



Thumbi v County Executive Member for Finance, Laikipia County Government & another (Environment and Land Judicial Review Case 3 of 2023) [2024] KEELC 5876 (KLR) (20 August 2024) (Judgment)

Neutral citation: [2024] KEELC 5876 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 3 OF 2023**

AK BOR, J

AUGUST 20, 2024

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 ARTICLE 47

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT OF 2012

AND

**IN THE MATTER OF FAIR ADMINISTRATIVE
ACTIONS ACT 2015 SECTIONS 7,8,9,10 & 11**

BETWEEN

TIRUS KINYUA THUMBI APPLICANT

AND

**THE COUNTY EXECUTIVE MEMBER FOR FINANCE, LAIKIPIA COUNTY
GOVERNMENT 1ST RESPONDENT**

**THE COUNTY CHIEF OFFICER FINANCE, LAIKIPIA COUNTY
GOVERNMENT 2ND RESPONDENT**

JUDGMENT

1. The ex parte Applicant commenced the judicial review proceedings against the County Executive Committee Member for Finance and the County Chief Officer for Finance, both of Laikipia County



- Government, seeking an order of mandamus to compel them to satisfy the decree issued in Nanyuki CMC ELC Case no. 169 of 2018 on the basis that the Applicant had extracted and served the decree and certificate of costs pursuant to the court's judgment but the Respondents had failed to satisfy the decree and costs. He added that he had issued various demand letters to no avail and annexed a copy of the decree, certificate of costs and bill of costs filed in Nanyuki CMC ELC Case No. 169 of 2018.
2. Alexander Muchemi the County Attorney of the country government of Laikipia swore the replying affidavit in opposition to the judicial review application. He deponed that the application was incompetent for want of supporting affidavit and added that the office of the County Attorney was not served with the certificate of costs so that it could forward it to the department of Finance, County planning and Development. He stated that they were only served the demand letter on 14/3/2023.
 3. That that notwithstanding, the office of the County Attorney had already been allocated the budget for the 2023-2024 financial year which did not provide any allocation for the settlement of pending decretal sums. He exhibited a copy of the budget for the County Attorney and Legal Services in the total sum of Kshs. 4,900,000/=. He averred that it was imperative for the court to understand that it was the duty of the County Assembly to allocate the budget and that it was the Executive which implemented the approved budget. He added that the Executive sought for the budget to settle the decretal sums but the Assembly did not allocate the budget to the Office of the County Attorney as a result of which they could not settle this particular decretal sum.
 4. He indicated that they would continue following up and hoped that the County Assembly would allocate them the budget to settle decretal sums including this one. He sought indulgence for the Respondents and to be given time to expedite the budgeting for and payment of the costs to the Applicant upon service of the certificate of cost. He urged the court to dismiss the judicial review application to allow for the proper procedure in the payment process. He maintained that the Respondent was willing to settle the said costs as part of its expenditure and that the judicial review application was therefore moot.
 5. Daniel Ngumi, the Chief Officer in charge of Finance in Laikipia County swore another replying affidavit in opposition to the judicial review matter. He deponed that even though the County Government of Laikipia did not agree with the findings of the court, it intended to honour the decretal sum as ordered in Nanyuki CMC ELC No. 169 o 2018. He implored the court to take judicial notice that payments by the County Government were subject to the county planning and budgetary frameworks pursuant to the Public Finance Management Act of 2012. He explained that the failure to settle the sum due was as a result of budgetary restrictions because the County Assembly did not approve the issuance of the necessary budget to the County Attorney in the 2023-2024 FY. He reiterated the averments made by Mr. Alexander Muchemi on the process for payment and budget allocation by the County Government.
 6. He averred that it was in the public domain that there were financial constraints facing County Governments through the disbursement of the allocation of funds from the National Treasury and that the Laikipia County was not an exception. He reiterated that the County Attorney was not able to settle the decretal sum his office would continue pursuing approval of the budget by the Assembly. He added that the Respondents had on numerous occasions engaged the Applicant's advocate orally to indulge the County Government and afford it sufficient time to settle the decretal sum.
 7. In the further affidavit filed in court on 11/3/2024, Tirus Kinyua Thumbi averred that the decree and certificate of costs were served upon the County Attorney on 14/3/2023. He averred that the elaborate procedure for execution against the government was only meant to give adequate notice to the government so that it could make arrangements to satisfy the decree but was not intended to exempt



- the government from meeting its obligations or settling decrees and orders of the court. He pointed out that the Respondents had not contested the fact that there was an outstanding decretal amount that was yet to be satisfied in Nanyuki CMC ELC Case No. 169 of 2018. He added that the Respondents ought to give a proposal on how they intend to settle the decretal sum.
8. The court gave directions for parties to file and exchange submissions. Both parties filed their set of submissions. The Applicant submitted that this matter was transferred by the High Court of Kenya to the ELC on 3/10/2023 for disposal. Regarding this court's jurisdiction to handle the matter, the Applicant submitted that the court was created under Article 162 (2) (b) of *the Constitution* and Section 13 of the ELC Act. The Applicant submitted that this matter emanated from a land matter before the Magistrate's Court and the decree issued by that court. Consequently, that this court had the jurisdiction to determine this matter by granting an order of mandamus so that the decree from the Magistrates' Court could be implemented against the Respondents who are officials in the County Government of Laikipia.
 9. He elaborated that his original claim was for compensation for the unlawful demolition of his property and that the court granted Kshs. 28,166,167/= as general damages for the unlawful demolition of the Applicant's property. He maintained that this was not a money decree but arose from compensation for the unlawful demolition of his property on Nanyuki Municipality Block 9/533 and that consequently this court had jurisdiction under Article 23 (3) (f) and 165 (3) (a) read with Article 162 (2) (b) of *the Constitution* because the matter touched on land.
 10. The Applicant cited *Ken Kasinga v Daniel Kiplagat Kirui & 5 Others* [2015] eKLR in which Emukule J. stated that as long as a dispute could be categorized as being a dispute over the environment or over land, the ELC had unlimited jurisdiction.
 11. The Applicant submitted that there was a judgment against the government and that the government should be compelled to pay and as such he was entitled to the orders sought in this proceedings. He added that the Government Proceeding Act applied to the execution of decrees against the County Government and cited Section 21 of the *Government Proceedings Act* and Order 29 of the Civil Procedure Rules. He also cited Section 45 of the County Government Act which establishes the office of the County Officer of Finance. He referred to the decision of Nyamweya J. (as she then was) in *Republic v County Secretary Nairobi City County and 3 others ex parte Koceyo Advocate* (2020) eKLR where she observed that the County Executive Committee member for finance was the head of treasury and responsible for finance matters in the counties. The court went on to state that arising from the provisions cited, the Respondents were jointly responsible for the satisfaction of court orders and decrees on payment of money owed by the Nairobi City County. The Applicant concluded that he had demonstrated that he had a decree against the County Government of Laikipia which the County had failed to satisfy and it was only fair that the Respondents are compelled to perform their duty by paying.
 12. The 1st and 2nd Respondents submitted that this court had jurisdiction based on the decision in *Karisa Chengo & 2 others v Republic*. They also submitted that under Section 13 (7) of the ELC Act, the court in exercise of its jurisdiction had power to make any orders and grant any reliefs as it deemed fit and just including prerogative orders.
 13. The Respondents pointed out that in *Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR it was held that the remedy of judicial review was concerned with reviewing not the merit of the decision but the decision making process itself. Further, that the remedy of judicial review was intended to ensure that the individual was given fair treatment by the authority to which he



had been subjected and was not intended to substitute the opinion of the judge for that the authority constituted by law to decide the matter in question.

14. The Respondents cited the decision of Odunga J. (as he then was) in *Republic v The Attorney General & Another Ex parte, James Alfred Koroso* where he observed that the relief sought was not execution or attachments and that it was not meant to make any person individually liable for any order for any payment but was intended to obligate a government officer to pay out of the funds provided by Parliament.
15. The Respondents submitted that payment of decretal sums had to be done in accordance with the budget approval by the County Assembly through approval of the county fiscal strategy paper and the enactment of the Appropriations Act pursuant to Articles 220, 221, and 224 of *the Constitution*. Further, that deductions of funds from the county revenue funds were approved by the Controller of Budget who relied on the budget approved and provided by the County Assembly following the budget process set out in Section 125 of the *Public Finance Management Act*.
16. The Applicant cited *Five Star Agencies Limited v National Land Commission and Another* [2024] eKLR where the court observed that the satisfaction of a decree or judgment was deemed to be an expenditure by Parliament and therefore must be justified in law and provided for in the government's expenditure. Further, that it was for that reason that Section 32 of the *Government Proceedings Act* provided that any expenditure incurred by or on behalf of the government under that Act should be defrayed out of money provided by Parliament. The Respondents urged that it was imperative for the Applicant to remain patient as due process is followed to satisfy the decree. It contended that the court must pronounce that decrees must be budgeted for and appropriated by the County Assembly failing which the Assembly and its members would become liable. They urged that the County Attorney would be happy to embrace such an order since payment remains at the discretion of the County Assembly. They added that a critical procedure in the budget creation was public participation where they recommended that the Applicants should take part in.
17. The Respondents cited *Kenya Revenue Authority; Proto Energy Limited Ex parte, relied on Republic v County Secretary Nairobi City County & Another ex parte Tom Ojienda and Associates* [2019] eKLR where the prerequisites to be considered by the court in exercising its discretion to issue an order of mandamus were set out. They invited this court to apply those prerequisites here which include whether there was prior demand and an outright refusal to comply either expressly or through unreasonable delay where time was given to comply. The Respondents concluded that they had not declined to comply with but that they needed time and cooperation from the Applicant to follow due process towards compliance.
18. The Applicant seeks an order of mandamus to compel the Respondents to settle the decree emanating from a land dispute in the Magistrates' Court. The Respondents position is that they require an order to be made by this court so that the decrees can be budgeted for and appropriated by the County Assembly before they can pursue the allocation of funds to settle such decrees.
19. As the Applicant rightly submitted, the *Government Proceedings Act* applies to this case. Section 21 of the *Government Proceedings Act* deals with the satisfaction of orders against the Government. It stipulates that where in any civil proceedings by or against the Government, any order (including an order for costs) is made by any court in favour of any person against the Government, 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, at any time after the costs have been taxed, issue to that person a certificate in the prescribed form containing particulars of the order.



A copy of the certificate issued under that section may be served by the person upon the Attorney-General. In the case of the County Government, it would be served upon the County Attorney.

20. The Applicant has not shown that the certificate of order for payment provided for by Section 21 of the [Government Proceedings Act](#) was issued or that it was served upon the County Attorney as stipulated by law.
21. The court finds that the application dated 22/12/2023 was filed prematurely and declines to grant the orders sought in that application for want of service of the certificate of order against government stipulated in Section 21 of the [Government Proceedings Act](#).
22. Each party will bear its own costs of the suit.

DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF AUGUST 2024.

K. BOR

JUDGE

In the presence of: -

Mr. Jefferson Okenwa for the Applicant

No appearance for the Respondent

