



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

JUDICIAL REVIEW APPLICATION NO 10 OF 2020

IN THE MATTER OF AN APPLICATION TO APPLY FOR ORDERS OF JUDICIAL REVIEW (ORDER OF MANDAMUS)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

SECTION 8 &9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA AND THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

AND

IN THE MATTER OF ELC 506 OF 2008

THE KINGPOST LIMITED VS NAIROBI CITY COUNTY

AND

IN THE MATTER OF THE DECISION AND/OR JUDGEMENT IN ELC 506 OF 2008

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT

BETWEEN

REPUBLIC.....APPLICANT

AND

THE COUNTY

GOVERNMENT OF NAIROBI.....1ST RESPONDENT

COUNTY EXECUTIVE

COMMITTEE MEMBER, FINANCE..... 2nd RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER,

LANDS, PLANNING URBAN RENEWAL,

HOUSING AND PROJECT MANAGEMENT.....3RD RESPONDENT

THE KINGPOST LIMITED.....EX-PARTE APPLICANT

JUDGMENT

1. Vide the Notice of Motion dated 29th October 2020, the Ex-Parte Applicant (*Applicant*) seeks the following orders;

a) That the Honourable Court be pleased to grant the Ex-Parte Applicant an order of Mandamus against the Respondents compelling them to forthwith pay the decretal amount of Kshs 4,500,000/= and costs awarded at Kshs 260,220.67/= with accrued interest with effect from the date of the judgment and taxation respectively until payment in full.

b) That the Honourable Court do grant leave to the Ex-Parte Applicant, in default of payment to apply to cite and hold the Respondents to be in contempt of Court and mete an appropriate punishment.

c) That the Honourable Court do grant such further orders and or consequential orders, writs and declarations for purpose of enforcing the Ex-Parte Applicant's judgment or decree herein.

d) That the costs of the Application be paid by the Respondents.

2. The Application is based on the grounds set out in the Statutory Statement and the Verifying Affidavit of the Managing Director of the *Ex-parte* Applicant. The *Ex parte* Applicant's Director has averred that the *Ex-parte* Applicant filed a suit being **Thika ELC No. 35 of 2017 (formerly Nairobi ELC No. 506 of 2008)**; that following a full contested hearing, they were successful against the 1st Respondent and that the court vide its Judgment dated 19th June 2018 granted them permanent injunctive orders, declaratory orders, general damages for trespass and nuisance to the tune of Kshs 4,500,000 and costs of the suit and interest.

3. The *Ex parte* Applicant's Director averred that subsequently, the Deputy Registrar assessed and taxed the costs; that a certificate of taxation was issued on 18th September 2019; that the decree was issued on 26th November 2019 and a certificate of order against the County Government of Nairobi was issued on 27th November 2019 and that no appeal has been preferred against the said Judgment to date.

4. According to the *Ex parte* Applicant's Director, all the above cited documents were duly served on the Respondents and demand for payment notices issued; that the Respondents have nevertheless failed, neglected and/or ignored the *Ex-parte* Applicant's demand for payment; that the *Ex-parte* Applicant is desirous of enjoying the fruits of its Judgment herein; that the Respondents' properties are protected from due process of execution in the usual manner and that it is imperative that the court grants the order of mandamus.

5. In response to the Application, the Respondents filed grounds of opposition dated 27th November 2020 in which they averred as follows:

i. That the Application is fatally incompetent and incurably defective.

ii. That the Applicant's application seeking an order of Mandamus is mis-advised since the Respondents have not failed, neglected and/or refused to pay the Applicant the decretal amount of Kshs 4,500,000 and costs awarded at Kshs 260,220.67 in ELC No 35 of 2017.

iii. That the County Government Responsibilities with respect to management and control of Public Finance under the **Public Finance Management Act CAP 412C** of the Laws of Kenya gives the duty to pay out funds from the County Treasury upon the County Executive Committee member in charge of Finance and not the Respondents as indicated in the Orders given on 6th July, 2017.

iv. That further, public officers are prohibited in law; under **Sections 196 and 197** of the **Public Finance Management Act (2012)** from paying the Applicant as had been ordered for, as it would be an offence to spend any public funds without any prior authorization.

v. That the County Government has various competing interests catered for in the budget and that the Court should allow for the Applicant's claim to be factored in the forthcoming budget as approved by the County Assembly since the County Executive cannot expend money not approved in the budget.

vi. That the Respondents are ready to pay once the same is allocated for, approved and passed by the County Assembly as provided for in **Section 125** of the **Public Finance Management Act (2012)**.

vii. That the Respondents have not consented or connived to commit contempt of court.

viii. That the Court allow for budgeting, allocation and approval of the amounts decreed through the procedures provided for under the **County Government Act**.

ix. That the Application is an abuse of precious judicial time and it is in the interests of justice and fairness that the instant Application be dismissed with costs to the Respondents.

6. The Notice of Motion proceeded by way of written submissions. The *Ex-parte* Applicant, through its counsel, submitted that the Applicant has met the conditions for issuance of a mandamus order for the payment of the sums due and for committal of the Respondents to civil jail for contempt of court.

7. Counsel submitted that despite service of the decree, the certificate of costs and the certificate of order on the Respondents, they have failed and/or neglected to pay the decretal sum together with the costs and that as the government's property is protected from execution proceedings, the *Ex-parte* Applicant's only remedy is by way of an order of Mandamus to compel the accounting officers of the 1st Respondent herein to make good the decretal amount. Reliance was placed on the case of **R vs A.G & Another ex-parte James Alfred Koroso Nairobi HC. JR Misc. Appl. No. 44 of 2012** where it was held that:

"In the present case the ex parte applicant has no other option of realizing the fruits of his judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that has been awarded is realized. Unless something is done he will forever be left babysitting his barren decree."

8. Counsel referred to Section 21(4) of the Government Proceedings Act which states as follows:

"Save as provided in this section, no execution, or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs 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."

9. Further, counsel relied on the Court of Appeal case of **Commissioner of Land vs Kunste Hotel Ltd [1995-1998] 1EA 1 (CAK)** which laid down the principles of Judicial Review thus; -

"Judicial Review is concerned not with the private rights or the merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he has been subjected."

10. It was argued for the *Ex-parte* Applicant that that the Respondents have a public duty to satisfy the decree, and in case of failure, the Court is mandated to compel them to do so. In support, counsel cited the Court of Appeal case of **R vs Kenya National Examination Council ex-parte Gathengi & 8 Others [1997] eKLR** where the court stated;

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual." At paragraph 90 headed "the mandate" it is stated: "The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

What do these principles mean" They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed..."

11. Counsel submitted that once a certificate of order was served upon the Respondent, the accounting officer was obliged to pay the person entitled or his advocate the lawful sum together with any interest thereon as was held in the case of **Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Securing Ex-parte Fredrick Manaoh Egunza (2012) eKLR**; that the County Executive in charge of Finance is the one under obligation to pay funds as the accounting officer as stated in **Njenga Mwangi & Wachira Partners vs County Secretary, City County of Nairobi (2018) eKLR** and that the 2nd Respondent as the line minister is supposed to initiate and follow-up on the payment process.

12. Counsel submitted that the enforcement of a Judgment is part of the due process and the State should ensure enforcement of court decrees against the government is completed within a reasonable time; that the right to access justice requires that final settlement of disputes be accomplished within a reasonable time and that it is a mockery of justice for a citizen to spend years and resources in court searching for justice and after obtaining judgment, it is treated as a worthless piece of paper.

13. It was submitted for the *Ex-parte* Applicant that the Respondents' failure to pay the decretal sum is not due to lack of resources but total contempt of court and that it is unjustified and unfair for the Respondents to keep the Applicant herein pending awaiting subsequent budgetary processes, which processes the Respondents repetitively fails to factor in the payment to the Applicant.

14. In conclusion, counsel urged that the Respondents are not above the law and should obey Court orders failure to which they should be compelled to do so; that **Article 48** of the **Constitution** mandates the State to ensure access to justice to all persons and finally that the decree holder has the right to enjoy the fruits of his judgment and the same should not be thwarted.

15. The Respondents through their counsel filed submissions on 24th February, 2021. Counsel submitted that the application is fatally incompetent as the orders sought by the *Ex-parte* Applicant do not lie as against the Respondents and that there is no statutory duty imposed upon them to act as demanded.

16. It was submitted that the Applicant has not stated under which law the cited Respondents have a duty to act as demanded; that the County Government's responsibilities with respect to management and control of public finance under the **Public Finance Management Act** vests

in the County Executive Committee in charge of finance and not the 1st and 3rd Respondents herein as indicated in the Orders given on 6th July, 2017.

17. Counsel cited the case of Kenya National Examination Council vs R Ex-parte Geoffrey Gathenji Njoroge & Others (1997) eKLR where it was stated:

“In Abdi Kadir Salat Gedi vs Principal Registrar of persons & Another JR 15 OF (2014)Eklr the Honourable judge relied on an authority in Halsbury’s law of England,4th Edition, Volume 1 at 111 paragraph 89 and 90 to rule that “ The order of mandamus is of a most remedial nature and cannot be issued against a party not obliged to perform such a duty where the party alleged to have not performed such a statutory duty where the party alleged to have not performed such a statutory duty is to the discretion of the court not the suitable party for the suit.”

18. It was submitted that the Respondents have competing interests including settling decrees to the public but have limited resources and have statutory processes that they must abide by before the settlement of the same and that public officers are prohibited in law under sections 196 and 197 of the **Public Finance Management Act (2012)** from paying the Applicant as ordered for, as it would be an offence to spend any public funds without prior authorization.

19. According to counsel, the County Government is in the middle of its financial year and the budget cycle is already closed and that the Respondents would require constitutional or county legislation approval which has yet to be given to make the payment. Reliance was placed on the case of Kenya National Examination Council vs Republic Ex-parte Geoffrey Gathenji Njoroge(supra) where the court quoted paragraph 90 Halsbury’s Law of England 4th Edition Volume 1 at 111;

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

20. Counsel submitted that the Respondents are ready to pay the accrued sums 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)**.

Analysis & Determination

21. Having considered the pleadings and submissions made by the parties, the issues that arise for determination are;

i. *Whether the Respondents are proper parties in these proceedings and if so, whether the orders sought against them*

are available to the Ex-parte Applicant?

ii. *Orders as to costs.*

22. In determining these issues, it is crucial to first lay down the principles that guide the Court when dealing with the judicial review remedy of mandamus, which the Ex-parte Applicant is seeking. The Court of Appeal in Commission on Administrative Justice vs Kenya Vision 2030 Delivery Board & 2 others [2019] eKLR stated as follows:

“As observed by the Judge and correctly so in our view, the principle that guides the High Court when dealing with the scope and efficacy of an order of mandamus was crystalized by the Court in Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others (supra) namely:

“The order of mandamus is of most extensive remedial nature and is in the form of 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 of 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 it may issue in cases where although there is an alternative remedy, yet the mode of redress is not convenient, beneficial and effectual.”

23. This position was reiterated in the English case of R vs Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741 where it was stated as follows:

“It is important to remember that “mandamus” is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it.”

24. From the foregoing it is apparent that the writ of mandamus will issue where there is a public duty to be performed by the Respondents and where no other appropriate remedy is available to the Applicant.

25. It is not in dispute that the 1st Respondent herein was the Defendant in **Thika ELC No. 35 of 2017 (Formerly Nairobi ELC No. 506 of 2008)**. The said matter was heard and finally determined in favour of the Ex-parte Applicant who was granted, among other orders, the

decretal sum of Kshs 4,500,000 together with costs assessed at Kshs 260,220.67. No appeal has been preferred against the said decision.

26. The Respondents have argued that the application is fatally defective as there is no statutory duty imposed upon them to act as demanded; that the Applicant has not stated under which law the cited Respondents have a duty to act; that the 1st and 3rd Respondents are improper parties; that the Respondents have competing interests, limited resources and statutory processes which they must abide by before the settlement of the same and that public officers are prohibited in law under **sections 196 and 197** of the **Public Finance Management Act** from paying the Applicant as ordered by the court because it is an offence to spend any public funds without prior authorization.

27. The 1st Respondent is established as one of the counties in Kenya pursuant to **Article 6** and the first schedule of the **Constitution, 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.”

28. Pursuant to the provisions of the said **section 33** of the **Sixth Schedule** to the **Constitution**, County Governments are the legal successors of the defunct local authorities. The 1st Respondent assumed all assets and liabilities of the former Nairobi City Council. Although the *Ex-parte* Applicant had sued the former local authority, it was in order for the subsequent proceedings to be conducted in the name of the new outfit, the 1st Respondent herein.

29. It is trite that execution of decrees against the Government must be in accordance with provisions of the **Government Proceedings Act, Section 21 (4)** of the Act provides as follows: -

“Save as provided in this Section, no execution or attachment or process in the nature thereof shall be issued out of any Court for enforcing payment by the Government of any money or costs, 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”.

30. The question of whether a county government is a government for purposes of the **Government Proceedings Act** was determined in the case of **Republic vs AG and another ex-parte Stephen Wanyee Roki (2016) eKLR** where Odunga J persuasively stated thus;

“Although the provisions of the Government Proceedings Act do not expressly refer to County Governments, Section 7 of the Sixth Scheduled to the Constitution (Transitional and Consequential Provisions) provides that;

All law in force immediately before the effective date continues in force and shall be construed with alteration, adaptation, qualification and exceptions necessary to bring it into conformity with this Constitution.

It follows that the provisions of the Government Proceedings Act, a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. One such construction would be the reality that the Government is now at two levels and Article 189 (1) (a) of the Constitution requires that the Constitutional status and institutions of Government at both the National and County levels be respected. In my view, such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to execution proceedings.”

31. **Section 21(1)** of the **Government Proceedings Act** lays out the procedure for execution against the Government as follows:

“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.

32. **Section 21 (3)** of the said Act goes further to state;

“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.

33. From the foregoing, it is apparent that execution proceedings against a government or public authority can only be as against the accounting officer of the said government or authority, who is under a statutory duty to satisfy a Judgment made by the Court against that body.

34. The question of who is an accounting officer in the county government, was extensively delved into by a three Judge bench of the High court in the case of *Council of Governors & 6 others vs Senate [2015] eKLR* where they stated thus;

“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;

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.

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.....”

35. **Section 103** of the **Public Finance Management Act, 2012** establishes the County Treasury comprising of the County Executive Member for Finance, the Chief Officer and the departments of the County Treasury responsible for Finance and fiscal matters. Under **section 103 (3)** thereof, the County Executive Committee member for Finance is the head of the County Treasury.

36. **Section 104** of the **Public Finance Management Act** sets out the responsibilities and powers of a County Treasury as headed by the said County Executive Member for Finance, some of which include preparing the annual budget for the county, managing the county government’s public debt and other obligations. The totality of the foregoing is that the accounting officer for the County Government is the County Executive Member for Finance, the 2nd Respondent herein.

37. The 1st Respondent herein was the Defendant in **ELC No. 506 of 2008 (also Thika ELC No. 35 of 2017)** and is the entity sought to be compelled to settle the decree. The 2nd Respondent does not exist independently, but as an officer of the 1st Respondent. Whereas the *Ex-parte* Applicant is correct that the 3rd Respondent is the line minister in matters land, it is apparent that he has no role in these proceedings. This is a case of mis-joinder.

38. The effect of mis-joinder of parties in judicial proceedings was discussed by the Court of Appeal in *Republic vs Charles Lutta Kasamani & another ex parte Minister for Finance & Commissioner of Insurance as Licensing and Regulating Officers [2006] eKLR* where the court stated thus:

*“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.. This Court said so in *Dipak Panachod Shah & Another vs The Resident Magistrate Nairobi and the Attorney General - Civil Application NAI. 81/00(UR)*.*

39. This position was adopted by the court in the case of *Consolata Kihara & 21 Others vs The Director of Kenya Trypanosomiasis Research Institute [2003] eKLR*, where it was held;

“Having carefully studied the whole record on this file, I agree with Mr Akhaabi (for the applicants), that the issues raised by Mr Munene about joinder and misjoinder of parties, are not of significance to these proceedings, because no miscarriage of justice, or any form of injustice is alleged as a result of the choosing of parties to this litigation...”

40. Further, the Court in *Republic vs County Secretary, Nairobi City County & another ex-parte Mohamed Tariq Khan [2017] eKLR* having adopted the reasoning in *Consolata Kihara & 21 Others vs The Director of Kenya Trypanosomiasis Research Institute Nairobi (supra)* went further and stated;

“This position is even more relevant to proceedings in the nature of judicial review which are neither criminal nor civil and

particularly in application for mandamus where what is sought is the enforcement of a decree against the respondent not in his personal capacity but in his official capacity. In such circumstances, the respondent is simply being compelled to facilitate the payment as opposed to imposing personal liability.”

41. Article 159 (2) (d) of the Constitution enjoins this Court to administer justice without undue regard to technicalities of procedure. The substance of the reliefs sought by the *Ex-parte* Applicant still be realized notwithstanding the mis-joinder of the 3rd Respondent in these proceedings.

42. Having settled the issue of propriety of the parties, the next issue to be addressed by this court is whether the *Ex-Parte* Applicant has met the conditions precedent to the settling of decrees against the government as set out in Sections 21(1) and (2) of the Government Proceedings Act.

43. In dealing with the aforementioned issue, the court in Republic vs Permanent Secretary, Ministry of State for Provincial administration and Internal Security Exparte Fredrick Manoah Egunza(*supra*) stated as follows:

“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.”

44. The Ex parte Applicant has annexed copies of the Judgment, decree, certificate of taxation and certificate of order against the 1st Respondent arising from **Thika ELC No. 35 of 2017 (Formerly ELC HCCC No 506 of 2008)**.

45. The *Ex parte* Applicant also annexed copies of demand letters dated 1st October 2019 and 9th January 2020 (duly stamped as received) respectively which were sent to the Respondents herein as well as to the County Attorney-Nairobi City County which enclosed the notice of entry of judgment, the certificate of costs and decree, the certificate of order against the government and demand for payment. This Court therefore finds that the proper procedure was followed.

46. Having found that the *Ex-parte* Applicant followed the laid down procedure in informing the 1st Respondent about the Judgment of the court, the next issue to consider is whether there are other considerations to be factored before the enforcement of a decree against the Respondents.

47. It is the Respondents' case that the money to be used to settle the decretal amount has not been budgeted for and can only be included in the budget for the forthcoming financial year; that as the same has yet to be done, they are pursuant to Sections 196 and 197 of the Public Finance Management Act (2012) prohibited from paying the Applicant any funds; that there is a laid down procedure for the issuance of funds and that the court should let the proper procedure to be followed.

48. The issue of payment of a decretal amount by a public entity was addressed in the case of Jaribu Credit Traders Limited vs Nairobi County Government [2018] eKLR where Aburili J stated;

“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 vs 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.”

49. Further, the court in Republic vs Principal Secretary, Ministry of Defence & Another ex parte David Gitau Njau & 9 Others[2018] eKLR stated as follows:

“...it is therefore my view that settlement of decretal sum by the Government and its agencies 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.”

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.

In my view it is the obligation of the government department concerned in conjunction with the Treasury to ensure that funds are allocated towards the settlement of the liabilities owed by the Government. The failure to do so amounts to failure to perform a statutory obligation hence warrants the grant of an order of mandamus Whereas difficulties in the settlement of decretal sum may be a basis for seeking accommodation with respect to settlement, such difficulties cannot be a basis for seeking that an otherwise merited application for mandamus ought not to be granted.”

50. In this case, the *Ex-parte* Applicant has moved this Court to compel the Respondents to satisfy a Judgment of this court. The Respondents have not given any reason why the Judgment has not been satisfied more than two years down the line. As has been held in numerous decisions, settlement of decretal sums by the Government and its agencies does not necessarily depend on the availability of funds, or budgetary allocations.

51. In any event, as at today, the budget for the financial year 2021/2022 has already been approved by the County Assembly. The Judgment of this court was delivered on 19th June, 2018, and should have been factored in the budget of the financial years 2019/2020, 2020/2021 or 2021/2022. There is therefore no reason why the Respondents should not be ordered to settle the decretal amount.

52. This Court therefore finds that since the *Ex-parte* Applicant has Judgment in its favour with respect to the demanded decretal amount and costs, and the procedure stated in **section 21** of the **Government Proceedings Act** having been followed, there is a duty upon the 1st and 2nd Respondent to pay the debt already decreed by a competent Court of law to be due and payable by them.

53. With respect to prayer 2 of the Motion, the court opines that the same is immature at this stage. Contempt proceedings and/or leave to apply thereto only come into play where an order of mandamus having been issued has not been complied with.

54. Accordingly, for the reasons set out above, this court finds that the *Ex parte* Applicant’s Notice of Motion dated 29th October 2020 is merited, and partially succeeds as follows:

i. A writ of Mandamus against the County Government of Nairobi and the County Executive Committee Member for Finance-Nairobi County compelling them forthwith to satisfy the decree of this court in ELC No. 506 of 2008 (also Thika ELC No. 35 of 2017) is hereby issued.

ii. The Ex-parte Applicant will have the costs of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF NOVEMBER, 2021.

O. A. ANGOTE

JUDGE

In the presence of:

Ms Gatuhi for the Ex parte Applicant

No appearance for the Respondents

Court Assistant – John Okumu