



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW CASE NO. 22 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY SECRETARY,**

**NAIROBI CITY COUNTY.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY EXECUTIVE MEMBER IN**

**CHARGE OF FINANCE, NAIROBI CITY COUNTY.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF OFFICER IN CHARGE OF FINANCE,**

**NAIROBI CITY COUNTY.....3<sup>RD</sup> RESPONDENT**

**EX PARTE : KOCEYO AND CO. ADVOCATES**

**JUDGMENT**

**The Application**

1. The *ex parte* Applicant herein is the firm of Koceyo and Company Advocates (herein referred to as “the Applicant”), and it claims that it rendered legal services to the County Government of Nairobi in various matters and on diverse dates. However, that the said County Government failed to pay the Applicant for the legal services, and the Applicant thereupon filed its Bills of Costs for taxation, which Bills were taxed and certificates of taxation issued in the various matters. The Applicant contends that the County Government of Nairobi has refused failed and/or neglected to satisfy the decretal sums.

2. The Applicant consequently filed a substantive application for judicial review orders herein by way of a Notice of Motion dated 11<sup>th</sup> April 2019, in which it has sued the County Secretary, County Executive Member in charge of Finance, and the Chief Officer in charge of Finance of the Nairobi City County as the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively. The Applicant states that the said Respondents are the ones vested with the statutory duty to pay funds from the Nairobi County Treasury. The Applicant is seeking the following orders:

**I. That an Order of Mandamus be issued to compel the County Secretary Nairobi City County, the County Executive Member in charge of Finance, Nairobi City County and the Governor, Nairobi City County (sic), to satisfy the decretal sum of Kshs 2,436,044.05 together with interest and costs thereon as awarded by this Court in:-**

**a) JR Misc. Application No. 62 of 2017.....Kshs 545,098.05**

**b) Misc. Application No. 2 of 2018.....Kshs 556,191.00**

c) Misc. Application No. 3 of 2018.....	Kshs 280,183.50
d) Misc. Application No. 19 of 2018.....	Kshs 294,582.00
e) JR Misc. Application No. 27 of 2018.....	Kshs 200,448.00
f) Misc. Application No. 25 of 2017.....	Kshs 559,542.50
<b>Total Decretal sum.....</b>	<b>Kshs 2,436,044.50</b>

## II. That the costs of this Application be borne by the Respondents.

3. The Applicant relied on its statement dated 25<sup>th</sup> January 2019, and a verifying affidavit sworn on the same date by Titus Koceyo, its Managing Partner, to which he annexed the pleadings, judgments, decrees, Bill of Costs and Certificates of Taxation issued in the aforementioned suits. Also annexed was a letter of demand addressed to the Respondents dated 24<sup>th</sup> January 2019.

4. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the application by way of Grounds of Opposition dated 19<sup>th</sup> September 2019, wherein they denied refusing or neglecting to satisfy the decretal sums in question, and contended that any liability or expenditure incurred against the County Government can only be defrayed from moneys provided to it by the National Government. However, that the National Government has not provided adequate funds for the County Government to be able to settle its outstanding decrees, including the Applicant's claim. Further, that the satisfaction of such decree are deemed to be expenditure by Parliament and must be justified in law, and the County Government can only be accountable for what it has received from the National Government. The Respondents averred that that the Applicant's claim be settled amicably without involving the court process.

### The Determination

5. The application was canvassed by way of written submissions. The Applicant filed submissions dated 25<sup>th</sup> October 2019, while the Respondents' Advocates, Mbaluka & Company Advocates, relied on submissions on record dated 16<sup>th</sup> October 2019.

6. I have considered the Applicant's and Respondents' pleadings and submissions. I am also guided by the Court of Appeal's decision on the nature of the remedy of mandamus in **Republic vs Kenya National Examinations Council ex parte Gathenji and Others, (1997) e KLR** as follows:

**“ 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.”**

7. The issues that require to be determined therefore are firstly, whether the Respondents are under a public duty and obligation to satisfy the decrees and orders issued in favour of the Applicant, and secondly, if so, whether the Applicant is entitled to the relief it seeks.

8. The Applicant in this respect submitted that it is trite law that for a court to grant an order of mandamus the Respondent must have a duty by law which they have refused to fulfill. The Applicant relied on the decision in **Republic vs Kenya National Examinations Council exparte Gathenji and Others, (supra)** on the nature of the remedy of mandamus, and for their submission that the Respondents are mandated by law to pay up debts they owed where a suit is instituted against the County Government.

9. Reliance was also placed on the decision in **Soloh Worldwide Inter-enterprises vs County Secretary Nairobi County and Another (2016) eKLR**, for the position that the person who had the overall financial obligation for the purpose of the affairs of the county government must be the county executive in charge of finance and unless he shows otherwise, he is the one under the obligation to pay funds in the capacity as the accounting officer. Further, that jurisprudence on the subject of the order of mandamus demands that where there is a breach of public duty or power, the Court must compel the public authority to perform the duty imposed by statute.

10. Lastly, it was the Applicant's submissions that as the law bars it from executing against the Government, it has no other effective remedy but judicial review, and he asked the court to allow the Notice of Motion. The Applicant relied on the cases of **Republic vs Attorney General & Another Exparte James Alfred Koroso (2013) eKLR**, **Republic vs County Secretary, Nairobi City County & Another Exparte Wachira Nderitu Ngugi & Co Advocate (2016) eKLR**, and **Republic vs County Chief Officer, Finance & Economic Planning, Nairobi City County Exparte Stanley Muturi (2017) eKLR** for this position.

11. The Respondents, while relying on section 21(4) of the Government Proceedings Act, submitted that they have not disregarded the orders of the Court and have every intention of complying with the same, but should be given more time to do so. They reiterated that the National Government has not provided adequate funds to settle the decrees against them. Reliance was placed on the decision in **Republic vs Town Clerk, Kisumu Municipality ex parte East African Engineering Consultants, (2007) ) e KLR** for the position that a public officer cannot incur personal liability where a public body has no funds for payments, and that the Applicant and Respondents ought to settle the claim amicably without involving the Court process. The decision in **Wachira Nderitu, Ngugi & Company Advocates vs Town Clerk City Council of Nairobi, (2015) e KLR** was also cited for the proposition that the Respondents ought to be given time to arrange their finances and settle the Applicant's claim. Lastly, the Respondents sought costs on the ground that they have not refused to make good the

Applicant's claim.

12. The applicable law on execution proceedings against the National and County Governments is section 21 of the Government Proceedings Act, which provides as follows:

**“(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.**

**(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.”**

13. Nairobi City County is one of the Counties established by Article 6 of the Constitution and the First Schedule to the Constitution, and is constitutionally recognized as a distinct government level of government by the said Article. In addition, the definition of “Government” in the Government Proceedings Act refers to the “Government of Kenya”. In this respect I adopt the holding by Odunga J. in **Republic v Attorney General & another ex-parte Stephen Wanyee Roki [2016] eKLR** as regard the application of the Government Proceedings Act to County Governments:

**“20 Although the provisions of the Government Proceedings Act do not expressly refer to County Governments, section 7 of the Sixth Schedule 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 the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.***

**21. 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 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.”**

14. The decision relied upon by the Respondents, namely **Republic vs Town Clerk, Kisumu Municipality ex parte East African Engineering Consultants, (supra)** is also distinguished on the ground that it involved the status and liability of a municipal council under the repealed Local Government Act, to which the Government Proceedings Act did not apply. The status and liability of County Governments are on the other hand now governed by the Constitution and County Governments Act, and the Government Proceedings Act is now expressly applicable to County Governments as explained in the foregoing.

15. As to whether the Respondents herein are under a duty to pay the subject decretal sums, an order of mandamus is normally issued when an officer or an authority by compulsion of law or statute is required to perform a duty, and that duty, despite demand in writing, has not been performed. Execution proceedings against a government or public authority under the Government Proceedings Act can only be as 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 that body. This was also the holding in **Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012)** where Githua J. held 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.”

16. Section 44 of the County Government Act in this respect establishes the office of the County Secretary who is secretary to the County Executive Committee, and is answerable for the operations of the County Executive, and whose functions include being head of the county public service. Section 103 of the Public Finance Management Act No 18 of 2012 also establishes the County Treasury comprising of the County Executive member of Finance, the Chief Officer and the departments of the County Treasury responsible for finance and fiscal matters. Under section 103(3) of the Act, the County Executive Committee Member for Finance is the head of Treasury, and is thus the responsible for finance matters in the County.

17. This Court therefore finds that arising from these provisions, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are jointly responsible for the satisfaction of Court orders and decrees on payment of money owed by the Nairobi City County by virtue of their roles and functions. In addition, the decretal sum due from the Respondents in the present application has not been disputed, and the Applicant in this respect annexed copies of the judgments and decrees awarded in the various cases that are the subject of this application. The Applicant also annexed copies of the Certificates of Costs issued in its favour, after taxation of its Bills of Costs in the various suits.

18. In addition, the Applicant annexed a copy of a letter of demand dated 24<sup>th</sup> January 2019 sent by his Advocates to the County Attorney, and which enclosed the decrees issued in its favour. It is notable in this regard that the main purpose of the procedure in section 21 of the Government Proceedings Act is to notify the Respondents that the debt is due to facilitate payment, and is not meant to relieve the Respondents from meeting their legal and statutory obligation to satisfy decrees and orders of the Court.

19. This Court also notes that the Respondents do not expressly deny the Applicants’ claim, and rely on the County Government’s inability to settle the claims as a result of inadequate budgetary allocations. The Government Proceedings Act in this respect imposes a statutory duty on the Respondents to satisfy the decretal sums due to the Applicant upon compliance with the procedure set out therein, and not upon the availability of funds. To allow the performance of these duties dependent on the availability and/or provision of funding would in effect make the duties discretionary, and allow the Respondents to decide if and when to undertake duties which are in their nature mandatory. It is also notable that no such exemption is provided by law. In any event the lack of funding to pay the decretal sum does not extinguish the existence and nature of the Respondent’s duties, and only affects the mode of performance of that duties.

20. The issue whether the lack of budgetary allocation can absolve the Respondent of its duty to pay the decretal sum was discussed in the case of **Republic vs Principal Secretary, Ministry of Defence & Another ex parte David Gitau Njau & 9 Others**, (*supra*), and I am in this regard in agreement with the holding by Odunga J. when the learned Judge stated as follows:

**“19....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.”**

**20. 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.**

**21. 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.”**

21. This Court therefore finds that as judgment was already entered in favour of the Applicant with respect to the demanded decretal amount and costs; the procedure stated in section 21 of the Government Proceedings Act has largely been followed; and there has been a demand for payment made, there is a duty upon the Respondents who are the relevant accounting officers, to pay a debt already decreed by a competent Court of law to be due and payable by them.

22. In the premises, I find that the Applicant's Notice of Motion dated 11<sup>th</sup> April 2019 is merited. I accordingly grant the following orders:

**I. An order of mandamus directed to the County Secretary Nairobi City County, the County Executive member in charge of Finance, Nairobi City County and the Chief Officer in charge of Finance of the Nairobi City County, to comply by paying to Koceyo and Company Advocates the following decretal sums, together with interest thereon as awarded by this Court in the decrees issued in:-**

- (a) JR Misc. Application No. 62 of 2017.....Kshs 545,098.05
- (b) Misc. Application No. 2 of 2018.....Kshs 556,191.00
- (c) Misc. Application No. 3 of 2018.....Kshs 280,183.50
- (d) Misc. Application No. 19 of 2018.....Kshs 294,582.00
- (e) JR Misc. Application No. 27 of 2018.....Kshs 200,448.00
- (f) Misc. Application No. 25 of 2017.....Kshs 559,542.50
- Total Decretal sum.....Kshs 2,436,044.50

**II. The Applicant shall have the costs of the Notice of Motion dated 11<sup>th</sup> April 2019 of Kshs 50,000/=.**

23. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JANUARY 2020**

**P. NYAMWEYA**

**JUDGE**