



Republic v County Government of Kajiado & 2 others (Judicial Review Miscellaneous Application 390 of 2014) [2025] KEHC 6957 (KLR) (Judicial Review) (27 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6957 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 390 OF 2014**

RE ABURILI, J

MAY 27, 2025

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF KAJIADO 1ST RESPONDENT

CHIEF OFFICER, TREASURY (FORMERLY FINANCE & ECONOMIC PLANNING, KAJIADO COUNTY MORRIS PUTIA KAAKA) 2ND RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER TREASURY (FORMERLY FINANCE AND ECONOMIC PLANNING, KAJIADO COUNTY), MICHAEL SEMERA 3RD RESPONDENT

RULING

1. This matter has been pending since 4th October, 2014 which is well over ten years now and one of those cases where the public will say the courts sit on cases forever. In other words, it is a matter that has become a backlog 14 times, since backlog is defined as the case which has been in court for a period exceeding one year or 365 days. But is it true that courts just create backlog? Let's see from the brief history underlying this backlogged case, like many others pending before this Court.
2. The exparte applicant is a beneficiary of an arbitral award delivered by John M. Ohaga on 5th November, 2009 which was adopted by the Court on 13th December, 2011.
3. The respondent never settled the award decree as a result of which the exparte applicant decree holder applied for judicial review orders of mandamus to compel settlement since there can be no execution by way of attachment against the government as prohibited by Order 29 of the Civil procedure Rules



and Section 21 of the *Government Proceedings Act*. On 30th May 2016, the court granted judicial review orders of mandamus against the respondent.

4. Still, the respondents have never settled the decree for mandamus and as a result, the ex parte applicant applied for orders of contempt against the accounting officer of the County Government of Kajiado, citing the Chief Officer, Treasury and the County Executive Committee Member, Finance for deliberately disobeying court orders of mandamus and completely refusing to settle decree.
5. The orders of mandamus were specifically issued against the persons of Morris Putita Kaaka and Keswe Mapena who were the then Chief Officer and CECM The Treasury or Finance and Economic Planning respectively.
6. As at the time of issuing certificate of order against the government in HCC COMM 442 of 2011, the total amount as per decree Issued by Ogola J, on 13th December, 2011 was USD 5,764,233/64.
7. From this old tattered court record, it is clear that the parties at one time tried to negotiate for an out of court settlement with the respondent seeking for a reduction of the awarded and decreed amount but this offer was not acceptable to the ex parte applicant hence the matter has remained being litigated on year after year with contempt proceedings being commenced and prosecuted against the Chief Officer and CECM Finance vide notice of motion dated 14th December 2018.
8. As expected, the respondents viciously opposed the contempt of court application with the first swearing an affidavit dated 17th December, 2019 and at paragraph 1, he stated that he was the former Chief Officer, Finance and Economic Planning of the 1st Respondent. He deposed on various facts including the fact that he had been informed by the then Chief Officer Finance and Economic planning that the County Government had resorted to making an annual provision of Kshs 20,000,000 in supplementary budget towards settling the decree, upon persuading the County Assembly and the general public, noting the previous challenges experienced by the County Government in seeking to make provisions for a larger sum annually since previous attempts to make provision of larger sums were resisted during public participation for a owing to limited resources for development projects hence the County Assembly also rejected the request to approve the same.
9. It was also deposed that it was not practically possible to settle the debts in lump sum as that would bring the County Government to its knees, noting that the debts were incurred by the predecessor of the County Government.
10. At one time, the battleground in this matter became a battle field between Advocate and client, with the ex parte applicant and its initial advocates parting ways but the advocate client bill of costs being filed in this matter for assessment and claims for payment which was obviously erroneous and it indeed, diverted the attention of the court and parties from the core business of pursuing the settlement of the decree.
11. Vide letter dated 18th October 2021, the Controller of budget wrote to the Chief Officer of the 1st Respondent castigating them for failing to settle decree as required by law and the agreement giving rise to the arbitral award thereby causing interest to accrue. The Chief Officer responded vide letter dated 4th November, 2021 assuring the Controller of Budget that the 1st respondent was committed to settling the said decree in strict compliance with the settlement agreement that was signed by both parties.
12. It is important to note that on 9th April 2021, the parties had reached a negotiated settlement Deed before the Solicitor General wherein they agreed that the amount due would now be Kshs 392,3 million out of which the 1st respondent was to pay Kshs 100 million within 14 days thereof while the



- balance of Kshs 292.3 million was to be settled during the financial year 2021/2022, within the month of July and September, 2021.
13. Additionally, the settlement Deed at Clause 3 Clearly states that the Claim by the County Government of Kajiado arising out of the Arbitration Proceedings prior to execution of the Settlement Deed was waived.
 14. The parties also agreed that upon signing of the settlement Deed, the claimant would cause to be withdrawn from court all pending suits and or applications against the County Government and its officers.
 15. As shown by the acknowledgement letter of 8th December 2021, on 19th May 2021, the 1st respondent paid Kshs 100 million which was the 1st instalment as per the Settlement Deed. The applicant's counsel was therefore lamenting that the balance had not been paid yet as per the settlement Deed and observing that the 1st respondent was not committed to adhering to the Settlement Deed as it had only committed Kshs 80 million in the Financial year 2021/2022, noting that the applicant had forfeited over Kshs 400 million and accepted less than half of what it was entitled to.
 16. In the Replying affidavit sworn by Morris Putita Kaaka on 17th December 2019, he deposes at paragraph 7 that the County Government had resorted to making an annual provision of Kshs 20,000,000 in supplementary budgets towards making good the decree, which provision the Chief Officer, Finance, had termed as acceptable and viable upon persuading the County Assembly and the public , despite the previous challenges encountered in making provisions for larger sums of money.
 17. The Hansard report of the Senate Committee on public accounts dated July 16th 2021, is clear that indeed, the amount which was decreed was Kshs 670 million which had been recognized as contingent liability in the financial statements of the County Executive of Kajiado for the year ended 30th June 2017.
 18. In the Financial Report for the year ended 30th June 2018, at page 53, annexed to the replying affidavit of the former Chief officer, Finance, Mr Morris Putita, he presents the Kshs 670,000 as contingent liability due to third parties, the exparte applicant herein and that the County Government had filed an appeal which was yet to be determined.
 19. With the above historical background of this matter, the 1st respondent now by its application dated 22nd July 2024 seeks orders to stay the ensuing sentencing proceedings pursuant to contempt of court proceedings. It also seeks an order that the exparte applicant be compelled by this court to participate and or subject itself to the Kajiado County Government 2023-2024 Budget making process as the matter concerns contingent liability.
 20. Further, that this court orders that the exparte applicant's land rates amounting to Kshs 243,004,000 be offset against the outstanding and subject debt owed to the exparte applicant amounting to Kshs 292,300,000 and costs of the application.
 21. That application is opposed by the exparte applicant's replying affidavit sworn on 25th July 2024 again giving the history of the matter as stated above in my tour of the file herein.
 22. The parties' advocates argued the application orally on 8/4/2025 with Mr. Muriithi for the respondents submitting that the applicant had refused to participate in the budget making process, that it owes the respondent land rates and that it had also refused to attend public participation so that the pending bills are considered in the budgeting process.



23. In response, Mr. Wakhisi counsel for the ex parte applicant submitted reiterating what was deposed in the applicant's replying affidavits and insisting that mandamus was issued, contempt proceedings commenced and arrest warrants issued. That the allegation that Mr. Michael Semera was no longer an employee of the 1st respondent was not proved. That the court can re issue warrant against the CECM Finance and the County Secretary. Further, that prayer 2 of the Notice of motion was overtaken by events because the subject financial year had lapsed hence it was overtaken by events.
24. That there was no legal requirement for the applicant to participate in budget process and that in any event, there was no evidence of invitation for it to attend the budget process.
25. On alleged land rates owing, it was submitted that there was no evidence of any invoice being served upon the applicant, with the claim that the rates are owed from 2009 plus interest and penalty with no justification, yet this matter was filed in this court in 2014. That there is a settlement Deed in 2021 dated 9/4/2021 and that if the applicant owed those land rates, they would have been claimed. That the affidavit of Mr. ole Sakuda had merit.
26. Counsel urged the court to dismiss the application.
27. In a rejoinder, the respondent's counsel submitted that the warrants of arrest cannot be issued against Mr. Semera who was no longer an employee of the 1st respondent.

Analysis and determination

28. I have considered all the above and having perused the court file and given a brief history of what has transpired over time, with advocates for both parties changing from time to time; the main issue for determination is whether the application dated 22nd July 2024 is merited. There are questions to be answered in the process of resolving the main issue.
29. The first question is whether the court should stay the ensuing sentencing proceedings pending the hearing and determination of the application subject of this ruling. The application was filed on 22nd July 2024 and therefore this prayer is overtaken by events, noting that there is no prayer for setting aside or reviewing of the contempt of court order issued by this court on 10th July 2019 by Nyamweya J wherein she found the 2nd respondent Chief Officer Mr. Morris Putita Kaaka to be culpable for contempt of court order made on 30th May 2016. She however suspended the sentencing for one year to enable the respondents take action of purging the contempt.
30. As that contempt has never been purged even after the settlement Deed of 2021 wherein the decretal sum was reduced by over Ksh 400 million, there is absolutely no ground upon which the court would stay the sentencing any longer, and the said prayer having been overtaken by events.
31. The second question is whether this court should compel the ex parte applicant to participate in budgeting process of the 1st respondent and whether it should subject itself to the Kajiado County Government's 2023-2024 budget making process as the matter concerns contingent liability.
32. As already established in the historical background of this matter, the debt owed to the ex parte applicant was already subjected to public participation and budgeting processes of 2021-2022 financial year before and during the negotiations that led to the Settlement Deed.
33. this was also a matter that the Controller of Budget raised issues on and cautioned the 1st respondent against delay in settling the debt as per the settlement deed and the 1st respondent committed itself to settling the same as per the settlement Deed.



34. Furthermore, the 2023-2024 financial year and its budgeting process already lapsed and therefore there is nothing to be involved in by the exparte applicant. Additionally, the issue of the debt being a contingent liability was not new at all as all the material in this file clearly show that the matter was even presented as an audit query to the Senate Committee on Public Accounts. The County Government too subjected that issue to public participation and County Assembly approval and it features in the financial reports of the County Government including the year ending 30th June, 2018 as stated above, with the County Executive making provision for settlement in the proportions of Kshs 20,000,000 annually.
35. It therefore follows that the 1st respondent cannot be allowed to restart the fresh process of settling a decree in a new manner where parties already settled the issues regarding the decree and even part of the said settlement deed sum was paid.
36. Besides the prayer being overtaken by events, there are other reasons for this court not to allow that kind of prayer in this matter. Generally, a court cannot compel a decree holder (i.e., a creditor with a judgment in their favor) to participate in the budgeting process of a county government as a condition to enforcement of the decree, for the following reasons:

a. Finality of Judgments

37. Once a court renders a judgment, the successful party (the decree holder) has a legal right to enforce it. That right is not contingent on participating in administrative or political processes such as budgeting.

b. Doctrine of Separation of Powers

38. Courts adjudicate rights and issue enforceable orders. In this case, the decree was already in the process of being enforced through, mandamus and the subsequent contempt of court proceedings. Budgeting is a function of the executive arm (County Treasury and Assembly) and the judiciary cannot force a private party to take part in that executive process.

c. Obligation of Government to Satisfy Judgments

39. Under the *Public Finance Management Act* and the *Government Proceedings Act*, once a judgment is entered against a government entity, the entity is expected to make budgetary provisions to pay the debt. The responsibility is on the County government, not the decree holder.
40. Courts have severally held that governments cannot use budgetary constraints as an excuse to avoid settling a valid court decrees.
41. The Court of Appeal in CA 212 OF 2014 Isaiah Oduor Ochanda v Attorney General & another made it clear that:

“Procedural protection should not be construed in a manner that abrogates or renders the jurisdiction of the court to punish for disobedience of its order practically inoperative and that in appropriate cases, the court retains the discretion to dispense with procedural protection in the interest of justice, moreso, now that Article 159(2) (d) of *the Constitution* ordains that justice shall be administered without undue regard to procedural technicalities. See *Jaribu Credit Traders Limited v Nairobi County Government* [2018] KEHC 8000 (KLR).



42. As was stated by Odunga J in Republic v Attorney General & another Exparte James Alfred Koroso [2013] KEHC 90 (KLR)

“16... the ex parte applicant has no other option of realizing the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of *the Constitution* which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of *the Constitution* executive authority derives from the people of Kenya and is to be exercised in accordance with *the Constitution* in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.”[emphasis added.

43. Failure by government organs to budget for decrees is an internal administrative failure, not something to burden decree holders with.

44. In view of the above, this court cannot compel the decree holder to participate in budgeting processes of the 1st respondent, a process that was already undertaken by the 1st respondent and the issue of whether the decree was payable resolved before the Settlement Deed was signed in 2021, reducing the decretal amount by over Kshs 400,000,000

45. If the court were to issue such compulsive orders for decree holders to engage in political administrative activities of the County Governments, then it would be clothing governments with immunity from settling decrees and such orders would have the effect of shifting the burden of enforcement from the debtor (County government) to the creditor, decree holder. It would also undermine the authority of the judgment and finally, it would potentially violate the decree holder’s rights to fair administrative action and equal treatment under the law.

46. In the end, I find and hold that this court cannot compel a decree holder to participate in the budgeting process of the 1st respondent County Government of Kajiado. The duty to budget for and settle judgments lies with the County Government and if the County Government fails to honour the decision of the court or settlement Deed, then the decree holder’s remedy is to pursue enforcement mechanisms provided for in law and not to engage in the political/administrative budgeting process.

47. Accordingly, the prayer 2 of the Notice of motion dated 22nd July 2024 is declined and dismissed.

48. The other question is whether this court should order that the exparte applicant’s land rates amounting to Kshs 243,004,000 as per the invoice dated 31.05.2024 should be set off against the outstanding and subject debt owed to the exparte applicant amounting to Kshs 292,300,000.

49. In my exploration of this old ragged file, I have given the background of this matter, where the debt originated from and how it ended up in this court for mandamus and eventually, the contempt of court



proceedings, with Nyamweya J suspending the sentencing of the Accounting Officer for one year to allow the purging of the contempt.

50. Later, the parties negotiated out of court and under the able leadership of the Solicitor General, they reached a settlement and executed a settlement deed. It was after the settlement Deed in 2021 that the 1st respondent paid the exparte applicant Kshs 100 million leaving a balance which is unsettled to date and the Controller of budget raising issues with the non-settlement. The 1st respondent assured the Controller of budget that it was committed to settling the balance, now that the amount had already been reduced by more than half and the same was agreed to be settled between July and September 2021 as it had been factored in the 2021-2022 financial year budget.
51. For this court to be asked to allow a set off of the decretal sum owed with the alleged outstanding land rates which the exparte applicant denies owing to the 1st respondent, I find this to be one of the strangest claims being brought against the exparte applicant through the back door for the following reasons:

d. Improper Forum for Fresh Claims

52. Additionally, respondent's claim for alleged outstanding rates constitutes a new cause of action which was neither pleaded nor adjudicated in the proceedings that gave rise to the judgment herein. Neither was it included in the settlement deed which was executed after negotiations presided over by the Solicitor General. The present proceedings for enforcement via mandamus is not the forum for the litigation of fresh claims.

e. Doctrine of Finality of Judgment

53. The decree sought to be enforced arises from a final and conclusive judgment. The Respondent's attempt to now introduce a set-off undermines the principle of finality of litigation, and is tantamount to a collateral attack on a valid court order without compliance with the procedures for review, appeal or setting aside.

f. Waiver and Estoppel

54. The Respondent had every opportunity to raise any claim of set-off or counterclaim during the initial hearing and/or in its response to this Honourable Court during the mandamus proceedings or during the settlement Deed process. Its failure to do so operates as a waiver of any such claim and the Respondent is estopped from raising it at this late stage in these proceedings.

g. Public Policy and Rule of Law

55. To allow the Respondent to circumvent compliance with a court order by belatedly alleging a debt, which remains unverified, unproven, and unadjudicated, would erode the authority of the courts and promote impunity in the enforcement of decrees against public bodies.

h. Independent Legal Remedies Available

56. If the Respondent genuinely believes that the Applicant is indebted in respect of land rates, it is at liberty to pursue recovery in a separate suit, subject to due process and applicable legal standards. Such a potential debt does not operate to nullify or suspend this Court's decree of mandamus as was later reduced into the Settlement Deed.
57. In view of the foregoing, this court finds and holds that the Respondent's claim for set-off is procedurally improper and legally untenable. It is declined and dismissed.



58. On the whole, I find all the prayers sought by the 1st respondent in the notice of motion dated 22nd July 2024 are devoid of any merit. The application in question dated 22nd July 2024 is hereby dismissed.
59. As to whether this court can make any other orders as it may deem fit and just, I observe that the 1st respondent maintained that Mr. Michael Semera no longer works for the 1st respondent. The ex parte applicant put the 1st respondent to strict proof thereof.
60. This court is aware that Chief Officers and County Executive Committee Members are all political appointees of the sitting Governors and that it is in the discretion of the Governor, the County's political head, to retain or transfer them from one Department or sector to another.
61. This matter has been pending for a while and therefore it is possible that the 1st respondent has other officers other than those or that who was cited for contempt. It would be superfluous to insist on a particular Chief Officer to be brought before this court for sentencing, even where such officers have since left employment of the County Government of Kajiado. That said, the contempt proceedings were against the office holder as at the time that the orders were made.
62. However, in view of the successive proceedings which culminated in the settlement deed, and as this is the first time that the terms of the settlement deed are before this court, if there is breach thereof, then the ex parte applicant ought to establish with precision the Chief Officer and Accounting Officer responsible for settling the balance of the amount due on the Settlement Deed and demand for settlement by the current office holder.
63. Only when there is resistance to settlement or refusal through brazen disobedience would the applicant be entitled to seek for fresh contempt proceedings against that office holder/Accounting Officer, and not to insist on the person who may not be in office by effluxion of time. This court cannot demand for sentencing of a person who is not responsible for complying with this court's orders, the applicant having previously named the specific accounting officer. It is upon the applicant to move the court appropriately to avoid causing orders to lapse.
64. I have dismissed the application. The tax payer continues to suffer the consequences of impunity by the 1st respondent. However, I must mention that the application which was filed by the 1st respondent was one of the most frivolous of all applications. Nonetheless, the parties rely on the expertise of their counsel on record and therefore in order not to punish the residents of Kajiado any longer, I order that each party bear their own costs of the application, in order to save the residents of Kajiado more costs.
65. The applicant is at liberty to apply.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF MAY, 2025

R.E. ABURILI

JUDGE

