



**Republic v County Secretary, Nairobi City County Chief Officer, Finance/County Treasurer & another; Garden of Eden Restaurant (Exparte Applicant) (Environment and Land Miscellaneous Application E011 of 2022) [2023] KEELC 920 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 920 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E011 OF 2022  
J OMANGE, J  
FEBRUARY 2, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY SECRETARY, NAIROBI CITY COUNTY CHIEF OFFICER,  
FINANCE/COUNTY TREASURER ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**GARDEN OF EDEN RESTAURANT ..... EXPARTE APPLICANT**

**RULING**

1. The subject matter of this suit is the execution of the Decree and Certificate of Costs arising from the Judgment delivered on 4<sup>th</sup> October 2019 in ELC 102 of 2012.
2. By a Chamber Summons, Verifying Affidavit and a Statutory statement, all dated 7<sup>th</sup> July 2022, the *Ex Parte* Applicant sought leave to take out judicial proceedings, seeking this Honourable Court’s aid in executing a Decree dated 4<sup>th</sup> November 2019 and a subsequent Certificate of costs dated 9<sup>th</sup> June 2019 both issued by this Court in ELC 102 of 2019.
3. Upon being granted leave, the Applicant filed a Notice of Motion Application dated 18<sup>th</sup> July 2022 seeking orders of:
  - a. *Mandamus* directed to the County Secretary, Nairobi City County and the Chief Officer, Finance/ County Treasurer, Nairobi City County to comply by paying the Applicant within 21 days of the Court order of the Court:



- i. Special damages in the sum of Kshs 6,777,432.46 together with interest at Court rates from the date of filing suit until payment in full;
- ii. General damages in the sum of Kshs 1,000,000;
- iii. Exemplary damages in the sum of Kshs 5,000,000;
- iv. Interest on the general and exemplary damages at Court rates until payment in full and
- v. Costs of the suit in the sum of Kshs 741,798.21 together with interest at Court rates from the date of taxation until payment in full.

being the decretal sum and costs in respect of ELC Case No 102 of 2012 Maggie Mbogo T/A Garden of Eden Restaurant v North Lake Limited and 2 others.

- b. In default, a Notice to Show Cause do issue against the County Secretary, Nairobi City County and the Chief Officer, Finance/ County Treasurer, Nairobi City County, Accounting Officer in the Department concerned why they should not be cited for Contempt of Court;
  - c. Costs of this Application be provided for.
4. The Application was based on the grounds that were set out in the Statutory Statement by the Applicant, to summarise: on 4<sup>th</sup> October 2019, Judgment was entered against the Nairobi City Council by Hon Justice J. W Mutungi for Kshs 6,777,432.46 together with interest at Court rates from the date of filing suit until payment in full, General damages in the sum of Kshs 1,000,000, Exemplary damages in the sum of Kshs 5,000,000; Interest on the general and exemplary damages at Court rates as well as Costs of the suit.
  5. It was averred that after delivery of the Judgment, the Applicant extracted a decree from the Judgment on 4<sup>th</sup> November 2019 which was served upon the 2<sup>nd</sup> Respondent on 7<sup>th</sup> November 2019, and subsequently costs were taxed at Kshs 741,798.21 on 18<sup>th</sup> November 2019.
  6. The Applicant contended that despite extracting a Certificate of Costs, a Certificate of order against the Government upon the 2<sup>nd</sup> Respondent, in April 2021, the Nairobi City County has not complied with the payment of the decretal sum.
  7. The Application was served upon the Respondents, who filed a Grounds of Opposition dated 5<sup>th</sup> December 2022.
  8. The Respondents contended that the Application was premature, frivolous, vexatious and an abuse of Court process, that the County Government's responsibilities with the control of public finance vests the duty to pay out of the County Treasury any monies upon the County Executive Committee member in charge of finance and not the Respondents, that the Respondents' offices have recently been constituted and no service has been effected upon the new officials to enable them make a proper arrangements for compliance, that the expenditure by County Governments are appropriated annually by the County Assembly and not the Respondents.
  9. The Respondents therefore urged the Court to allow the County Assembly to allocate the necessary funds for compliance with the Applicant's decree.
  10. It was the Respondents case that the County Government has competing interest including settling the decree, but has limited resources and must abide by the laid down procedure in settling decrees against it, that the officers in the 1<sup>st</sup> Respondent's offices are not in a position to pay off the decretal sum



since the County Government is in the middle of its financial year and such funds must be provided by the County government.

11. The Respondents noted their willingness to pay the decree once funds have been allocated and approved by the County Assembly, and therefore urged the Court to allow the budgeting, allocation and approval of the decreed sums through the County Government Act.

### **Submissions**

12. The Court directed that the Application be canvassed by written submissions. The Applicant filed submissions dated 1<sup>st</sup> December 2022.
13. The Applicant placed reliance on a number of authorities including *Republic v County Secretary, Nairobi City County & another Ex Parte Wachira Nderitu Ngugi & Co. Advocates* [2016] eKLR where the High Court affirmed the treatment of both National and County Governments equally with respect to execution and the case of *Republic v County Secretary, Nairobi City County & 3 others; Koceyo & Co. Advocates (Ex Parte)* [2020] eKLR on the point that the County Secretary, CEC Finance and Chief Officer, Finance are jointly and severally liable for the satisfaction of decrees on payment of money owed by the Nairobi City County.
14. The Respondents filed submissions in which they averred that the decree, certificate of costs and certificate for order against the government was not properly served hence there is no ground to warrant issuing an order of mandamus. Counsel argued that there is no evidence that the Respondents were served as the evidence on record is that it is their advocates who were served.
15. Counsel referred the court to the case of *Republic v County Government of Vihiga Ex Parte Global Exhibitions Ltd* (2021) eKLR wherein the court had this to say :

“The statutory duty on the part of government to settle a judgment or decree of a court arises only after the government has been served with the certificate of order against it. Without being served with the said certificate, government does not incur the duty to pay or satisfy the judgment or decree, and, as a consequence, a mandamus order would not be available, since mandamus is meant to compel performance of a statutory or legal duty. That is the purport and effect of section 21(3)(4) of the *Government Proceedings Act*.”
16. Counsel for the Respondent submitted that the failure to serve the Certificate of Order is fatal to the Applicants application. Counsel further submitted that the County Secretary does not control the budgetary allocation or appropriation for Nairobi County hence has been wrongly suited.
17. This Court has considered the Applicants’ Application, the statutory statement, affidavit, exhibits, the submissions by the both counsels and the authorities cited. From the averments of the both parties, it is common ground there is a Decree and Costs passed in the Principal suit being ELC 102 of 2012.

### **Issue for Determination**

18. Flowing from the foregoing, the issues for determination are:-
  - a. whether the Applicant has satisfied the conditions precedent to warrant the orders of this court.
  - b. whether the Respondents have a legal duty to satisfy the Decree subject of these proceedings



19. The judicial relief sought by the Applicant is in the nature of mandamus. It is settled law that before an order of mandamus is issued, an Applicant must abide by the procedure in Section 21 of the [Government Proceedings Act](#) which provides:

“(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.”

20. Section 21 (3) thereof further provides:

“If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.”

21. These procedures are applicable to County Governments by dint of Section 21 (5) which provides” This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.

22. Having said so, it is for this Court to determine whether the Applicant has satisfied the foregoing procedures.

23. The Applicant has attached, to support its Application, a copy of the Judgment dated 4<sup>th</sup> October 2019 and delivered on 30<sup>th</sup> October 2019, an Affidavit of service sworn on 7<sup>th</sup> June 2020 evincing service of the Decree upon the Respondent, a copy of the Decree dated 4<sup>th</sup> November 2019, an Affidavit of Service sworn on 22<sup>nd</sup> June 2020 for the service of the Certificate of Costs, a copy of the Certificate of order against the Government dated 14<sup>th</sup> April 2021 and Certificate of order for costs against the Government both duly stamped by the Respondents’ Advocates on record.

24. I note that that whereas the Decree and Certificates of costs were served upon the Respondents directly, the Certificates issued pursuant to the [Government Proceedings Act](#) were served upon the Respondents’ Advocates. The said Advocates stamped them in acknowledgement. It has been argued by counsel for



the Respondent that given that the Certificates were not personally served upon the Respondents, the requirements of the *Government Proceedings Act* have not been met.

25. I have anxiously considered this submission and I note that in the persuasive authority which was cited, the applicant had not served the certificates at all as opposed to the present case where service was effected upon the Respondents advocates. Section 21 (2) of the Act provides that “ 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 is not couched in mandatory terms and in my view contemplates service on other persons other than the Attorney General.
26. In the same vein, I am persuaded by the Court’s view in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* [2012] eKLR, where in reference to the proceedings in the Act, the court stated inter alia “ The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court...”
27. It is clear that the Respondents are aware of the obligation to pay special damages of Kshs 6,777,432.46, general damages of Kshs 1,000,000, exemplary damages of Kshs 5,000,000 and Kshs 741,789.21 as costs. They do not dispute this, only requesting for time to settle the decree. In my view, the stringent requirements of the *Government Proceedings Act* have been met.
28. According to the Judgment, these sums attract interest at court rates, at different aspects: Special damages attract interest from the date of filing the suit (28<sup>th</sup> February 2012), general and exemplary damages attract interest from the date of judgment (4<sup>th</sup> October 2019).
29. For a relief of mandamus to be granted, there is need to satisfy the Court that the party against whom it is issued, is responsible. On the question of whether the Respondents bear the legal duty to satisfy this decree I am guided by the decision of Nyamweya J in the case of *Republic v County Secretary Trans Nzoia County Government and Another Ex Parte Veterans Pharmaceuticals Ltd* (2019) eKLR in which the case court held

“section 44 of the County Government Act 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 *Public Finance Management Act* also establishes the County Treasury comprising of the County Executive member of Finance, the Chief Officer and the departments of the County Treasury responsible for finance and fiscal matters.

12. Under section 103(3) of the *Public Finance Management Act*, the County Executive Committee Member for Finance is the head of Treasury and is thus the responsible for finance matters in the County. Therefore, both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are jointly responsible for the satisfaction of Court orders and decrees on payment of money owed by the Trans Nzoia County by virtue of their roles and functions.
30. Finally, the Respondents have cited budgetary constraints, competing interests in meeting the decree, and that the current regime was recently constituted to office and were not served. On the first issue, I find that the Principal case was filed against the Nairobi City Council, whose functions were fully taken over by Nairobi City County. The Court held that this could not render the suit against the Government defective. The case was defended by the County Government of Nairobi City, who even



filed a Counterclaim. The case was prosecuted between the years 2013 until 2019 when Judgment was delivered. Subsequently, costs were assessed in the year 2020. In 2022, these proceedings were instituted.

31. I find that the County Government has been sufficiently aware of the extent of potential risk since the year 2013. If meeting the looming risk should have required a budgetary allocation, they should have or must have made a budgetary allocation from then.
32. In *Republic v County Secretary, Nakuru County Government & another Ex parte Evanson Mbugua Waweru* [2021] eKLR the Court granted the order of mandamus despite the plea of lack of budgetary allocation. Having intimated the willingness to satisfy the decree, budgeting, which is out of the Applicant's control cannot be used to impede compliance with a valid Court order.
33. In this case, if a budget was necessary, then the same should have been factored in either the financial years of 2020, 2021 or 2022. I am also aware of the possibility of supplementary budgeting to cover eventualities.
34. I associate myself with the finding in *Jaribu Credit Traders Limited v Nairobi County Government* [2018] eKLR, where the Court addressed itself to the issue of payment of a decretal amount by a public entity;

“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 v 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.”

35. In *Republic v Town Clerk Of Webuye County Council & another* [2014] eKLR Majanja J held as follows:

“a decree holder's right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario, the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the *Constitution* particularised under Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159(2)(a) and (b) and the applicant's right of access to justice protected under Article 48 of the *Constitution*.”

36. The Applicant's rights to enjoy the fruits of its judgment should not be thwarted. This Court takes the view that whatever the case, the decree must be satisfied, at one point. Decrees and orders of the



Court are not issued in vain. Due to the growing interest rate applicable to the sums, it shall be a more prudent, accountable and better use of public resources if the decree is satisfied sooner rather than later.

37. Execution of the orders of this Court, and indeed any Court in Kenya should be straightforward. In my opinion, every party- whether a private or public institution has a legal obligation to respect and comply with the orders and decrees of the Court. Provided that there is no subsequent order halting or suspending such an order, strict adherence should be automatic. Execution processes should only be a way of expediting adherence.

### **Determination**

38. The upshot of the foregoing is that the Applicant has made a good case for the grant of the reliefs sought, which I hereby grant in the Application has merit, as is allowed in the following terms:
- i. A writ of mandamus is hereby issued directed to the County Secretary, Nairobi City County and the Chief Officer, Finance/ County Treasurer, Nairobi City County to comply by paying the Applicant Special damages in the sum of Kshs 6,777,432.46 together with interest at Court rates from the date of filing suit until payment in full; General damages in the sum of Kshs 1,000,000, Exemplary damages in the sum of Kshs 5,000,000; Interest on the general and exemplary damages at Court rates until payment in full and Costs of the suit in the sum of Kshs 741,798.21 together with interest at Court rates from the date of service until payment in full;
  - ii. The Costs of this cause, is hereby assessed at Kshs 50,000 shall be borne by the Principal Defendant- Nairobi City County.
  - iii. Within 14 days of this Judgment, the Deputy Registrar of this Court shall ascertain the total sums payable as per the Judgment of this Court dated on 4<sup>th</sup> October 2019, factoring the interest at Court rates as outlined in Paragraph 25 of this Judgment, and the assessed costs of Kshs 100,000.
  - iv. The ascertained sum shall continue to attract interest at Court rates from the date of this Judgment until payment in full.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 2<sup>ND</sup> DAY OF FEBRUARY 2023.**

**JUDY OMANGE**

**JUDGE**

In the presence of: -

Mr. Momanyi for Mr. Waweru for Ex parte applicant

Mr. Obeo for Respondent

Steve - Court Assistant

