



**Republic v County Government of Mombasa & 3 others; Bayview  
Real Estate Limited (Exparte Applicant) (Miscellaneous Application  
E006 of 2024) [2025] KEHC 5673 (KLR) (24 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 5673 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MOMBASA**  
**MISCELLANEOUS APPLICATION E006 OF 2024**  
**OA SEWE, J**  
**MARCH 24, 2025**  
**IN THE MATTER OF SECTIONS 8, 9 & 10 OF THE LAW**  
**REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**  
**AND**  
**IN THE MATTER OF SECTION 21 OF THE GOVERNMENT**  
**PROCEEDINGS ACT, CHAPTER 40 OF THE LAWS OF KENYA ON THE**  
**SATISFACTION OF ORDERS AGAINST THE COUNTY GOVERNMENT**  
**AND**  
**IN THE MATTER OF THE POWERS OF THE COUNTY CHIEF**  
**FINANCE OFFICER TO SETTLE THE CERTIFICATES OF ORDER**  
**AND COSTS AGAINST THE COUNTY GOVERNMENT OF MOMBASA**  
**AND**  
**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**  
**ORDERS OF MANDAMUS AGAINST THE CHIEF FINANCE**  
**OFFICER OF THE COUNTY GOVERNMENT OF MOMBASA**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> RESPONDENT**  
**THE CHIEF OFFICER, FINANCE, COUNTY GOVERNMENT OF**  
**MOMBASA ..... 2<sup>ND</sup> RESPONDENT**



**THE COUNTY ATTORNEY, COUNTY GOVERNMENT OF  
MOMBASA ..... 3<sup>RD</sup> RESPONDENT  
COUNTY GOVERNMENT OF MOMBASA ..... 4<sup>TH</sup> RESPONDENT  
AND  
BAYVIEW REAL ESTATE LIMITED ..... EXPARTE APPLICANT**

**JUDGMENT**

1. The Notice of Motion dated 22<sup>nd</sup> July 2024 was filed by the ex parte applicant, Bayview Real Estate Limited (hereinafter, “the applicant”) pursuant to Section 21 of the Government Proceedings Act, Sections 8, 9 and 10 of the Law Reform Act, Chapter 26 of the Laws of Kenya and Order 53 Rule 3 of the Civil Procedure rules, 2010. The applicant thereby prayed that:
  - (a) An order of Mandamus be issued directed at the Chief Officer of Finance of the County Government of Mombasa, compelling her to exercise her powers under Section 21 of the Government Proceedings Act (“the Act”) and specifically to satisfy the Certificates of Order and Costs against the Government both dated 25<sup>th</sup> June 2024 amounting to Kshs. 19,026,720/= in favour of the applicant.
  - (b) That the costs of the application be provided for.
2. The application was premised on the grounds that the application obtained a decree and costs against the County Government of Mombasa, 1<sup>st</sup> respondent herein, all amounting to Kshs. 19,026,720/= as at 25<sup>th</sup> June 2024. The applicant contended that attempts to have the 1<sup>st</sup> respondent pay the said amount amicably have proved futile; and that the continued non-payment of the outstanding amount denies the applicant the enjoyment of the fruits of its judgment. It was therefore the assertion of the applicant that the only avenue available for the recovery of the outstanding sums from the 1<sup>st</sup> respondent is through these judicial review proceedings; and that unless the Court intervenes by way of an Order of Mandamus, the debt shall remain unpaid indefinitely and shall continue accruing interest to the great prejudice of the applicant.
3. The application was premised on the Supporting Affidavit sworn on 22<sup>nd</sup> July 2024 by Mr. Daniel Njoroge Kihiko, a director of the applicant. The applicant thereby confirmed that the said application was filed pursuant to the leave granted on 18<sup>th</sup> July 2024. The applicant relied on the facts as set out in the Statement of Facts and the Verifying Affidavit filed in support of the application for leave. It annexed copies of the Order granting leave, the Decree and Certificate of Costs issued on 25<sup>th</sup> September 2019 in Mombasa CMCC 1966 of 2018: Bayview Real Estate Ltd v County Government of Mombasa to the Supporting Affidavit and marked Annexures “DN-1” and “DN-2”.
4. Further to the foregoing, the applicant averred that it applied for and obtained a Certificate of Order and a Certificate of Costs against the Government dated 25<sup>th</sup> June 2024 and served the same on the respondent for settlement. Copies of the two documents were annexed to the Supporting Affidavit and marked Annexures “DN-3”. The applicant further averred that, despite service of the said Certificates, the respondents have refused, neglected and failed to settle the long overdue amount, necessitating the instant proceedings.
5. It was in the light of the foregoing that the applicant prayed for the orders sought, positing that unless the Court intervenes and issues an Order of Mandamus to compel the 2<sup>nd</sup> respondent, being the Chief



- Finance Officer of the 1<sup>st</sup> respondent, to pay the outstanding sum of Kshs. 19,026,720, the same shall continue to remain unpaid to his prejudice.
6. The respondents opposed the application. They relied on the Grounds of Opposition dated 3<sup>rd</sup> October 2024 and contended that:
    - (a) The application offends Section 45(4) of the County Government Act in that it cannot found a cause of action by instituting a suit against the wrong party.
    - (b) the application offends Section 148 of the Public Finance Management Act.
    - (c) The application offends Section 103 of the Public Finance Management Act.
  7. In response to the respondents' Grounds of Opposition, the applicant filed a Supplementary Affidavit sworn on 14<sup>th</sup> October 2024 confirming that the current Accounting Officer of the 1<sup>st</sup> respondent.
  8. The application was canvassed by way of written submissions, pursuant to the directions given herein on the 19<sup>th</sup> September 2024. The applicant relied on its written submissions dated 16<sup>th</sup> October 2024. Hence, the applicant proposed a single issue for determination, namely, whether the application dated 22<sup>nd</sup> July 2024 meets the threshold for granting the Judicial Review Order of Mandamus.
  9. The applicant urged the Court to take into consideration that there is no dispute that the 1<sup>st</sup> respondent owes it Kshs. 19,026,720/= pursuant to the Decree issued by a competent court of law; or that service of the Certificates of Order against the Government in respect of both the decretal sum and costs were duly served on the 1<sup>st</sup> respondent. In response to the assertion by the respondents that the applicant sued the wrong party, the applicant relied on Order 1 Rule 9 of the Civil Procedure Rules which states that:

No sui shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”
  10. The applicant also relied on Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County, Ex Parte Stanley Muturi [2017] eKLR in which it was held that misjoinder, of the sort complained of herein, is not necessarily fatal to the suit. The applicant further contended that it was for the respondent to prove that the 2<sup>nd</sup> respondent is not the Accounting Officer for the 1<sup>st</sup> respondent. The applicant also relied on Republic v County Executive Committee Member, Build Environment and Urban Planning Sector, County Government of Nairobi & 2 others; Waas Enterprise (Ex Parte Applicant) (Miscellaneous Application 22 of 2023) [2023] KEHC 25954 (KLR) wherein it was affirmed that the Chief Office of Finance is an accounting officer of the County Government.
  11. On the authority of Republic v Chief Officer, Finance, Kisumu County Government; Ex Parte Applicant: Caroline Achieng Ngare [2020] eKLR, the applicant submitted that judicial review remedy of Mandamus is a mechanism for compelling the officers of the government entity to pay; and is not of itself a mode of execution against the officer concerned in his personal capacity.
  12. In response to the applicant's written submissions, the respondents filed written submissions dated 3<sup>rd</sup> October 2024. In support of their contention that the application offends Section 45(4) of the County Government Act, the respondents submitted that the Chief Officer only exercises delegated powers and is therefore not the Accounting Officer. They relied on Soloh Worldwide Inter-enterprises v the County Secretary, Nairobi City County & another [2016] eKLR and Council of Governors & others v the Senate [2015] eKLR in which it was held that the Accounting Officer for a County Government



is the County Executive Member for Finance and not the Chief Officer for Finance, unless otherwise shown.

13. In the light of the foregoing, there appears to be no dispute that the applicant obtained a Decree in its favour in Mombasa CMCC No. 1966 of 2018; and that the costs were thereafter assessed and certified; such that, as at 25<sup>th</sup> June 2024, the total decretal sum due from the 1<sup>st</sup> respondent to the applicant stood at Kshs. 19, 026,720/=. There was credible proof that the applicant applied for and obtained Certificates of Order against the Government, not only for the principal sum, but also for the certified Costs. Copies thereof were annexed to the applicant's Supporting Affidavit.
14. There being no indication that the decision of the Magistrate's Court in Mombasa CMCC No. 1966 of 2018 was set aside on appeal or review, or that the Decree and Certificate of Costs have been settled I am satisfied that the 1<sup>st</sup> respondent is indebted to the application in the sum aforementioned. Accordingly, the applicant had no other option of realizing the fruits of his judgment other than by way of an Order of Mandamus. This is because Section 21(4) of the Government Proceedings Act is explicit that:
  - (4) ...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."
15. The foregoing state of affairs was aptly captured in in Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza (Miscellaneous Application 31 of 2012) [2012] KEHC 1643 (KLR) (25 September 2012), as follows:

"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..."
16. In the premises, Section 21 of the Government Proceedings Act sets out the applicable procedure for settlement of debts against the Government as follows in Subsections (1), (2) and (3):
  - (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.

17. That the above provisions are equally applicable to County Governments is explicit in Subsection (5). It states:

- (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.

18. The rationale for this stringent procedure was well captured in *Kisya Investments Ltd v Attorney General & Another* [2005] 1 KLR 74 thus:

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 threefold 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 decrees or judgements 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 moneys provided 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 authorised by statute, and any unauthorised payment may be recovered. SEE HALSBURY'S LAWS OF ENGLAND 4<sup>TH</sup> EDN VOL. 11 PARA 970, 971 AND 1370. 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 judgements. 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. SEE AUCKLAND HARBOUR BOARD VS.R (1924) AC 318, 326. The second situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the ministry of Finance, Treasury, Comptroller 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 judgements and will be inundated with executions



and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship 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 paralyzed and soon the Government will not only be bankrupt but it's 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.” (also see Republic v Permanent Secretary Office of the President Ministry of Internal Security & Another, Ex Parte Nassir Mwandishi, supra)

19. In the premises, the only issues arising herein for determination are:

- (a) Whether this is a case of misjoinder and whether the Chief Officer for Finance, the 2<sup>nd</sup> respondent herein, is the Accounting Officer of the County Government of Mombasa; and if so,
- (b) Whether the orders sought ought to issue.

**A. On whether the Chief Officer for Finance is a proper party to these proceedings:**

20 Section 103 of the Public Finance Management Act, provides as follows:

- (1) There is established for each county government, an entity to be known as County Treasury.
- (2) The County Treasury shall comprise—
  - (a) the County Executive Committee member for finance;
  - (b) the Chief Officer; and
  - (c) the department or departments of the County Treasury responsible for financial and fiscal matters.
- (3) The County Executive Committee member for finance shall be the head of the County Treasury.

21. In the same vein, Section 148 of the Public Finance Management Act states that:

1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.
2. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.

22. From the foregoing provision, it is plain that the Accounting Officer is the County Executive Committee Member for Finance, unless otherwise demonstrated. The same view was taken in Republic v County Secretary, Nairobi City County & Chief Officer, Finance/Nairobi City County Treasurer ex-parte Mohamed Tariq Khan (supra) in which it was held: -

8. It must however be remembered always that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound



to comply with the orders sought therein. In this case the Respondent ought to have been the Accounting Officer who is the County Executive Member for Finance.

23. Similarly, in *Council of Governors & Others v The Senate* [2015] eKLR, at paragraphs 134 to 137, a three judge bench of the High Court grappled with the question as to who is an accounting officer for purposes of the County Government entities. Here is what the Court had to say:

134. The Petitioners have also sought the interpretation of the term “Accounting Officer”. In that regard, Article 226 of the Constitution provides;

- (1) Act of Parliament shall provide for –
  - (a) ....
  - (b) The designation of an accounting officer in every public entity at the national and county level of government
- (2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

Pursuant to this provision, Parliament enacted the Public Finance Management Act. The appointment and designation of a County Government Accounting Officer is provided for under Section 148 of that Act, as follows;

1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.
2. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.

135. It therefore follows that “an accounting officer” for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the Public Finance Management Act. Indeed, Section 148 (3) of the Public Finance Management Act mandates the County Executive Committee Member for Finance to ensure that each County government entity has an accounting officer as provided for under Article 226(2) of the Constitution.

136. As regards the accounting officer for the County Assembly, Section 148(4) of the Public Finance Management Act provides that;

The Clerk of the County Assembly shall be the accounting officer of the County Assembly”.

137. Having found as we have, it follows that the question posed by the Petitioners as to whether the County Governor is an Accounting Officer, must be answered in the negative. He is not an Accounting Officer and we have said why.”

24. It is plain therefore that, in the absence of proof of appointment by the County Executive Committee member for Finance of the accounting officer for the County Government of Mombasa, as is the case herein, the proper person to look to for the settlement of debts owing from the County Government of Mombasa is the County Executive Committee member for Finance. Indeed, in *Republic v Kisii*



County Government Ex-Parte Peter Kaunda Nyamosi & 2 others [2018] eKLR, the position taken was:

25. It is therefore clear that the accounting officer for the County Government is the County Executive Member for Finance. Since the order of mandamus was against the County Government, I do not think that this is fatal as the order of mandamus remains alive and the court may issue a notice to show cause against the accounting officer, upon whom the statutory duty is imposed, to ensure that its decision is enforced (see *Consolata Kihara & 21 Others v Director of Kenya Trypanosomiasis Research Institute* [2003] KLR 582 and *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi)* NBI HC Misc. App. 222 of 2016 [2018] eKLR).”
25. The same position was taken in *Soloh Worldwide Inter-Enterprises v County Secretary Nairobi County & another* [2016] eKLR thus:
  17. “It therefore follows that the person who has the overall financial obligation for the purposes of the affairs of a County Government must be the County Executive in Charge of Finance and unless he shows otherwise, he is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In an application for mandamus where orders are sought to compel the satisfaction of a decree against a County Government, the proper person to be a respondent ought to be the said County Executive in Charge of Finance unless he discloses that he had in fact appointed an accounting officer for that purpose...”
26. In arriving at the foregoing conclusion I have taken into account the arguments advanced by the applicant on misjoinder. I have given consideration to the persuasive decision of Hon. Odunga, J. (as he then was) in case of *Republic v The County Chief Officer, Finance & Economic Planning, Nairobi City County Ex Parte Stanley Muturi* (supra) that misjoinder ought not to be fatal to an application for Mandamus. The applicant relied on paragraphs 20 to 24 of that decision in which the Court held:
  20. It is true that the County Executive in Charge of Finance is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In this case the Respondent ought to have been the Accounting Officer.
  21. However, as this is merely a misjoinder the same ought not to be fatal to the application though the Court may in exercise of its discretion deny the applicant, even if successful, costs of the application. An issue as to the effect of misjoinder in judicial proceedings was the subject of determination in *Republic Ex Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005* in which the Court of Appeal stated:

Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”. [Emphasis added].



22. This was the position adopted in *Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute Nairobi* H.C. Misc. Appl. No. 594 of 2002 [2003] KLR 582, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation. This position is even more relevant to proceedings in the nature of judicial review which are neither criminal nor civil and particularly in application for mandamus where what is sought is the enforcement of a decree against the respondent not in his personal capacity but in his official capacity. In such circumstances, the respondent is simply being compelled to facilitate the payment as opposed to imposing personal liability.
23. It is therefore my view that whereas misjoinder or non-joinder may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed where the substance of the reliefs sought can still be realised notwithstanding the irregularity.
24. Article 159(2)(d) of the Constitution enjoins this Court to administer justice without undue regard to technicalities of procedure, as long as the rules of natural justice are adhered to. At the end of the day the entity which is bound to settle the decree is the County Government and not the said officer in his personal capacity. Misjoinder of parties in County Governments was also considered in *Council of Governors & Others vs. The Senate* Petition No. 413 of 2014 where it was held that:
- “...the role of the Governor under Section 30(3) (f) of the County Governments Act is critical in fiscal management at the County level. He is the Chief Executive Officer and the buck stops with him in the management of county resources. It is critical that such a provision exists so as to ensure responsibility of public resources which would ultimately enhance the national values as provided for under Article 10 of the Constitution as well as the spirit and tenor of constitution.”
27. It is instructive to note that in the above case the application was for contempt of court; and the court noted at paragraph 18 that the stage for challenging the grant of the order of Mandamus had passed. It is therefore understandable that the issue of misjoinder was treated as not being fatal to the application. In any case, the authority is merely persuasive and not binding on the Court.
28. For the reasons aforementioned and the authorities relied on at paragraphs 25 to 29 of this Judgment, I take the view that an order of Mandamus can only issue to the duty bearer, who, in Section 21 of the Government Proceedings Act is identified as the Accounting Officer. In so far as it has not been demonstrated that the 2<sup>nd</sup> respondent is the Accounting Officer for the 1<sup>st</sup> respondent, this suit is misconceived. It is hereby struck out with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF MARCH 2025.**

**OLGA SEWE**

**JUDGE**

