



Republic v Attorney General & 2 others; Makoma & another (Exparte) (Judicial Review Application E029 of 2023) [2025] KEHC 2046 (KLR) (14 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2046 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E029 OF 2023
J NGAAH, J
FEBRUARY 14, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

HON. ATTORNEY GENERAL 1ST RESPONDENT

MINISTRY OF EDUCATION 2ND RESPONDENT

PRINCIPAL SECRETARY OF EDUCATION 3RD RESPONDENT

AND

MICHAEL MILISI MAKOMA EXPARTE

MAMI PHILIPINA MAKMORIO MILISI EXPARTE

JUDGMENT

1. The application before court is dated 7 February 2024 brought under Article 47 of *the Constitution* of Kenya 2010, Section 8 and 9 of the *Law Reform Act* Cap 21 Laws of Kenya Order 53 Rule (1)(2) (3)&(4) of the Civil Procedure Rules 2010. The application seeks the following orders:

- “ 1. That this Honourable Court be pleased to certify the matter urgent and hear the application ex-pate on priority basis and service of the application be dispensed with at the first instance.
2. That this Honourable Court be pleased to issue an order of Mandamus directed to the Respondents herein, namely the Hon. Attorney General, Ministry of Education and the Principal Secretary of Education to pay the Applicants the sum of Kes.1,579,368.00 being the decretal amount in CMCC NO. 2032 of 2017 Michael Milisi Makoma & Marni Philipina Makmorio



Mlisi (suing as the administrators of the Estate of Lucy Pius Kariuki) Deceased vs The Attorney General and Daniel Wanjohi Kithaka together with interest at 12% per annum from 19th December 2022 until payment in full.

3. That the respondents herein bear the costs of this application.”
2. The application is based on an affidavit verifying the facts relied upon sworn by Mami Philipina Makmario Mlisi on 15 September 2023. It is also based on a statutory statement of even date.
3. According to the applicants, on 10 November 2021, they obtained a judgment against the 1st Respondent in Mombasa Chief Magistrates’ Court Civil Case No. 2032 of 2017; Michael Milisi Makoma & Mami Philipina Makmorio Mlisi (suing as the administrators of the Estate of Lucy Pius Kariuki) Deceased v The Attorney General and Daniel Wanjohi Kithaka.
4. The judgment was for the sum of Kshs. 1,410,150/=. Subsequently, and more particularly on 19 December 2022, the applicants obtained a certificate of order against government for the sum of Kes.1,579,368.00.
5. The 1st respondent was served with the certificate of order against government but has since neglected or refused to settle the claim hence this suit.
6. The respondents did not file any response to the application.
7. It is not in doubt that execution or attachment of property is one of the ways through which decrees or orders are enforced. But the Government is protected from such process of execution or attachment or other similar process in enforcement of decrees or orders. This protection is encapsulated in section 21 of the [Government Proceedings Act](#), in particular, section 21(4) thereof. That section reads 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.

8. In the face of this protection from execution or attachment, the only available route open to the applicants is to compel the accounting officer of the parent ministry or the government department on whose behalf the 1st respondent was sued to perform his statutory duty under section 21(3) of the Act and pay what has been decreed as due and owing to the applicants. In other words, only the order of mandamus would be the appropriate order in the circumstances.

9. According to Halsbury's Laws of England/Judicial Review (volume 61 (2010) 5th Edition)/5. Judicial Remedies/ (1) introduction paragraph 689:

“A mandatory order is, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal requiring him, or them, to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty (See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL). The breach of duty may be a failure to exercise a discretion, or a failure to exercise it according to proper legal principles.”

This is reiterated in paragraph 703 which states:

“A mandatory order is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or it to do some particular thing specified in the order which appertains to his or its office and is in the nature of a public duty... the purpose of a mandatory order is to compel the performance of a public duty, whether of an inferior court or tribunal to exercise its jurisdiction, or that of an administrative body to fulfil its public law obligations. It is a discretionary remedy.”

10. And with particular reference to public officers who, like in the instant case, fail to perform their public duty, paragraph 706 is clear that a mandamus order may be issued to compel them to carry out the duty. It reads as follows:

“

“706. Public duties by government officials.

If public officials or public bodies fail to perform any public duty with which they have been charged, a mandatory (mandamus) order may be made to compel them to carry out the duty (See *R v Metropolitan Police Comr, ex p Blackburn (No 3)* [1973] QB 241, [1973]



1 All ER 324, CA; R v London Transport Executive, ex p GLC [1983] QB 484, [1983] 2 All ER 262, DC.)”

11. Besides service of the certificate of order against the Government, it is not contested that the applicants have complied with the rest of the conditions prescribed in section 21 of the *Government Proceedings Act*. To be precise, there is no evidence that the applicants defaulted in any other step prescribed under this provision of the law as to disentitle them to the order of mandamus.
12. A demand for payment having been made and the 3rd respondent having failed to pay; no other evidence is required to demonstrate that the 3rd respondent has failed to perform a public duty with which he is charged under section 21(3) of the *Government Proceedings Act*. A mandamus order would properly issue in such circumstances.
13. Accordingly, I allow the applicant’s application to the extent that the order of mandamus is hereby granted compelling the 3rd respondent, to pay the applicants in terms of the certificate of order against the government dated 19 December 2022. The applicant will also have costs of the application. It is so ordered.

DATED, SIGNED AND DELIVERED ON 14 FEBRUARY 2025

NGAAH JAIRUS

JUDGE

