



Kobby Technologies Limited v Attorney General & another; Kingsway Business System Limited (Interested Party) (Judicial Review Miscellaneous Application E090 of 2025) [2025] KEHC 9713 (KLR) (Judicial Review) (7 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9713 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E090 OF 2025**

RE ABURILI, J

JULY 7, 2025

BETWEEN

KOBBY TECHNOLOGIES LIMITED APPLICANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE NATIONAL TREASURY AND PLANNING 2ND RESPONDENT

AND

KINGSWAY BUSINESS SYSTEM LIMITED INTERESTED PARTY

RULING

Ruling On Leave To Apply

1. The Applicant in its Chamber Summons application dated 8th April 2025 seeks the following prayers;

1. That leave of this Honourable Court be granted to the ex parte Applicant to apply for an order of Prohibition against the 1st Respondent and 2nd Respondent restraining and barring the payment of all monies which are due and owing from the 2nd Respondent to the Interested Party under Tender No. TNT/049/2019-2020, the Addendums thereunder and the 4th Addendum dated 14/5/2024 of Tender No. TNT/049/2019-2020 and the said debt be applied towards the settlement the Garnishee Order Absolute dated 24/2/2025 passed against the 2nd Respondent and the Certificate of Order and Costs Against the Government dated 8th April 2025 as entered in Milimani Commercial High Court Commarb/e063/2022-kobby Thechnologies Limited Versus Kingsway Business Systems Limited In favour of the ex parte Applicant against the Interested Party.



2. That leave of this Honourable Court be granted to the ex parte Applicant to apply for an order of Mandamus against the 1st Respondent and the 2nd Respondent compelling them to pay to the ex parte Applicant forthwith the decretal sum of Kshs.212,755.850/= to settle the Garnishee Order Absolute dated 24/2/2025 which was passed against the 2nd Respondent and Respondent and the Certificate of Order and Costs Against the Government dated 8th April 2025 in Milimani Commercial High Court Commarb/e063/2022 Kobby Technologies Limited Versus Kingsway Business Systems Limited out of the debt which is due and owing from the 2nd Respondent to Kingsway Business Systems Limited under Tender No. TNT/049/2019-2020 the Addendums thereunder, and the 4th Addendum dated 14/5/2024 of Tender No. TNT/049/2019-2020.
3. That the costs of this Application be paid by the Interested Party.
2. The application is verified by the affidavit of Bico Norris Hamalah sworn on 8th April 2025 and also based on the grounds contained in the statutory statement of even date.
3. A brief background of the events leading to the filing of the instant application as narrated by the Applicant is that the 2nd Respondent awarded Tender number TNT/049/2019 to the Interested Party and to the applicant for a period of 36 months with effect from March 2021 at a consideration of Kshs.647,064,000.00 out of which the Applicant's fees was Kshs.303,888,768.00.
4. The Applicant and the Interested Party then entered into a sub-contracting Agreement that was founded on the Tender. However, due to a breach of the sub-contract, a dispute arose between the two parties and pursuant to the sub-contract terms, the dispute was referred to arbitration where a Final Arbitration Award was issued on 17th October 2022.
5. The Award was recognised as an order of the court in Milimani Commercial H.C. Commercial ARB/E063/2022-Kobby Technologies Limited vs. Kingsway Business Systems Limited and a decree dated 28th July 2024 issued for the principal sum of Kshs.165,832,388/= plus interest at the rate of 12% per annum with effect from 16th November 2022 until payment in full. Costs of the suit were also issued by the Court. Party and Party costs were also taxed on 16th January 2025 at Kshs.23,169.25.
6. The Applicant then commenced garnishee proceedings against the 2nd Respondent in Milimani Commercial HCCOMMARB/E063/2022-Kobby Technologies Limited vs. Kingsway Business Systems Limited seeking for the attachment of the debt due from the 2nd Respondent to the Interested Party under Tender No. TNT/049/2019-2020 and under the 4th Addendum dated 14th May 2023. A Garnishee Order Absolute dated 24th February 2025 was issued and a certificate of costs and certificate of order against government dated 8th April 2025 also issued.
7. The ex parte Applicant's case is that the Interested Party through its Business Development Manager Mr. Kenneth Kadenge confirmed that it was yet to be paid by the 2nd Respondent the sum of Kshs.91,542,000/= and Kshs.46,464,500/= under the 4th Addendum.
8. That despite service of the Garnishee Absolute Order and a demand for payment having been issued upon the 2nd Respondent the amounts owing still remain unsettled. The Applicant states that on or about 1st April 2025 the 1st Respondent was served with a Notice of the Intention to file the instant proceedings.



Response

9. In response the Respondent filed grounds of opposition on 4th June 2025 in which it is contended that the Application does not meet the threshold of issuing the order of mandamus sought as the Attorney General is not the accounting officer in the National Treasury and there is therefore no legal/statutory duty her.
10. The Interested Party filed a Replying Affidavit sworn on 12th May 2025, deposing that although the Ex parte Applicant had been contracted to form a tri-partite consortium, it did not dutifully and diligently perform its obligations. That as evidenced by various correspondence, the Ex parte Applicant recalled its staff from the National Treasury on 15th April 2021 without any justifiable cause. This is said to have led the Interested Party to hire required consultants.
11. The Interested Party states that there is an existing appeal against the ruling of Mulwa J enforcing the award and also a pending application for setting aside the Arbitration Award in Misc. Application No.E687 of 2022.It is urged that the genesis of the protracted litigation is the failure to consolidate Misc. Application No.E687 of 2022 and High Court Arbitration No.E063 of 2022 which request, it is argued, had been made by counsel for the Interested Party to ensure that there are no conflicting decisions emanating from the High Court over related matters.
12. According to the Interested Party, it could not comply with the conditions of stay granted in High Court Civil Appeal E537/2024 owing to financial constraints and that the Ex parte Applicant has not demonstrated its ability to repay the monies if the Appeal succeeds. It is also urged that the 2nd Respondent is not amenable to judicial review as the works to be undertaken are yet to be completed.

Submissions

13. The Applicant filed two sets of submissions dated 26th May 2025 and 10th June 2025. It is the Applicant's submission that section 23 of the [Government Proceedings Act](#) provides for the attachment of money payable by the government to its creditors. The Applicant relies on the case of Multiline Services Limited vs. [Nairobi City County Government \(Judicial Review Application E025 of 2023\)](#) [2023] KEHC (KLR) (Judicial Review) (19 October 2023) (Ruling) where the court is said to have held that an award of costs formed a prima facie basis for the grant of leave to apply for an Order of mandamus.
14. On the nature of the order of prohibition and mandamus, reliance is placed in the case of Republic vs. Kenya National Examination Council ex parte Gathenji & 8 Others Civil Appel No. 234 of 1996 [1997] eKLR. The Applicant also relies on the case of Republic vs. Principal Secretary, Ministry of Interior and Co-ordination of National Government Ex parte Robert Ng'ang'a Mwangi [2022] eKLR where it is stated that the court held that whereas execution against government is not available, the Accounting Officer of any department is under a statutory obligation to satisfy a judgment of the court.
15. With regard to the late filing of the Respondents' grounds of opposition, the Applicant submits that no leave was sought for the pleadings to remain on record and as such, the grounds of opposition ought to be struck out for being incompetent and irregularly filed.
16. On the 1st Respondent's contention that it is not the accounting officer of the National Treasury and therefore ought not to have been added as a party in the instant suit, the Applicant relies on Article 156 of [the Constitution](#) on the functions of the Attorney General, section 12 of the [Government Proceedings Act](#) on parties to the proceedings, section 13 of the same Act on service of all documents related to civil



proceedings against or by the Government upon the Attorney General and section 19 of Act on Civil Proceedings against government.

17. The Applicant submits that section 21 of the [Government Proceedings Act](#) merely prescribes who is vested with the obligation to pay but that the 1st Respondent as the Chief Legal Advisor of the Government must be made a party in proceedings against government.
18. The Applicant also relies on the case of Republic vs. Kenya Broadcasting Corporation Ex parte Dorcas Florence Kombo [2018] eKLR where the court is said to have observed that a decree holder's right to enjoy fruits of his judgment must not be thwarted and that the court should adopt an interpretation that will favour enforcement and secure accrued rights.
19. The Respondents in their submissions dated 4th June 2025 submit that an Accounting Officer is provided for under Section 2 of the [Public Finance Management Act](#) which further provides under Section 67(2) of who an accounting officer is with regards to the national institution or government entity.
20. It is submitted that the person responsible for the administration of the Ministry of The National Treasury is the Principal Secretary concerned, therefore, going by the [Government Proceedings Act](#) and [Public Finance Management Act](#), the Principal Secretary should be the accounting officer. The Respondents rely on the case of Republic V Attorney General Ex Parte Mirriam Wambugu & Another (2021) eKLR where Nyamweya J(as she the was) is said to have held that execution proceedings against a government or public authority under the [Government Proceedings Act](#) can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body.
21. According to the Respondents, the orders sought against the Attorney General are improper and thus make the application defective and the same should be dismissed.
22. On costs, it is submitted that costs follow the event.
23. The Interested Party also filed written submissions dated 3rd June 2025. It submits that the Applicant is undeserving of the orders for leave to institute judicial review proceedings as this would lead to multifarious proceedings before different judicial officers over the same subject matter.

Analysis and Determination

24. I have considered the chamber summons application, verifying affidavit and statutory statement. I have also considered the responses and the submissions by all parties. The main issue for determination is whether the Applicant has made out a case for the grant of leave to apply for judicial review orders against the Respondents.
25. A procedural issue has been raised by the Applicant that the grounds of opposition filed by the Respondents were filed without the leave of the court because, during the mention of 27th May 2025, the respondents only sought leave to put in submissions to the chamber summons which leave was granted This is however is not the position as on 27th May 2025 this court issued the following directions:
 1. The Respondent is granted 5 days of today to file a response to the application by the applicant, together with brief written submissions.
 2. The Interested Party is granted 5 days of today to file and serve written submissions.
 3. Mention on 9th June 2025 to fix a Ruling date.



26. For the above reason, I find the objection by the applicant against the respondents' filing of grounds of opposition to be devoid of merit.
27. Onto the substance of the chamber summons and whether leave to apply should be granted as sought under Order 53 of the Civil procedure Rules, the main reason for leave as explained by Waki J. (as he then was), in Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.
28. Therefore, at the leave stage, this Court's task is to determine whether the applicant has established an arguable case for permission to commence judicial review proceedings.
29. In the cases of Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others (supra) and Meixner & Another vs A.G [2005] eKLR, it was held that the leave of court is required with a view to filtering out frivolous applications and the test to be applied is whether the applicant has an arguable case.
30. I must highlight that leave would be unnecessary had the Applicant approached the Court under the Fair Administrative Action and Rules, 2024. However, a party is at liberty to choose whether to apply under Order 53 of the Civil Procedure Rules and the Law Reform Act or under the Fair Administrative Action Act and Rules.
31. It is also important to note that the Court, at this stage, is not expected to delve deep into the merits or demerits of the intended application, should it be of the view that a prima facie case for leave is established, so as to avoid prematurely determining the intended substantive application. Additionally, it does not mean that once leave is granted, which may be granted, in most cases, ex parte, then the substantive motion must succeed.
32. Leave is merely an avenue for the applicant to exercise the right to access justice and to ventilate their grievances while enjoying the right to a fair hearing before a court of law as guaranteed under Article 50(1) of the Constitution, especially where on the face of it, the court does not find that the intended motion is frivolous or an abuse of court process.
33. On the material presented before this Court, I am satisfied that the Applicant has raised an arguable case, particularly regarding the subsistence of court orders that are yet to be satisfied, and in view of the provisions of section 23 of the Government Proceedings Act which permit a decree holder to apply that any money being held by the Government and due and owing to a judgment debtor be paid to that decree holder.
34. This is not the same as garnishee proceedings against the government as a judgment debtor, which process is barred by section 25 of the Government Proceedings Act.
35. I note from the Respondents' and Interested Party that none of them challenge the existence of valid court orders that are yet to be satisfied and as to whether there is an appeal or application for setting aside or not, this Court has not been shown any order of stay of the orders adopting the final award.
36. On the 1st Respondent's contention that she is not the accounting officer of the National Treasury and as such the orders sought against her cannot issue, it is true that unless there is a specific decree issued against the Attorney General as a primary party to court proceedings, for acts done or omissions on the part of that office or its officers, no mandamus can issue compelling the Attorney General.
37. However, the Attorney General is the principal legal adviser to the national Government as stipulated in Article 156(4)(b) of the Constitution and is mandated to represent the national government in



court civil or any other legal proceedings to which the national government is a party, other than criminal proceedings. In that capacity, the Attorney General is often joined as a party in suits involving national government ministries, departments, or agencies, regardless of whether specific orders are sought against the Attorney General or not or whether she is the accounting officer of the concerned entity.

38. Furthermore, section 12 of the [Government Proceedings Act](#) on Parties to proceedings mandates that civil proceedings by or against the Government shall be instituted by or against the Attorney General. The section provides:

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- (1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Office of the Attorney-General, as the case may be.
- (2) No proceedings instituted in accordance with this Part of this Act by or against the Office of the Attorney-General shall abate or be affected by any change in the person holding the Office of the Attorney-General

39. For the above reasons, I find and hold that the joinder of the Attorney General to these proceedings does not render the application defective. Her presence is consistent with her constitutional role as the Principal Legal Advisor and therefore the legal representative of the national government. Furthermore, no prejudice arises from the fact that no substantive orders can be directed at her office, other than her duty to advise the national Treasury in this case, to settle the decretal sum due to the judgment debtor by paying to the decree holder in the proceedings pending before the Commercial division of the High Court, as provided for under section 23 of the [Government Proceedings Act](#).

40. Consequently, the application dated 8th April is allowed in the following terms;

- a. Leave is hereby granted to the Applicant to apply for judicial review orders of PROHIBITION and MANDAMUS against the 2nd Respondent only in prayers 2 and 3 of the chamber summons dated 8th April, 2025.
- b. The substantive Notice of Motion shall be filed and served within 21 days from the date hereof in a fresh judicial review file.
- c. Each party to bear their own costs of this application for leave to apply.
- d. This file is closed.

Owing to the sabasaba unrests of 7/7/2025 which made it impossible for the Judge to reach the Court, this ruling is pronounced as scheduled and shall be uploaded on the Court tracking system for the parties to access. Parties' counsel to be notified.

DATED, SIGNED AND DELIVERED OFFLINE AT NAIROBI THIS 7TH DAY OF JULY 2025

R.E ABURILI

JUDGE

