



Republic v County Secretary, County Government of Mombasa & 2 others; Ali Mbarak Ali t/a Mbarak Pit Contractors (Exparte Applicant) (Judicial Review Miscellaneous Application E007 of 2023) [2024] KEHC 17016 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEHC 17016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E007 OF 2023**

OA SEWE, J

APRIL 18, 2024

**IN THE MATTER OF ARTICLES 2, 3, 23(3), 47,
176(1) & 179 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF AN APPLICATION BY ALI
MBARAK ALI T/A MBARAK PIT CONTRACTORS**

AND

**IN THE MATTER OF LEAVE GRANTED ON 15TH MAY 2023
TO APPLY FOR JUDICIAR REVIEW BY WAY OF MANDAMUS**

AND

**IN THE MATTER OF SECTIONS 2, 103, 147 & 148 OF
THE PUBLIC FINANCE MANAGEMENT ACT, 2012**

AND

IN THE MATTER OF SECTIONS 44 & 45 OF THE COUNTY GOVERNMENT ACT, 2012

AND

**IN THE MATTER OF SECTION 21 OF THE GOVERNMENT
PROCEEDINGS ACT, CHAPTER 40, LAWS OF KENYA**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY SECRETARY, COUNTY GOVERNMENT OF MOMBASA 1ST
RESPONDENT**



COUNTY EXECUTIVE MEMBER FOR FINANCE, COUNTY GOVERNMENT
OF MOMBASA 2ND RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 3RD RESPONDENT

AND

ALI MBARAK ALI T/A MBARAK PIT CONTRACTORS ... EXPARTE
APPLICANT

JUDGMENT

1. Before the Court for determination is the Notice of Motion dated 15TH May 2023. It was filed by the ex parte applicant pursuant to the leave granted herein on 15th May 2023 for the following orders:
 - a. That an order of Judicial Review by way of Mandamus be directed to the County Secretary, County Government of Mombasa, the County Executive Member for Finance, County Government of Mombasa and the County Government of Mombasa, the 1st, 2nd and 3rd respondents herein respectively, to compel them to pay to the ex parte applicant the sum of Kshs.14,203,064.80 (Kenya Shillings Fourteen Million, Two Hundred and Three Thousand and Sixty-Four, and Eighty Cents) arising from the decretal award plus interest accrued in Mombasa CMCC No. 3154 of 2004: Ali Mbarak Ali T/A Mbarak Pit Contractors v Municipal Council of Mombasa.
 - b. That the costs of the application be borne by the 1st, 2nd and 3rd respondent's herein.
2. The application was premised on the grounds that the ex parte applicant (hereinafter, the applicant) obtained judgment against the defunct Municipal Council of Mombasa on 14th September 2018 in Mombasa CMCC No. 3154 of 2004: Ali Mbarak Ali T/A Mbarak Pit Contractors vs Municipal Council of Mombasa in the sum of Kshs. 1,915,400 together with interest from 26th June 2001 and costs of Kshs. 170,383/= which sums remain unpaid to date despite several reminders. The applicant further deposed that he extracted a Certificate of Order against the Government dated 8th October 2020 and served the same upon the County Government of Mombasa in accordance with Section 21(1) of the *Government Proceedings Act*; and that no explanation or justification has been given by the respondents for their continued reluctance to pay the judgement debt. He added that he had no option but to file the instant suit with a view of enforcing compliance by the respondents.
3. The application was supported by the affidavit of the applicant, sworn on 15th March 2023 and the Statement of Facts filed along with the application for leave. He annexed to his affidavit certified copies of the Judgment dated 14th September 2018, the Decree ensuing therefrom and the Certificate of Costs dated 29th October 2018. The applicant also exhibited copies of the demand letters written to the respondents seeking the settlement of the decretal sum as well as copies of the Certificate of Order against the Government dated 8th October 2020 and its forwarding letter dated 17th June 2021.
4. The respondents opposed the application on the basis of the Grounds of Opposition dated 11th July 2023. They contended that:
 - a. The application offends Section 21 of the *Government Proceedings Act*.
 - b. The application is inconsistent with Order 29 of the Civil Procedure Rules.



- c. The application offends Section 103 of the *Public Finance Management Act* No. 18 of 2012 as the 1st respondent is not the head of the Treasury and should therefore be discharged from these proceedings.
 - d. The judgment debt the subject of these proceedings has not been brought to the attention of the respondents as an external advocate was in conduct of the suit.
 - e. The application is unfounded, frivolous and vexatious as the applicant has failed to lay a legal basis for not following the procedure for execution against the Government.
5. The application was canvassed by way of written submissions, pursuant to the directions given herein on 30th May 2023. In his written submissions dated 28th June 2023, the applicant proposed the following issues for determination:
 - a. Whether the applicant has established grounds and satisfied all the requisite tests, before an order of judicial review by way of Mandamus can issue.
 - b. Whether the Municipal Council of Mombasa was succeeded by the County Government of Mombasa and whether the latter is liable for the outstanding debts of the former, arising from litigation.
 6. Thus, counsel for the applicant relied on *Republic v County Secretary Nairobi City County & Another Ex Parte Tom Ojienda & Associates* [2019] eKLR for an exposition of the factors that must be present for an order of Mandamus to issue. He added that the respondents have had sufficient time to pay but have refused to pay in spite of several reminders; and therefore the only option available to the applicant is an order of Mandamus. As to the scope and efficacy of an order of Mandamus, the applicant made reference to *Republic v National Examination Council, Ex Parte Gathenji & Others* [1977] eKLR.
 7. The applicant further submitted that, having complied with Section 21 of the *Government Proceedings Act*, the respondents were duty bound to pay; and therefore that he is entitled to the relief sought herein. On the authority of *Republic v County Secretary, Machakos County Government & Another, Ex Parte Veteran Pharmaceuticals Limited* [2019] eKLR, the applicant submitted that the 1st and 2nd respondents are the proper officers of the 3rd respondent for finance matters. He further submitted that the County Government of Mombasa is the successor of the Municipal Council of Mombasa and therefore obligated in law to settle the judgment debt.
 8. On their part, the respondents proposed the following issues for determination in their written submissions dated 14th August 2023:
 - a. Whether the applicant has fulfilled the requirements of Section 21 of the *Government Proceedings Act*; and
 - b. Whether the County Secretary is an accounting officer in connection with matters relating to Finance.
 9. Mr. Tajbhai, learned counsel for the respondents submitted that Mandamus entails a special procedure that ought to be complied with before an application for the order can lie, namely:
 - a. A prior demand for performance;
 - b. A reasonable time to comply with the demand, unless there was outright refusal; and
 - c. An express refusal, or an implied refusal through unreasonable delay.



10. Counsel also relied on Order 29 Rule 1 of the Civil Procedure Rules and *Republic v County Secretary, Nairobi City County & Another, Ex Parte Tom Ojienda & Associates (supra)* and *Abdalla A. Hassan v County Government of Mombasa* [2020] eKLR to support the argument that the applicant has failed to meet the threshold for the grant of the order of Mandamus. He similarly submitted that the County Secretary is not the accounting officer of the 3rd respondent and was therefore wrongly enjoined to these proceedings. He made reference in this regard to Sections 2, 103 and 104 of the *Public Finance Management Act*, No. 18 of 2012 and the case of *Republic v County Secretary, Nairobi City County & Another, Ex Parte Mohamed Tariq Khan* [2017] eKLR to advance this argument.
11. From the foregoing summary, there is no dispute that, on the 14th September 2018 judgment was entered for the applicant against the defunct Municipal Council of Mombasa in Mombasa CMCC No. 3154 of 2004: *Ali Mbarak Ali T/A Mbarak Pit Contractors vs Municipal Council of Mombasa*. A copy of the lower court's judgment together with a Decree in respect thereof and a Certificate of Costs were annexed to the Statement of Facts. The total sum due as at 14th September 2018 was computed by counsel for the applicant to be Kshs. 13,761,355.68 in a demand letter addressed to counsel for the judgment debtor.
12. There being no indication that the said judgment was set aside on appeal or review, I find as a fact that the applicant is indeed owed by the defunct Municipal Council of Mombasa. Hence, the first issue for determination is whether the County Government of Mombasa is the successor of the Municipal Council of Mombasa with regard to the judgment dated 14th September 2018.
13. In this regard, I am persuaded by the decision of Hon. Okong'o, J. in *J.A.S. Kumenda & Another v Clerk Municipal Council of Kisii & 6 Others* [2013] eKLR in which the learned judge held:

“...the County Governments are in my view the successors of the local authorities that were constituted under the repealed Local Government Act and should be the ones to proceed with pending legal actions by the defunct local authorities and against whom the pending legal proceedings against the said local authorities should be sustained. I find support in this proposition in the Sixth Schedule to *the Constitution* of Kenya. Section 33 of the Sixth Schedule to *the Constitution* of Kenya, 2010 provides that, an office or institution established under *the constitution* of Kenya, 2010 is a legal successor of the corresponding office or institution under the former Constitution or under a former Act of parliament in force immediately before the effective date of *the Constitution* of Kenya, 2010 whether known by the same name or a new name. County Governments under the new constitution took over the powers and functions of the local authorities as they were recognized and defined under the old constitution and the Local Government Act. Pursuant to the provisions of the said Section 33 of the Sixth Schedule to *the Constitution* of Kenya, 2010 County Governments are therefore the natural and presumptive legal successors of the defunct local authorities. It follows therefore that until the body referred to in Section 59 of *Urban Areas and Cities Act* is established, legal actions that were pending by and against the defunct local authorities can be sustained or pursued against County Governments under whose jurisdiction such local authorities were situated. To hold as argued by the Respondents herein that such legal proceedings should remain suspended until such a time that the said body is set up would result in an absurd and a manifestly unjust situation for the hundreds of litigants who have pending suits against the defunct local authorities. Such holding would also put courts in very awkward position as they would not know what to do with matters involving the defunct local authorities which are pending rulings and judgments before them.”



14. Similarly, in Republic v Town Clerk of Webuye County Council and Another [2014] eKLR Hon. Majanja, J. was of the following view:

“Despite the statutory lacuna’s in the County Government Act and the Urban Areas and Cities Act, the rights accrued as a result of the litigation are preserved upon repeal of the Local Government Act by the Constitution. Section 33 of the Sixth Schedule to the Constitution provides for succession of institutions upon promulgation. It states that,

“An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of parliament in force immediately before the effective date, whether known by the same or a new name.”

In my view and taking into account the legal provisions I have cited, the County is the legally established body unit contemplated under the law that takes the place of local authorities unless there is a contrary enactment. I therefore find and hold that the proceedings and judgment against Webuye Town Council and its officers must continue against Bungoma County which must now bear the burden of the judgment.”

15. The same position was taken in Bungoma High Court Miscellaneous Application No. 10 of 2014: Abdi Ali Sheikh vs The County Secretary County Government of Kakamega (unreported), thus:

“The Respondents contended that the liability of the Lugari County Council did not as a matter of course fall on the Respondent. That the Transition Authority is yet to specify which of the assets and liabilities of the Lugari County Council is to be taken by the Central government and which one will remain with the Respondent. In my view, Articles 48 and 159(2)(b) behooves this court to ensure that justice is attained without undue delay. It was not in contemplation of the drafters of our Constitution as well as the Transition into Devolved Government Act, that settlement of claims, more so, decrees against the defunct local authorities would be suspended indefinitely. If that was the intention, nothing would have been easier than to expressly provide so. To my mind, Section 35 of the Transition to Devolved Government act which the Respondent relied on, do not amount to a suspension of settlement of claims by the devolved units, it only bars such units from transferring assets and liabilities to 3rd parties so that no devolved unit short changes the Central Government on the shared assets or liabilities which the decree in Bungoma CMCC No. 366 of 2005 is not.”

16. In the premises, I am satisfied that the 3rd respondent is indeed the successor of the defunct Municipal Council of Mombasa for purposes of the subject judgment debt. That said, the other pertinent issues for determination are:

- a. Whether the applicant has fulfilled the requirements of Section 21 of the Government Proceedings Act; and
- b. Whether the County Secretary is an accounting officer in connection with matters relating to Finance.



A. On whether Section 21(3) of the Government Proceedings Act and Order 29 Rule 3 of the Civil Procedure Rules have been complied with:

17. An elaborate procedure has been set out, not only under Section 21 of the Government Proceedings Act, but also under Order 29 Rule 3 of the Civil Procedure Rules for compliance before an order of Mandamus can issue. For instance, Section 21 of the Government Proceedings Act, stipulates thus in Sub-Sections (1) and (2):

(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.

(2) 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.”

18. Further to the foregoing, Subsections (3) and (4) of Section 21 of the Government Proceedings Act state:

(3) 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.

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, 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.”



19. That the aforestated provisions apply to County Governments such as the 3th respondent is not in doubt; for Subsection (5) of Section 21 is explicit that:

“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.”

20. The rationale for this stringent procedure was well captured in *Kisya Investments Ltd v Attorney General & Another* [2005] 1 KLR 74 thus:

“History and rationale of Government’s immunity from execution arises from the following:

Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of:

- (i) The raising of revenue- (by taxation or borrowing);
- (ii) its expenditure; and
- (iii). The audit of public accounts. The satisfaction of decrees or judgements is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government’s expenditure. It is for this reason that section 32 of the *Government Proceedings Act* provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorized by statute, and any unauthorized payment may be recovered. See Halsbury’s Laws of England 4TH EDN Vol. 11 [970, 971 and 1370] As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. See *Auckland Harbour Board Vs. R* (1924) AC 318, 326. The second situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the ministry of Finance, Treasury, Comptroller and Auditor General etc. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their “own” funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will



be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer's hammer. No Government can possibly survive such an onslaught. The Government and therefore the state operations will ground to a halt and paralyzed and soon the Government will not only be bankrupt but it's Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the Law that prohibits execution against and attachment of the Government assets and property.” (also see Republic v Permanent Secretary Office of the President Ministry of Internal Security & Another, Ex Parte Nassir Mwandishi, supra)

21. Accordingly, I have perused the documents annexed to the applicant's initial affidavit and noted that, other than the judgment, the decree and certificate of costs, the applicant annexed a Certificate of Order against the Government dated 8th October 2020. The said Certificate clearly indicates the judgment sum, interest thereon and costs due from the judgment debtor for purposes of Order 29 Rule 3 of the Civil Procedure Rules, which requires that:

“ Any application for a certificate under section 21 of the *Government Proceedings Act* (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and such certificate shall be in one of Form Nos. 22 and 23 of Appendix A with such variations as circumstances may require.”

22. The applicant also presented correspondence to demonstrate that the 3rd respondent was all along aware of the judgment; and that demands for payment were sent by the applicant's advocate, not only to the 3rd respondent directly but also through its Advocates. I am therefore satisfied as to compliance with Section 21 of the Government Proceedings and Order 29 Rule 3 of the Civil Procedure Rules.

B. Whether the County Secretary is an accounting officer in connection with matters relating to Finance:

23. Apart from the judgment debtor, the 3rd respondent, the applicant brought this suit against the County Secretary as well as the County Executive Member for Finance. Hence, counsel for the respondents posited that the County Secretary is not compellable, granted the specific duties of a county secretary as set out in Section 44(3) of the *County Governments Act*. I entirely agree with that assertion because that provision states:

The County Secretary shall—

- a. be the head of the county public service;
- (b) be responsible for arranging the business, and keeping the minutes, of the county executive committee subject to the directions of the executive committee;
- (c) convey the decisions of the county executive committee to the appropriate persons or authorities; and
- (d) perform any other functions as directed by the county executive committee.



24. In *Council of Governors & Others v The Senate* [2015] eKLR, at paragraphs 134 to 137, a three judge bench of the High Court grappled with the question as to who is an accounting officer for purposes of the County Government entities. Here is what the Court had to say:

“134. The Petitioners have also sought the interpretation of the term “Accounting Officer”. In that regard, Article 226 of *the Constitution* provides;

- (1) Act of Parliament shall provide for –
 - (a)
 - (b) The designation of an accounting officer in every public entity at the national and county level of government
- (2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

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

1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.
2. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.

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

136. As regards the accounting officer for the County Assembly, Section 148(4) of the *Public Finance Management Act* provides that;

The Clerk of the County Assembly shall be the accounting officer of the County Assembly”.



137. Having found as we have, it follows that the question posed by the Petitioners as to whether the County Governor is an Accounting Officer, must be answered in the negative. He is not an Accounting Officer and we have said why.”
25. It is plain therefore that, in the absence of proof of appointment by the County Executive Committee member for Finance of the accounting officer for the County Government of Mombasa, as is the case herein, the proper person to look to for the settlement of debts owing from the County Government of Mombasa is the County Executive Committee member for Finance. Indeed, in *Republic v Kisii County Government Ex-Parte Peter Kaunda Nyamosi & 2 others* PARA 2018. eKLR, the position taken was:
25. It is therefore clear that the accounting officer for the County Government is the County Executive Member for Finance. Since the order of mandamus was against the County Government, I do not think that this is fatal as the order of mandamus remains alive and the court may issue a notice to show cause against the accounting officer, upon whom the statutory duty is imposed, to ensure that its decision is enforced (see *Consolata Kihara & 21 Others v Director of Kenya Trypanosomiasis Research Institute* P[2003] KLR 582 and *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi)* NBI HC Misc. App. 222 of 2016 [2018] eKLR).”
26. The same position was taken in *Soloh Worldwide Inter-Enterprises vs County Secretary Nairobi County & another* [2016] eKLR thus:
17. 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...”
27. It is therefore plain from the foregoing that, whereas the County Secretary was wrongly impleaded herein, in so far as the applicant roped in the County Executive Committee member for Finance as the 2nd respondent, this suit is properly before the Court.

C. Whether the order of Mandamus ought to issue:

28. Needless to say that Mandamus is a relief available to litigants under Article 23(3)(f) of *the Constitution* as well as Order 53 of the Civil Procedure Rules. Its scope was well explicated in *Halsbury's Laws of England*, 4th Edition, Volume 1 thus:

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..."

29. As was pointed out in *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security, Ex Parte Fredrick Manoah Egunza* PARA 2012. eKLR, the applicant has no other way of realizing the decree passed in its favour. In that case, Hon. Githua, J, aptly pointed out that:

Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the *Government Proceedings Act* (hereinafter referred to as the 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 Hon 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 Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon."

30. Similarly, in *Republic vs Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another* [2018] eKLR, Hon. Mativo, J. (as he then was) held: -

29. Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in *Apotex Inc. vs. Canada (Attorney General)*, [23] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. [24] The eight factors that must be present for the writ to issue are:-

- (i) There must be a public legal duty to act;
- (ii) The duty must be owed to the Applicants;
- (iii) There must be a clear right to the performance of that duty, meaning that:
 - a. The Applicants have satisfied all conditions precedent; and
 - b. There must have been:
 - i. A prior demand for performance;
 - ii. A reasonable time to comply with the demand, unless there was outright refusal; and
 - iii. An express refusal, or an implied refusal through unreasonable delay;
 - (iv) No other adequate remedy is available to the Applicants;
 - (v) The Order sought must be of some practical value or effect;
 - (vi) There is no equitable bar to the relief sought;



(vii) On a balance of convenience, mandamus should lie.

31. All these conditions have been satisfied herein. In particular, the applicant has demonstrated that a prior demand for payment was made; that a reasonable time to comply with the demand was given, and that no payment has been made in respect of a decree that was issued way back on 29th October 2018. Moreover, the respondents utterly failed to proffer any reason why the decree has not been settled.

32. In the premises, I entertain no doubt at all that the remedy sought is indeed warranted; as otherwise, the applicant would be left at the mercy and whims of the respondents as to when and whether his decree would come to fruition. In this regard, I entirely agree with the sentiments expressed by Hon. Odunga, J. (as he then was) in *Republic v the Attorney General & Another, Ex parte James Alfred Keroso* [2013] eKLR that:

...Unless something is done, he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of *the Constitution* which enjoins the state to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya..."

33. In the light of the foregoing, I find merit in the application dated 15th May 2023. The same is hereby allowed and orders granted as hereunder:

(a) That an order of Judicial Review by way of Mandamus be and is hereby issued directed to the County Executive Member for Finance, County Government of Mombasa, the 2nd respondent herein, to compel him to pay to the ex parte applicant the sum of Kshs. 14,203,064.80 (Kenya Shillings Fourteen Million, Two Hundred and Three Thousand and Sixty-Four, and Eighty Cents) arising from the decretal award plus interest accrued in Mombasa CMCC No. 3154 of 2004: *Ali Mbarak Ali T/A Mbarak Pit Contractors vs Municipal Council of Mombasa*.

(b) That the costs of the application be borne by the 3rd respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18TH DAY OF APRIL 2024

OLGA SEWE

JUDGE

