



**Republic v Chief Officer Finance Nakuru County Government &
another; Gichoya (Exparte) (Environment and Land Judicial Review
Case 2 of 2020) [2022] KEELC 3652 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3652 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 2 OF 2020
FM NJOROGE, J
JUNE 23, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**CHIEF OFFICER FINANCE NAKURU COUNTY GOVERNMENT 1ST
RESPONDENT**

COUNTY GOVERNMENT OF NAKURU 2ND RESPONDENT

AND

AGNES MUMBI GICHOYA EXPARTE

JUDGMENT

1. The Notice of Motion dated 8/12/2020 seeks the following orders:-
 - a. That an order of *Mandamus* do issue to compel the Respondents herein, by themselves and or their agents to settle the decree issued by the court in Nakuru CMCC 1885 of 2003, *Agnes Mumbi Gichoya V Teresia Wangari Mwangi* (sued in her capacity as the legal representative of the estate of the late Fredrick Mwangi) and Nakuru County Government by paying to the Subject Applicants the sum of Kshs. 4,720,960/= being the decretal amount and costs of the suit forthwith and in default the Respondents be committed to civil jail for such period as the court may direct.
 - b. That the costs of the application for leave and this Motion be awarded to the Subject.



The Application

2. The Application is based on the grounds that the Ex parte Applicant was a successful litigant in Nakuru CMCC 1885 of 2003 which suit was against the 2nd Respondent herein. That judgment was entered against the 2nd Respondent in favor of the Ex parte Applicant in Nakuru CMCC 1885 of 2003 for a total sum of Kshs. 4,200,000 plus costs and interest of the suit. That the interest from the date of judgment to date was tabulated at Kshs. 294,000 while the costs payable to the Ex parte Applicant was assessed at Kshs. 226,960 making the total amount due Kshs. 4,720,960.
3. The Ex parte Applicant avers that the Respondents have since failed and/or refused to pay the claim despite being served with the decree and making various promises to pay. The Ex parte Applicant now seeks an order of mandamus to compel the Respondents to pay the decretal sum. That the Ex parte Applicant has been denied the right to enjoy the fruit of the judgment hence the instant application.

The Response

4. The Respondents opposed the instant application vide a Preliminary Objection dated 25/2/2021 which was later withdrawn on 25/11/2021 after which they filed a Replying Affidavit dated 29/11/2021 sworn by George Kinyanjui.
5. He averred that the present application was premature and non-cognizant of the Government budgetary cycle and thus misleading the court with regard to the actual state of affairs.
6. He further averred that the 2nd Respondent did not neglect and or refuse to pay but that the instant decretal sum among other pending decretal sums were included in the budgetary provisions for the financial year 2021/2022 and forwarded to the County Assembly for approval in compliance with the [Public Finance Management Act](#).
7. The application was canvassed by way of written submissions.

Submissions

8. The *Ex parte* Applicant filed her submissions dated 17/2/2022 on 7/03/2022 while the Respondents filed their written submissions dated 9/3/2022 on the same date.
9. The *Ex parte* Applicant relied on Section 21 of the [Government Proceedings Act](#) and submitted that the Decree issued in Nakuru CMCC No. 1885 of 2003 was served upon the 2nd Respondents on 16/10/2020 which decree contained the Certificate of Costs which has not been disputed by the Respondents.
10. On the order of *Mandamus*, she cited a number of cases including the Court of Appeal case of [Republic v Kenya National Examinations Council ex parte Gathenji & others](#) (1997) eKLR and the case of [Republic v Commissioner of Lands & another ex parte Kitthinji Murugu M'agere](#), Nairobi High Court Misc. Application No. 395 of 2012 and submitted that the said order is used to compel public officers to perform duties imposed upon them by law and where there are no other remedies then mandamus becomes the most appropriate order. She also submitted that she has complied with the provisions of the law and an order of mandamus ought to be granted.
11. She argued that the Respondents contend that the instant application is premature and yet they have been making positive steps to pay the decretal sum. She further argued that the reason given by the Respondents on budgetary approvals by the County Assembly is neither here nor there as it is the Respondent's responsibility to satisfy court decrees and that the duty cannot be shifted to the Ex parte



Applicant and thus leaving the Applicant in abeyance yet she is entitled to enjoy the fruits of the judgment.

12. The *Ex parte* Applicant urged the court to allow the application and issue an order of mandamus against the Respondents compelling them to satisfy the decree in Nakuru CMCC No. 1885 of 2003 as well as costs.
13. The Respondents submitted on one issue which is whether the *ex parte* Applicant is entitled to the prerogative order of mandamus as prayed. They cited the Court of Appeal Case of *Republic v Kenya National Examinations Council ex parte Gathenji & others* (1997) eKLR and argued that they have not in any way declined, refused and/or neglected to pay the Applicant but that the instant application is premature to the extent that it is non-cognizant of the government's budgetary cycle.
14. They also relied on the case of *Erastus K. Gitonga & 4 others v National Environmental Management Authority; Law Society of Kenya (Interested Party)* [2019] eKLR where the court recognized the government's budgetary cycle. They finally submitted that they have acted within the law and that the *Ex parte* Applicant has not demonstrated otherwise thus the courts intervention is unnecessary.

Analysis and Determination

15. It is this my view that the main issue for determination that arises is whether the *Ex parte* Applicant has established grounds to warrant this court to grant the orders sought.
16. It is common ground that an order of Mandamus is issued to compel a person or body of persons, who have failed to perform a duty to the detriment of a party who has a legal right to expect the duty to be performed. Mandamus is a judicial command requiring the performance of a specified duty which has not been performed. It is a discretionary remedy, which a court may or may not grant and it being a judicial one, must be exercised on the basis of evidence and sound legal principles.
17. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty. The Court of Appeal in the case of *Republic v Kenya National Examinations Council ex parte Gathenji & others* (1997) eKLR determined as follows: -

“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.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a Mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute



and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed...”

18. In the instant case, there is a public duty on the part of the Respondents to act. They do not deny this. The duty is owed to the *ex parte* Applicant. This has not been denied. However, the Respondents advanced grounds that the delay of payment of the decretal sum is caused by the government budgetary cycle and that they have not refused and or neglected to make payments.
19. The *Ex parte* Applicant on the other hand has satisfied all the conditions precedent. She obtained the requisite Certificate of Order as the law demands and demanded the payment. This is not denied. There is failure to comply despite promise to perform and the failure is evidenced from the letters by the Respondents dated 25/03/2021 and 28/04/2021 requesting for payments of outstanding court decrees. It has also not been denied. Furthermore, there is no response from the relevant body showing that indeed there is delay with a definitive time the Applicant should expect payments. The order sought is of practical effect and there is no other adequate remedy available to the Applicant. There is no equitable bar to the relief sought.
20. In addition, looking at the authority relied on by the Respondents where the court recognized the government budgetary cycle it is clear that the government also made a provision of a definite time to which the said payments would be made instead of leaving it open.
21. In applying the above tests to the facts and circumstances of the instant case, it is my view that the *Ex parte* Applicant has satisfied the conditions enumerated in the above case and this follows that there is a basis for this court to grant the order of mandamus.
22. In view of the foregoing, it is my opinion that the application 8/12/2020 is merited. This court can allow it and order that:
 - a. An order of Mandamus is hereby issued directed to the Respondents namely Chief Officer Finance and Nakuru County Government to pay the *Ex parte* Applicant the sum of Kshs. 4,720,960 being the decretal amount in Nakuru CMCC No. 1885 of 2003 together with interest and costs as already calculated until payment in full.
 - b. The Respondents shall pay to the *Ex parte* Applicant costs of this application.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 23RD DAY OF JUNE, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

