Republic v National Hospital Insurance Fund Management Board & another; Muriu Mungai & Company Advocates LLP (Exparte Applicant) (Judicial Review E093 of 2023) [2024] KEHC 2414 (KLR) (Judicial Review) (28 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2414 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW E093 OF 2023

JM CHIGITI, J

FEBRUARY 28, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

NATIONAL HOSPITAL INSURANCE FUND MANAGEMENT BOARD ..... 1ST RESPONDENT

THE CHIEF EXECUTIVE OFFICER, NATIONAL HOSPITAL INSURANCE FUND MANAGEMENT BOARD ..... 2ND RESPONDENT

AND

MURIU MUNGAI & COMPANY ADVOCATES LLP ..... EXPARTE APPLICANT

JUDGMENT

1. The application before this court is the one dated 24th day of July 2023 wherein the applicant seeks for ORDERS:

    1. That an Order of Mandamus do issue directing the Respondents to unconditionally pay the decretal amounts in the decree issued in Nairobi, High Court Comm. Case No. E 369 of 2022, on the following terms :

        a) The sum of Kshs. 177,161,532.00 tabulated as:

            i) Principal sum of Kshs. 175,200,000.00;

            ii) Unpaid disbursements of Kshs. 1,961,532.00

b) Interest on (a) above at the rate of 12% per annum effective 14th March 2023 until payment in full, which was Kshs. 10,542,324.58 as at the date of the decree, and all further accrued interest.

c) Costs of the suit of Kshs. 3,174,948.00

2. That costs of this application be awarded to the Ex-Parte Applicant.

2. In challenging the suit, the Respondent filed grounds of opposition and submissions.

Brief background;

3. On 23rd September 2022, the Applicant instituted High Court Commercial Case No. E369 of 2022 against the 1st Respondent, the National Health Insurance Fund Management Board.

4. On 13th March, 2023 the parties entered into a consent judgment that was adopted as an order of the court on 14th March 2023 in favour of the Applicant against the 1stRespondent herein in the terms, inter alia, that; -

"i) Judgment entered for the Plaintiff against the Defendant in the sum of Kshs. 177,161,532 tabulated as follows:

a) Principal sum of Kshs. 175,200,000.00,

b) Unpaid disbursements of Kshs. 1,961,532.00.

ii) The Defendant to pay the Plaintiff interest on the sums above at the rate of 12% per annum effective 14th March 2023 until payment in full. The current amount outstanding is Kshs. 10,542,324.58.

iii) The Defendant do pay to the Plaintiff costs of the suit which has been agreed at Kshs. 3,174,948.

iv) The decretal amount shall be settled in two (2) equal monthly installments payable over a period of 30 days with effect from 15th March 2023.

v) Upon payment of the sums under (3), (4) and (5) above this matter be marked as settled with no further orders as to costs...."

5. The Applicant forwarded to the 1stRespondent's advocates the original decree and wrote letters dated 6th April 2023, 15th May 2023, and 14th June 2023 pursuing settlement of the decretal sum. The amount remains unsettled.

6. Reliance is placed in the Court of Appeal in the case of Republic -vs- Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No. 234 of 1996 where the Court cited with approval the Halsbury's Law of England, 4thEdn. Vol. 7 p.111 para. 89 as follows:

"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."

7. Justice Mativo, as he then was, in Republic -vs- National Hospital Insurance Fund Board of Management & another Ex-parte Law Society of Kenya [2019] eKLR stated that eight factors must be present for the writ of mandamus to issue which are as follows:

> " (i) There must be a public 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 the 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."

8. Put differently, for a Court to grant an order of mandamus, the Respondents must have statutory or legal duty owed to the Applicant, which despite demand, they have refused to fulfill. In the present case the Ex-parte Applicant seeks an order of mandamus to compel the Respondents to pay the decretal sum as issued in the primary suit more so wherein the judgement was by consent of the parties.

9. By dint of section 42(5) of the *National Hospital Insurance Fund Act*, 1998, which came into force on 28th January, 2022 following the National Hospital Insurance Fund (Amendment) Act, No. 1 Of 2022, 2022, the 1stRespondent was granted immunity from attachment of its assets. The same provides that:

> " Despite any other written law, the assets of the Fund shall not be liable to attachment under any process of the law."

10. Section 5 and 6 of the *National Hospital Insurance Fund Act* grants the 1st Respondent the power to manage, control and administer the assets of the Fund in such a manner and for such purposes as best promotes the objects for which the Fund is established, which necessarily includes settlement of liabilities such as the decretal amount herein.

11. Section 5 (1) (d) (e) of the *National Hospital Insurance Fund Act*, 1998 states that the objects of the Board include:

> "(d) to regulate the contributions payable to the Fund and the benefits and payments to be made out of the Fund;
>
> (e) to protect the interests of contributors to the Fund;"

12. Further, section 6 (a) of the *National Hospital Insurance Fund Act*, 1998 grants the Board powers to among others: manage, control and administer the assets of the Fund in such manner and for such purposes as best promotes the objects for which the Fund is established.

13. By virtue of section 10 of the *National Hospital Insurance Fund Act*, the 2ndRespondent is responsible for the day to day management of the Fund and is the secretary of the Board.

14. Notwithstanding the immunity, as set out above, the *National Hospital Insurance Fund Act* places a duty upon the Respondents to manage the funds for the Institution and this includes the liabilities accruing thereto.

15. The applicant argues that the Respondents are jointly obligated to satisfy the decretal sum and costs awarded to the Ex-parte Applicant and have thus been rightfully sued in this judicial review application.

16. There is no challenge to the said decree as awarded in the primary suit.

17. In Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006 wherein Majanja J. addressed the importance of the Court in ensuring that the right of a successful litigant to enjoy the fruits of his judgement as follows:

> "...a decree holder's right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of *the Constitution* particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant's right of access to justice protected under Article 48 of sthe Constitution the *Government Proceedings Act* (GPA) preamble to the GPA provides that:
>
> 'An Act of Parliament to state the law relating to the civil liabilities and the rights to the Government and to civil proceedings by and against the Government, to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government, ..."

18. Section 21 of the GPA deals with satisfaction of orders against the government. As a condition precedent to the enforcement of decrees for money issued against the government, payment will be based on a certificate of costs that is issued by the court after the expiration of 21 days from the entry of judgment.

19. Once the certificate against the government is served upon the attorney general, section 21(3) of the GPA imposes a statutory duty on the accounting officer concerned to pay the sums specified in the order.

20. According to the Applicant, the GPA is not applicable to the circumstances of this case as the 1stRespondent is neither classified as the government or government department, while the 2nd

Respondent is not an officer of the government. No specific reference has been made to state corporations in the GPA.

21. The 1st Respondent and 2nd Respondent are both established under section 4 of the National Health Insurance Fund Act, 1998. The 2nd Respondent is the Chief Executive Officer and ex-officio member of the 1st Respondent.

22. Section 4(3) of the National Health Insurance Fund Act further provides that:

> " The Board shall be a body corporate with perpetual succession and a common seal, and shall, in its corporate name, be capable of-
>
> (a) suing and being sued; …."

23. Section 2 of the *State Corporations Act*, Cap. 466 defines a state corporation as:

"State corporation" means-

(a) a State Corporation established under Section 3.

(b) a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law."

24. Reliance is placed in the case of Ikon Prints Media Company Limited -vs- Kenya National Highways Authority & 2 others [2015] eKLR. The late Justice Onguto held:

> " … it is important to point that it would not be tenable to invoke the *Government Proceedings Act* … as a bar to any execution herein. The 1st Respondent is a body corporate with perpetual succession and a common seal. It is a corporate entity capable of subsisting independently. It is dependent on government funding but is not government or servant of or agent of Government for the purpose of the *Government Proceedings Act*. The 1st Respondent is an independent judicial person capable of being sued and suing. …Any judgments decreed against the 1st Respondent are not judgments against the government but against an independent juridical body."

25. Justice Maurine Odero while dealing with a similar issue in Greenstar Systems Limited -vs- Kenyatta International Convention Centre (KICC) & 2 others [2018] eKLR while citing the above decision by Onguto J. as of persuasive value held that:

> " The above authority … upholds the view that a state corporation or parastatal is not automatically subject to the *Government Proceedings Act*. Where proceedings are instituted under this Act the Hon Attorney General will be a party. The Hon Attorney General is not a party in the present proceedings."

26. Similarly, in this case, these proceedings were not instituted under the GPA and the Attorney General has not been sued as a party notwithstanding the fact that the 1st and 2ndRespondents have opted to procure the services of the Attorney General to represent them in the matter.

27. As was held by Justice J. B. Ojwang (as he then was) in Ng'ok -vs- Attorney General & Another [2005] eKLR which cited with approval the holding by Justice Aaron Ringera in Attorney General -vs- Kenya Commercial Bank HCCC No. 329 of 2001 in which held as follows:

> "... I think the Attorney General's institution of a suit for an on behalf of the National Irrigation Board which is a body corporate with power to sue and be sued in its own name is a legal misadventure. It is an action without juridical basis ..."

28. Justice Maureen Odero in the Greenstar case while dismissing an application seeking to stop execution proceedings by the decree holder against the Kenyatta International Convention Centre relied on the definition of government as defined by the Blacks Law Dictionary as being:

> "(1) The structure of principles and rules determining how a state or organisation is regulated.
>
> (2) The sovereign power in a Nation or state
>
> (3) an organization through which a body of people expresses political authority; the machinery by which sovereign power is expressed."

29. Based on the definition above Justice Maureen Odero held that the KICC did not fall within the confines of the above definition as it was a tourism agency established under the *Tourism Act* hence not a government department.

30. The Applicant seeks to distinguish the authority cited by the Respondents (Republic v Attorney General & Another Ex Parte Orbit Chemicals Limited [2017] eKLR in that the civil proceedings in that case were against the Attorney General, who is sued on behalf of the government.

31. It is also the Ex-Parte Applicant's submission that the authority of Commissioner General Kenya Revenue Authority vs. Silvano Anema T/A Marenga Filing Station Civil Appeal No 45 of 2000 has nothing to do with certificate of order against the government, but on the point that "it is the verifying affidavit and not the statement to be verified, which is the evidential value in an application for judicial review." Therefore, the Respondents' tenuous attempt to rely on this decision to urge the point of lack of "positive averment that a certificate was issued and served" in misconceived.

The Respondents case;

32. The Attorney-General respectfully submits that the Notice of Motion dated 24th July 2023 is premature by dint of Section 21(1) & (3) of the *Government Proceedings Act*.

33. The National Health Insurance Fund is parastatal established under the *National Hospital Insurance Fund Act* Cap 255 of the Laws of Kenya while the National Hospital Insurance Fund Management Board is established in Section 4(1) of the aforementioned Act thus the application of the *Government Proceedings Act*.

34. Section 21(1) of the *Government Proceedings Act* provides:

> "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:

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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.

35. Section 21 (3) of the said Act on the other hand provides:

> 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.

36. No Certificate of Order Against the Government has been served and as such there no liability accruing as against the respondents to warrant issuance of the orders sought.

37. Reliance is placed in the case of Republic v Attorney General & another Ex parte Orbit Chemicals Limited [2017] eKLR held as follows;

> " 51. It was contended that the applicant neither obtained nor served upon the Respondents a certificate of order against the Government. I my view, this Court must satisfy itself that the certificate mentioned in section 21 of the said Act was served before an order of mandamus can issue against the Government, or against a Government department, or against an officer of the Government as such, the Court whose decision is to be implemented ought to issue a certificate in the prescribed form containing particulars of the order otherwise known as Certificate of Order Against the Government. Such a certificate however can only be applied for after the expiry of twenty-one days from the date of the decision 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. In other words, after a decision against the Government is made the person in whose favour the decision is made must wait for at least 21 days before applying for the said prescribed certificate. However, a separate certificate may be issued in respect of costs. A copy of the said certificate may then be served by the person in whose favour the decision is made upon the Attorney-General. In my view it is only after the said procedure is complied with and a demand for payment is made that the cause of action accrues for the purposes of an application for an order of mandamus seeking to compel the Government, or a Government department, or an officer of the Government to settle the sum in question."

38. I therefore associate myself with the views expressed by Githua, J in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza (supra) that 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 and that the said provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues. In other words, payment does not depend on availability of funds though nothing stops the Court from considering that fact in determining whether or not to issue the orders and what orders to issue.

39. Being a condition precedent for the issuance of an order of mandamus, it follows that the Court can only issue the said relief when satisfied that the said certificate was issued and served. In other words, where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass. Therefore, where there is a genuine dispute as to whether the right to apply for an order of mandamus has matured, the Court must deal with the issue. In this case there is no averment and much less evidence of the existence of the statutory certificate under section 21 aforesaid. No such copy has been exhibited either.

40. In Sebaggala vs. Attorney General and Others [1995-1998] EA 295 it was held that:

> "A cause of action" means every fact, which, if traversed, it would be necessary for the plaintiff, to prove in order to support his right to a judgement of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can probably accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove the facts but every fact necessary for the plaintiff to prove to enable him to obtain decree. Everything, which is not proved, would give the defendant a right to an immediate judgement must be part of the cause of action. It is, in other words, a bundle of facts, which it is necessary for the plaintiff to prove in order to succeed in the suit. But it has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It is a media upon which the plaintiff asks the court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit."

41. Therefore, what constitutes the cause of action must be gleaned from the facts as averred by the parties and not on the prayers sought. With respect to judicial review, those facts are contained in the verifying affidavit. This position was restated by the Court of Appeal in Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000, where it was held that:

> "We are certain that the issue of the procedure used does not arise inasmuch as the applicant has not ruled out the possibility of the bulk of the products containing the chemical used only in the products meant for export. That much is clear from some of the matters in the Statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters. We would observe that it is the verifying affidavit not the Statement to be verified, which is of

evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:

'The application for leave "By a statement" – The facts relied on should be stated in the affidavit (see R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.'At page 283 of the report of the case of R v. Wandsworth Justices, Viscount Caldecote CJ said:

'The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.' "

42. Without a positive averment that the statutory certificate was issued and served, I cannot find that a cause of action for the purposes of these proceedings seeking a judicial review relief in the nature of mandamus had accrued.

43. It is for that reason alone that I am unable to grant the orders sought herein. In the premises the instant application is struck out but with no order as to costs

Analysis and determination:

The issues for determination are:

Whether or not, the respondents are liable under the *government proceedings act*.

44. It is it is not in question that the amount claimed is owed to the applicant. This is so because there was a consent entered into by the parties in the primary suit.

45. On 13th March, 2023 the parties entered into a consent judgment that was adopted as an order of the court on 14th March 2023 in favour of the Applicant against the 1stRespondent herein in the terms, inter alia, that ;-

" i) Judgment entered for the Plaintiff against the Defendant in the sum of Kshs. 177,161,532 tabulated as follows:

a) Principal sum of Kshs. 175,200,000.00,

b) Unpaid disbursements of Kshs. 1,961,532.00.

ii) The Defendant to pay the Plaintiff interest on the sums above at the rate of 12% per annum effective 14th March 2023 until payment in full. The current amount outstanding is Kshs. 10,542,324.58.

iii) The Defendant do pay to the Plaintiff costs of the suit which has been agreed at Kshs. 3,174,948.

iv) The decretal amount shall be settled in two (2) equal monthly installments payable over a period of 30 days with effect from 15th March 2023.

v) Upon payment of the sums under (3), (4) and (5) above this matter be marked as settled with no further orders as to costs....”

46. There is a decree to this effect. The same has been served. This court notes that there was an attempt to enter into an out of court settlement, which never crystallized. That said that is neither here nor there.

47. The Respondents do not deny owing the amount claimed by the applicant. The 1st Respondent and 2nd Respondent are both established under section 4 of the National Health Insurance Fund Act, 1998. The 2nd Respondent is the Chief Executive Officer and ex-officio member of the 1st Respondent.

48. Justice Maurine Odero while dealing with a similar issue in Greenstar Systems Limited -vs- Kenyatta International Convention Centre (KICC) & 2 others [2018] eKLR while citing the above decision by Onguto J. as of persuasive value held that:

> “ The above authority ... upholds the view that a state corporation or parastatal is not automatically subject to the *Government Proceedings Act*. Where proceedings are instituted under this Act the Hon Attorney General will be a party. The Hon Attorney General is not a party in the present proceedings.”

49. Similarly, in the case that is before me the proceedings were not instituted under the GPA and the Attorney General has not been sued as a party notwithstanding the fact that the 1st and 2ndRespondents have opted to procure the services of the Attorney General to represent them in the matter.

50. As was held by Justice J. B. Ojwang (as he then was) in Ng’ok -vs- Attorney General & Another [2005] eKLR which cited with approval the holding by Justice Aaron Ringera in Attorney General -vs- Kenya Commercial Bank HCCC No. 329 of 2001 in which held as follows:

> “ ... I think the Attorney General’s institution of a suit for an on behalf of the National Irrigation Board which is a body corporate with power to sue and be sued in its won name is a legal misadventure. It is an action without juridical basis ...”

51. Justice Maureen Odero in the Greenstar case while dismissing an application seeking to stop execution proceedings by the decree holder against the Kenyatta International Convention Centre relied on the definition of government as defined by the Blacks Law Dictionary as being:

> “ (1) The structure of principles and rules determining how a state or organisation is regulated.
>
> (2) The sovereign power in a Nation or state
>
> (3) an organization through which a body of people expresses political authority; the machinery by which sovereign power is expressed.”

52. Based on the definition above Justice Maureen Odero held that the KICC did not fall within the confines of the above definition as it was a tourism agency established under the *Tourism Act* hence not a government department.

53. Section 4(3) of the National Health Insurance Fund Act further provides that:

> “ The Board shall be a body corporate with perpetual succession and a common seal, and shall, in its corporate name, be capable of-

(a) suing and being sued; ...."

54. Section 2 of the *State Corporations Act*, Cap. 466 defines a state corporation as:

"State corporation" means-

(a) a State Corporation established under Section 3.

(b) a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law."

55. In the case of Ikon Prints Media Company Limited -vs- Kenya National Highways Authority & 2 others [2015] eKLR the judge held:

> " ... it is important to point that it would not be tenable to invoke the *Government Proceedings Act* ... as a bar to any execution herein. The 1st Respondent is a body corporate with perpetual succession and a common seal. It is a corporate entity capable of subsisting independently. It is dependent on government funding but is not government or servant of or agent of Government for the purpose of the *Government Proceedings Act*. The 1st Respondent is an independent judicial person capable of being sued and suing. ...Any judgments decreed against the 1st Respondent are not judgments against the government but against an independent juridical body."

56. It is this court's finding and I so hold that it would not be tenable to invoke the *Government Proceedings Act* ... as a bar to any execution proceedings herein.

57. I am satisfied that the Respondent is a the Board is a body corporate that is capable of suing and being sued.

Whether or not the Applicant is entitled to the orders sought:

58. In the case of Republic -vs- National Hospital Insurance Fund Board of Management & another Ex-parte Law Society of Kenya [2019] eKLR the court stated that eight factors must be present for the writ of mandamus to issue which are as follows:

"

" (i) There must be a public 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 the 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."

The applicants' case in the suit before me fits into the principles as enunciated above.

This court is satisfied that on 23rd September 2022, the Applicant instituted High Court Commercial Case No. E369 of 2022 against the 1stRespondent, the National Health Insurance Fund Management Board and that on 13th March, 2023 the parties herein entered into a consent that was adopted as an order of the court on 14th March 2023 in favour of the Applicant against the 1stRespondent herein in the terms, inter alia, that ;-

"i) Judgment entered for the Plaintiff against the Defendant in the sum of Kshs. 177,161,532 tabulated as follows:

a) Principal sum of Kshs. 175,200,000.00,

b) Unpaid disbursements of Kshs. 1,961,532.00.

ii) The Defendant to pay the Plaintiff interest on the sums above at the rate of 12% per annum effective 14th March 2023 until payment in full. The current amount outstanding is Kshs. 10,542,324.58.

iii) The Defendant do pay to the Plaintiff costs of the suit which has been agreed at Kshs. 3,174,948.

iv) The decretal amount shall be settled in two (2) equal monthly installments payable over a period of 30 days with effect from 15th March 2023.

v) Upon payment of the sums under (3), (4) and (5) above this matter be marked as settled with no further orders as to costs...."

59. There is no dispute that the Applicant forwarded to the 1st Respondent's advocates the original decree and wrote letters dated 6th April 2023, 15th May 2023, and 14th June 2023 pursuing settlement of the decretal sum.

60. The amount remains unsettled.

Disposition:

61. I am Satisfied that the applicant has made out a case for the grant of an order of Mandamus and I so hold.

Order;

62. The application dated 24th day of July 2023 is allowed in the following terms:

1. An Order of Mandamus is hereby issued directing the Respondents to pay the decretal amounts in the decree issued in Nairobi, High Court Comm. Case No. E 369 of 2022.

2. The costs to the Applicant.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 28 TH DAY OF FEBRUARY, 2024

.....

CHIGITI. J (SC)

JUDGE