

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

JUDICIAL REVIEW APPLICATION NO. E023 OF 2023

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

AND

**IN THE MATTER OF: ARTICLE 23 (3) OF THE FAIR ADMINISTRATIVE
ACTION ACT 2015**

AND

**IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORMS ACT
CAP 26 LAWS OF KENYA**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF KIAMBU.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE CHIEF FINANCE OFFICER

COUNTY GOVERNMENT OF KIAMBU.....3RD RESPONDENT

AND

EPHANTUS ERERI ENA.....EXPARTE APPLICANT

RULING

- 1. Ephantus Ereri Ena, the Ex-parte Applicant has by way of Notice of Motion application dated 26th September, 2023 sought the following orders:-**

a) THAT an Order of Mandamus directed to the Respondents namely the County Government of Kiambu, the Attorney General of Kenya and the Chief Finance Officer, County Government of Kiambu to pay to the Exparte Applicant the sum of Kshs 1,140,330.00 being the decretal amount in Thika CMCC No. 285 of 2013 issued on 18th November, 2022 together with interest at court rates from 7th November, 2022 until payment in full.

b) THAT consequent to the grant of the prayers above the Honourable court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders and or favour the cause of justice.

c) THAT the costs of this application be provided for.

2. The Application is based on the grounds as set out on its face and the Supporting Affidavit of **Ephantus Ereri Ena** sworn on 26th September, 2023. The Applicant holds that he filed **Thika CMCC No. 285 of 2013** against the 1st Respondent herein and a Judgment was rendered on 7th November, 2023 in his favour and a Decree was subsequently issued on 18th November, 2023. That he was awarded Kshs. 1,140,330/= upon which a Certificate of Order was issued and the Respondents have refused to comply with the same and pay the decretal amount together with costs and accruing interests despite several demands having been issued. The Exparte Applicant

has urged the court to allow the application and compel the Respondents to pay the said decretal sum.

3. The 2nd Respondent opposed the application by way of Grounds of Opposition dated 28th April, 2023 on the basis that the Attorney General was wrongly enjoined in the suit and that the Applicant has not met the threshold of issuing an Order of Mandamus against it. It thus prays that the application be struck out with costs.
4. The Application was canvassed by way of submissions which the Applicant filed and are dated 25th January, 2024. In this submissions, the Applicant has reiterated that it has complied with all the regulations but the Respondents has ignored and or refused to comply with the Certificate of Order against the Government. The Applicant has relied on the decision in the case of **Republic –vs- County Government of Kiambu Exparte Laban J. Macharia Muiruri (2021) eKLR** in which the circumstances when an Order of Mandamus can issue were set out. He holds that a lawful judgment was issued against the Respondents but they have failed to perform their duties. He has thus urged the court to grant the orders sought herein.

5. In their submissions dated 14th February, 2023, the Respondents have relied on their Grounds of Opposition dated 28th November, 2023 which was never re-uploaded in the Court Tracking system (CTS) as ordered by the court, hence causing a delay in the ruling of this matter. Given the time passed, the court shall proceed to rely solely on the submissions filed by the parties in respect of the application in this Ruling.
6. The Respondents argue that the Applicant did not serve the Decree and Certificate of Costs upon them as required under **Order 22 Rule 18 of the Civil Procedure Rules** that a Notice to Show Cause where an application for execution is made after one (1) year since delivery of Judgment. They have relied on the case of **Industrial and Commercial Development Corporation –vs- J. Kemuma Onyango and 3 Others [1983]eKLR**.
7. The Respondents have further argued that there are discrepancies in the matter given that the Certificate of Order and the Decree provide different dates when the Judgment was issued. The Certificate of Costs shows that Judgment was delivered on 7th November, 2021 while the date of the Decree is 7th November, 2022. This then means that the period of one (1) year as provided for under **Order 22 Rule 18 of Civil Procedure Rules** and thus the application ought to be dismissed.

Analysis and Determination.

8. In considering this application dated 26th September, 2023, I have read through the grounds set out in support thereof, the Grounds of Opposition dated 28th April, 2023 and submissions filed by the parties in support of their respective positions on the application.

9. From these pleadings, the issues for determination are:-

a) Whether the 2nd Respondent, the Attorney General is rightly enjoined in this proceedings.

b) Whether an Order of Mandamus directing the Respondents to pay to the Exparte Applicant in the sum of Kss.1,140,330.00 being the decretal amount in Thika CMCC No.285 of 2013 issued on 18th November, 2022 together with interest at court rate can issue.

10. On the issue of the 2nd Respondent, Attorney General having been wrongly enjoined in this proceedings, I have read through the proceedings herein and find the Respondents being the County Government of Kiambu, the Attorney General and The Chief Finance Officer, County Government of Kiambu. **Section 103 of the Public Finance Management Act, No.18 of**

2012 provides as follows:-

“103. (1) There is established for each county government, an entity to be known as County Treasury.

(2) The County Treasury shall comprise —

(a) the County Executive Committee member for finance;

(b) the Chief Officer; and

(c) the department or departments of the County Treasury responsible for financial and fiscal matters.

(3) The County Executive Committee member for finance shall be the head of the County Treasury.

11. From this provision, the County Treasury comprises of the County Executive Member of Finance, the Chief Officer and the Department of the County Treasury responsible for finance under **Section 103(3) of the Act**, the county Executive Committee Member of Finance is the head of Treasury and hence responsible for finance affairs of the County Government by virtue of their roles and functions.

12. In view of these provisions, it is clear that the Attorney General is wrongly enjoined in the proceedings as it is not an Accounting Officer with the first (1st) Officer.

13. The next issue is on whether an Order of Mandamus sought herein can issue in the circumstances presented. It is trite that any execution against the Government should be done through Judicial Review proceedings, which is the procedure laid down under **Order 53 of the Civil Procedure Rules** as follows:-

“[Order 53, rule 1.] Applications for mandamus, prohibition and certiorari to be made only with leave.

1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a Judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The Judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the Judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the Judge orders

otherwise:

Provided that where the circumstances so require, the Judge may direct that the application be served for hearing inter parties before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.

14. In the case of Republic –vs- Kenya National Examination Council Exparte Gathenji and 9 Others [1997]eKLR, the Court held as follows in this regard:-

“The next issue we must deal with is this: 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.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.....”.

15. Justice Mativo (as he then was) in the case of **Republic –vs- Principal Secretary, Ministry of Internal Security & Another Exparte Schon Noorani & Another [2018]eKLR**, sets out the requirements for an Order of Mandamus to issue as follows:-

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that

controls procedural delays. The test for mandamus is set out in Apotex Inc. vs. Canada (Attorney General),^[23] *and, was also discussed in Dragan vs. Canada (Minister of Citizenship and Immigration).*^[24] *The eight factors that must be present for the writ to issue are:-*

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. The Applicants have satisfied all conditions precedent; and

b. There must have been:

i. A prior demand for performance;

ii. A reasonable time to comply with the demand, unless there was outright refusal; and,

iii. An express refusal, or an implied refusal through unreasonable delay;

(iv) No other adequate remedy is available to the Applicants;

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

16.It is also trite law that an application for an Order of Mandamus to be tenable, the same should be made after a certificate of Order the against

government is served upon the Government in compliance with **Section 21 of the Government Proceedings Act** which provides as follows:-

“[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

17. In the case of Republic –vs- County Government of Vihiga, Ex-parte

Global Exhibitions Incorporated Ltd [2021 eKLR, (Musyoka, J), as

follows:-

“A party wishing to realize the fruits of a Judgment or decree against the government must obtain a certificate of order against the government. The Government pays against the certificate of order against it. It is a critical accounting instrument for the purpose of Government Finances and Accounts. The centrality of the certificate of order against government, with respect to enforcement of money decrees against the government, whether at the national or at the county level, has been the subject of pronouncement by the courts.”

18. In this case, having read through the grounds in support of the application and the written submissions filed by respective parties, it is not in doubt that the Certificate of Order against the Government was served upon the Respondents together with the Decree and Certificate of Costs and there is no evidence of protest for failure to comply with **Order 22 of the Government Proceedings Act**. According to the Respondents, what is in doubt, is the date on which the Judgment the off-shoot of the Decree, Certificate of Costs and Certificate of Order was delivered. The question is, was it on 7th November, 2021 or 7th November, 2022? This court notes that the Decree and Certificate of Costs are dated 7th November, 2022 while in the Certificate of Order against the Government, it is indicated that Judgment was delivered on 7th November, 2021.

19. Upon perusing the Decree and Certificate of Costs as well as the correspondences forwarding the documents to the Respondents, the date featuring in them is 7th November, 2022. Guided by this, this Court is inclined to deem the proper date of Judgment to be 7th November, 2022 and that there could have been a typographical error in the date entered in the Certificate of Order against the Government. Therefore, in the interest of justice, and pursuant to the provisions of **Article 159 (2) of the Constitution** this is deemed to be a procedural technicality which does not go to the root of the substantive application.

20. Accordingly, the Court allows the Notice of Motion application dated 26th September, 2023 in the following terms:-

a) THAT the 2nd Respondent be and is hereby struck out from these proceedings.

b) THAT an Order of Mandamus be and is hereby directed to the 1st and 3rd Respondents namely the County Government of Kiambu and the Chief Finance Officer County Government of Kiambu to pay to the Exparte Applicant the sum of Kshs. 1,140,330.00 being the decretal amount in Thika CMCC No. 285 of 2013 issued on 18th November, 2022 together with interest at court rates from 7th November, 2022 until payment in full.

c) Costs of this application to be paid by the 1st Respondent.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU

THIS 7TH DAY OF JANUARY, 2026.

D. O. CHEPKWONY

JUDGE

ORIGINAL