



Republic v County Secretary, Nairobi County Government & another; Latis Construction Limited (Exparte Applicant) (Judicial Review Application E039 of 2023) [2023] KEHC 23109 (KLR) (Judicial Review) (28 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23109 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E039 OF 2023
JM CHIGITI, J
SEPTEMBER 28, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY SECRETARY, NAIROBI COUNTY GOVERNMENT 1ST RESPONDENT

NAIROBI COUNTY GOVERNMENT 2ND RESPONDENT

AND

LATIS CONSTRUCTION LIMITED EXPARTE APPLICANT

RULING

1. The Application before me is dated 4th April 2023. The Applicant seeks the following orders:
 1. Spent
 2. That the Honourable Court be pleased to make an order for enlargement of time and grant leave to the Ex-parte Applicant to bring Judicial Review proceedings against the Respondent herein out of time, seeking for the enforcement of the Arbitral award made and published 23rd March 2016 and subsequently adopted as a decree of the Honourable Court on 11th May 2018.
 3. That leave do issue for the Applicant to apply for an order of mandamus directed to the County Secretary, Nairobi County Government in the Republic of Kenya compelling him to satisfy the decree issued by the High Court, Miscellaneous Cause No. 303 of 2017, Latis Construction Limited ~vs~ The County Secretary, Nairobi County Governemnt & Another being payment



Kenya Shillings One Hundred Thirty Six Million, Two Hundred Sixteen Thousand, Four Hundred Forty Seven and Forty Four Cents (Kshs. 136,216,447.44) as per the Certificate of Order against Government dated the 20th August 2020, with interest thereafter levied at the decreed rate of 18% per annum till payment in full.

4. That the costs be awarded to the applicant.
2. The Application is supported by the Statutory Statement of fact and verifying affidavit of Latis Kitana.
 - a. That the Applicant was issued with a decree by the court on 24th July, 2018.
 - b. The certificate of taxation was issued on 24th December 2018.
 - c. A Certificate of Order against the County Secretary. Nairobi County Government was issued on 20th August, 2020.
 - d. In 2018 a committee on pending bills was formed to evaluate the genuine and non-genuine unsettled bills.
 - e. There have been numerous requests to the Respondents Advocates to have this matter settled.
 - f. That the delay in bringing this matter is not inordinate, as he was under the genuine belief that the Respondent would settle the matter as they had so indicated.
3. Through these proceedings the Applicant seeks to compel the Respondents to satisfy the decree in the High Court emanating from Miscellaneous Cause No. 303 of 2017. being payment of Kenya Shillings One Hundred Thirty-Six Million, Two Hundred Sixteen Thousand, Four Hundred Forty Seven and Forty Four Cents (Kshs. 136,216,447.44) as per the Certificate of Order against Government dated the 20th August 2020, with interest thereafter levied at the decreed rate of 18% per annum till payment in full.
4. The Applicant relies on the case of Anne Mumbi Hinga Vs Victoria Kariuki Gathara (2009) eKLR where the court made a finding that:

“The provisions of Arbitration Act make it clear that it is a complete Code except as regards the enforcement of the award /decree where Arbitration Rules 1997 apply Civil Procedure Rules where appropriate....”
5. Rule 141 of the Arbitration Rules provides that:

“In all matters not expressly provided for in the Act and these Rules, the Arbitral Tribunal and the parties shall act in accordance with the provisions of the Act and these Rules and shall make every reasonable effort to ensure that an Award is legally enforceable.”
6. It is further submitted that the Arbitration rules and Act do not provide for a time set to recognize and enforce an arbitral award, however it does state that the Arbitral Tribunal and parties shall make every reasonable effort to ensure that an award is legally enforceable.
7. In the case of Anne Mumbi Hinga (supra) it was stated that that:

“A careful look at all the provisions cited in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot



override section 10 of the Arbitration Act which provides that except as provided in this Act no court shall intervene in matters governed by this Act...The provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules, 1997 apply the Civil Procedure Rules where appropriate. In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act. It is clear to the Court that no application of the Civil Procedure Rules would be regarded as appropriate if its effects would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration. It follows therefore all the provisions invoked except section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court, suo moto, because jurisdiction is everything...Had the superior court played a supportive role as contemplated in section 10 of the Arbitration Act and the other provisions in the Act which invite court's intervention, the consequential delay of close to 10 years in enforcing the award the subject matter of this appeal would have been avoided...Besides the issue of jurisdiction as explained above, section 35 of the Arbitration: Act bars any challenge even for a valid reason after 3 months from the date of the delivery of the award. The last date for the challenge was 15th February, 2008 and all the applications filed in the superior court were incompetently brought before the superior court and the court lacked jurisdiction...We are concerned that contrary to the finality of arbitral awards as set out in the Arbitration Act the superior court all the same entertained incompetent applications which have in turn resulted in the 10 years' delay in the enforcement of the award."

8. Section 41 of the Arbitration Act (1995) binds the government. The Respondents in their replying affidavit stated that inclusion of the 1st Respondent in these proceedings is a misjoinder. The office of the County Secretary is established under Section 44 (1) of the County Government Act which provides as follows:

“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; HC JR No. E039 of 2023 — Ex-parte Applicant's submissions on application dated 4th April 2023
- 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.”

9. 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."

10. The 1st Respondent is in charge of the operations of the Public service. The function of the County secretary was considered by J. Nyamweya in Republic vs County Secretary Nairobi City County and 3 others ex parte Koceyo Advocate (2020) eKLR. The judge stated thus:

“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 1st, 2nd and 3rd 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."

11. 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.

12. The Applicant argues that courts have a responsibility to ensure that the arbitral autonomy is safeguarded. In the case of Republic -Vs- Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti (2018) eKLR, the Learned Judge, Justice Mativo in allowing extension of time stated:

“In addition, the discretionary powers of the court are constrained by the objectives of *the Constitution* to grant access to justice. 'Discretion' signifies a number of different legal concepts. Here the order is discretionary because it depends on the application of a very general standard, what is 'just and equitable', which calls for an overall assessment in the light of the factors mentioned in (*the Constitution* or a statutory provision), each of which in turn calls for an assessment of circumstances. Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed



rule to the facts on which its operation depends. There is nothing arbitrary or capricious about exercising a discretion in order to give effect to a constitutional right."

13. Article 47 of *the Constitution* (2010) provides that:

"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

14. This is echoed under Section 4 of the *Fair Administrative Action Act*. In the present case, the Ex-Parte Applicant was awarded an arbitral award that was recognized by the High Court in Miscellaneous Cause No. 303 of 2017 and adopted as a decree of the court. The Ex-Parte Applicant then proceeded to apply for a Certificate of Order as provided for under Section 21(1) of the *Government Proceedings Act* and a certificate was issued on 20th August, 2020. Thereafter, a committee was established to determine the unsettled bills that were genuine in order for the same to be settled. The Applicant had the belief, understandably so, that their bill would be settled over this period however the said payment was never made. This legitimate expectation resulted to the delay in filing the application herein.

1st And 2nd Respondents' Case

15. The 1st and 2nd Respondents filed a Replying Affidavit dated 11th May, 2023 and Grounds of Opposition dated 12th May, 2023. The Respondents submit that the Application offends the provisions of Sections 9(2) of the *Law Reform Act*, Cap 26 Laws of Kenya which stipulates for the time within which such applications shall be made.

16. Section 9(2) of the Law Reforms Act states as follows: -

"9. Rules of court

(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates. They argue that "shall as it appears in the above section is not for cosmetic reasons. In the case of Republic v Non-Governmental Organizations Ex parte Linda Bono & 4 others; Philip Opiyo Sadiah & 5 others (Interested Parties) [2020] eKLR stated as follows: -

"The duty of the courts of justice to try to get at the real intention of *the Constitution*, legislation or Regulation by carefully attending to the whole scope of the provisions. The Supreme Court of India pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature,



its design and the consequences which would follow from construing it in one way or the other.

The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.²⁵¹ The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory (261 Ordinarily the words 'shall' and 'must' are mandatory and the word 'may' is directory. The word shall does not appear in the above Regulation thrice for cosmetic purposes. A proper construction of the above Regulation leads me to the conclusion that it is mandatory. Had the drafter intended otherwise, he could have deployed the word "may" which is permissive."

17. They urge this court to dismiss the applicant's application as the Law Reforms Act does not give any room for enlargement of time. Moreover, the applicant herein pegs its application in Rule 141 of the Arbitration Rules and Order 50 Rule 6 of the Civil Procedure Rules, 2010 but it is the Respondents' submission that the provision of a statute overrides that of a subsidiary legislation thus the instant application cannot stand but should fail with costs.
18. In the case of *Raila Odinga & Others vs Nairobi City Council* {1990- 1994} 1E.A 482 the Court held that: -
 - “(i) the Rules under the Act cannot override the clear provisions of Section 9(2) of the Act; (ji) an act of Parliament cannot be amended by subsidiary legislation; (iti) Parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it.”
19. The Applicant has not provided sufficient reasons to warrant the delay thus the same is inexcusable. They also refer the court to the case of *Republic vs Kenya School of Law & Council of Legal Education ex parte Daniel Mwaura Marai* (2017) eKLR whereby it was held that: -

“The provisions of a subsidiary legislation can under no circumstances override or be inconsistent with any act of Parliament be it the one under which they are made or otherwise.”
20. That same breadth, Section 31(b) of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya provides that no subsidiary legislation shall be inconsistent with the provisions of an Act of Parliament.
21. The Applicant does not deserve an order for enlargement of time to bring Judicial Review proceedings against the Respondents.
22. According to the Respondents the present application offends the provisions of the *Government Proceedings Act*, CAP 40 Laws of Kenya in regard to execution against the government. They rely on the



case of Republic v County Secretary, County Government of Mombasa & 2 others Ex-parte Samuel Mutemi t/a Tudor Paradise [2021] eKLR relied heavily in the case of Council of Governors & Others v The Senate Petition No 413 of 2014 [2015] eKLR where the question as to who is the accounting officer of a County Government was dealt with in extensive by the Court which 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. the keeping of financial records and the auditing of accounts of all governments and other public entities, and prescribe other measures for securing efficient and transparent fiscal management; and
 - 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.

Pursuant to this provision, Parliament enacted the *Public Finance Management Act*. The appointment and designation of a County Government Accounting Officer is provided for under Section 148 of that Act, as follows;

A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.

Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.

It therefore follows that “an accounting officer” for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the *Public Finance Management Act*. Indeed, Section 148 (3) of the *Public Finance Management Act* mandates the County Executive Committee Member for Finance to ensure that each County government entity has an accounting officer as provided for under Article 226(2) of *the Constitution*.

As regards the accounting officer for the County Assembly, Section 148(4) of the *Public Finance Management Act* provides that; “The Clerk of the County Assembly shall be the accounting officer of the County Assembly”.

23. Having found as we have, it follows that the question posed by the Petitioners as to whether the County Governor is an Accounting Officer, must be answered in the negative. He is not an Accounting Officer and we have said why.”



24. 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:
- “ Be the head of the county public service;
- Be responsible for arranging the business, and keeping the minutes, of the county executive committee subject to the directions of executive committee;
- Convey the decision of the county executive committee to the appropriate persons or authorities; and
- Perform any other functions as directed by the county executive committee.”
25. 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.
26. They argue that the inclusion of the 1st Respondent in these proceedings is a misjoinder as judicial review applications are mainly brought against the person who is bound by the law to comply with the orders sought.
27. They submit that the orders as sought in the instant application cannot be enforced against the parties cited herein thus leave should not be granted and that the Respondents have never been parties in these proceedings.

Analysis And Determination

Issues For Determination:

1. Whether this court can make an order for the enlargement of time and grant leave to the Ex-parte Applicant to bring Judicial Review proceedings against the Respondent herein out of time.
2. Whether leave can issue for the Applicant to apply for an order of mandamus directed to the County Secretary, Nairobi County Government as sought.
3. Whether the County Secretary, Nairobi County Government is a proper party.

On The 1st Issue:

28. In the *Joseph Muriithi Nyaga v Embu County Government* [2021] eKLR, The Court while addressing its mind to the issue of whether the application for leave to file for orders of mandamus had been filed within the stipulated period held as follows;
- “ 17. I have clearly looked at the said Order 53 of the CPA and there is nowhere in that Rule it is stated that an application for the order of mandamus must be made within six months of the date of the act complained of. It is only in Order 53 Rule 2 that a specific timeline is given for the application for the order of certiorari. That particular Rule reads as follows:
2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a



time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

29. Further, from the reading of the said section 9(2), the prescription as to the time within which applications for an order of mandamus, prohibition or certiorari ought to be made is in regards to specified proceedings. There are no other rules which have been made in regards to execution against the government taking the same as specific proceedings as contemplated by the said section.
30. It is my view therefore, that the respondent herein misconstrued the law in raising the preliminary objection. It is clear that section 9(2) does not limit the time for filing an application for mandamus to six months but provides that rules made to provide for the procedure of the courts may limit such time. The procedural rules (CPR 2010) which are the only applicable rules do not provide for such a limitation on time in relation to an application for orders of mandamus but only when seeking for orders of certiorari.
31. I am in agreement with this finding. The Applicant did not have to seek orders to enlarge time to seek leave for orders of Mandamus.

Issue 2 and 3rd Issues:

32. Issues 2 and 3 are interrelated. The applicable law on leave to commence judicial review proceedings is Order 53 Rule 1 of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The reason for the leave was explained by Waki J (as he then was), in *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others*, Mombasa HCMCA No. 384 of 1996 as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by, and to remove the uncertainty in which public busy bodies with misguided or trivial complaints or administrative error officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

33. It is also trite that in an application for leave, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant’s case is sufficiently meritorious to justify leave. In *Uwe Meixner & Another v Attorney General* [2005] eKLR, it was held that the leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case. Thus, the first step in the Judicial Review procedure involves the mandatory “leave stage.” At this stage an application for leave to bring Judicial Review proceedings



must first be made. The leave stage as held by Waki J is used to identify and filter out, at an early stage, claims which may be trivial or without merit.

34. From the material available this court it is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant.
35. The Applicant is seeking to compel the Respondents to satisfy the decree in the High Court, Miscellaneous Cause No. 303 of 2017 being payment of Kenya Shillings One Hundred Thirty-Six Million, Two Hundred Sixteen Thousand, Four Hundred Forty-Seven and Forty-Four Cents (Kshs. 136,216,447.44) as per the Certificate of Order against Government dated the 20th August 2020, with interest thereafter levied at the decreed rate of 18% per annum till payment in full.
36. Without getting into the merits of the case, I am persuaded that the Expartes claim is not trivial. The Applicant has made out a case fit for further investigation at a full inter partes hearing of the substantive application for orders of Mandamus and I so hold. The Respondent argues that the Applicant has sued the wrong party.
37. The Respondents argues that Exparte Applicant has sue two respondents being The County Secretary and the Nairobi County Government Nairobi County Government.
38. The Respondent argues that the inclusion of the 1st Respondent in these proceedings is a misjoinder as judicial review applications are mainly brought against the person who is bound by the law to comply with the orders sought.
39. This court takes note of the fact that the Exparte Applicant sued two Respondents. The Respondents have no issues with the Nairobi County Government Nairobi County Government being a Respondent.
40. The 2nd Respondent is the primary party in the suit. This fact alone is sufficient in my mind to enable me to allow the suit to be admitted for leave. Whether or not the 1st Respondent is wrongly sued, the law on misjoinder does not render an otherwise valid suit fatally defective. The 2nd Respondent remains liable to honour the decree.
41. In any event the 1st Respondent has been a party to the arbitral proceedings. The 1st Respondent is a party in the Decree and the Certificate of taxation and I do not find any prejudice occasioned by leaving the 1st Applicant as such.
42. 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 vs. 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.”
43. The Respondents case is a red herring aimed at ensuring that they deny the Applicant justice. This suit survives and the same must graduate past the leave phase and I so hold.

Order:

The Application dated 4th April 2023 is allowed in the following terms:



1. The Applicant shall file and serve the substantive Motion within 14 days of today's date.
2. The Application shall be heard by way of written submissions.
3. The Respondents shall file and serve their responses if any to the application within 14 days of service.
4. The Applicant shall thereafter file and serve its submissions within 7 days of service.
5. The Respondents shall thereafter file and serve their submissions within 7 days of service.
6. The submissions shall be limited to 7 pages each.
7. The matter shall be mentioned on 14th November, 2023 for further directions.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2023.

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JOHN CHIGITI (SC)

JUDGE

