



Republic v Chief Executive Officer, Finance County Government of Mombasa; John Mbau Mburu t/a J.M. Mburu & Company Advocates (Ex parte) (Judicial Review Application 29 of 2020) [2025] KEHC 6894 (KLR) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6894 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION 29 OF 2020**

J NGAAH, J

MAY 16, 2025

BETWEEN

REPUBLIC APPLICANT

AND

CHIEF EXECUTIVE OFFICER, FINANCE COUNTY GOVERNMENT OF MOMBASA RESPONDENT

AND

JOHN MBAU MBURU T/A J.M. MBURU & COMPANY ADVOCATES EX PARTE

JUDGMENT

1. The applicant’s application is the motion amended on 25 September 2024 expressed to be brought under Order 53 Rules 3(1) and (2) of the *Civil Procedure Rules* and in which the applicant seeks the order of mandamus couched as follows:

“An Order of Mandamus do issue directed to the respondent, the Accounting Officer of the Mombasa County Government, the constitutional and legal successor of the defunct Municipal Council of Mombasa, to pay the applicant a sum of Ksh. 84,405.76 being the sum due pursuant to a decree issued on 28th January, 2019 by the High Court of Kenya at Mombasa in HC Miscellaneous Civil Application Number 400 of 2010 (*John Mbau Mburu t/a J.M.Mburu & Company, Advocates v Municipal Council of Mombasa*) plus further interest at the rate of 14 % per annum till payment in full”.

The applicant has also asked for an order for costs.



2. The application is based on a statutory statement amended on 25 September 2024 and an affidavit verifying the facts relied on sworn on even date by Mr. John Mbu Mburu.
3. According to Mr. Mburu, he represented the defunct Municipal Council of Mombasa in the Mombasa Chief Magistrates' Court Civil Case No. 2302 of 2002; *Geoffrey Inyama v Municipal Council of Mombasa*. On 22 October 2010, he filed an advocate/client bill of costs for taxation; the bill was eventually taxed at Kshs. 42,554.98.
4. The applicant then sought for judgment for this sum against the Municipal Council of Mombasa. On 4 December, 2018, judgment was entered accordingly together with interest at the rate 14 %. The sum due on account of principal plus interest as the said date was Kshs. 84,405.76 and it continues to accrue interest till payment in full.
5. On 29 March 2019, the applicant served the decree to the County Government of Mombasa, under a cover letter dated 28 March 2019 addressed to the Government's County Secretary. As at the time of filing the application, the applicant had not been paid.
6. The respondent, according to the applicant, is the accounting officer of the County Government of Mombasa which is alleged to have failed or neglected to settle the decretal sum hence the instant application.
7. The respondent opposed the motion by way of grounds of objection dated 28 September 2021. According to the respondent, the application offends Section 21 of the *Government Proceedings Act* and is inconsistent with order 29 of the *Civil Procedure Rules*. The application is also said to be contrary to section 103 of the *Public Finance Management Act* No. 18 of 2012. Finally, the application is said to be unfounded, frivolous and vexatious.
8. It is not in dispute that the County Government of Mombasa is indebted to the applicant and, therefore, ordinarily, the applicant would be entitled to execute the decree to enjoy the fruits of his judgment. This is so because execution or attachment of property is one of the ways through which decrees or orders are enforced.
9. 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.

10. The fundamental question in this application is whether the applicant has complied with this particular provision and, therefore, whether he merits the order of mandamus.
11. It is apparent that under section 21(1) of the *Act*, an officer of the court whom the law describes as “the proper officer of the court” is enjoined to issue a certificate in a prescribed form containing particulars of an order by the court for payment of costs, among other orders that the court is entitled to make. But the certificate will only be issued upon application by the party in favour of whom the order has been issued. To the extent that “the proper officer of the court” is enjoined to issue the certificate, it is a mandatory document. And since it can only be issued on application by a party in whose favour the order has been made, the application for the certificate is equally mandatory.
12. And according to section 21(2) service of the certificate on the Attorney General appears to be within the discretion of the party in whose favour the certificate has been issued. However, such a party would not go to great lengths applying for the certificate and, the proper of the court would not be enjoined by the law to issue the certificate for the sake it.
13. The point is that an application for the certificate and its issue are not futile exercises or an exercise in vain for, under section 21(3) of the *Act*, the certificate serves a specific purpose: it is on the basis of the certificate that the accounting officer for the Government department concerned makes the payment due to the person or party in the proceedings in whose favour the order was made and the certificate issued. This is what I understand to be the meaning of

“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...”



14. Apart from providing the particulars of the amount payable, the certificate, in a sense, authorises the accounting officer to make the payment due to the person that holds the order against the government.
15. It follows that where one is obliged to invoke section 21 of the *Government Proceedings Act* to enforce payment against the Government, a certificate of order against Government is mandatory and, for that reason, section 21(2) of the *Act* which appears to leave it to the holder of the certificate to either serve or not serve it to the Attorney General ought not to be read in isolation; it must be read together with section 21(3) in order to give meaning to section 21 (1), on the need for a certificate of order against Government.
16. That said, there is no proof and, it is not even suggested that the applicant sought and obtained a certificate of order against Government. That being the case, the question whether it was served or not does not even arise. The consequence is that the motion for mandamus has been made prematurely since without the having been served with the certificate, the accounting officer cannot be said to have declined to settle the decree.
17. 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.”

And in paragraph 706 of the same treatise, it is stated:

“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.)”

18. Thus, the order of mandamus may be issued in circumstances where there is failure to perform a public duty or failure to exercise discretion or to exercise it according to legal principles.
19. As noted, in the absence of the certificate of order against government, the accounting officer of the County Government of Mombasa cannot be said to have failed to perform a public duty with which he is charged and, therefore, susceptible to the order of mandamus when the certificate had not been brought to his attention.
20. For the reasons I have given, I hereby hold that the applicant’s application is incompetent and misconceived. It is hereby dismissed. Considering that the existence of the decree against the County Government has not been contested, I make no order as to costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 16 MAY 2025

NGAAH JAIRUS

JUDGE

