



REPUBLIC OF KENYA



**Mwatsama v Attorney General & another (Judicial Review Application 259 of 2019)
[2025] KEHC 3634 (KLR) (Judicial Review) (24 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3634 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION 259 OF 2019
RE ABURILI, J
MARCH 24, 2025**

BETWEEN

CLEMENT MWATSAMA APPLICANT

AND

**THE HON ATTORNEY GENERAL 1ST RESPONDENT
PRINCIPAL SECRETARY, MINISTRY OF TOURISM AND
WILDLIFE 2ND RESPONDENT**

JUDGMENT

1. The applicant herein Clement Mwatsama is holding a decree issued in the Chief Magistrate's Court at Milimani CMCC NO. 10870 of 2003 on 4/3/2010 which decree was escalated to the High Court on appeal vide Milimani HCCA No. 117 of 2010. The appeal was dismissed with costs to the applicant herein. The initial decree was for Kshs 1,536,592.09, inclusive of interest and costs of Kshs 93,134.66 making it Kshs 1,735,228.75, plus taxed costs awarded in the High Court on appeal being Kshs 105,502 on 20th July 2020 all totaling the sum of Kshs 1,805,612.98 against the Attorney General on behalf of the State Department of Tourism and Wildlife.
2. The applicant obtained certificate of order against the Government pursuant to Order 29 Rule 3 of the Civil Procedure Rules on 20th July 2020 and to date, no efforts have been made to settle the decree now spanning 15 years while the interest continues to accrue at the rate of 12% per annum.
3. By these proceedings, therefore, the applicant decree holder seeks judicial review orders of mandamus to compel the Principal Secretary, who is the Accounting Officer of the Ministry of Tourism and Wildlife to settle the said outstanding decree.



4. The application for mandamus, pursuant to leave granted by the court is dated 18th February, 2023 supported by the statutory statement, verifying affidavit and annexures which include the original decree, certificate of costs in the High Court on the dismissed appeal and the certificate of order against the Government. The applicant also annexes the demand notices issued to the respondents seeking for settlement of the decree.
5. The application was served on the respondents and from the court record, the litigation counsel has been notifying the court each time that the matter came up for hearing, that the office of Attorney General had notified the Ministry to settle the decree and seeking for time to follow up on payment.
6. The respondents were nonetheless granted the opportunity to file their replying affidavit to the application and they filed grounds of opposition dated 3rd February 2025 contending that the Attorney General is not liable to settle the decree hence no mandamus can issue against that office. That the 2nd respondent had not willfully neglected to settle the decree but that it had been facing budgetary constraints. That the 2nd respondent sought and obtained approval from the National Treasury to settle the decree subject to availability of funds. That once the funds are made available by the National Treasury, the 2nd respondent shall settle the decree.
7. The application was argued orally reiterating their respective positions as pleaded with the applicant lamenting that his right to the enjoyment of the fruits of the lawful judgment have been curtailed by the respondents' failure to settle decree while the respondents reiterated that once funds are made available, the decree shall be settled.

Determination

8. I have considered the application for mandamus as pleaded and argued by both parties. There issue for determination is whether the application is merited.
9. There is no dispute that a decree exists in favour of the applicant against the 2nd respondent and that the Attorney General was only sued in the primary proceedings pursuant to the provisions of the [Government Proceedings Act](#), Cap 40 Laws of Kenya, on behalf of the Ministry of Tourism and Wildlife, as the Government's legal representative in civil proceedings.
10. Further, it is not in dispute that where the Attorney General is only sued as the Principal Legal Advisor to the Government and therefore, where decree issued, it cannot be executed against that office unless the cause of action directly arose from acts or omissions of that office.
11. No execution of decree by way of attachment and sale can be made against the Government. Section 21(4) of the [Government Proceedings Act](#) pronounces that position clearly as follows:

“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 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.”
12. The rationale for this law was succinctly stated in *Kisya Investments Ltd vs Attorney General & Another* [2005] 1 KLR 74 by the High Court comprising Ibrahim and Visram JJ(as they were then) as follows:

“History and rationale of government's immunity from execution arises from the following...Firstly, there has been a policy in respect of Parliamentary control over revenue



and this is three fold and is exercised in respect of (i) The raising of revenue (by taxation or borrowing);(ii)Its expenditure; and (iii) The audit of public accounts. The satisfaction of decree or judgments is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government's expenditure. It is for this reason that Section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the monies provide by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorized by statute, and any unauthorized payment may be recovered. As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (Section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that parliament is very jealous of its control over the expenditure and this is as it should be. No ministry or department has any ready funds at all times to satisfy decrees or judgments- while existence of claims and decrees may be known to the ministries and departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the government expenditure. The second situation, which arises from the above, is that once a decree or judgment is obtained against the government, it would require some reasonable time to have it forwarded to the Ministry of Finance, Treasury, Controller and Auditor General etc for scrutiny and approvals for it to be paid from the consolidated fund. The Ministries and Departments do not have their "own" funds to settle such decrees or payments and considering the nature of the government structure, procedures, red tape and large number of claims, this could take a long time. If execution and or attachment against the government were allowed, there is no doubt that the government will not be able to pay immediately upon passing of decrees and judgments and will be inundated with executions and attachments of its assets day in day out. Its buildings will be attached and its plans and equipment will be attached, its vehicles , aircraft, ships and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer's hammer.

No government can possibly survive such an onslaught. The government and therefore the state operations will ground to a halt and paralysed and soon the government will not only be bankrupt but its constitutional and statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the law that prohibits execution against and attachment of the government assets and property."

13. Thus, the Civil Procedure Act and Rules, in line with the above provisions of the law as pronounced by the courts do not permit execution against the Government including County Governments and therefore the only remedy available to the decree holders against the Government is the remedy of Judicial Review by way of an order of mandamus to compel the Government and more particularly the Accounting Officers of the relevant State Departments to settle the decree of the court.
14. In Republic V Attorney General Exparte James Alfred Koroso JR 44/2012 Odunga J (as he then was in the High Court) added his voice to the question of how a decree against the Government can be settled through execution process and stated:

"...in the present case, the exparte applicant has no other option of realizing the fruits of this judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that he has been awarded is realized. Unless something is done he will forever be left babysitting his barren decree. This



state of affairs cannot be allowed to prevail under our current constitutional dispensation in light of 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 judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks 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 or 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...The institution of Judicial Review proceedings in the nature of mandamus cannot be equated with execution proceedings. In seeking an order of mandamus the applicant is seeking, not relief against the Government, but to compel a government official to do what the government, through Parliament, has directed him to do. The relief sought is not execution or attachment or process in the nature thereof. It is not sought to make any person “individually liable for any order for any payment,” but merely to oblige a government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty case upon him by Parliament. The fact that an Accounting Officer is not distinct from the state of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In mandamus cases it is recognized that when statutory duty is cast upon a public officer in his official capacity and the duty is owed not to the state but to the public, any person having a sufficient legal interest in the performance of the duty may apply to the courts for an order of mandamus to enforce it.

In other words, mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the state, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of the order of mandamus, his/her action amounts to insubordination and contempt of court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the court’s displeasure at the failure by a servant of the state to comply with the directive of the court given at the instance of the Republic employer of the concerned public officer and to uphold the dignity and authority of the court.”

15. From the above statutory and judicial pronouncements, which restate the law, it is clear that the only remedy available to such a decree holder as the *ex parte* applicant herein against the Government is judicial review remedy of mandamus to compel the Accounting Officer of the relevant Ministry or State Department to settle the material decree.
16. In the instant case, the respondents do not dispute the decree. They acknowledge the indebtedness in terms of the primary decree in the lower court and the decree for costs as taxed in favour of the applicant in the High Court on appeal. All they respondents are and have been saying for the last fifteen years is that they need time to settle because of budgetary constraints although the National Treasury has approved payment subject to availability of funds.



17. That may be so, that indeed, payment requires money. However, surely, a 15 year old decree? Has the Ministry never received any exchequer for the last fifteen years and is this the first time it is hearing of this decree in a case it went on appeal to challenge Judgment and the award made to the applicant herein? Is it fair to the applicant decree holder?
18. The applicant who is the decree holder has rights which have crystallized, to enjoy the fruits of his lawful judgment and those rights must not be curtailed. That right must be safeguarded and enforced by the court as espoused in Article 159(2) (a) and (b) of *the Constitution* that justice shall be administered without delay, and the applicant's right to access Justice under Article 48 of *the Constitution* as guaranteed must be respected and protected by all. However, those rights have remained a mirage for the last fifteen years as the applicant has been carrying what appears to be a paper decree.
19. It is not in doubt that the 2nd respondent is under a public duty to settle decree of the court made in favour of the exparte applicant against the 2nd respondent, fifteen years ago and that non settlement of such decrees is what makes many Kenyans disillusioned with the court or judicial system, claiming that the courts delay in the dispensation of justice, yet the case was determined long ago and what is pending is the post judgment decree for settlement.
20. It is expected that judgment debtors settle decrees once judgment is rendered and, in this case, an appeal was preferred by the respondents, which appeal was dismissed in 2019. To date, the respondents are still saying that they are willing to settle decree but that they have not secured funding. What an irony and a mockery of justice? Is it right to make a justice seeker to remain a mere pious explorer in their pursuit of justice and remain in the corridors of justice forever?
21. Sadly, the courts will continue to bear the brunt of alleged delayed justice as decrees against the Governments remain unsettled forever. Courts adjudicate over disputes and determines the merits thereof upon which decrees are executed in the manner provided for in law.
22. In this case, the law provides that where there is no payment made, only mandamus can issue to ensure that justice may eventually be served because there is no other remedy available to the decree holder/ applicant.
23. The decretal sum due to the exparte applicant continues to increase due to the accruing interest and costs, which figure is skyrocketing at the expense of the Kenyan citizen and tax payer, as long as the decree remains unsettled.
24. In view of the foregoing, the respondents cannot be heard to say that they have no money to settle the decree together with certificate of stated costs since 4th March, 2010 when judgment was rendered and decree first issued in the judgment of the lower court in Milimani CMCC No. 10780 of 2003, a suit filed over twenty years ago.
25. The defence of non-allocation of funds and waiting for such allocation in the financial year which is almost coming to an end in June is indeed no excuse for non-payment or commitment to pay since 2010. In Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] e KLR, Githua J expressed herself as follows on that issue of non-allocation and I agree with her, especially, considering the period that it has taken for the respondents to settle the decree:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like



any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. 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. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.” [Emphasis mine].

26. I associate with the said decision and add that settlement of decretal sum by the Government whether National or County does not necessarily depend on the financial year’ allocation, where there has been a pending unsettled decree for many years and in this case, noting the time it has taken for the applicant to reach this point. Making funds available for settlement of decrees is the responsibility of the accounting officer who has been sitting on this decree for over 15 years. Has the accounting officer not been procuring goods and services for the Ministry over the years, does the accounting officer not have an annual budgetary plan and do they not audit the cases that are pending in court and know which ones have been determined and where settlement is not made, a matter is followed through for funds to be made available for settlement?
27. In Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012 this Court pronounced itself as follows:
- “I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly, I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein.”
28. In other words, it cannot be said that this court has not been sensitive to the question of availability of funds, it has given the respondents ample time to settle the decree but the respondents appear to be playing ping pong with the court as it frustrates the decree holder from realizing the decree.
29. Thus, a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations even by instalments while staying afloat. A payment plan would



be the best. This court does not rejoice in seeing public officers being held in contempt of court orders and warrants of arrest being issued time and again.

30. It is not unusual to find over ten warrants of arrest against one public officer and the question is, where does such an officer get funds from, to settle all those decrees at once to escape the penalty that comes with being convicted and sentenced for contempt of Court? In my view, the Government needs to come up with a proper plan for settling of decrees. Parliament on the other hand legislates and the laws as enacted are the ones that give courts the power to issue the orders that have to be enforced. It follows that Parliament should at all times be alive and sensitive to budgets presented before them and to allow governments or government departments to function without hurdles being experienced by accounting officers, regarding settlement of decrees.
31. It follows that financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the 2nd Respondent herein being the accounting officer to settle a sum decreed by the Court to be due from the Ministry.
32. That being the case, the order that commends itself in these Judicial Review proceedings is a Judicial Review order of mandamus compelling the 2nd respondent Principal Secretary, Ministry of Tourism and Wild Life to settle decree in the sum of Kshs 1,735,22.75 being an award made in Milimani Commercial CC No. 10870 of 2003 inclusive of costs on appeal in HCCA 117 of 2010.
33. A decree for mandamus to issue plus a certificate of order against the government in these proceedings. The 2nd respondent is hereby given 90 days of today to settle the decree and in default, the applicant is at liberty to apply for appropriate penal orders as provided for in the law noting that the interest and costs of filing further applications for contempt presents more financial burdens to the tax payers.
34. The applicant will have costs of these judicial review proceedings.
35. Mention on 23rd June, 2025 to confirm settlement of decree.

DATED, SIGNED & DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF MARCH, 2025

R.E. ABURILI

JUDGE

