the Honourable Court be pleased to issue an order of Mandamus directed to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as the Accounting Officers of the 4<sup>th</sup> Respondent compelling them to pay the ex-parte Applicants the decretal amount at a sum of KES. 19,188,568. 96 in Milimani Chief Magistrate Court,



Civil Case No. 3901 of 2018, Lued (A) Chemicals Limited Vs Nairobi City County.

2. That the Honourable Court be pleased to grant such further Orders that it may deem just and expedient in the circumstances.
3. That costs of this suit be borne by the 4<sup>th</sup> Respondent.
2. The Application is founded on the grounds set out on the face therein and by a Statement of facts dated 27<sup>th</sup> October and supporting affidavit sworn by Edward Kiogora dated 2<sup>nd</sup> November, 2022.
3. The Applicant avers that pursuant to a judgment delivered on 14<sup>th</sup> August 2020 by Hon. D.W. Mburu (PM) in favour of the ex-parte Applicant as against the 4<sup>th</sup> Respondent in Milimani Chief Magistrate Court, Civil Case No. 3901 of 2018, where the 4<sup>th</sup> Respondent was ordered to pay the ex-parte Applicant a sum of KES 12,240,200/- and interest at Courts' rate from the date of filing suit and costs of the suit as set out in the judgment delivered on 14<sup>th</sup> August 2020 and marked as "Exhibit DK-4".
4. Subsequently, on 4<sup>th</sup> May 2021, party and party costs were duly assessed in Milimani Chief Magistrate Court, Civil Case No. 3901 of 2018, by the Executive Officer of the Court at KES 477,495.00 and a Court decree duly issued to that effect.
5. On 21 September 2022, a Certificate of Order against Government at a sum of KES 19,188,568.96 was duly issued in favour of the ex parte Applicant as against the 4<sup>th</sup> Respondent as marked. "Exhibit EK-5(a)& (b)", the demand letter dated 6<sup>th</sup> October 2022 to the Respondent and a Certificate of Order against Government issued on 4<sup>th</sup> May 2021 demonstrate this.
6. The Applicant contends that despite the Respondents being notified of the decretal amount vide a Certificate of Order against Government on 7<sup>th</sup> October 2022, the Respondents herein have failed and/or refused to settle the decretal amount.
7. The judgment and decree herein were issued by a Court of competent jurisdiction and the judgment and decree have not been set aside or challenged by the 4<sup>th</sup> Respondent via an appeal.
8. The ex-parte Applicant avers that it has complied with Section 21 of the *Government Proceedings Act*, as a result of which a public duty and obligation has been placed upon the 4<sup>th</sup> Respondent to pay the entire decretal amount through its accounting officers, the 1<sup>st</sup>, 2<sup>nd</sup>, & 3<sup>rd</sup> Respondents.
9. The Applicant contends that the Respondents in failing to settle the decretal amount have acted in bad faith, unreasonably and thus violated the ex-parte Applicant's legitimate expectation that they will obey Court judgment and pay the decretal amount due.
10. The Respondents decision not to satisfy the Court decree herein is an irrational, breach of their public and statutory duties and obligations.
11. No execution can issue against the 4<sup>th</sup> Respondent which is a state body in enforcement of the Court decree under Section 21(4) of the *Government Proceedings Act*, and the only recourse available to the ex-parte Applicant is an order of mandamus compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents being the accounting officers to satisfy the Court Decree on behalf of the 4<sup>th</sup> Respondent.
12. Unless this Honourable Court intervenes as a matter of urgency in granting the judicial review orders of mandamus, the ex-parte Applicant's right to access justice will continue to be violated by the Respondents who have refused to satisfy the Court's Decree.



13. The Applicant in its submissions dated 28<sup>th</sup> February 2023, relied on the case of Republic v County Secretary, Nairobi City County & 3 others; Koceyo & Co. Advocates (Ex Parte)[2020] eKLR, where the Court stated inter-alia on liability of County Government as follows:-

“As to whether the Respondents herein are under a duty to pay the subject decretal sums, an order of mandamus is normally issued when an officer or an authority by compulsion of law or statute is required to perform a duty, and that duty, despite demand in writing, has not been performed. Execution proceedings against a government or public authority under the Government Proceedings Act can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body.”

14. This was also the holding in Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security [2012].
15. The Applicant also cited the Court of Appeal on the efficacy of an order of mandamus in the case of Republic v Kenya National Examination Council ex-parte Gathenji & Others[1997] eKLR cited with approval in the case of Vivo Energy Limited (Formerly Known as Kenya Shell Limited) v National Land Commission [2020] eKLR; which stated as follows on the writ of mandamus:-

“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, 4<sup>th</sup> 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. [ts 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.” 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.” 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....”

### **Respondents case**

16. In opposition, the Respondents filed a Replying Affidavit dated 15<sup>th</sup> May 2023 and written submissions dated 16<sup>th</sup> May 2023.
17. The Respondents aver that the said demand and judgement by the Ex-parte Applicant is being taken into consideration together with that of the other creditors by the Nairobi City County and the same has not been ignored nor deliberately withheld.



18. The Respondents contend that the County is facing serious financial challenges occasioned by the current economic situation in the country which has seen National Treasury fail to disburse revenue shares to the counties.
19. The county is heavily indebted and is unable to meet its financial obligations at the moment and therefore needs time to make arrangements on how to raise enough revenue to meet these obligations.
20. The current administration inherited huge pending bills out of which more than 21 billion arises from court judgements, decrees and legal fees which the County cannot be able to settle at once.
21. Consequently, the Governor vide Gazette Notice dated the 16<sup>th</sup> day of January 2023 marked MW1 appointed a task force to review, scrutinize and verify the pending legal bills and all creditors including the Applicant herein invited to submit their claims for scrutiny and verification.
22. The taskforce is supposed to submit a report with recommendations for settlement of the said bills and enable the county establish the actual legal debts and form the basis of its budgetary estimations for the coming financial year 2023-2024.
23. The taskforce is still in the process of auditing the pending bills and once the report is out it will be published and the budget process will be completed in readiness to pay the deserving creditors.
24. Monies due to the Applicant have been subjected to the said process and are awaiting the necessary consideration and once the funds are available, the same will be paid by the County government.

### **Analysis & Determination**

25. I have considered the arguments advanced by the parties herein. The issue for determination is whether an Order of Mandamus should issue as prayed in the Ex parte Applicant's application.
26. The Respondents have not complied with the decree leaving the Applicant with little or no options than to move the court for mandamus orders to enforce the decree.
27. The Applicant has a legitimate expectation that it shall not only access but also enjoy the fruits of the judgment.
28. The *Fair Administrative Action Act* shall remain a dead letter unless the Respondent and indeed all judgment debtors settle the decrees.
29. *The Constitution* provides for the right to access justice under Article 48 of *the Constitution*.

“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”
30. Article 23 of *the Constitution* then makes provision for judicial review as one of the reliefs that an aggrieved party can invoke so as to compel a judgment debtor to comply with court orders and the same is available as an avenue to compel the state to settle decrees emanating from court by way of judgments.

Article 23(1) of *The Constitution* provides that“1. The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

2. Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of



a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

3. In any proceedings brought under Article 22, a court may grant appropriate relief, including an order of judicial review.”

31. The Respondent has not lodged any appeal challenging the judgment in issue.

32. The *Government Proceedings Act* is intended to set a procedure for the recovery of claims by beneficiaries of judgment. 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* 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.”

33. Section 21 (3) of the said Act further 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.”

34. I am satisfied that the Applicant notified the Respondents of the existence of the decree when it extracted and served the decree, certificate of costs and the certificate of order against the Government by a letter dated 6<sup>th</sup> October 2022 annexed and marked as exhibit EK-5a.

35. The Applicant has a right to fair administrative action under Article 47 which it seeks to enforce before this court. It is incumbent upon the Respondents to prove that there is justification in limiting the right under Article 24 of *the Constitution*.



36. The scope of an order of mandamus was set out in the decision of Republic vs Kenya National Examination Counsel ex parte Gathenji & Others [1997] eKLR where it was held 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, 4<sup>th</sup> 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.”

37. The Court in the case of Republic v The Attorney General & Another ex parte James Alfred Koroso [2013] eKLR held as follows;

“...in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realized. Unless something is done he will forever be left baby-sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of *the Constitution* which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or in-actions of public officers.”

38. The Respondents aver that the said demand and judgement by the Ex-parte Applicant is being taken into consideration together with that of the other creditors by the Nairobi City County and the same has not been ignored nor deliberately withheld.

39. The Respondents further contends that the Governor vide Gazette Notice No. 451 Vol. CXXV-No.11 dated the 16<sup>th</sup> day of January 2023 appointed a task force to review, scrutinize and verify the pending legal bills and all creditors including the Applicant herein invited to submit their claims for scrutiny and verification.

40. The court takes note that the gazette notice makes no reference to the Applicant and does not offer any proposals on how to fulfill the decretal amount sought by the Applicant herein. The Applicant is not invited by the Gazette Notice to submit its claims for examination and verification. In addition, the Court has not been furnished with the status report from the taskforce committee or the Respondent on the same.

41. The Court in the case of Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR held as follows on the issue of budgetary allocation:-

“The defence of non-allocation of funds by Parliament was also raised by the Respondent in the present application in his replying affidavit. Odunga J. in his ruling of 12<sup>th</sup> February 2018 extensively dealt with the defence as follows:



“As regards lack of budgetary allocation, Githua, J in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza [2012] eKLR 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.” [Emphasis mine].

42. Article 48 of the Constitution is alive and this court has a duty to promote protect and fulfil success to justice delayed is justice denied. Judicial review remedies under Article 23 of the constitution offers the Applicant a robust redress in the orders sought.

**Orders:**

In the premises, I am satisfied that the Ex Parte Applicant has made a case for the grant of an order of mandamus and I hereby grant the same in terms of prayer (1) of the Notice of Motion dated 2<sup>nd</sup> November, 2022.

Costs awarded to the Ex parte Applicant.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2023**

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**J. CHIGITI (SC)**

**JUDGE**

