



IN THE HIGH COURT KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NUMBER 89 OF 2017

JARIBU CREDIT TRADERS LIMITED.....APPLICANT

VERSUS

NAIROBI COUNTY GOVERNMENT.....RESPONDENT

JUDGMENT

1. The Applicant **JARIBU CREDIT TRADERS LIMITED** is a limited liability company incorporated in Kenya under the Companies Act Cap. 486 Laws of Kenya.
2. The Respondent **NAIROBI COUNTY GOVERNMENT** is a statutory body established under the Constitution of Kenya.
3. By a Notice of motion dated 10th of March 2017 brought under the provisions of Order 53 Rule 3 of the Civil Procedure Rules, the ex parte applicant **JARIBU CREDIT TRADERS LIMITED** seeks for a judicial review order by way of Mandamus to compel the County Secretary and the Head of County Public Service as the accounting officer of the County Government to make payment of the sum of Kshs. 3,637,385.20 with interest on Kshs 3,316,508.75 at the rate of 12% per annum from 1st August 2016 until payment in full; and that the costs of this Application to be awarded to the Applicant.
4. The motion is predicated on the grounds that-the said County Secretary has failed or neglected to pay the said amount in satisfaction of the decree passed in **Chief Magistrate's Court Civil Case No. 655 of 2013 – Jaribu Credit Traders Limited versus Nairobi City Council** and that Leave to institute these proceedings was granted to the applicant by the court on 1st March 2017.
5. The application is further supported by the affidavit sworn by **SURESH KANTARIA** sworn on 27th February 2017 and filed herein on 28th February 2017 and upon the statutory statement dated 27th February 2017 and filed on 28th February 2017.
6. The ex parte applicant's case as per the statement and sworn affidavit of its Chairman Mr **SURESH KANTARIA** is that the applicant filed suit on 12th September 2001 being **High Court Civil Case No. 1393 of 2001 – Jaribu Credit Traders Limited versus Nairobi City Council** claiming the sum of Kshs. 1,212,077.15/- from the Respondent for goods sold and supplied to the respondent's employees on hire purchase by the applicant at the respondent's request. The suit was transferred from the High Court to the Chief Magistrate's Court on 21st January 2013 and was given the case number Chief Magistrate's Court Civil Case 655 of 2013. A defence was filed by the defendant on 4th February 2002 denying liability.
7. The case was heard before the Honourable Mr D. W. Mburu (Principal Magistrate) on 21st July 2015 and 24th September 2015 and judgment was delivered on 29th February 2016 and the applicant was awarded the sum of Kshs. 1,212,077.15 with costs and interest.
8. Thereafter, the decree was issued, costs assessed and a Certificate of stated costs thereto issued on 28th June 2016 as shown by an annexed copy of the decree marked "SK1."
9. That in 2012 the County Government of Nairobi took over the assets and liabilities of the Nairobi City Council which latter ceased to exist. A Certificate of Order against the Government was also issued on 17th August 2016. That the County Secretary as the accounting officer of the County Government is by law required to satisfy any judgment against the County Government.
10. Then the Certificate of Order against the Government together with the decree were served upon the County Secretary and the Head of County Public Service under cover of letter dated 25th August 2016. In the said letter, notice of intention to take out judicial review proceedings in default of the payment of the decretal amount was given.

11. It is alleged that to date no payment has been received by the applicant and that the amount now due to the applicant is Kshs. 3,637,385.20 together with further interest on Kshs. 3,316,508.75 at the rate of 12% per annum from 1st August 2016 until payment in full.
12. The Certificate of Order against the Government together with the decree were served upon the Nairobi County Secretary and Head of County Public Service under cover letter dated 25th August 2016. In the said letters, notice of intention to take judicial review proceedings against the County Secretary in default of payment of the decretal amount was given.
13. It is claimed that to date no payment has been received by the applicant and that the amount now due to the applicant from the County Secretary is Kshs. 3,637,385.20 together with further interest on Kshs. 3,316,508.75 at the rate of 12% per annum from 1st August 2016 until payment in full.
14. The respondent opposed the notice of motion and filed grounds of opposition dated 23rd March, 2017 and contending that the application is premature, misconceived and bad in law and that the applicant has misled the court to issue mandamus orders against the respondent. That under the public Finance Management Act Cap 412C Laws of Kenya, it is the accounting officer that is the County Executive Committee member of the respondent in charge of Finance who should be compelled to settle the decree and not the respondent hence the application is fatally incompetent.
15. Further, that the purported decree was neither served on the respondent nor its advocate.
16. That there is no statutory duty imposed on the respondent to settle decree as no law was cited as placing such duty upon the respondent to act but that nonetheless, the order should be directed to the Country Executive Committee Member in charge of Finance not the respondent herein who is wrongly suited and therefore the prayer for mandamus is null and void as no action can be founded on a wrong party.
17. That the application is malafides, frivolous and vexatious as it should have been directed to the CCM in charge of Finance and not the respondent.
18. That it would be contrary to sections 196 and 197 of the Public Finance management Act (2012) for the respondent to spend any public funds without any prior authorization and that the respondent does not owe any duties or responsibilities to the applicant and that the respondent should have moved the court to claim for damages for wrongful institution of suit and waste of the court's time.
19. That the respondent has various competing interests catered for in the budget hence the court should allow for the applicant's claim to be factored in the forthcoming budget as approved by the County Assembly since the County Executive Committee cannot expend money not approved in the budget it will amount to an illegality.
20. The parties' advocates filed written submissions which they adopted as canvassing their respective client's positions in this matter.
21. In the exparte applicant's submissions dated 18th April 2017 the applicant's counsel reiterates the contents of the statutory statement and affidavit and maintains that the prayers sought against the respondent are merited as there is no denial that there is a valid decree of the court for the sums of money claimed and that no reasons have been given for non-payment. Further, that the respondent has a public duty to settle decree of the court which is an Order of the Court. Reliance was placed on **R vs Permanent Secretary Ministry of Water Resources Management & Development exparte Akamba Timber & Hardware Ltd (2006) eKLR**.
22. It is further submitted that the applicant has exhausted all options availed by section 21(1),(2)(3) of the Government Proceedings Act and yet there has been no payment and therefore it has been left without any remedy.
23. Further reliance was placed on section 21(4) of the Government Proceedings Act and the case of **R v Attorney General & 2 others exparte Mwikali Muindi Katunga & Another (2014) eKLR**.
24. It was submitted that the respondent has a duty to ensure that all the amounts due and owing are paid to the person entitled as per the Certificate of Order against the Government together with interest if any and that the respondent cannot run away from its responsibilities by simply saying that the orders sought do not lie against it.
25. It was also submitted that the County Executive Committee is an entity through which the County Government discharges its functions and duties therefore the argument propounded by the respondent that the CCM is independent of the respondent is unreasonable and ought to be disregarded. In addition, it was submitted that the mere fact that the CC is accountable to the respondent it means that the respondent is a proper party to this suit and therefore cannot purport to run away from its obligations.
26. On the part of the respondent, submissions were filed on 11th April, 2017 dated 10th April, 2017. The respondent's counsel framed two issues for consideration namely:- **1. Whether the Respondent is the one against whom the orders sought herein ought to issue? 2. Whether the Applicant served the Respondent with the Order as required by Law?**
27. On the first issue of whether the respondent is the one against whom the orders sought herein ought to issue? It was submitted that the proper person whom the Applicant ought to have cited should have been the Respondent's County Executive in charge of Finance. Consequently, the Applicant's application is premature, misconceived and bad in law.
28. Further, that the County Government's Responsibilities with respect to management and control of public finance under the **Public Finance Management Act, CAP 412C** of the Laws of Kenya provides that 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. Reliance was placed on **Section 103 and**

104 of the Act which states that;

“There is established for each county government, an entity to be known as County Treasury and shall comprise of the County Executive Committee member for finance, the Chief Officer, the department or departments of the County Treasury responsible for financial and fiscal matters.”

“Subject to the Constitution, a County Treasury shall monitor, evaluate and oversee the management of public finances and economic affairs of the county government including—developing and implementing financial and economic policies in the county, preparing the annual budget for the county and co-ordinating the preparation of estimates of revenue and expenditure of the county Government, co-coordinating the implementation of the budget of the county government, mobilizing resources for funding the budgetary requirements of the county government and putting in place mechanisms to raise revenue and resources, managing the county government’s public debt and other obligations and developing a framework of debt control for the county.....”

29. It was therefore submitted that based on the above provisions of the law the Order sought by the Applicant does not properly lie against the Respondent as there is no statutory duty imposed upon the Respondent to act as demanded. This is because the County Government’s Responsibilities with respect to management and control of Public Finance under the **Public Finance Management Act CAP 412C** of the Laws of Kenya gives the duty to pay out funds from the county Treasury upon the County Executive Committee member in charge of Finance and not the Respondent herein.

30. It was submitted that the Applicant cannot claim that the Respondent has **no Authority** to act as ordered. That the alleged contemnor is a public officer and is prohibited in Law; under sections 196 and 197 of the **Public Finance Management Act (2012)** from paying the Applicant as ordered for it would be an offence to spend any public funds without any prior authorization.

31. Further, it was contended that in any case the Applicant is asking the Honourable Court to issue an order of mandamus as against the Respondent yet the Applicant has not cited the law in which the Respondent is obligated to act as demanded. Reliance was placed on **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where Goudie, J expressed himself, *inter alia*, as follows:

“Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. ...Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...”

32. It was submitted that the claim by the Applicant against the Respondent **for contempt of Court** is consequently null and void and the Applicant cannot found a cause of action by instituting a wrong party. That such an Order should be referred to the County Executive Committee member in charge of finance and not the Respondent herein who is wrongly suited and therefore the Application is fatally incompetent and incurably defective. Reliance was placed on **Soloh Worldwide Inter-Enterprises v County Secretary Nairobi County & another [2016] eKLR** where it was held:

“It therefore follows that the person who has the overall financial obligation for the purposes of the affairs of a County Government must be the County Executive in Charge of Finance and unless he shows otherwise, he is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In an application for mandamus where orders are sought to compel the satisfaction of a decree against a County Government, the proper person to be a respondent ought to be the said County Executive in Charge of Finance unless he discloses that he had in fact appointed an accounting officer for that purpose.”

33. Further, it was submitted that the Respondent has various competing interests catered for in the budget and the Respondent prays that the Honourable Court allows for the Applicant’s claim to be factored in the forthcoming budget as approved by the County Assembly since the County Executive cannot expend money not approved in the budget. It will amount to an illegality. Reliance was placed on **Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others [2015] eKLR** where the court held:

“The Honourable Court held that under the provisions of Section 104(1)(a)(b) of the Public Finance Management Act, it is the responsibility of the County Treasury to prepare the Annual Budget for a County and co-ordinate the preparation of Estimates of Revenue and Expenditure of a County Government. The procedure for the budgetary process under Section 117 of the Public Finance Management Act therefore starts with the preparation of a County Fiscal Strategy Paper which is then submitted for approval by the County Assembly by 28th February of each financial year. In preparing the County Fiscal Strategy Paper, the County Treasury is obligated to specify the broad strategic priorities and policy goals that will guide the County Government in preparing its budget for the coming financial year. Thereafter, under Section 118 of the Act, the County Treasury prepares a County Budget Review and Outlook Paper in respect of the County for each financial year and submits the paper to the County Executive Committee by 30th September of that year. The County Executive Committee then is obligated to discuss that Outlook Paper and after approval it is laid before the County Assembly before it is published and publicized.”

34. On the second issue of whether the applicant served the respondent with the order, it was submitted that the Court Order issued on 29th February, 2016 which the Applicant purports to be disobeyed by the Respondent was neither served upon the Respondent nor its Advocate.

35. Further, that the Applicant is deliberately misleading the Honourable Court in their Application when they purport that the Respondent allegedly disobeyed the Court's Order issued on 29th February, 2016.

36. That the Applicant had a duty in law to ensure that upon the Court making its determination they serve the Respondent with the Orders made therein.

37. It was submitted that the law requires that when a Court makes an Order against the Government then such an order must be served on the government via a specified procedure set out under **Section 21(1), (2) and (5) of the Government Proceedings Act**, which states,

*“ 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.”*

*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.***

*This section shall, with necessary modifications, **apply to any civil proceedings by or against a county government, or in any process.***

38. The Respondent contends that it was not aware of the said Orders issued on 29th February, 2016 and that it only came to know of the same when it was served with an Application dated 27th February, 2017 wherein the Order was attached.

39. It was submitted that from the excerpt of the Government Proceedings Act above, the Applicant is required to effect service of the Orders of the Court within 21 days from the date the Orders were made. Therefore, it was submitted that the Applicant's Application is consequently bad in law as it ambushes the Respondent with an allegation of Contempt yet the Respondent was not served with the said Orders within the stipulated time. The respondent urged the court to dismiss the exparte applicant's application with costs.

DETERMINATION

40. I have considered the foregoing and in my humble view, the issues for determination in these proceedings **are: 1) whether the respondent is suited in these proceedings and if so, whether the orders sought against it are available to the exparte applicant; 2) what orders should this court make; and 3) who should bear the costs of these proceedings.**

41. On whether the respondent herein is suited, Article 6(1) of the Constitution establishes counties that constitute the territory of Kenya. Under Article 6(2), the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.

42. The First Schedule to the Constitution lists the counties and Nairobi City is County number 47.

43. Under the County Governments Act, the County governments are corporate entities with a corporate seal and they can sue and be sued in their own corporate names.

44. From the facts of this case, the respondent is the successor institution to the former Nairobi City Council established under the repealed Local Government Act Cap 265 Laws of Kenya and therefore the liability subject of the original civil suit was incurred by the former Nairobi City Council predecessor to the Nairobi City County.

45. Under section 18 of the Transitional and Consequential provisions of the Constitution, All local Authorities established under the Local Government Act (Cap 265) existing immediately before the effective date shall continue to exist subject to any law that might be enacted and that law is the County Governments Act.

46. The respondent accordingly assumed all assets and liabilities of the former Nairobi City Council. In that regard, albeit the applicant had sued the former local authority, it was in order that any subsequent proceedings be conducted in the name of the new outfit and that is the respondent herein. That is the general legal position espoused in **J.A.S. Kumenda & Another vs. Clerk Municipal Council of Kisii & 6 Others [2013] eKLR** and **Republic vs. Town Clerk of Webuye County Council & Another [2014] KLR**. See ***Transition to Devolved Government Act***, 2012 section 7 thereof.

47. According to the respondent, judicial review orders of mandamus do not lie against the respondent but against the Executive Committee member in charge of Finance who would be compelled to settle decree as the respondent has no statutory duty to pay to the exparte applicant any decretal sum as per the decree passed against it.

48. Further, that therefore the respondent is non-suited in these proceedings which are frivolous, vexatious, and null and void *ab initio*. It is further claimed that the order allegedly disobeyed was never served upon the respondent and that the court cannot compel the respondent to settle any monies which are not appropriated to it to pay out in accordance with the Public Finance and Management Act. It was contended

that under Section 104(1)(a)(b) of the Public Finance Management Act, it is the responsibility of the County Treasury to prepare the Annual Budget for a County and co-ordinate the preparation of Estimates of Revenue and Expenditure of a County Government.

49. On the part of the exparte applicant, it is submitted that the Executive Committee member is merely a part of the respondent hence there is no defect in these proceedings where the respondent is a party.

50. In answering this issue, it is important to appreciate the place of judicial review remedy of mandamus as has been afforded in various instances.

51. In **Republic vs. Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996**, the Court of Appeal cited, with approval, *Halsbury's Law of England*, 4th Edn. Vol. 7 p. 111 para 89 thus:

"The order of mandamus is of 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."

52. In the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 All E.R. 741, at 743**, Lord Goddard C. J. said -

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges."

53. In **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441**, it was held:

"The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the mandamus order using this method. There is only one rider – an officer can only be committed where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...Local Authorities Transfer Fund Act, which provides funds to local authorities, part of which should be used to pay debts does not provide for their attachment since section 263A of the Local Government Act prohibits it. It just enables the Local Authorities to honour their debt obligations including those covered by a mandamus order. The Local Authorities have to pay as a matter of statutory duty or in the case of mandamus in obedience to the order from the state or the Republic. There is no provision in the LATF Act for attachment or execution".

54. This procedure was dealt with extensively in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** eloquently, in my view, expressed himself, inter alia, as follows:

"Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment...The foregoing may also be thought to be much in point in relation to the applicant's unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty...Since mandamus originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law...English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting "simply in his capacity of servant". There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a mandamus would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of mandamus will lie for the enforcement of the duties...With regard to the question whether mandamus will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, mandamus will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile... It seems to be an illogical

argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government...Whereas mandamus may be refused where there is another appropriate remedy, there is no discretion to withhold mandamus if no other remedy remains. When there is no specific remedy, the court will grant a mandamus that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a mandamus is to go, then mandamus will go... In the present case it is conceded that if mandamus was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of mandamus must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament...In the court's view the granting of mandamus against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In mandamus cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as persona designata, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for mandamus by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by mandamus on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which mandamus will not lie for this reason alone are comparatively few...Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as persona designate to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of mandamus will issue as prayed with costs."

55. I have reproduced the aforesaid decisions in order to show the circumstances under which the Court exercises its supervisory or judicial review jurisdiction in granting an order of *mandamus*. What comes out clearly from the foregoing is that the Court only compels the satisfaction of a duty that has become due.

56. In matters where the applicant claims that the Respondent ought to be compelled to pay a certain amount of money it does not suffice to simply aver that the Respondent is under an obligation to settle its liability to the Applicant. The Applicant must go a step further and prove that the sum claimed is actually due. Where therefore liability is admitted or proved, the next stage is to prove the actual quantum payable and where the said sum is yet to be determined an order of *mandamus* cannot for forth for payment of the said sum.

57. In other words where there is a condition precedent necessary for the duty to accrue, an order of *mandamus* will not be granted until that condition precedent comes to pass. Therefore where there is a genuine dispute as to the exact sums payable, the Court will not by an order of *mandamus* compel the Respondent to exercise that duty until the dispute is sorted out. As was appreciated in **Newton Gikaru Githiomi & Anor vs AG/Public Trustee Nairobi HC JR 472 of 2014:**

"It must be remembered that judicial review orders are discretionary. Since they are not guaranteed, a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. Further, as the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised."

58. Whereas the Court may compel the performance of the general duty where such duty exists, it will however not compel its performance in a particular manner for example by compelling the respondent to pay a particular amount unless that amount has been ascertained. This position was appreciated by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others**

Civil Appeal No. 266 of 1996 as follows:

“The order must command no more than the party against whom the application 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...These principles mean that an order of mandamus compels 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. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...” [Emphasis added].

59. In **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J.** said -

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. "

60. The same position was adopted in the case of **The Republic v. Director – General of East African Railways Corporation, ex parte Kaggwa (1997) KLR 194**, in which Chesoni, J (as he then was) stated:

“Mandamus is neither a writ of course neither a writ of right but a discretionary remedy which the court will grant only if there is no more appropriate remedy. In other words, if there is a satisfactory alternative remedy available to the applicant, the court will not grant mandamus. Adequate alternative remedy is an important limitation to the availability of an order of mandamus. The purpose of Mandamus is to compel the performance of a public duty or an act contrary to, or evasive of, the law; and it does not lie against a public officer as a matter of course and where one or more, of the bars or limitations exists, the court will, usually, not exercise its discretion in favour of the applicant. These bars are: that there is an alternative specific remedy at law; that there is no possibility of effective enforcement, or performance will be impossible by reason of the circumstances, like lack of power or means to obey on the part of the Respondent; and that it will result in interference by the judicial department with the executive arm of the government...All in all, these bars are discretionary; but there has to be a good reason for them not to apply to a particular case where they exist.”

61. From the above plethora of cases, it is clear that mandamus is a discretionary remedy which will only issue where there is a public duty to be performed by the respondent. However, the remedy will not be available where **there is no possibility of effective enforcement; or performance will be impossible by reason of the circumstances, like lack of power or means to obey on the part of the Respondent; and that it will result in interference by the judicial department with the executive arm of the government.**

62. In the instant case, the respondent is the main defendant in the civil suit giving rise to the decree that is sought to be enforced through these proceedings. There is no other way or means through which that decree can be enforced 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.

63. It therefore follows that only an order of mandamus is available to the ex parte applicant who is a successful litigant in a civil suit. Section 21(4) of the Government Proceedings Act Cap 40 Laws of Kenya provides:

Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, 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.

64. Article 48 of the Constitution guarantees to every person access to justice. In addition, a person who has a decree of the court ought not to be a mere pious explorer in the judicial process by being prohibited from enjoying the fruits of his lawful judgment as that would be a denial of justice.

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 EC M 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 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.”

67. As was held in **Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] e KLR**, though persuasive but good law made by Githua J. that:

“ The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issues against the government is found in Section 21(1) and (2) of the Government Proceedings 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 Honourable 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 Honourable Attorney General, Section 21(3) imposes a statutory duty on the accounting officer to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”

68. It should also be noted that the law does not condition settlement of decree on budgetary allocations. In any case, the decree subject of these proceedings is over one year from 29th February 2016 and each year that passes, the respondent County Government is allocated funds and generates revenue from its own sources to cater for such eventualities/ meeting their legal obligations especially for a civil suit that proceeded to hearing interpartes hence there can be no genuine claim that the respondent has been ambushed with these mandamus proceedings. Furthermore, provision for settlement of decrees emanating from courts is something each Government agency must make in its annual budgetary projections. This position is supported by the holding in **Republic vs Permanent Secretary of State for Provincial Administration** (supra) where the court stated, and I agree:

“This provision [section 21(1)(2) of Cap 40] does not condition payment to budgetary allocation and Parliamentary approval of government expenditure in the financial year subsequent to which government liability accrues. The respondent’s claim that the applicant should have waited until the start of the next financial year to enforce payment of the decree issued in his favour cannot be sustained firstly because it has no legal basis and secondly because it is the responsibility of the government to make contingency provisions for its liabilities in tort in each financial year so that successful litigants who obtain decrees against the government are not left without a remedy.”

69. In this case, what the respondent is saying to the applicant is that you have a paper judgment because although I owe you the money claimed as per the decree of the court, but I cannot pay you because you have not joined to these proceedings my officer, the Executive Committee Member in charge of Finance who is mandated to release the money due to you.

70. The respondent is a state agency that is bound by the principles and values of governance espoused in Article 10 of the Constitution among them, the Rule of law.

71. The above position is fortified by the decision in **Kenya Bus Services Ltd & Others v Attorney General and Others [2005] 1 EA 111** where it was held:

“Fundamental rights cannot be enjoyed in isolation and by a select few while they trample on others or tread upon their rights since the enjoyment of fundamental rights and freedoms contemplates mutuality and an atmosphere of respect for law and order including the rights of others and the upholding of the public interest. The function of the court when faced with the task of establishing or determining the limitation and restrictions on the other hand is to do a balancing act and in this balancing act are principles, values, objectives to be attained, a sense of proportionality and public interest and public policy considerations.

There cannot be a cause of action based on a lawful exercise of right of execution by interested parties since it is a serious contradiction to suggest that creditors who are enforcing their rights under the private law should be stopped from doing so because there are allegation of violation of the constitution by the state or government.”[emphasis added].

72. The Court of Appeal in **CA 212 OF 2014 Isaiah Oduor Ochanda v Attorney General & another** made it clear that:” *procedural protection should not be construed in a manner that abrogates or renders the jurisdiction of the court to punish for disobedience of its order practically inoperative and that in appropriate cases, the court retains the discretion to dispense with procedural protection in the interest of justice, moreso, now that Article 159(2) (d) of the Constitution ordains that justice shall be administered without undue regard to procedural technicalities.”*

73. Albeit this judgment is not concerned with contempt of court as was the above cited case, and as was erroneously claimed by the respondent that no order was served upon the respondent hence no contempt can be leveled against it, the principles espoused therein are the same, that procedural protection can be dispensed with in the interest of justice and moreso where there is no prejudice occasioned to the respondent.

74. The alleged defect in this case is that the ECM Finance is not enjoined to these proceedings, not that the respondent is a wrong party who is non-suited. A party against whom judgment was decreed cannot be nonsuited for purposes of mandamus to compel settlement of that decree.

75. **Section 21(3)** of the Government Proceeding Act provides that the responsible officer for purposes of settlement of decree is the accounting officer of the responsible Ministry of the Government. Nevertheless, **section 21(4)** provides, in essence, that, no officer of the Government shall be individually liable for payment of money or costs ordered against the Government or any Government department or any officer of the Government. It therefore follows that for purposes of execution of the order of mandamus, which is a whole process away from mandamus itself, the exparte applicant will have to identify the responsible officers before any executable order can be granted, say, in contempt of court proceedings, and not necessarily at this stage. It is upon the respondent to direct its relevant office and officers to process payment which is due as per decree and in default, the exparte applicant will identify that responsible officer and seek to cite them for

contempt of court. See **Isaiah Ochanda v Attorney General & another [2016] eKLR**.

76. I am in agreement with the *ex parte* applicant's assertion that the County Executive Committee is an entity through which the County Government discharges its functions and duties therefore the argument propounded by the respondent that the ECM is independent of the respondent is unreasonable and ought to be disregarded. In addition, the mere fact that the ECM is accountable to the respondent it means that the respondent is a proper party to this suit and therefore cannot purport to run away from its obligations.

77. Furthermore, what is before this court is not contempt proceedings but mandamus which, upon issue, the respondent is under a duty, through its accounting officer to settle and in default, there are consequences of disobedience which is beyond the scope of this judgment. It cannot be true that the respondent will be saying that I can't pay because my Executive Committee member has not been joined to these proceedings. It is equally paradoxical for the respondent to say it can't pay, won't pay and at the same time urge the court to order for payment to be made in the next financial year.

78. The respondent being the primary party to the original suit that gave rise to the decree subject of these proceedings cannot arrogate and abrogate. That would amount to impunity and an affront to the rule of law by state agencies.

79. The law prohibits personal liability of a public officer. Thus, the spirit of the law is not to punish individual office holders as they have no personal debt but to compel action.

80. In this case, the quantum of money to be paid is clear. There is evidence that on 26th August, 2016 the *ex parte* applicant's counsel served upon the respondent's County Secretary and Head of Public Service copies of Plaint, Defence, Decree and Certificate of Order Against the Government, urging him to inform the relevant sector to settle the decree as shown in the certificate and a copy of that letter was sent to the respondent's advocates currently on record.

81. Among the Annexures is a Certificate of Order against the Government dated 17th August 2016 in CMCC No. 655 of 2013, between the *ex parte* applicant herein and the respondent's predecessor Nairobi City Council. A decree issued on 28th June 2016 is also attached. In my humble view, therefore, there was no ambush as the respondent has all along been aware of the judgment and decree which it ought to settle and in the absence of any appeal or stay pending appeal, it is under a duty to settle that decree fully.

82. It is for those reasons that I find the *ex parte* applicant's case merited and accordingly, I issue mandamus directed at the Respondent Nairobi City County compelling it to settle the sum of Kshs. 3,637,385.20 with interest on Kshs 3,316,508.75 at the rate of 12% per annum from 1st August 2016 until payment in full. The said payment to be made within 90 days of this judgment and in default, unless there is an order to the contrary, leave to apply for appropriate orders in accordance with the enacted law is hereby granted. The *ex parte* applicant will also have the costs of this application.

Dated, signed and delivered in open court at Nairobi this 8th day of March 2018.

R.E.ABURILI

JUDGE

In the presence of:

Miss Wataka h/b for Mr Makori for the *ex parte* applicant

Miss Maina for the Respondent

CA: Kombo