



**Republic v County Government of Nairobi; KCB Bank
Limited (Exparte) (Judicial Review Application E077 of 2022)
[2023] KEHC 22611 (KLR) (Judicial Review) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22611 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E077 OF 2022
JM CHIGITI, J
SEPTEMBER 21, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY GOVERNMENT OF NAIROBI RESPONDENT

AND

KCB BANK LIMITED EXPARTE

JUDGMENT

1. The Ex parte Applicant herein is before this court vide an application dated 9th June, 2022 which seeks the following orders;
 1. An order of Mandamus to issue compelling the Respondent to pay to the ex parte Applicant Kenya Shillings Four Billion Two Hundred and Ninety-Five Million One Hundred and Ninety-One Thousand Three Hundred and Seventy-Two (Kshs. 4,295,191,372.00) to which must be added any further accrued interest and penalties which have fallen due under the Term Loan Facility; Kenya Shillings Six Million (Kshs. 6,000,000.00) being an interim payment in diminution of the costs incurred by the ex parte Applicant in enforcing its rights pursuant to Clause 15.2 of the Facility Letter which sum shall include the further costs of the Tribunal outstanding at the date of the Third Interim Award assessed at Kenya Shillings Three Million (Kshs. 3,000,000/=) and Kenya Shillings Six Million Forty-Nine Thousand Three Hundred and Forty-Nine (Kshs. 6,049,349.00) being the total sum due from the Respondent to the ex parte Applicant in respect of costs under Clause 15.2 of the Facility Letter and Clause 16.2 of the Deed of Variation in respect of the costs of arbitration as of the date of the publication of



the Final Award all awarded in the Decree issued by this Honourable Court on 25th February 2022 and certified in the Certificate of Order against the Government dated 20th May 2022 in High Court Miscellaneous Application N0. E1122 of 2020 KCB Bank Kenya Limited vs. The County Government of Nairobi.

2. This Honourable Court be pleased to issue any other order to meet the ends of justice.
3. The costs of this application be borne by the Respondent.”
2. The application is supported by the grounds on its face a Statutory Statement dated 26th May, 2022 and a Verifying Affidavit sworn on even date by Phinias Isindu.
3. The Ex parte Applicant’s case is that pursuant to the Court’s order of 25th February,2022 the Respondent was directed to pay to the Ex parte Applicant the following sums;
 - i. Kshs. 4,295,191,372.00 being the amount declared by the Sole Arbitrator to be the outstanding debt owed to the Applicant by the Respondent, to which must be added to any further accrued interests and penalties which have fallen due under the Term Loan Facility aforesaid;
 - ii. An additional Kshs. 6,000,000.00 being an interim payment in diminution of the costs incurred by the Applicant in enforcing its rights pursuant to Clause 15.2 of the Facility Letter which sum includes the further costs of the Tribunal outstanding at the date of the Third Interim Award assessed at Kshs. 53,000,000/=;
 - iii. Kshs. 6,049,349.00 being the total sum due from the Respondent to the Applicant in respect of costs under Clause 15.2 of the Facility Letter aforesaid and Clause 16.2 of the Deed of Variation aforesaid in respect of the costs of arbitration.
4. A brief background of the matter before this Court is that by a Facility Letter dated 30th March between Equity Bank Limited and the City Council of Nairobi the Council was advanced a Term Loan Facility of Kshs. 5,000,000,000.00/=.
5. The benefit of the Term Loan Facility is said to have later been assigned to the Applicant pursuant to a Deed of Assignment dated 10th September 2014 whereby Equity assigned all its rights, title and interest under the Facility Letter and the Security Document aforesaid to the Applicant on and subject to the terms and conditions set out in the Deed of Assignment.
6. Pursuant to Section 58 of the Urban Area and Cities Act No. 13 of 2011, the obligations of the Council under the Facility Letter were vested in the Respondent. The Applicant contends that the terms of the Facility Letter dated 10th September,2014 between the Respondent and Applicant were varied as set out in the said Deed of Variation however, a dispute arose between the parties which resulted in the commencement of arbitral proceedings which led to the award of sums as set out above. A final award is said to have been published and received on 28th August,2020.
7. The Respondent is said to have failed to pay the sums awarded to the Applicant in the Decree and Certificate of Order upon demand.
8. The Applicant contends that it does not have any other avenues of execution and enforcement of both the Third Interim Award and Final Award both upheld and affirmed in the Decree other than through judicial review proceedings.



9. In response the Respondent filed a Replying Affidavit sworn by W S Ogola who swears to be the Respondent's County Solicitor and an Advocate of the High Court. In the affidavit it is deposed that the application is both fatally and incurably defective as it does not relate to the Respondent herein.
10. Further that the orders sought by the Ex parte Applicant do not lie as against the Respondent as there is no statutory duty imposed upon the Respondent to act as demanded. It is also averred that the Applicant has not stated under which law the cited the Respondent has a duty to act as demanded.
11. The Respondent also contends that pursuant to the [Public Finance Management Act](#) 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 herein and as such the Respondent herein is wrongly suited. The County Executive Committee member is said to be the head of the Treasury.
12. The Respondent's case is also that the failure to sue the County Executive Committee Member in Charge of Finance is fatal as he will be condemned unheard contrary to the express rules of natural justice.
13. It is contended that all expenditures by the County Government are appropriated by the County Assembly and not the Respondent herein in each financial year.
14. Also, that the County Government has competing interests including settling decrees to the public yet it has limited resources. There is also said to be a statutory process it must abide by before the settlement of the same. The services provided by the County Government it is argued serve approximately four million Nairobi residents yet no adequate resources are available.
15. The Respondent's case is also that the officers responsible for payment of any of the Respondent's funds are public officers and are prohibited under sections 196 and 197 of the [Public Finance Management Act](#) 2012 from paying the Applicant as it would be an offence to spend any public funds without any prior authorization and budgetary appropriation.
16. It is also the Respondent's argument that the immediate settlement of the Order would require County Legislation approval which has not been given to the Respondent because of the already closed budget cycle. The funds are said to not have been provided for in the County budget.
17. The Respondent contends that it is ready to pay once the same is allocated for, approved and passed by the County Assembly as provided for under section 125 of the [Public Finance Management Act](#), 2012.
18. In its Supplementary Affidavit sworn on 4th May, 2023 the Applicant's case is that the Respondent does not deny its indebtedness to the Applicant, its recognition and enforcement of the Third Interim and Final Awards as allowed vide the Court's Ruling dated 4th February, 2022, and its obligation to pay the demanded sums. The Applicant's compliance with the provisions of Section 21 of the [Government Proceedings Act](#) are also not disputed.
19. The Respondent is said to be under a statutory duty under Section 21 of the [Government Proceedings Act](#) to settle the decretal sum owed. Also, that Section 92(1) of the [Public Finance Management Act](#) places an obligation on the Respondent to settle the debt due and owing to the Ex parte Applicant and which debt is manifest in the decretal sum sought to be paid in the Substantive Motion.
20. Further that Section 92(3) of the Act is said to place the duty of notifying the Respondent's County Executive Committee Member for Finance of the outstanding sums on the Respondent. The CECM of Finance is said to have been informed of the same through the demand letters dated 29th March, 2022 and 23rd May, 2022.



21. The Applicant also contends that non-joinder of the CECM of Finance is not fatal to the application. The Applicant also contends that no evidence has been adduced of the competing interests or the limited resources as claimed by the Respondent nor does the statutory process alluded to absolve the Respondent from satisfying the decretal sums owed.
22. The application was canvassed by way of written submissions. The Ex parte Applicant filed written submissions dated 2nd March,2023 and Supplementary submissions dated 4th May,2023.
23. The Applicant in its submission's places reliance on the case of Republic vs. Nairobi City County & 2 Others Ex parte Allied Investments Limited [2020] eKLR where the Court held that the Government was now at two levels and that Article 189(1)(a) of *the Constitution* required both the National and County Levels to be respected and this included with respect to execution proceedings.
24. The Applicant also cites section 21(1) and 21(5) on satisfaction of decrees against Government. It is also submitted that Section 21 cannot be read in isolation but is also supplemented by the procedure set out under Order 29 of the Civil Procedure Rules.
25. It is submitted that before an order of mandamus can be issued the procedure under Section 21 of the *Government Proceedings Act* must be satisfied as was held in the cases of Republic vs. County Secretary Migori County Government & Another [2019] eKLR and Permanent Secretary Office of the President Ministry of Internal Security & Another Ex parte Nassir Mwachhihi [2014] eKLR.
26. The Applicant's demand letter dated 29th March,2022 it is submitted did not elicit a positive response or further action from the Respondent but a response by the Respondent's advocates seeking indulgence to enable them assist the Respondent to come up with a proposal for the settlement of the amount that was being demanded. The said proposal was never communicated.
27. The Respondent it is submitted as was held by the Court in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza [2012] eKLR is now under a statutory duty to settle the decretal sum owing.
28. It is also the Ex parte Applicant's submission that the Respondent and the Member for Finance share the fiscal responsibility and obligations of the Respondent which extends to the settlement of the Decretal sum sought as was held in the case of Republic vs. County Government of Kiambu Ex parte Laban J Macharia Muiruri [2021] eKLR.
29. The Applicant submits that the County Assembly is not independent or distinct from the Respondent and as such an appropriation by the Assembly is an appropriation by the Respondent.
30. On the issue of costs, the Applicant submits that it is entitled to costs and that it is trite law that costs follow the event as provided under Section 27 of the *Civil Procedure Act*. The Ex parte Applicant further submits that although it was granted costs in all proceedings which remain unpaid it continues to incur substantial costs in pursuit of a legitimate debt.
31. The Respondent in its submissions dated 19th April,2023 submits that as was held by the Court in Shah vs. Attorney General (No. 3) Kampala HCCM No. 31 of 1969 [1970] EA 543 the principles of granting orders for mandamus are as follows;
 - a. The duty is in the nature of a public duty.
 - b. The duty affects the rights of an individual.
 - c. There is no more appropriate remedy.



- d. The person or authority to whom it is issued must be under a statutory or legal duty to do or not to do something.
 - e. The duty is of an imperative nature.
32. The Respondent submits that it is a requirement that the orders are to be issued to a party who is under a statutory duty to do something. Further that the Ex parte Applicant has not demonstrated that the Respondent had a duty perse and that the compliance with court orders is not a statutory duty that is specific to the Respondent herein.
33. It is also the Respondent's submission that the Mandamus Order sought by the ex parte Applicant is a judicial command requiring the performance of a specified duty which has not been performed. The Respondent in the instant application it is argued has not refused to act and/or perform its duty to ensure that the Applicant is paid.
34. The Respondent submits that it is in fact willing to expedite the same and it prays that the Honourable court and the Applicant do indulge it as it makes arrangements towards settlement of the same. The case of Republic v County Secretary Nairobi City County & 3 others; Koceyo & Co. Advocates (Ex Parte) [2020] eKLR is cited to buttress this argument.
35. On the circumstances under which an order of mandamus may be issue the Respondent refers to the case of Republic vs. Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996.
36. The cases of Soloh Worldwide Inter-enterprise vs County Secretary Nairobi County and Another (2016) eKLR and Republic v County Secretary, Nairobi City County & 2 others Ex Parte Koceyo and Co. Advocates [2018] eKLR are cited on who the right party to whom execution proceedings against a government or public authority can be issued is.
37. On the issue of costs, the Respondent refers to the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others Petition No. 4 of 2012 [2014] where the Court reiterated that costs follow the event.

Analysis and Determination

38. The court has considered the arguments advanced by both parties herein and two issues crystallizes for determination as follows;
- i. Whether the Respondent has a legal duty to satisfy the decree subject of these proceedings; and
 - ii. Whether the Applicant has satisfied the conditions precedent to warrant the orders of this court.
39. I note from the positions adduced by the parties that it is not in contention that there is a valid court order pending fulfilment by the Respondent herein.
40. The Respondent submits that it is in fact willing to expedite the same and it prays that the Honourable court and the Applicant do indulge it as it makes arrangements towards settlement of the same.
41. The Respondent in the instant application further submits that it has not refused to act and/or perform its duty to ensure that the Applicant is paid.
42. It is contended that all expenditures by the County Government are appropriated by the County Assembly and not the Respondent herein in each financial year.



43. Also, that the County Government has competing interests including settling decrees to the public yet it has limited resources. There is also said to be a statutory process it must abide by before the settlement of the same. The services provided by the County Government it is argued serve approximately four million Nairobi residents yet no adequate resources are available.
44. The Respondent's case is also that the officers responsible for payment of any of the Respondent's funds are public officers and are prohibited under sections 196 and 197 of the Public Finance Management Act 2012 from paying the Applicant as it would be an offence to spend any public funds without any prior authorization and budgetary appropriation.
45. It is also the Respondent's argument that the immediate settlement of the Order would require County Legislation approval which has not been given to the Respondent because of the already closed budget cycle. The funds are said to not have been provided for in the County budget.
46. The Respondent contends that it is ready to pay once the same is allocated for, approved and passed by the County Assembly as provided for under section 125 of the Public Finance Management Act, 2012.
47. These are in effect unequivocal acknowledgments and admissions on the part of the Respondent that it owes the Applicant the amount as claimed in this suit, that does not challenge the fact that it was properly served with the relevant documents, that it is willing to settle. With these admissions alone, this court is satisfied that the application has merits.
48. The Respondent has not denied having been served by the Applicant in accordance with the provisions of Section 21(1) of the Government Proceedings Act which provides thus;

“(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.”

49. Section 21 (3) also provides as follows;

“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.”

50. However, the Respondent contends that execution proceedings against a government can only be issued against the accounting officer or chief officer of the said government or authority who is under a statutory duty to satisfy a judgment made by the Court against the body.

51. Contrary to this argument the Court in the case of *Jaribu Credit Traders Limited v Nairobi County Government* [2018] eKLR held as follows;

“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 ECM 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.”

52. This Court agrees with the opinions expressed by Aburili J above. As the *Government Proceedings Act* forbids execution of a decree against the Government by way of attachment and sale of Government property and the Respondent is a county government, its assets are not subject to attachment and sale, the Ex parte Applicant herein is properly before this court as it is the only way it can realize the fruits of its judgment.

53. The scope of an order of mandamus was discussed in the decision of *Republic vs Kenya National Examination Counsel ex parte Gathenji & Others* [1997] eKLR where it was held as follows;

“The next issue we must deal with is this: What is the scope and efficacy of an Order of Mandamus? Once again, we turn to Halsbury’s Law of England, 4th Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says: - “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.”

54. The Court having rendered judgement in favour of the Ex parte applicant herein meant that the Respondent herein is under an obligation to satisfy the decree in question without fail. It was also the Ex parte applicant’s legitimate expectation that this duty would be performed.
55. The Respondent is yet to settle the decretal amount owing as awarded in the Decree issued by this Honourable Court on 25th February,2022 and certified in the Certificate of Order against the Government dated 20th May 2022 despite several demands having been made.
56. The Respondent in its defense also claims that the Ex parte applicant has no claim against it and that it is not able to satisfy the decree at the moment due to insufficient budgetary allocation.
57. The Court in the case of Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR held as follows on the issue of budgetary allocation;

“The defence of non-allocation of funds by Parliament was also raised by the Respondent in the present application in his replying affidavit. Odunga J. in his ruling of 12th February 2018 extensively dealt with the defence as follows:

“As regards lack of budgetary allocation, Githua, J in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza [2012] eKLR expressed herself as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. 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. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.” [Emphasis mine].

26. I associate with the said decision and it is therefore my view that settlement of decretal sum by the Government whether National or County does not necessarily depend on the availability of funds. This position was appreciated by this Court in *Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi* Miscellaneous Application No. 354 of 2012 in which this Court pronounced itself as follows:

“I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly, I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein.”

27. In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations. In other words, financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle a sum decreed by the Court to be due from it. That objection therefore fails.”
48. Non-allocation of funds by Parliament is not an acceptable defence or justifiable excuse for non-payment of decretal sums ordered to be paid by Government officials, in the absence of any evidence of any attempts made by the responsible Government official to commence the process of such allocation. In the present case, this is particularly relevant given that the present contempt of Court proceedings commenced in April 2017, and the Respondent did



not indicate what steps if any, have been taken since then to effect payment of the monies due to the Applicant.”

58. The Respondent’s argument that it lacks budgetary allocation is therefore not a valid reason for failing to comply with this court’s orders. It sits on quicksand.
59. The court Odunga J (as he then was) in Republic v Machakos County; Mwangangi & Company Advocates (Exparte) (Judicial Review E010 of 2021) [2022] KEHC 10717 (KLR) (13 June 2022) (Judgment) held as follows on the importance of settling court decrees;

“I associate myself with the position adopted by Majanja, J in Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006 that:

“...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* particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant’s right of access to justice protected under Article 48 of *the Constitution*.”

Orders

The Application dated 9th June, 2022 is hereby allowed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21TH DAY OF SEPTEMBER 2023

J. CHIGITI (SC)

JUDGE

In Presence of:-

Wakhisia h/b for Wetangula for Applicant

Ms. Maingi h/b for Mogaka for Respondent

