



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW APPLICATION NO. 183 OF 2019**

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

**AND**

**SECTION 1A, 1B & 3A OF THE CIVIL PROCEDURE ACT**

**AND**

**IN THE MATTER OF THE ORDERS MADE BY THIS HONOURABLE COURT ON THE 26<sup>TH</sup> OF AUGUST, 2016,**

**IN THE HIGH COURT CONSTITUTIONAL & HUMAN RIGHTS DIVISION PETITION NO. 399 OF 2014**

**BETWEEN**

**PAUL KANGETHE WARUHIU.....1<sup>ST</sup> APPLICANT**

**GEORGE KANGETHE WARUHIU.....2<sup>ND</sup> APPLICANT**

**STANELY KANGETHE WARUHIU.....3<sup>RD</sup> APPLICANT**

**BENJAMIN KIMANI WARUHIU.....4<sup>TH</sup> APPLICANT**

**VERSUS**

**COUNTY CHIEF FINANCIAL OFFICER.....1<sup>ST</sup> RESPONDENT**

**COUNTY CHIEF LEGAL SECRETARY.....2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KIAMBU.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. By a Notice of Motion dated 18/6/19 the applicant seeks an order of Mandamus to compel the payment of a sum of money subject of a consent order in a High Court Petition No. 399 of 2014 for compensation in respect of compulsory acquisition of land, as follows:

1. **THAT** this Honourable Court be pleased to grant orders of Mandamus directed to the Respondents herein compelling them to pay the outstanding decretal amount as agreed upon in the consent order dated 26<sup>th</sup> of August 2016.

2. **THAT** the cost of this Application is borne by the Respondents.

**ON THE GROUNDS** stated in the Statutory Statement dated 28<sup>th</sup> May 2019.

2. The Grounds for seeking the reliefs are set out in the Statutory Statement filed herein as follows:

**2. THE GROUNDS ON WHICH THE RELIEFS ARE BEING SOUGHT**

- a. THAT the Applicants' land situated in Kiambu County (formerly in Kiambu District) had been compulsory acquired by the Government sometime in 2007 vide a Gazette Notice No 1468 and 1469.
- b. THAT the Applicants' subsequently filed High Court Petition No 399 of 2014 at Nairobi praying for amongst others, a declaration that the government had infringed on their right to property and in the alternative a total sum of Ksh.285,889, 870/= be found owing to the Applicants as compensation.
- c. THAT the parties herein agreed to settle the Petition vide consent dated 20<sup>th</sup> June 2016 and filed on 21<sup>st</sup> June 2016.
- d. THAT as per the terms of the said consent; Honourable Justice Lenaola ordered that the Applicants should be paid a total amount of Ksh.85,524,000/= being compensation in respect of the compulsory acquisition of L.R. Numbers Githunguri/Gathieko/332, Githunguri/Gathieko/333, Githunguri/Gathieko/334, Githunguri/Gathieko/335, and Githunguri/Gathieko/336.
- e. THAT Honourable Justice Lenaola further ordered that the total sum of Ksh.85,524,000/= compensation, Ksh.55,905,135/= due from the national government to be paid to the Applicants.
- f. THAT Honourable Justice Lenaola also ordered that the balance of the compensation amount being Ksh.29,618,865/= to be paid by the 3<sup>rd</sup> Respondent herein; County Government of Kiambu, in the following manner;
- i) Ksh.5,000,000/= within 60 days of the payment of Ksh.55,905,135/= as detailed in 2 above.
  - ii) Ksh.10,000,000/= on or before 28<sup>th</sup> February 2017.
  - iii) The balance of the decretal amount thereof being Ksh.14,618 865/= be paid on or before 31<sup>st</sup> of August 2017.
  - iv) Party and Party Costs.
- g. THAT the 3<sup>rd</sup> Respondent was also ordered to settle the Party and Party Costs to the Applicants' advocates, within 45 days of the initial transfer of Ksh.55,905,135/=.
- h. THAT the national government has since settled the sum of Ksh.55,905,135/= as per the terms of the Consent Order.
- i. THAT from the Ksh.29,618,865/= payable by the 3<sup>rd</sup> Respondent, only a part payment of Ksh.13,000,000 was released sometime in June 2017. Therefore; the total amount due from the Respondent is the balance of Ksh.16,818,865 together with party and party costs.
- j. THAT notwithstanding the aforesaid orders compelling the 3<sup>rd</sup> Respondent to release the said fund the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent acting in their capacity as the accounting officer and chief financial officer respectively of the 3<sup>rd</sup> Respondent have blatantly and in total disregard of the said order failed, neglected and/or refused to comply and cause the release of the funds still due.
- k. THAT as a result if this failure, refusal, and/or neglect to release the funds the Applicants have been unable to enjoy the fruits of their judgment for more than two years now yet the case has been long concluded.
- l. THAT the Respondents have failed to settle the Party and Party Costs.
- m. THAT the Respondents have offended the rules of Natural Justice by failing to honour the terms of the consent and the order of Court.
- n. THAT it is essential for the rule of law and administration of justice that Court orders are obeyed.
- o. THAT unless the Orders prayed for are granted, the Court orders made shall be nugatory and the Applicants shall be prejudiced.
- p. THAT it is in the interest of justice that the orders prayed for granted.

**DATED** at **NAIROBI** this 28<sup>th</sup> day of **MAY** 2019

**MWAGAMBO & OKONJO**

**ADVOCATES FOR THE APPLICANT"**

3. In responding to the suit, the Respondent by Replying Affidavit sworn by its County Attorney on 25<sup>th</sup> July 2019 set out its case as follows:

**“RESPONDENT’S REPLYING AFFIDAVIT**

- 3. THAT** I am aware that the Ex parte Applicant, by way of a Petition, filed a suit, that is High Court Petition No. 399 of 2014, claiming that their constitutional right to property had been infringed upon.
- 4. THAT** I am aware that by a consent filed before the aforementioned suit, the parties agreed to have the matter resolved amicably by imposing obligations on the parties to a suit. On the one part the Respondent, herein, was to make payment to the ex parte applicant, whereas the ex parte applicant was to ensure that the title documents to the suit property are handed over to the Respondent.
- 5. THAT** as per the contents of the consent order dated the 21<sup>st</sup> of July, 2016 and issued in the 26<sup>th</sup> of July, 2016 the sum of Kshs.29,618,865 was to be paid out by the Respondent in this suit.
- 6. THAT** on date, as per the ex parte applicant and the sum that is left outstanding is Kshs.16,618,865 and the costs of the suit.
- 7. THAT** the balance due and owing to the ex parte applicant herein, remains outstanding for two reasons. These are;
- a) The sum of Kshs.16,618,865 remains outstanding as the ex parte applicants have neglected, refused and or otherwise failed to honour the terms of the consent order in totality or at all.
- b) The sum of Kshs.15,000,000 claimed as costs to the suit is a sum that is unknown to Respondent as no taxation has been done and neither has there been an agreement on the costs demanded.
- 8. THAT** I am aware that the sum of money, now demanded through the instant suit, was to be released conditionally as per the terms of the consent order. More specifically, a reading of **Order 4**, of the order forming the subject matter of this suit, reveals that title documents of the suit properties were to be released to the custody of the interested parties’ (the respondent herein) advocates within 7 days of compliance with **Order 1**.
- 9. THAT** I am aware that to date, no title documents have been released and/or forwarded to either the Respondent or their advocates on record in the constitutional petition a fact the ex parte applicants have conveniently failed to disclose to this Court.
- 10. THAT** a careful reading of the said order further reveals that the payments were to be made sequentially and not immediately as is alluded to in the instant suit. That is, payments were to be made upon a series of events taking place not upon adoption of the consent order only.
- 11. THAT** as result of the failure by the Applicant to release the title documents after part payments had been made, the Office of the Auditor General faulted the Department of Agriculture at the County Government of Kiambu for engaging in irregular payments.
- 12. THAT** the office of the Auditor General did raise audit queries alluding to an irregularity in the Department of Agriculture for releasing a substantial sum of money without obtaining title documents, a fact well documented in the Audit Queries for the financial year 2016/2017. Annexed and marked JW1 is a copy of an extract of the audit report.
- 13. THAT** a reading of the ex parte applicants supporting affidavit and statements of facts reveals that the alleged costs due and owing are in the sum of Kshs.15,000,000. That a reading of the instant suit reveals that the said figure is neither supported by a certificate of costs nor a fees agreement.
- 14. THAT** it is therefore improper for the ex parte applicants to move this Court to seek enforcement of costs, whereas no attempt had been made to either have the said costs taxed or agreed upon prior to seeking the Courts intervention in compelling payment of the same.
- 15. THAT** I am aware that it is a matter of judicial notice that where costs are not agreed upon, a party ought to move the Court by way of a bill of costs in order to have the taxing master assess the contents of the bill and issue a certificate of costs.
- 16. THAT** it is evident from the foregoing, that the ex parte applicants have failed to enjoy the fruits of the consent judgment by failing to play a key role of facilitating the release, into the custody of the Respondents, of title documents as per the wording, of the consent order.
- 17. THAT** I am aware that a reading of the County Governments Act reveals that the offices of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent do not exist within the devolved units of County Governments and as such the orders sought are unenforceable as against them.
- 18. THAT** a reading of the Chamber Summons dated 28<sup>th</sup> May, 2019 reveals that the prayers sought at the leave stage are substantially different from the prayers sought in the Notice Motion dated the 18<sup>th</sup> of June, 2019.”

4. The Respondent urges a condition precedent to the payment that the ex parte applicant was obliged to “ensure that the title documents to the suit property are handed over to the Respondent”, and that the respondent had paid its obligation in part and the balance remains outstanding because of the applicant’s on failure to honour the terms of the consent and to have the claimed costs taxed in default of

agreement.

5. By a Supplementary Affidavit sworn by Counsel for the applicants on 15/8/2019 in response to the Replying Affidavit, it is contended that the 3<sup>rd</sup> Respondent had waived its rights to demand for titles to the applicant's property by its partial payment of the decretal sum as follows:

3. THAT in response to paragraph 4 to 7 of the said Affidavit, the 3<sup>rd</sup> Respondent waived terms 3 of the consent when it made a part payment of Ksh.13,000,000 from the Ksh.29,618,865 payable by them as per the consent order.

4. THAT the partial payment of Ksh.13,000,000 was made to the Applicants sometime in June 2017 with no demand of the titles to the Applicant's property acquired by compulsory acquisition as now demanded by the 3<sup>rd</sup> Respondent.

5. THAT it is only until sometime in 2018 when the Applicants demanded for the balance of Ksh.16,818,865 that the 3<sup>rd</sup> Respondent insisted on the titles being released to them despite having made a significant payment of Ksh.13,000,000 on the decretal sum.

6. THAT the Applicants and the 3<sup>rd</sup> Respondent were unable to agree on the costs hence this part of the Applicants claim can be referred to taxation.

7. THAT even then; the 3<sup>rd</sup> Respondent did not make any demand for the titles to be released to them as now do.

8. THAT the issue of costs which can be preferred to taxation does not defeat the Applicants' claim for the balance of the decretal sum of Ksh.16,815,865 payable by the 3<sup>rd</sup> Respondent.

9. THAT the 3<sup>rd</sup> Respondent is currently enjoying possession of the suit property by virtue of compulsory acquisition and the initial payment of the Ksh.13,000,000 in June 2017 represented that the titles were no longer needed as there was no protest was made at that stage.

10. THAT I am aware by my own knowledge as an Advocate that by dint of Section 120 of the Land Act, formal possession is taken by the government after an award has been made and the amount of the first offer paid.

11. THAT a reading of section 120 (4) reveals that upon taking possession of payment of just compensation in full, the land shall vest in the national and county governments absolutely free from encumbrances.

12. THAT the Respondents now claiming that the Applicants are not compliant with the orders is an afterthought as they had already initiated payment of the compensation.

13. THAT the titles and already been handed over to the National Government as it was required by law in previous constitution.

14. THAT I am aware by my own knowledge as an Advocate that Section 121 (3) of the Land Act provides that if the documents are not forthcoming, the Registrar will cause an entry to be made in the register recording the acquisition of the land under the Act, Attached and marked PK03 is a copy of letter to the 3<sup>rd</sup> Respondent affirming this position.

15. THAT the contention that the Auditor General faulted the 3<sup>rd</sup> Respondent for making payments without title documents is contested as the exhibit relied upon is a report from the 3<sup>rd</sup> Respondent and not the Auditor General's office.

16. THAT the said report dated 15<sup>th</sup> of March 2018 has never been shared with the Applicants until filing of this Judicial Review Application therefore the motive of the same is questionable.

17. THAT there is no evidence submitted by the Respondents from the Auditor's office that payments initially made to the Applicants' were irregular.

18. THAT the orders sought by the Applicants in the substantive application which is payment for the decretal sum are not fundamentally different from those sought at leave stage as alleged by the Respondents

6. The ex parte applicant concedes lack of certificate of taxation of costs and avers that following the disagreement on the costs "this part of the Applicant's claim can be referred to taxation", but urges that the "the issue of cost which can be referred to taxation does not defeat the applicant's claim for the balance of the decretal sum of Ksh.16,815,865/= payable by the 3<sup>rd</sup> Respondent".

7. The Counsel for the parties then made oral submissions at the hearing, urging their respective contentions on the matter as follows:

"3/9/19

Coram: Hon E. Muriithi, J

Court assistant: Ooko

*Mr Otoyoy for Applicants with Ms Chelagat*

*Mr Ranga for the Respondents*

*Mr Okonjo for applicant*

*Notice of Motion dated 18/6/2019.*

*Order of Mandamus directed at Respondents compelling him to pay obtaining amount in consent order of 26/6/2016 in the trial Court Constitutional Petition 395 of 2014.*

*Applicants had compulsorily acquired by the Government in 2007 G2 1468 and 1469 of 2007.*

*Dispute arose as to compensate payable. National Government offered an amount 55,030,05,135 applicants moved the Constitutional Court in Petition 399 of 2014.*

*There was a consent after many meetings. Respondents were Interested Party in Constitutional Petition no. 399 of 2014 as Agriculture had not been devolved by the Constitution. The consent was reached after meetings with national government, County Government. National Government to pay the Ksh 55 million. Total amount of the consent was 85 million.*

*The balance of 29,610,865 was to be paid by the Interested Party in the Petition no. 399 of 2014, County Government of Kiambu.*

*The order provided that 5 million was to be paid within 60 days of the judgment of the 55 million by the National Government. Thereafter 10 months on or before February 2017 and the balance of the portion of the award of 14 million plus to be paid on or before 31/8/17.*

*The National Government did pay their portion and in subsequent thereof the Respondent paid 13 million in June 2017 leaving a balance of 16,818,865/- which is the subject of this application. They were also directed to pay party and party costs within 45 days of the payment of the 55 million on agreement on taxation in default. There is no agreement on costs and the matter shall go to taxation.*

*A term of the agreement on order 4. The Respondent rely on the order to withhold the payment. A simple reading of the order. I submit that the terms are independent of each other. There is no provision that prayer no 4 is related to no 3 or that judgment is deponed on the documents being released.*

*Applicant's Supplementary Affidavit of 16/8/2019 at paragraph 13, we say that titles have duly been handed over to the National Government at the time of the initial acquisition in 2007. The titles were not forthcoming. We also advised the applicants by section 120 of Land Act formal possession of Land by Government is taken after an award has been made an amount of first offer made.*

*Section 120 (4) reveals that upon taking possession on payment in full the land shall rest in the national government and the County Government absolutely.*

*The process was not finalized when we went to Court. It was only of formalised upon the Court order.*

*Section 121 (3) of the Land Act, if documents are not forthcoming the Registrar shall cause the entry in the Register recording the acquisition of the Land under the Act. The Respondents are already in possession of the property. Their payment was not conditional upon release of documents. However, even if it were, the fact that the title documents were not forthcoming for the reason explained to them is no reason for withholding the outstanding decretal amount. Having paid Ksh 13 million without any conditions they are aware that they are under an obligation to pay to the balance.*

*Fault by Auditor General for making payments relying on a Report from the Respondents and not the Auditor General. The document is a response by the Auditor General not a faulting by the Auditor General.*

### **Mr Ranga**

*Application is opposed by Replying Affidavit dated 28/7/19, by County Attorney John Wanjohi. List of Authorities, East African Portland v. Superior Homes (2017) eKLR.*

*Procedure and parties to the case*

*Ex parte applicant noted that C/S application of 28/5/19.*

*Notice of Motion filed on 29/6/19.*

*Parties to the suit in the JR. First and 2<sup>nd</sup> Respondent have never existed in the 3<sup>rd</sup> Respondent and as such no order of Mandamus can issue against them. The offences are not a creation of the County Government Act.*

Leave was granted and the prayer substantively changed and they indicated the figures sought. The Notice of Motion sought different order without indicating the amounts sought. The application is substantively affected.

There is an admission made that costs had never been agreed or taxation done. Therefore the removal of the costs was upon realization that costs had not been determined. Once leave is granted it is the Republic as applicant. On substance, at paragraph 7 of the Replying Affidavit, we have indicated the reason for failure to pay. The applicant have failed to honour the consent order and that the sum of Ksh 15,000,000/= costs is non-existent as there have not been determined.

### **Consent order**

There was a contract between the parties. It was after several meetings that the consent was entered into after agreement.

Prayer no 4 of the consent order is the problematic issue. Applicants are disagreed with respondent whether prayer no. 4 affects the payments.

Applicants admitted that they were in possession of title documents as at 21/7/16. It was not notified as now alleged that the title documents were forwarded to the National Government. They should have provided a surrender or other documents transferring the title. They merely referred to Section 120 of the Land Act.

A consent order is a contract and parties are bound. Order no. 4 refers to order no. 2 above. The order requires the release of the document within 7 days. The terms of the consent are inter-related. They are not independent. None is superior to the other. If it is a consent judgment, the applicants are seeking to use the Court to amend the terms of the contract. They ask the Respondent to release money and avoid fulfilling their part of the bargain.

At paragraph 25 of the East African Bank Court decision, the trial Court can alter the consent. There is a trial Court in the matter Petition 399 of 2014. The applicant has not executed the order in Petition 399 of 2014 as they would be compelled to abide by the consent order.

Annexure to the Replying Affidavit is not a response to the Auditor. It is a letter informing about the Report on Audit. It is an extract. Agriculture is devolved. Hence the forwarding to the Ministry of Agriculture.

Paragraph 13, 14 a supplementary Affidavit, applicant contend that they handed over documents to the national government. Ss. 107 and 108 of the evidence Act requires them to prove the allegation.

Respondent has annexed a document for the Finance Department on the audit query.

R v. KNEC ex p. Gathenji on availability of mandamus requires a public duty. An applicant also has a duty to come to Court with clean hands. The applicants do not comply with the consent order. Only refer to section 120 of the Act. The requirement of Article 10 of the Constitution requires integrity.

Payment of Ksh. 13,000,000/= is accepted. The auditor General noted an irregularity requiring an explanation as to payment of Ksh.13 million without documentation. We are seeking to regularize on the audit.

We pray for costs.

### **Reply by Mr Okonjo**

Article 159 (2) (d) of the Constitution without undue regard to procedural technicalities, on the framing of the application as moved by the Republic upon grant of leave.

### **Change or vary of prayers in the Notice of Motion**

There is no variance as we seek to same order of mandamus against the same offices to do the same duty to pay. We dropped a prayer of costs but did not vary the prayers for payment in leave to commence the proceedings.

The objections were not raised at preliminary objection and since they were not raised the application should be considered on merits.

It is the respondents who seek to vary the terms of the contract by refusing to pay the amount which was not conditional. There was no condition in order 3 by order 4.

What detriment the respondent will suffer. I refer to section 120 of the Land Act that their being in possession of the Land gives them all they require while denying the applicants their payment.

Section 121 (3) the Registrar can cause registration of title upon a take over of property. The property is with the respondent who are using it. If we had the title we have no reason not to give them.

The rights of the applicants are to compensation as compulsory acquisition has been done. Their duty was just to surrender the property and they have no other claim to the property. The Respondent is utilizing the property as we speak. There is no explanation as to why they have not paid part of the money.

The Respondent may pay the decretal sum and pursue the application of order 4 separately if there is any need to do so. We submit there is no need to do so because of Section 120 – 121 of Land Act 2012.

### **Ms Ranga with leave of Court**

It is the respondent's choice as to how to implement the consent order. But the applicant only seeks to avoid the terms of consent. The applicant has not taken any step to obtain title documents."

### **Determination**

8. I have considered the application and the submission for the parties, and it appears to me that the dispute in this matter is resolved by considering the scope of order of Mandamus in enforcing the payment of money under a consent order in a suit; whether a consent judgment may be varied by a party unilaterally; and whether the terms of a consent judgment may be enforced independent of costs.

9. At the outset, the court agrees with the Respondents that upon the grant leave, the judicial review proceedings are intitled in the name of the Republic seeking orders on behalf of the ex parte applicants and that there is no authority without leave of court for an applicant to seek by Notice of Motion orders different from those for which leave was granted.

10. On merit, the true scope of the order of Mandamus has been settled since **R v. Kenya National Examination Council ex parte Geoffrey Gathenji Njoroge & 9 Ors.** C.A Civil Appeal no. 266 of 1996 (1997) eKLR as follows:

*"What is the scope and efficacy of an ORDER OF MANDAMUS" Once again we turn to HALSBURY'S LAW OF ENGLAND, 4<sup>th</sup> 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 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."*

11. Although an order for payment against a County Government may be enforced in the same manner as one against the National Government by virtue of section 21 (5) of the Government Proceedings Act, there is no evidence in this matter that the ex parte applicant complied with the provisions of section 21 so as to invite the remedy of Mandamus for the performance of public duty to settle the decretal sum in accordance with section 21 (3) of the Government Proceedings Act which provides as underlined below:

### **"21. Satisfaction of orders against the Government**

*(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.  
(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.”

12. I respectfully agree with the Court of Appeal in **East African Portland Cement Company Ltd v. Superior Homes Limited (2017)** eKLR that “the trial Court was entitled to consider and found appropriate way, set aside or review the consent judgment”. If the title documents are unavailable the matter may be resolved by invoking sections 120 and 121 of the Land Act as urged by the counsel for the ex parte applicant in its letter to the Respondent on 9<sup>th</sup> May 2018 and it is the applicant to move the trial court, as distinguished from the judicial review court, for the review of the consent judgment and for further appropriate orders.

13. I also respectfully consider that the question whether the Respondent had waived its rights under consent order by making the partial payments of the decretal sum is a matter for the Court that made the consent judgment and not the judicial review Court on the application for an order of Mandamus. The resolution of such question of waiver requires the determination of the facts of the case, a task unsuited to the special nature of judicial review procedure which is really not a fact finding Court. If facts are disputed or to be ascertained and a determination of the import of such facts made it is the trial civil Court rather than the judicial review Court that should undertake the determination. In effect, the determination that a party to a consent order has waived certain terms of a consent order, is a review of the terms of the consent order, which is a trial Court role not the executing Court.

14. In **THE COMMISSIONER OF LANDS VERSUS KUNSTE HOTEL LIMITED**, CIVIL APPEAL NO. 234 OF 1995, [1997] eKLR, the Court of Appeal underlined the position of law that Judicial review is not concerned with the private rights of parties, and the rights of a party to consent judgment to invoke the principle of waiver, estoppel or acquiescence by conduct of the other as a principle right for consideration outside the judicial review procedure. The Court of Appeal in **Kunste** held as follows:

*“But it must be remembered that **judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process.** Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. (See R v. Secretary of State for Education and Science ex part Avon County Council (1991) 1 ALL ER. 282, at p. 285.). The Point was more succinctly made in the English case of Chief Constable of the North Wales Police v. Evans (1982) 1 WLR 1155, by Lord Hailsham of St. Marylebone, thus:*

*“The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court.”*

15. If the applicant’s claim to enforcement of public duty is not within the ambit and procedure of section 21 of the Government Proceedings Act for enforcement of public duty to satisfy judgment debt against the Government including County Government by virtue of section 21 (5) of the Government Proceedings Act, the applicant’s application can only be an application in execution of a decretal sum between private parties in the regular civil process, and an order of mandamus is not available.

16. Moreover, the applicant concedes that costs have not been ascertained by taxation following disagreement between the parties. As such, the decretal sum cannot be executed without leave of Court under section 94 of the Civil Procedure Act which provides as follows:

*“**94. Execution of decree of the High Court before costs ascertained** Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of costs incurred in the suit can be ascertained by taxation, **the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs;** and so as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation”.*

No leave has been sought or obtained.

### **Conclusion**

17. I consider that the application for an order of Mandamus to enforce the payment of monies the subject of the consent judgment in Petition no. 399 of 2014 is premature as the obligation or duty to satisfy the judgment debt has not crystallized in terms of the provisions of section 21 of the Government Proceedings Act, which is applicable to the matter, and because the review of the terms of the consent the subject of the judgment sought to be enforced may only properly be undertaken by the trial Court that made the consent judgment and not this judicial review Court, and, in any event, the costs of the suit which are part of the Decree sought to be enforced have not been ascertained and no leave of Court under section 94 of the Civil Procedure Act has been sought and obtained.

### **Orders**

18. Accordingly, for the reasons set out above, the ex parte applicant’s Notice of Motion dated 18/6/2019 is declined for being premature.

19. There shall be no order as to costs.

*Order accordingly.*

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 14<sup>TH</sup> DAY OF NOVEMBER 2019**

**J.M. MATIVO**

**JUDGE**

**Appearances:**

M/S Kaguru Paul & Co. Advocates for the Applicants.

M/S Mwangambo & Okonjo, Advocates for the Respondents.