

**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. E001 OF 2024 (JR)**

SOLUTIONS SAVINGS & CREDIT CO-OPERATIVE

SOCIETY LIMITED.....EX PARTE APPLICANT

VERSUS

THE COUNTY EXECUTIVE COMMITTEEMEMBER FOR FINANCE  
AND ECONOMIC PLANNING THARAKA NITHI COUNTY.....

.....1<sup>ST</sup> RESPONDENT

THE CHIEF OFFICER FINANCE AND ECONOMIC

PLANNING THARAKA NITHI COUNTY.....2<sup>ND</sup> RESPONDENT

THE COUNTY GOVERNMENT

OF THARAKA NITHI .....3<sup>RD</sup> RESPONDENT

**R U L I N G**

1. The Application dated 6<sup>th</sup> March 2024 seeks the following: -

(i) Spent

(ii) That this honourable court be pleased to grant leave to the Ex-parte Applicant to commence judicial review proceedings seeking for the

judicial review order of Mandamus compelling the Respondents to fully satisfy the decree in Nairobi Co-operative Tribunal Claim No. 218 of 2019.

(iii) That costs of this Application be provided for.

2. The Application is founded on the grounds set out on the face of the Application and the Statement of facts. The Ex-parte Applicant's case is that it had sued the 3<sup>rd</sup> Respondent in Nairobi Tribunal Claim No. 218 of 2019 alongside Tharaka Nithi Cereals Marketing and Co-operative Union Limited seeking judgment against them jointly and severally for the sum of Kshs. 13, 140, 645 plus interests and costs of the proceedings.

3. The suit followed a Memorandum of Understanding (MOU) between the parties that the Ex Parte Applicant advance Kshs. 15,000,000 to Tharaka Nithi Cereals Marketing and Co-operative Union

(principal loanee) repayable with interest at the rate of 2% per month repayable in two months.

4. It was averred that as per the MOU, the loan was to be disbursed through cumulative advances paid directly to small scale farmers who are members of the Co-operative Saccos affiliated with the principal loanee. Further, that the MOU was reinforced by the Guarantee and Indemnity by the 3<sup>rd</sup> Respondent vide a counter guarantee and indemnity executed on 7<sup>th</sup> June 2018 which expressly stated that in default the amount would continue to attract interest at 2% per month and the Ex-Parte Applicant would then invoke the terms of the guarantee and indemnity given by the 3<sup>rd</sup> Respondent.

5. The Ex- Parte Applicant contends that it disbursed the said funds as per the terms of the MOU but the Principal loanee defaulted in repayment which the

3<sup>rd</sup> Respondent was made aware of but defaulted to satisfy its Guarantee and Indemnity. The Principal loanee subsequently repayed Kshs. 2,500,000 leaving Kshs. 13,140,645 which remained owing at the time of the Tribunal case.

6. It was the Ex-Parte Applicant's case that in the Tribunal case, judgment was delivered on 20<sup>th</sup> September 2023 in favour of the Ex-Parte Applicant against the 3<sup>rd</sup> Respondent and the Principal loanee jointly and severally awarding the Ex-parte Applicant the sum now of Kshs. 13, 140,645 with interest at 2% from the date of filing the suit till payment in full. That the decretal sum stands at Kshs. 25, 818, 233.40 which remains unpaid thus the mandamus orders sought.

7. The Respondents filed a replying affidavit dated 24<sup>th</sup> March 2025 sworn by Mwendani Franklin, the County Attorney for Tharaka Nithi County. He

deposed that through a letter dated 14<sup>th</sup> November 2024, the Respondents requested from the Applicant a comprehensive statement of accounts detailing the payments made by the Co-operative and the outstanding balance which documents were yet to be supplied. That due to absence of the documents, the Respondents require additional time to adequately prepare and file a substantive response to the Application.

8. Counsel stated that the County Government of Tharaka Nithi was not the principal debtor but merely acted as a guarantor for the principal loanee and therefore the primary liability for the sum in question fell upon the directors of the principal loanee who ought to have been sued before suing the County Government. That the County Government's role as a guarantor does not

automatically impose direct liability without first exhausting remedies against the principal debtor.

9. The Application was disposed of by way of written submissions as per the directions of the court. The Applicant filed their submissions dated 29<sup>th</sup> May 2024 while the Respondents filed their submissions dated 19<sup>th</sup> June 2025.

10. The Ex- Parte Applicant raised the following issues for determination: -

(i) Whether leave should be granted to the Ex-parte Applicant to apply for an order of mandamus against the Respondents.

(ii) Costs of the Application.

11. On their part, the Respondents raised the following issues for determination: -

(i) Whether the Applicant exhausted avenue for recovery, including enforcement of the Respondent's guarantee.

(ii) Whether an order of mandamus is available against individual county officers

(iii) Whether the Applicant exhausted remedies against the principal debtor.

(iv) Whether the parties are amenable to an agreed settlement.

12. Having considered the pleadings and submissions, the following issues arise for determination:

i. Whether leave should be granted to the Ex-Parte Applicant to commence judicial review proceedings for an order of mandamus against the Respondents.

ii. Whether the Application was premature.

iii. Who should bear the costs of the Application.

**(i) Whether leave to apply for Mandamus should be granted.**

13. The threshold for leave under **Order 53 Rule 1(1)** of the Civil Procedure Rules is the existence of an arguable case for the grant of the substantive order sought. Leave acts as a filter to weed out frivolous or unmeritorious claims and is only granted where the Applicant demonstrates a prima facie case that warrants further interrogation by the Court. See **Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No.384 of 1996.**

14. The Applicant seeks to compel the Respondents to satisfy a decree of the Co-operative Tribunal. The remedy of mandamus lies to compel a public officer or public body to perform a statutory duty which it has unlawfully failed or refused to perform.

15. In **Republic v Kenya National Examinations Council ex parte Gathenji & Others [1997] eKLR**) the Court of Appeal held:-

***“An order of mandamus compels the performance of a public duty which is imposed upon a person or body of persons by statute and where that person or body of persons has failed to perform the same.”***

16. Further, the Court explained the scope and efficacy of mandamus, borrowing from Halsbury’s Laws of England thus:-

***“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.”***

17. In other words, mandamus will compel a duty, but if the statute gives the body discretion how to perform that duty, the court will not use mandamus to dictate the manner of performance.

18. The Respondent argues that it was not the primary debtor and that its liability was limited to its role as guarantor as per the MOU and that the Ex-parte Applicant has not exhausted its remedies against the primary debtor. Further, the Respondent has exhibited correspondence (MF-O1) which shows on-going deliberation between itself and the ex-parte Applicant. To the mind of the court, the arguments would have served the Respondents better as a defence in the Tribunal or grounds for review or setting aside of the Tribunal's decision.

19. It is settled law that once a judgment or decree is entered against a government entity, the Accounting Officer of that entity is under a statutory duty to satisfy the decree upon compliance with the procedure under Section 21 of the Government Proceedings Act (Cap 40).

20. The Court of Appeal in **Republic v Permanent Secretary, Ministry of State for Provincial Administration & Internal Security ex parte Fredrick Manoah Egunza [2012] eKLR** emphasized that mandamus will lie to compel payment of a decretal sum by the Government once a decree has been issued and a certificate of order against the Government served.

21. The Applicant has exhibited a decree in its favour, which remains unsatisfied. There is no contention that the judgment has not been set

aside or stayed. As earlier observed, the Respondents' argument that the County's liability as a guarantor is secondary is not a valid defence at this stage. The Tribunal decree binds both the principal debtor and the guarantor jointly and severally. Unless set aside, the decree therefore confers direct liability upon the County.

22. I associate myself with the reasoning in **Republic v County Secretary, Nairobi City County & Another ex parte Wachira Nderitu Ngugi & Co. Advocates [2016] eKLR** where Odunga J (as he then was) held that where a decree has been issued against a County Government, the obligation to satisfy the same rests upon the County Secretary and the Chief Officer of Finance as the designated accounting officers under the County Governments Act.

23. The Respondents' further assertion that they requested documents from the Applicant is not a lawful justification for non-compliance with the Tribunal's decree. The role of the Court in judicial review is not to re-evaluate the merits of the underlying debt but to ensure compliance with legal duties. Prima facie, unless set aside a decree is conclusive as to the amount due.

24. I am therefore satisfied that the Applicant has established a *prima facie* case that the Respondents, being public officers, have failed to discharge a statutory duty to satisfy a lawful decree of the Co-operative Tribunal. The Application thus meets the threshold for grant of leave.

**(ii) Whether the Application is premature or misconceived**

25. The Respondents contend that the Applicant should first exhaust remedies against the principal debtor before moving against the guarantor. That submission is untenable. As already stated, once a decree is entered jointly and severally, the decree holder is entitled to pursue any or all of the judgment debtors for satisfaction of the entire sum.

26. The doctrine of exhaustion applies to statutory remedies, not to enforcement of decrees duly issued by courts or tribunals. The Applicant has already obtained judgment from the Co-operative Tribunal, and the proper avenue for enforcement against a public body is by way of judicial review of mandamus. Suffice to say, an order of mandamus is the only remedy available to enforce payment of a decree against a County Government under Section 21 of the Government Proceedings Act.

27. I therefore find that the Application is neither premature nor misconceived.

28. In the result, I grant the following orders:-

(i) Leave to the Ex-Parte Applicant to commence judicial review proceedings seeking an order of mandamus compelling the Respondents, to satisfy the decree in **Nairobi Co-operative Tribunal Claim No. 218 of 2019.**

(ii) The substantive motion shall be filed and served within 21 days from the date hereof.

(iii) Parties are at liberty to continue engagement on the issues arising from the MOU pending directions on the substantive motion.

(iv) Costs shall abide the outcome of the substantive Application.

Orders accordingly.

**Ruling delivered, dated and signed at Chuka this 11<sup>th</sup> day of November, 2025.**

.....

**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered in the presence of Mr. Kariuki for the Ex-parte Applicant and Mr. Munene holding brief for Mr. Mwendani for the Respondent. Muriuki (Court Assistant.)**