



Republic v Attorney General & another; Gitukui & others (Suing as the Legal Representatives of the Estate of William Ngugi) & another (Exparte Applicants) (Miscellaneous Application E049 of 2022) [2023] KEELC 16755 (KLR) (2 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16755 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION E049 OF 2022
BM EBOSO, J
MARCH 2, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

AND

SAMUEL NJOROGI GITUKUI & OTHERS (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF WILLIAM NGUGI) EXPARTE APPLICANT

JULIUS KIIRU MWAURA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MWAURA KIIRU) EXPARTE APPLICANT

JUDGMENT

1. Pursuant to the leave granted to the five exparte applicants on 22/7/2022, they brought a motion dated 1/8/2022, in which they sought an order of mandamus compelling the Solicitor General in the Attorney General’s Office and the Secretary of the National Land Commission, as the Accounting Officers of the two Government institutions, to pay them a sum of Kshs 838,815 awarded and taxed as costs payable to them in Thika ELC JR Case No 4 of 2017. The said motion is the subject of this Judgment.
2. The motion was premised on the statement of facts dated 21/7/2022, the verifying affidavit sworn by Dominic Mbugua Wainaina on 21/7/2022; and the supporting affidavit sworn on 1/8/2022 by Dominic Mbugua Wainaina. It was canvassed through written submissions dated 17/10/2022, filed



by M/s Kimathi Wanjohi Muli Advocates. The 1st respondent opposed the motion through grounds of opposition dated 4/8/2022 and written submissions dated 19/12/2022, filed by Ms Rose Nyawira, Senior State Counsel. The 2nd respondent did not respond to the motion.

3. The case of the *ex parte* applicants is that they sued the two respondents in Thika ELC Judicial Review Case No 4 of 2017. This Court [Gacheru J] heard the case and rendered a Judgment dated 27/10/2017, in which the court made findings in their favour and decreed that the respondents were to bear costs of the suit. Subsequently, they drew a bill of costs and caused it to be taxed. The taxing officer of the court taxed the bill of costs at Kshs 838,815 and issued a certificate of costs in accordance with the law. Subsequently, they caused a certificate of order to be issued and served on the respondents in accordance with the requirements in the *Government Proceedings Act*. Despite the foregoing, the respondents have failed to satisfy the decree. It is their case that there is no pending appeal against the Judgment and award of the court in Thika ELC JR Case No 4 of 2017.
4. The gist of the 1st respondent's case is that the Attorney General was sued in Thika ELC JR Case No 4 of 2017 in his representative capacity as the Principal Legal Advisor to the Government, hence an order of mandamus should not issue against the Solicitor-General. It is the case of the Attorney General that the order of mandamus should be directed solely against the 1st respondent.
5. I have considered the motion, the 1st respondent's response to the motion, and the parties' respective submissions on the motion. There is no dispute on the fact that an award of costs was made in favour of the *ex parte* applicants in Thika ELC JR Case No 4 of 2017. There is also no contestation about the fact that the awarded costs were taxed by the taxing officer of the court; a certificate of costs was subsequently issued; and that there is no pending appeal relating to the award of costs. Further, there is no contestation on the fact that a certificate of order was issued and served on the respondents. Lastly, there is no contest on the fact that the awarded costs remain unpaid. The suit against the 2nd respondent is uncontested. Consequently, the only issue to be determined in this motion is whether the Solicitor-General is the proper accounting officer in the Government to be compelled to satisfy the decree issued in Thika ELC JR Case No 4 of 2017.
6. The position of the *ex parte* applicants is that the award of costs was made against the two respondents and the two accounting officers of the two institutions have a legal duty imposed on them to pay the award. On his part, the Attorney General contends that he was sued in his representative capacity as the Principal Government Legal Advisor and on behalf of the National Land Commission and as such, the Solicitor General who is the Accounting Officer in his Office is not the proper departmental accounting officer responsible to satisfy the award. The Attorney General relies on the *ex parte* applicants' pleadings in Thika ELC JR Case No 4 of 2017 in which the *ex parte* applicants pleaded that they were suing the Attorney General in his representative capacity. Ms Nyawira relied on the High Court decision in *Republic v Attorney General & another Ex parte; Orbit Chemicals Limited* [2017] eKLR.
7. I have considered the rival submissions by counsel. I have also considered the relevant legal frameworks and jurisprudence on the issue under consideration. The Office of the Attorney General is established under Article 156(1) of *the Constitution*. The functions of the Office of the Attorney General are spelt out under Article 156(4) of *the Constitution* in the following terms:

- “(4) The Attorney-General—
- (a) is the principal legal adviser to the Government;



- (b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and
- (c) shall perform any other functions conferred on the Office by an Act of Parliament or by the President.”

8. Additional mandates of the Attorney General are spelt out in Article 156(5) and (6) as follows:

“(5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.

(6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.”

9. Section 12 of the [Government proceedings Act](#) enjoins parties with civil claims against the Government to sue the Attorney General in his representative capacity. Sections 21, 22 and 23 of the [Government Proceedings Act](#) contain an elaborate framework on satisfaction of orders and decrees issued against the Government. What emerges from the framework in Section 21 and 22 of the [Government Proceedings Act](#) is that, whenever a decree is issued against the Attorney General in a suit where the Attorney General has been sued in his representative capacity, the accounting officer for the responsible Government department is the one required to satisfy the decree or order. Indeed, the law requires that the certificate of order does specify the accounting officer of the Government department responsible to satisfy the decree or order.

10. In the present motion, the ex-parte applicants did not exhibit pleadings relating to Thika ELC JR Case No 4 of 2017. The court has nonetheless taken liberty to look at the court record relating to the said case to understand the capacity in which the Attorney General was sued in the case. Paragraph 2 of the statement of facts filed in the said Judicial Review Case reads as follows:

“2. The 1st respondent is the Chief Government Advisor and is sued on behalf of the National Lands commission. His address of service for purposes of this suit shall be State Law Office, Sheria House and P. O Box 40112 Nairobi.”

11. A perusal of the substantive motion in Thika Judicial Review Case No 4 of 2017 does not disclose any relief that was sought or obtained against the Government Department for which the Solicitor General is the accounting officer. The substantive order that was sought and obtained reads as follows:

“2 That the honourable court be pleased to bring before this court and quash the decision of the National Land Commission made on 4th day of August 2016 against the exparte applicants.”

12. From the foregoing, it is clear that the Attorney General was sued in a representative capacity on behalf of the National Land Commission. Whether or not that was tenable is not an issue for determination in this Judgment. Secondly, it is clear from the materials presented before this court that there is no evidence to suggest that the Solicitor General is the accounting officer responsible for the Government Department on whose behalf the Attorney General was sued in Thika ELC JR Case No 4 of 2017. An order of mandamus can only be directed against the accounting officer on whose behalf the Attorney General was sued. The ex-parte applicants’ pleadings in Thika ELC JR Case No 4 of 2017 reveal that



the Attorney General was sued on behalf of the National Land Commission. The said Commission is the 2nd respondent and elected not to contest this motion.

13. Not too long ago, faced with a motion similar to the present motion, Odunga J [as he then was] stated the following in *Republic v Attorney General & another Ex-parte Orbit Chemicals Limited* [2017] eKLR:

“It is therefore clear that in applications for mandamus seeking to compel the satisfaction of a decree, it is the accounting officer of the relevant government department that is obliged to satisfy the decree notwithstanding the act that the said officer was not a party to the trial proceedings and that in fact the only defendant there in was the Attorney General. Therefore whereas I agree with the position in *Peter Anyang' Nyong'o & 10 others vs Solicitor General* [2011]eKLR, that it is for the Attorney General to advise his clients to pay the costs which attracted his representation on behalf of the said client and that being a constitutional representative and being the principal legal advice or to the three arms of the government, he is required to direct any arm of Government he represented to pay the costs of any suit which he acted on its behalf; I however do not subscribe to the view that if any costs or liability accrues from his representation, he is obliged to pay the same and that if a particular organ refuses to pay he will be responsible on behalf of his agent.”

14. For the above reasons, it is my finding that the Solicitor General is not the accounting officer in charge of the Government Department responsible to satisfy the decree in Thika ELC JR Case No 4 of 2017. It is my further finding that the accounting officer responsible to satisfy the decree in Thika ELC JR Case No 4 of 2017 is the Secretary of the National Land Commission.
15. In the end, the notice of motion dated 1/8/2022 is rejected as against the 1st respondent. The motion is allowed as against the 2nd respondent in the following terms:
- a. An order of mandamus is hereby issued directing the Secretary of the National Land Commission, as the Accounting Officer of the Commission, to pay the ex-parte applicants the costs decreed in Thika ELC Judicial Review Case No 4 of 2017 in the sum of Kshs 838,815.
- b. The 2nd respondent shall bear costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 2ND DAY OF MARCH 2023

B M EBOSO

JUDGE

In the Presence of: -

Mr Njuguna for the Applicant

Court Assistant: Ms Osodo

