



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
JUDICIAL REVIEW APPLICATION NO. 4 OF 2020
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
AND
IN THE MATTER OF AN APPLICATION FOR LEAVER TO
COMMENCE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS
OF MANDAMUS
AND
IN THE MATTER OF THIKA ENVIRONMENT AND LAND COURT
CASE NO. 90 OF 2018
AND
IN THE MATTER OF ENFORCEMENT OF A DECREE OF THIS
COURT DATED 18TH DECEMBER, 2019
AND
IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM
ACT
AND
IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE
RULES
BETWEEN

1. PETER BUTALI

2. JACKSON MUNGAI MWAURA

- 3. PAUL NGUGI MUCHAI**
- 4. HAMISI GUCHU MBURU**
- 5. PAUL NJUGUNA KARUNGO**
- 6. KENNETH NJUGUNA NJENGA**
- 7. DANIEL NDEGWA SOLOMON**
- 8. BERNARD CHEGE KARUU**
- 9. CHARLES KINUTHIA NDUNGU**
- 10. SHABANO SAIDI GATHAYA**
- 11. EKIRA KABURA WAIREGI**
- 12. JOHN WAIKWA KAGIKA**
- 13. PHYLLIS WANJIKU MATU**
- 14. PATRICK NJERU NYAGA**
- 15. BENJAMIN WABIRIA MBURU**
- 16. STANLEY MUGO KIHORO**
- 17. MWANGI KUBAI**
- 18. IRENE MUTHONI WAKAHIU**
- 19. BEATRICE WANGUI MWAURA**
- 20. ALICE WAIRIMU WACHIRA**
- 21. ETHAN MURAGE NGECHU**
- 22. PETER GATHAMBA MBURU**
- 23. BERNARD NGUGI GATONGA**
- 24. CHARLES MBURU KAMAU**
- 25. TERESIA VICTORIA WAIRIMU NDUNGU**
- 26. CATHERINE MURUGI MWAURA**
- 27. JOHN MUGANE NDARAIYA**
- 28. SERINAH NJERI NGUGI**

29. DAVID KIVUTHI KAMOCHE
30. DR. PATRICIAH NYAGUTHII MUIRURI
31. FATUMA HAMISI NJENGA
32. PETER NGUGI WANJIRU
33. PETER KAHURIA GACHERU
34. MARGARET MWIHAKI KAMAMI
35. FURUS G.K. KAMAMI
36. JOSEPH MWARIRI NDUATI
37. EDWARD GITARE CHEMI

VERSUS

**THE DISTRICT LAND REGISTRAR, THIKA DISTRICT.....1ST
RESPONDENT**

**THE CHIEF REGISTRAR OF TITLES.....2ND
RESPONDENT**

**THE PERMANENT SECRETARY, MINISTRY OF
TRANSPORT INFRASTRUCTURE, HOUSING, URBAN
DEVELOPMENT AND PUBLIC WORKS.....3RD
RESPONDENT**

**THE HONORABLE ATTORNEY GENERAL.....4TH
RESPONDENT**

**VIEWLAND INVESTMENTS CO. LTD.....5TH
RESPONDENT**

JUDGMENT

1. The Applicants filed a Petition **Nairobi Constitutional Petition Number 20 of 2010** which was transferred to Thika and issued with a new number **Thika ELC No. 90 of 2017.**

The matter proceeded for full hearing and this Court delivered a Judgment dated 8/11/2019 where the Court among other reliefs ordered the Respondents to pay each of the Applicants Kesh 100,000 as general damages for trespass.

2. The total amount to be paid to the 37 Applicants therefore totaled Kesh 3,700,000. However, despite following up by the Applicants' Lawyers the 2nd Respondent have not paid. The Applicants have filed the current Notice of Motion pursuant to Section 8 and 9 of the Law Reform Act, Cap 26 and Order 53 Rules 1, 3 and 4 of the Civil Procedure Rules, 2010 pursuant to leave granted on 28/10/2021. The Applicants seek the following orders:

i) That pursuant to leave granted on 28th October, 2021, this Court be pleased to issue an order of Mandamus to compel the Respondents to pay the Applicants a sum of Kenya Shillings Three Million Seven Hundred Thousand (Kesh 3,700,000) as awarded to the Applicants in Thika ELC No. 90 of 2018 as contained in the Decree of this Court dated 1st December, 2019.

ii) That the costs of this application be provided for.

3. It is supported by a Statutory Statement and a Verifying Affidavit of GEOFFREY THIONGO sworn on even date to which the Applicant has annexed:

- a) A copy of the Judgment marked **G.T.1**
- b) A copy of the Decree marked **G.T.2**
- c) A copy of the letter written to the 2nd Respondent demanding payment marked as **G.T.3**, and
- d) A copy of a further letter to the 2nd Respondent calling for payment as **G.T.4.****

4. The Application is unopposed. I have scanned through the CTS and I am satisfied that despite the Respondents being served and despite the Court issuing directions on 7/10/2024 that all parties should file and exchange written submissions within 30 days by close of business on 11/11/2024 the Respondents did not file any response but they chose to file joint written submissions dated 25/11/2024 by the 1st to 4th Respondents.
5. The 5th Respondent did not file any response.
6. The application was canvassed by written submissions as stated above. The Petitioners filed their submissions dated 30/10/2024. The gist of their submission is that the 2nd Respondent has not denied owing the Petitioners/Applicants and so they deserve to be granted the orders made in the application. The 1st to 4th Respondents filed their written submissions dated 25/11/2024. The gist of their submissions is that the Judgment delivered on 8/11/2019 carries an error where according to them the Petitioner/Applicants should be 34 not 37. Further that an order of Mandamus needs to be specific and that the application here is not specific.

7. The Petitioners relied on the cases of **Republic vs County Secretary Narok County Government & Others JR No. E045 of 2021**, The Court Cited with Approval, Halsbury's Laws of England 4th Edition Vol. 7 P.111 and the case of **Republic vs The Attorney General & Another Ex Parte James Alfred Koros (2013) eKLR**. At the same time the Petitioner relied on Article 48 of the Constitution which underscores the importance of access to justice, which includes ability to have litigants who have favourable decision to be able to have them executed. This is the cardinal principle underscored by Justice A.K Ndung'u in **Republic vs The Attorney General & Another Ex Parte James Alfred Koros (supra)** because one cannot execute against the Government and that litigants seek the mandamus order.
8. The 1st to 4th Respondents' joint Respondents written submissions underscored the fact that there is an error in the Decree of declared sum being 34 Petitioners whose sum total of compensation of Kesh 100,000 should amount to Kesh 3,400,000 and not the sum of Kesh 3,700,000 and so they content that the Decree should be amended.
9. They further submit that they oppose the granting of the orders of mandamus on the ground that the application and the Decree Holder should not compel the Respondent to pay but wait when budget is available to be paid as the sum must be budgeted for from tax payers money.

10. They also submitted that the Petitioner's application is frivolous since it should have been directed to the Principal Secretary who is the Accounting Officer and not the District Land Registrar Thika District, or Chief Registrar of Titles not the Honorable Attorney General.
11. They relied on Section 21 of the Government Proceedings Act to aver thatand also on **Republic vs Kenya National Examination Council Ex Parte Gathenji & 8 Others Civil Appeal No. 234 of 1996** where the Court of Appeal cited with approval, **Halsbury's Law of England, 4th Edition. Vol. 7 p. 111 para 89.**
12. They conclude by stating that the Applicants have not met the threshold of granting of the orders sought.

Analysis and Determination

13. I have considered the Notice of Motion as filed and argued and the fact of the Applicants not deserving of the orders sought since there is an error in the Decree as issued. For me, the single issue for determination is whether the Applicant is entitled to an order of mandamus to compel the Respondents to pay the decretal sum under Section 21 of the Government Proceedings Act.
14. Section 25 of the Government proceedings Act bars any execution against the Government property by way of attachment and sale. This provision is replicated in Order 29 of the Civil Procedure Rules.

15. The rationale for barring execution against the Government was stated in **Kisya Investments Ltd v Attorney General & Another [2005] KEHC 3226 (KLR)** wherein the High Court comprising Ibrahim and Visram, JJ. (as they then were) held thus:

“History and rationale of government’s immunity from execution arises from the following.... Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i) The raising of revenue (by taxation or borrowing); (ii) Its expenditure; and (iii) The audit of public accounts. The satisfaction of decree or judgments is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government’s expenditure. It is for this reason that Section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the monies provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorized by

statute, and any unauthorized payment may be recovered. As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (Section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that parliament is very jealous of its control over the expenditure and this is as it should be. No ministry or department has any ready funds at all times to satisfy decrees or judgments - while existence of claims and decrees may be known to the ministries and departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the government expenditure. The second situation, which arises from the above, is that once a decree or judgment is obtained against the government, it would require some reasonable time to have it forwarded to the Ministry of Finance, Treasury, Controller and Auditor General etc. for scrutiny and approvals for it to be paid from the consolidated fund. The Ministries and Departments do not have their "own" funds to settle such decrees or payments and considering the nature of the

government structure, procedures, red tape and large number of claims, this could take a long time. If execution and or attachment against the government were allowed, there is no doubt that the government will not be able to pay immediately upon passing of decrees and Judgments and will be inundated with executions and attachments of its assets day in day out. Its buildings will be attached and its plants and equipment will be attached, its vehicles, aircraft, ships and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer's hammer. No government can possibly survive such an onslaught. The government and therefore the state operations will ground to a halt and paralyzed and soon the government will not only be bankrupt but its constitutional and statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the law that prohibits execution against and attachment of the government assets and property."

16. In the same breath, Section 21 (4) of the Government Proceedings Act prohibits execution against the Government. The Section provides that: -

“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.”

17. The Court in the case of **Republic vs. County Secretary, Nairobi City County & Another Ex parte Wachira Nderitu Ngugi & Co. Advocates [2016] eKLR**, held as follows:

“... the law as it stands presently is that no execution can be levied against the property of a Government in settlement of a decree in a civil case and hence the only recourse available to a decree holder is to apply for mandamus against the Chief Officer of the Government, and upon obtaining such orders, the decree holder will be at liberty to apply for committal of the Chief Officer if the order of mandamus is not complied with.”

18. The Respondents referred to the Court of Appeal of **Kenya National Examination Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & 9 Others [Supra]** where the scope of an order of mandamus was discussed and the Court stated that:

“What is the scope and efficacy of an order of Mandamus? Once again, we turn to Halsbury’s Law of England, 4th 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 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.”

19. Additionally, in **Republic v Attorney General & Another Ex parte James Alfred Koroso [2013] eKLR**, which was referred to by the Petitioners, it was held that where a Judgment Creditor has complied with Section 21 of the Government Proceedings Act and the Government fails to honour its obligation, an order of mandamus lies to compel the performance of that statutory duty.
20. The principles established in the aforementioned cases affirm that a mandamus order compels the execution of a public duty imposed by statute on an individual or entity, where such individual or entity has neglected to carry out that duty, thereby prejudicing a party with a legal entitlement to its performance.

21. Has the Applicant complied with the elaborate procedure for applying for mandamus under Section 21 of the Government Proceedings Act?
22. A Court will only issue an order of mandamus if it is shown that the requirements under Section 21 of the Government Proceedings Act have been fulfilled. In the case of **Republic vs. Permanent Secretary Office of The President Ministry of Internal Security & Another ex-parte Nassir Mwandishi [2014] eKLR**, Odunga, J. (as he then was), held as follows:

“.... It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the Government Proceedings Act have been complied [with] with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule

requires a demand by the Applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule...The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view, is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court.”

23. The Court also in, **Republic vs. Permanent Secretary Ministry of State for Provincial Administration and Internal Security [2012] eKLR**, held thus:

“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.”

24. I am persuaded to also adopt the reasoning of the Court in both **Republic vs. Permanent Secretary Office of The President Ministry of Internal Security & Another ex-parte Nassir Mwandih** and **Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (supra)**.
25. It is only after the procedure as laid down under Section 21 of the Government Proceedings Act has been complied with and a demand for payment made that a cause of action accrues for the purposes of an application for an order of mandamus against the Government.
26. In the instant case, it is undisputed that the Petitioners/Applicants have fully satisfied the requirements of Section 21 by securing a valid Decree, obtaining a Certificate of Order against the Government, and duly serving it upon the Respondents.
27. On their part, the Respondents have not alleged any procedural default or legal impediment to payment apart from referring to the issue of budget. That the Applicants should wait until the money is budgeted for since the Government draws its money from tax payers. There is no evidence of any Appeal, stay of execution or Judicial Review against the original Judgment. Allow me to digress here and address the issue of budget.
28. Now, the Permanent Secretary (read Principal Secretary) of the **MINISTRY OF TRANSPORT**

INFRASTRUCTURE, HOUSING, URBAN DEVELOPMENT AND PUBLIC WORKS has been sued. Since the delivery of the Judgment on **8/11/2019** there have been not one, not two, not three but **SIX** budget cycles. The Principal Secretary who is the Accounting Officer has been aware of this Court's decision since then. Therefore, the submission on budget is but an attempt to defeat the decision of this Court which is to the benefit of the Petitioners/Applicants.

29. As a matter of fact, there is no Appeal preferred against the decision of this Honorable Court. The principles of justice and finality require that valid Court orders be honoured.

30. The issue of error raised needs to be addressed through a formal application before the Court not through submissions. In any case the Respondent should honor and pay out Kesh 3,400,000 which they claim to be the correct figure instead of engaging the Petitioners/Applicants in this hide and seek game. It will end up costing the tax payers much more than was decreed.

31. The invocation of the error in the Decree cannot be used as a shield to avoid compliance with a lawful Decree.

32. Accordingly, I find the Notice of Motion dated 8/11/2020 to be merited and is hereby allowed in the following terms:

i) That pursuant to leave granted on 28th October, 2021, this Court has issued an order of Mandamus to compel the Respondents to pay

the Applicants a sum of Kenya Shillings Three Million Seven Hundred Thousand (Kesh 3,700,000) as award to the Applicants in Thika ELC No. 90 of 2018 as contained in the Decree of this Court dated 1st December, 2019.

ii) That the Costs of this application are awarded to the Petitioners/ Applicants to be paid by the 2nd Respondent.

iii) It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 2ND DAY OF DECEMBER, 2025 VIA MICROSOFT TEAMS.

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**MOGENI J
JUDGE**

In the presence of:

Mr. Thiong'o for 1st - 37th Petitioners/Applicants

Mr. Motari for the 1st and 2nd Respondents

Mr. Melita - Court Assistant

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**MOGENI J
JUDGE**