



**Republic v Nairobi City County Government & 5 others; KTK
Advocates (Exparte Applicant) (Judicial Review E087 of 2023)
[2024] KEHC 15342 (KLR) (Judicial Review) (3 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15342 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E087 OF 2023
JM CHIGITI, J
DECEMBER 3, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

NAIROBI CITY COUNTY GOVERNMENT 1ST RESPONDENT

CECM FINANCE & ECONOMIC AFFAIRS 2ND RESPONDENT

CHIEF OFFICER REVENUE ADMINISTRATION 3RD RESPONDENT

THE COUNTY SECRETARY NAIROBI CITY COUNTY 4TH RESPONDENT

COUNTY ATTORNEY 5TH RESPONDENT

**CHIEF OFFICER, FINANCE/COUNTY TREASURER NAIROBI CITY
COUNTY 6TH RESPONDENT**

AND

KTK ADVOCATES EXPARTE APPLICANT

RULING

1. The application before this court is the Notice of Motion dated 18.3.24 wherein the applicant seeks the following orders;
 1.spent
 2. That, a Notice to Show Cause does issue to the Respondents:



- i. CECM, Finance & Economic Affairs.
- ii. Chief Officer, Revenue Administration.
- iii. County Secretary, Nairobi City County.
- iv. County Attorney.
- v. Chief Officer, Finance/County Treasurer Nairobi City County

to Show Cause why Contempt of Court Proceedings should not be commenced against them for disobedience of Orders of this Honourable Court given on 13.02.24.

3. That, this Honourable Court does issue such orders as it may deem fit to grant in the interests of justice.
 4. That, the costs of this application be provided for.
2. It is the Applicant's case that an Order of Mandamus was issued on 13th February, 2024. A Certificate of Order against the Government was extracted and served upon the Respondents on 17th May, 2024. The decretal amount remains unpaid to date.
 3. Reliance is placed in the Court of Appeal in Nairobi Civil Appeal No. E290 of 2023, *Five Star Agencies Limited -Vs- National Land Commission & Another* [Unreported] set out the law over the road map for execution against the Government and its Organs and held thus:

“Having stated the foregoing, and since Decrees will from time to time be issued against the Government, what then is the option available to a Party who holds a Decree against the Government? The only remedy available to such a person is to institute Judicial Review Proceedings and seek an Order of Mandamus to compel the Government to settle the Decree in question....

It is clear beyond any peradventure that the procedure to be followed in execution against the Government is to seek an Order of Mandamus to compel the relevant person in the Government to settle the Decree in question.”

4. The Applicant submits that the *Constitution* is a progressive one that seeks to create equity, equality and parity to all litigants under the law. Article 2 of the *Constitution* enjoins all to be equal and under the law.
5. Article 40 of the *Constitution* protects the Right to Property and that the State "shall not deprive a person of Property of any description". Article 48 of the *Constitution* guarantees access to justice to all. Article 159 of the *Constitution* states that justice "shall be done to all irrespective of status"
6. Issuance of a Decree is the culmination of a litigation process. The law intends that the Decree be complied with.
7. the *Constitution* demands that all are equal before the law.
8. The enforcement of Decrees against the Government must at all be fair and equitable to all Parties and the Government cannot be the only one that can be execute its Decrees like other litigants but when it comes to execution against it, it is protected.



Respondents' case;

9. In opposition to the Applicants' Application, the Respondents filed a grounds of options dated 18th September, 2024 and written submissions dated 30th October, 2024.
10. The Respondents oppose the Application on the following grounds: -
 1. The *ex parte* Applicant herein has failed to present sufficient evidence to show any alleged prejudice they would suffer in the event the court declines to allow the application as prayed.
 2. There are no allegations made against the Respondents which have been substantiated or proven.
 3. The *ex parte* Applicant cannot purport to arbitrarily state that the Respondents have deprived the *ex parte* Applicant of its right to execute against Nairobi City County on the basis of mere speculation and allegations which are not backed with an iota of evidence at this stage.
 4. The instant application amounts to an abuse of court process as it is predicated upon a concoction of incompatible and contradictory prayers
 5. The entire suit is premised on conjecture and speculation of numerous facts on the part of the *ex parte* Applicant; in the premise the application is scandalous, frivolous, vexatious and a classic case of an abuse of the court process;
 6. The application herein offends elementary principles of the law relating to the execution against the government and is incurably offensive.
 7. The *ex parte* Applicant's application has failed to meet the well-established legal principles to warrant the grant of any of the orders herein.
 8. No legal or factual basis has been laid by the *ex parte* Applicant for the grant of the orders sought.
 9. On the aforementioned grounds, the *ex parte* Applicant's Application dated 18th March 2024 is bad in law, an abuse of the court process and ought to be dismissed with costs to the Respondents.
11. They place reliance on the case of *Republic vs Attorney General & Another Ex parte Wanyiri Kihoro & 5 Others* [2014]eKLR, where Majanja J observed that:-

“an order of mandamus will not issue as a matter of course. In order for the applicants to succeed in the matter they must demonstrate that the respondents failed to perform a constitutional or statutory duty. Mandamus issues to compel a person or body of persons to perform a particular duty imposed on him or them by the Constitution and statue by which duty he has refused to perform to the detriment of the applicant.”
12. They submit that they have not refused to pay the Applicant, and/or perform their duty to pay the decretal amount. There are clear cut procedures in accordance with the law that have to be followed by the Respondents for the stated sum of money to be disbursed.
13. They posit that 1st Respondent has an annual budget which has to be strictly adhered to and every future expenditure has to be advertently included in the budget for the money to be disbursed, when needed, by the authorized officers for the relevant purpose in full compliance with the provisions of the Constitution, the Public Finance Management Act (PFMA) 2012 and the County Government Act.



14. The *Public Finance Management Act* explicitly lays out the stages of a county budget process. This well laid-out process has several stages that needed to have been followed before the financial year for the money to be disbursed within the required time. It is clearly stipulated in the *Public Finance Management Act*, Section 125:

Stages in county government budget process

7. The budget process for county governments in any financial year shall consist of the following stages-
- a. integrated development planning process which shall include both long term and medium-term planning;
 - b. planning and establishing financial and economic priorities for the county over the medium term;
 - c. making an overall estimation of the county government's revenues and expenditures;
 - d. adoption of County Fiscal Strategy Paper;
 - e. preparing budget estimates for the county government and submitting estimates to the county assembly;
 - f. approving of the estimates by the county assembly;
 - g. enacting an appropriation law and any other laws required to implement the county government's budget;
 - h. implementing the County Government's budget; and
 - i. accounting for; and evaluating the county government's budgeted revenues and expenditures
15. It is their submission that that they had not budgeted for the expenditure in question and therefore they could not bend the established laws to accommodate the applicant. The Respondents, being public officers, owe a duty of transparency to the people.
16. They invoke in Article 9 of the *Constitution* that provides for the national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them - applies or interprets the *Constitution*; enacts, applies or interprets any law; or makes or implements public policy decisions. These values and principles include among them; good governance, integrity, transparency and accountability. Every transaction made by the Respondents has to be approved prior to the transaction being made. This scrutiny acts as a check against corruption, mismanagement, and abuse of power. When decision-making processes are transparent, public officers have to act in the public interest and adhere to established rules and regulations.
17. It is their case that Contempt of court is that conduct or action that defies or disrespects authority of court. *Black's Law Dictionary* 9th Edition, defines contempt as:

The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.



18. They place reliance in the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828, Ibrahim, J. (as he then was), underscored the importance of obeying court orders, stating:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void.” (emphasis)

19. They also place reliance on the case of *Gatharia K. Mutikika v Babarini Farm Limited* [1985] KLR 227, where it was held:

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily. It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be the where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge ... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

20. It is their submission that the Respondents have never willfully disobeyed this Honourable Court's orders. In the case of *Indian Airports Employees Union v Rania Catterie & Another* [AIR 1999 SC 880: 1999(2) SCC:537L where the court held: -

“in order to amount to "civil contempt" disobedience must be willful. If disobedience is based on the interpretation of court's order, notification and other relevant documents, it does not amount to willful disobedience”

21. Further in *Sheila Cassatt Issenberg & Watoto World Centre v Antony Machatha Kinyaniui* (Civil Suit 19 of 2020) {20211 KEHC 5692 (KLR) it was held,

“... But even as courts punish for contempt to safeguard the peaceful and development of society and the rule of law, it must be borne in mind that the power to punish for contempt is a discretionary one and should be used sparingly. That is why the court observed in *Carey v Laiken* (supra), that if courts were to find contempt too easily, "a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the



very judicial power it seeks to protect The court's contempt power should be used cautiously and with great restraint. It is an enforcement power of last resort rather than first resort.”

22. The Respondents submit that they 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.
23. It is their case that the immediate settlement of the Order would require County Legislation approval which has not been issued to the Respondents because the budget cycle has already been closed. The funds are not provided for in the County budget. The Respondents have always indicated to this Honourable Court that they are ready to pay the sum as soon as it is allocated for, approved and passed by the County Assembly as provided for under section 125 of the [Public Finance Management Act](#), 2012.
24. The Respondents argue that the instant application is incompetent, devoid of merit and an abuse of the court process and should be struck out and/or dismissed with costs to the Respondents.

Analysis and determination

25. It is the Respondent's case that they have not refused to pay the Applicant, and/or perform their duty to pay the decretal amount. It is its case however that there are clear cut procedures in accordance with the law that have to be followed by the Respondents for the stated sum of money to be disbursed.
26. It is also the 1st Respondent's case that it has an annual budget which has to be strictly adhered to and every future expenditure has to be advertently included in the budget for the money to be disbursed, when needed, by the authorized officers for the relevant purpose in full compliance with the provisions of the [Constitution](#), the [Public Finance Management Act](#) (PFMA) 2012 and the [County Government Act](#).
27. The Court in the case of [Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waitthaka](#) [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.”

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.”

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.”

28. This court is guided by the above authorities in finding that the Applicant has made out a case for the grant of the orders sought.

Order:

1. A Notice to Show Cause do issue to:
 - a. CECM, Finance & Economic Affairs.
 - b. Chief Officer, Revenue Administration.
 - c. County Secretary, Nairobi City County.
 - d. County Attorney.
 - e. Chief Officer, Finance/County Treasurer Nairobi
2. The matter shall proceed with the hearing of the said Notice on 13th March, 2025 at 10.30 AM.
3. The afore mentioned officers shall attend open court in person that day.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2024.

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J. M. CHIGITI (SC)

JUDGE

