



Nyukuri v Principal Secretary, Ministry of Interior & Co-ordination of National Government & another (Judicial Review Application E085 of 2024) [2025] KEHC 5989 (KLR) (Judicial Review) (14 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5989 (KLR)

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

JUDICIAL REVIEW APPLICATION E085 OF 2024

RE ABURILI, J

MAY 14, 2025

BETWEEN

BARASA KUNDU NYUKURI APPLICANT

AND

THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The Notice of motion dated 29th April 2024 was filed pursuant to leave of court granted on 24th April 2024, permitting the applicant to apply for judicial review orders of mandamus to compel the 1st respondent Principal Secretary, Ministry of Interior and Coordination of National Government to settle decree in Nairobi HC JR E1089 of 2020 Republic v the Director of Public Prosecutions & 2 others Exparte Barasa Kundu Nyukuri, in the sum of Kshs 1,543,758 being costs awarded in the said matter to the exparte applicant who is the applicant herein, vide certificate of order of costs against the government dated 18th December, 2023.
2. The applicant also prays for costs of this application.
3. The application is supported by the grounds on the face of the Notice of Motion, the statutory statement and the verifying affidavit sworn by the applicant on the 2nd April, 2024.
4. The applicant's case is that following the decision by the Director of Public Prosecutions and the DCI to institute criminal proceedings against him in Kibera CMCR Case No. E842 of 2020, the applicant challenged that prosecution vide HC JR No. E1089 of 2020 which challenge was successful with the



court quashing the criminal proceedings and prohibited the respondents therein from charging the applicant with offences relating to possession of file Reference No. CS/CO/OL in respect of budget responses of 2020-2021 for public administration and ICT respecting Bungoma County Assembly. That the Court also awarded the applicant costs of the application.

5. That subsequently, the applicant filed his bill of costs which were taxed and a certificate of costs issued dated 23rd November 2023 following the ruling on taxation dated 14th November, 2023.
6. That in compliance with section 21 of the *Government Proceedings Act*, the applicant obtained a certificate of order of costs against the Government dated 18th December, 2023 and served the same upon the Attorney General vide letter dated 6th February 2024 demanding for settlement of the taxed costs but that to date, there has been no compliance hence this application for mandamus to compel the Accounting Officer to perform his statutory duty as stipulated in section 21 of the *Government Proceedings Act*. The judgment, certificate of costs, ruling and certificate of order against the Government are all annexed to the applicant's affidavit.
7. The respondents filed grounds of opposition dated 18th March 2025 contending that they have not refused to pay the costs willfully but that they were facing budgetary constraint. That they had sought authority from Treasury to pay and once funds are available, the decrees will be settled hence the orders sought should not be granted at the moment.
8. The application was argued orally with the respective parties' counsel reiterating their pleadings, with the applicant's counsel submitting that the respondents do not deny that the costs are unsettled but that they had not demonstrated any efforts made to settle the same.

Analysis and Determination

9. I have considered the exparte applicant's notice of motion, the supporting documents, statutory statement and verifying affidavit. I have also considered the grounds of opposition and the respective parties' advocates oral submissions. The issue for determination is whether the orders sought are available to the exparte applicant.
10. Section 21(4) of the *Government Proceedings Act* provides:

“(4) (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 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.”
11. In *Kisya Investments Ltd vs Attorney General & Another* [2005] 1 KLR 74 the High Court comprising Ibrahim and Visram JJ(as they were then) held that:

“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 paralyzed 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.”

12. In view of the above position which I concur with, the Civil Procedure Rules 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 Officer of the relevant State Department to settle the decree of the court.

13. Order 29 Rule 2 of the Civil procedure Rules provides that:

“No order against the Government may be made under—

- (a) Order 14, rule 4 (Impounding of documents);
- (b) Order 22 (Execution of decrees and orders);
- (c) Order 23 (Attachment of debts);
- (d) Order 40 (Injunctions); and
- (e) Order 41 (Appointment of receiver).



14. In Republic V Attorney General Exparte James Alfred Koroso JR 44/2012 Honourable Odunga J (as he then was) 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 case 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 provisions and judicial pronouncements, it is clear that the only remedy available to a decree holder 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 costs as taxed. They, in fact, acknowledge the indebtedness in terms of the certificate of order of costs against the government which is unsettled due to budgetary constraints.
17. It therefore follows that the ex parte applicant who is the decree holder has rights which have crystallized, to enjoy the fruits of his lawful judgment by way of costs awarded to him as a successful litigant and therefore 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 which pronounces that justice shall be administered without undue delay and the applicant's right to access Justice under Article 48 of *the Constitution* promoted and protected.
18. Furthermore, there is proprietary interest in a monetary decree or certificate of costs or order for costs issued by a court of competent jurisdiction and therefore where such decree or order is not settled, then, no doubt, the right to protection of property under Article 40 of *the Constitution* is violated. There can be no better property lawfully acquired than that acquired through court process in an overt manner and due process having been followed.
19. The 1st respondent is the Accounting Officer of the Ministry against whom the costs were awarded and is therefore under a public statutory duty to settle decree or order of the court issued in favour of the ex parte applicant, in order that justice may at the end of the day be served because there is no other remedy available to the ex parte applicant.
20. Since the certificate of order for costs against the government was served upon the respondents in February 2024, there has been no payment received.
21. In view of the foregoing, the 1st respondent cannot be heard to say that they have no money to settle the certificate of order against the government. They ought to have followed the procedure that was set out in the decision that I have cited above and budgeted for the money and sought approval to pay during the last half or this ending financial year.
22. The grounds of opposition filed by the 2nd Respondent Attorney General does not demonstrate that the Ministry of Interior was ever advised and that they have since sought out the National Treasury for authority to settle the taxed costs. The respondents' counsel was submitting from the bar, which this court does not buy in that any efforts have been made to call for the funds to settle these costs.
23. That being the case, the order that commends itself in these Judicial Review proceedings is a Judicial Review order of mandamus compelling the 1st respondent principal Secretary, Ministry of Interior and coordination of national government or its successor in title to certificate of order of costs against the Government dated 18th December, 2023 amounting to Kshs 1,543,758.
24. In the end, I find this application for Judicial Review to be merited and I proceed to grant and issue the order of Mandamus compelling the Principal Secretary, who is the Accounting Officer of the Ministry/ State Department, Ministry of Interior and Coordination of National Government or its successor in title to settle Certificate of order of costs against the Government dated 18th December, 2023 amounting to Kshs 1,543,758.
25. In default of such settlement, the ex parte applicant is at liberty to apply.
26. In view of the burden on the tax payer, each party shall bear their own costs of this application, noting that the applicant underpaid the court fees required for judicial review applications which I hereby invoke the provisions of section 96 of the *Civil procedure Act* and direct him to pay in full within ten days of today.



27. Mention on 24th June 2025 for further orders and to confirm settlement.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF MAY, 2025

R.E. ABURILI

JUDGE

