



Republic v Nairobi City County; Elma Limited (Exparte) (Judicial Review Miscellaneous Application 143 of 2014) [2023] KEHC 21893 (KLR) (Judicial Review) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21893 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 143 OF 2014**

JM CHIGITI, J

JULY 27, 2023

BETWEEN

REPUBLIC APPLICANT

AND

NAIROBI CITY COUNTY RESPONDENT

AND

ELMA LIMITED EXPARTE

JUDGMENT

1. The application before this Court is dated 9th February, 2023 and it seeks the following orders;
 - i. That an order of mandamus be issued removing into this Honourable Court and compelling the Respondent to forthwith and without delay cause the payment of the sum of Kshs. 6,713,161/= to the *ex-parte* Applicant being the outstanding decretal award of costs in Misc. App. Judicial Review No. 143 of 2014, Republic v Nairobi City County; *ex-parte* Elma Limited.
 - ii. Costs of this Application be borne by the Respondent.
2. The application is predicated on the grounds on its face of the Application, the verifying affidavit of David Oyatta sworn on February 9, 2023, who swears to be an Advocate of the High Court of Kenya practicing as such in the name and style of Oyatta & Associates, and also the administrator of the Firm of Nyawara & Co. Advocates who had conduct of the matter before this Court.
3. The *ex-parte* Applicant herein is said to be the decree holder in Misc. App. Judicial Review No. 143 of 2014, [Republic v Nairobi City County; ex-parte Elma Limited](#) where a sum of Kshs. 6,713,161/=



was awarded as costs as against the Respondent in pursuance of a certificate of costs dated February 25, 2016. This amount is yet to be satisfied to date.

4. The Respondent in response filed grounds of opposition dated 23rd May, 2023 in which it is contended that this Court having rendered itself in the matter herein on October 8, 2014 is *funtus officio*. It is also contended that the ex parte applicant ought to have commenced fresh judicial review proceedings enforcing the decretal sum.
5. The Respondent also argues, that the accounting officers of the Respondent ought to have been made parties in the fresh judicial review proceedings. The Respondent also urges that failure to sue the County Executive Committee Member in charge of Finance is fatal as he will be condemned unheard contrary to the express rules of natural justice.
6. It is further contended that the Orders sought by the ex parte Applicant do not lie against the Respondent as there is no statutory duty imposed upon the Respondent to act as demanded. The Respondent also argues that the ex parte Applicant has failed to state under which law the cited Respondent has a duty to act as demanded.
7. The Respondent also contends that as provided under part IV of the [Public Finance Management Act](#) the statutory duty to pay out funds from the County Treasury vests in the County Executive Committee Member in Charge of Finance and not the Respondent herein.
8. The Respondent's case is that all expenditures by the County Government are appropriated by the County Assembly and not the Respondent herein in each financial year. The County is also said to have competing interests including settling decrees to the public but that it has limited resources. In addition, that there is a statutory process it must abide by before the settlement of the same.
9. The Respondent also argues that the officers responsible for payment of any of the Respondent's funds are public officers and are prohibited in law under sections 196 and 197 of the [Public Finance Management Act](#), 2012 from paying the Applicant as it would be an offence to spend any public funds without any prior authorization and budgetary appropriation.
10. Further that the immediate settlement of the order would require County Legislation approval which has not been given to the Respondent as the budget cycle has already been closed and further that the County Government is in the middle of its financial year and such funds would have to have been provided for in the county budget.
11. The application was canvassed by way of written submissions. The ex parte Applicant in its written submissions dated 20th April, 2023.
12. The ex parte applicant submits that it is trite that before an order of *mandamus* is issued, the Applicant must first satisfy the procedural requirement as stipulated under section 21 of the [Government Proceedings Act](#) which makes it a prerequisite for a certificate of costs and a certificate of order to be obtained and served against the government.
13. The case of [Kisya Investments Ltd v Attorney General](#) (2005) 1 KLR 74 is cited to support the above argument.
14. The applicant's case is that in compliance with the above requirement it extracted a Certificate of Costs dated February 25, 2016 and a certificate of order against Government on 13th August, 2019. The certificate of order is said to have been served upon the Respondent on 20th August, 2019.
15. The Respondent's failure to settle the outstanding decretal sum is said to be in breach of the Applicant's legitimate expectation which doctrine was elucidated in the cases of *Schmidt v Secretary*



of *State of Home Affairs* [1968] EWWCA Civ J1219-2, *Republic v Attorney General & another ex parte Waswa & 2 others* [2005] 1 KLR 280 and *Republic v Principal Secretary, Ministry of Transport, Housing and Urban Development ex parte Soweto Residents Forum CBO* [2019] eKLR.

16. It is also the ex parte applicant's submission that pursuant to article 47 of the *Constitution*, 2010 every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Respondent was therefore duty bound to settle the outstanding decretal sum in a timely fashion.
17. The applicant submits that the remedy of mandamus is provided for under section 8 of the *Law Reform Act* as read alongside with the provision of order 53 of the *Civil Procedure Rules*. Section 11 of the *Fair Administrative Action Act*, 2015 is also cited in this regard.
18. On the scope of the order of *mandamus* the case of *Republic v Kenya National Examination Council ex parte Gathenji & others* [1997] eKLR is cited on the scope of an order of mandamus.
19. The ex parte applicant submits that there is no other legal remedy available to the ex parte applicant other than an order of mandamus as sought.
20. The Respondent in its written submissions dated May 23, 2023 submits that it is not in dispute that this court has the jurisdiction to issue an order of mandamus however, having rendered its judgment in this matter on 8th October, 2014 it is *functus officio*.
21. The Respondent submits that as was held in the case of *Shah v Attorney General (No.3)* Kampala HMC No.31 of 1969 [1970] EA 543 there are principles that are established in the granting of orders of *mandamus* and these are;
 - a. The duty is in the nature of a public duty.
 - b. The duty affects the rights of an individual.
 - c. There is no more appropriate remedy.
 - d. The person or authority to whom it is issued must be under a statutory or legal to do or not to do something.
 - e. The duty is of an imperative nature.
22. It is also submitted that an order of mandamus is a judicial command requiring the performance of a specified duty which has not been performed and that in the instant application the respondent has not refused to act and/or perform its duty to ensure that the Applicant is paid on the contrary the respondent is in fact willing to expedite the same if only the Court and the applicant can indulge it to make arrangements towards settlement of the same.
23. The case of *Republic v County Secretary Nairobi City County & 3 Others; Koceyo & Co. Advocates (ex parte)* [2020] eKLR is cited on whether lack of budgetary allocation can absolve the Respondent of its duty to pay the decretal sum. On the circumstances under which an order of mandamus can be issued the case of *Republic v Kenya National Examination Council ex parte Gathenji & others* [1997] eKLR is referred to.
24. The Respondent reiterates that execution proceedings against a government can only be issued 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 the body as was held by the courts in *Soloh Worldwide Inter-enterprise v County Secretary Nairobi County & another* [2016] eKLR and *Permanent Secretary Ministry of State for Provincial Administration and Internal Security* [2012] eKLR.



25. On who should bear costs of these proceedings the Respondent submits that costs follow events. The case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR is cited on the issue of costs.
26. The Respondent in conclusion submits that it can only pay the decretal sum once the same is allocated for, approved and passed by the County Assembly as provided for in section 125 of the *Public Finance Management Act*, 2012.

Analysis and Determination

27. The court has considered the arguments advanced by both parties herein and two issues crystallizes for determination as follows;
 - i. Whether the Respondent has a legal duty to satisfy the decree subject of these proceedings;
 - ii. Whether the Applicant has satisfied the conditions precedent to warrant the orders of this court.
28. It is not in dispute that there is a valid court order pending fulfilment by the Respondent herein.
29. The Respondent has not denied having been served by the Applicant in accordance with the provisions of section 21(1) of the *Government Proceedings Act* which provides thus;

“(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.”

30. Section 21 (3) also 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.”



31. However, the Respondent contends that execution proceedings against a government can only be issued 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 the body.

32. Contrary to this argument the Court in the case of [*Jaribu Credit Traders Limited v Nairobi County Government*](#) [2018] eKLR held as follows;

“65. The respondent contends that only the ECM finance can be compelled to settle the decree and that therefore the application herein is fatally defective. I disagree. The entity to be compelled to settle decree of the court is the Respondent and the ECM is only but an officer in the Respondent’s office and establishment. This court has discretion and will not automatically strike out proceedings unless they are fatally defective. In exercising the discretion, the most important consideration, in my view, is that of justice and unless the applicant’s error of not specifically naming the ECM Finance is likely to occasion the respondents prejudice, the court, as always, should lean towards sustaining a suit. what this court finds in this case as a defect is only that of non-joinder and or misjoinder of a party.

66. An issue as to the effect of misjoinder or non-joinder in judicial review proceedings was the subject of determination in *Republic ex parte the Minister for Finance & the Commissioner of Insurance as Licensing and Regulating Officers v Charles Lutta Kasamani T/A Kasamani & Co Advocate & another* Civil Appeal (Application) No. Nai. 281 of 2005 in which the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular” We think not, as we find that it substantially complies with the guidelines set out by this Court.”

33. This Court associates itself with the above sentiments. The *ex parte* Applicant herein is correctly before this court as it is the only way it can realize the fruits of its judgment as the [*Government Proceedings Act*](#) prohibits execution of a decree against the Government by way of attachment and sale of Government property and the respondent being a county Government, its assets are not liable to attachment and sale.

34. 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 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.”

35. The Court having rendered judgement in favour of the *ex parte* applicant herein meant that the Respondent herein is under an obligation to satisfy the decree in question without fail. It was also the *ex parte* applicant’s legitimate expectation that this duty would be performed.
36. It is now over seven (7) years since the Court rendered the decree issued on October 14, 2014 and yet the same is yet to be satisfied this is despite the *ex parte* applicant testifying that several demands have been made a fact that is not disputed by the respondent. Neither is there any claim that the *ex parte* Applicant has failed to meet the threshold of execution against government as is provided under section 21 of the [Government Proceedings Act](#).
37. The Respondent in its defense also claims that the *ex parte* applicant has no claim against it and that it is not able to satisfy the decree at the moment due to insufficient budgetary allocation.
38. The Court in the case of [Republic v Principal Secretary, Ministry of Defence ex parte George Kariuki Waitbaka](#) [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 12th February 2018 extensively dealt with the defence as follows:

“As regards lack of budgetary allocation, Githua, J in *Republic v 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].

26. I associate with the said decision and it is therefore my view that settlement of decretal sum by the Government whether National or County does not necessarily depend on the availability of funds. This position was appreciated by this Court in *Wachira Nderitu, Ngugi & Co Advocates v The Town Clerk, City Council of Nairobi* Miscellaneous Application No 354 of 2012 in which this Court pronounced itself as follows:

“I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly, I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein.”

27. 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. That however, is not a reason for one to evade its responsibility to settle such obligations. In other words, financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle a sum decreed by the Court to be due from it. That objection therefore fails.”
48. Non-allocation of funds by Parliament is not an acceptable defence or justifiable excuse for non-payment of decretal sums ordered to be paid by Government officials, in the absence of any evidence of any attempts made by the responsible Government official to commence the process of such allocation. In the present case, this is particularly relevant given that the present contempt of Court proceedings commenced in April 2017, and the



Respondent did not indicate what steps if any, have been taken since then to effect payment of the monies due to the Applicant.”

39. The Respondent’s argument that it lacks budgetary allocation is therefore not a valid reason for failing to comply with this court’s orders.
40. The Respondent also claims that the court is *functus officio* having rendered itself on the matter before this Court on October 8, 2014.
41. The Supreme Court in the case of *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta & William Samoei Ruto* (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling) held as follows on the doctrine of *functus officio*;

“ 18. We, therefore, have to consider the concept of “*functus officio*,” as understood in law. Daniel Malan Pretorius, in “*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*,” (2005) 122 SALJ 832, has thus explicated this concept: “The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

19. This principle has been aptly summarized further in *Jersey Evening Post Limited v A1 Thani* [2002] JLR 542 at 550: “A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available” [emphasis supplied].”

42. The application before this Court is in regard to payment of costs awarded by the Court in its decision dated October 8, 2014 and taxed at the sum of Kshs.6,713,161.00/= on February 25, 2016. This is a matter that is yet to be determined by this court in finality and therefore the court cannot be said to be *functus officio*.
43. The court Odunga J (as he then was) in *Republic v Machakos County; Mwangangi & Company Advocates (Ex parte)* (Judicial Review E010 of 2021) [2022] KEHC 10717 (KLR) (13 June 2022) (Judgment) held as follows on the importance of settling court decrees;

“I associate myself with the position adopted by Majanja, J in *Republic v Town Clerk of Webuye County Council & another* HCCC 448 of 2006 that:

“...a decree holder’s right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that



favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under article 159 (2) (a) & (b) and the Applicant's right of access to justice protected under article 48 of the Constitution."

44. I am persuaded with the reasons fronted by the Applicant in support of its Application and I do hereby proceed to grant the orders sought.

Orders:

The application dated February 9, 2023 is hereby allowed in the following terms: -

- i. An order of mandamus is hereby issued removing into this honourable court and compelling the Respondent to forthwith and without delay cause the payment of the sum of Kshs. 6,713,161.00/= to the *ex-parte* applicant being the outstanding decretal award of costs in Misc. App] Judicial Review No 143 of 2014, *Republic v Nairobi City County; Ex-Parte Elma Limited*.
- ii. The *ex-parte* applicant shall have the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2023

J. CHIGITI (SC)

JUDGE

