



**Republic v Clerk Migori County Assembly; Mwamu t/a Mwamu
& Company Advocates (Exparte) (Judicial Review Application
E008 of 2022) [2023] KEHC 1037 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
JUDICIAL REVIEW APPLICATION E008 OF 2022
KW KIARIE, J
FEBRUARY 16, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

CLERK MIGORI COUNTY ASSEMBLY RESPONDENT

AND

**JAMES AGGREY MWAMU T/A MWAMU & COMPANY
ADVOCATES EXPARTE**

RULING

1. The applicant moved the court by way of Notice of Motion dated July 28, 2022. It was brought under section 3A of [Civil Procedure Act](#) & Order 53 Rule 1 of the [Civil Procedure Rules](#). He is seeking the following orders:
 - a. That the court grants an order of mandamus compelling the respondent to comply with the judgment in Miscellaneous Civil Application No 70 of 2018 James Aggrey Mwamu T/ A Mwamu & Company Advocates vs Migori County Assembly requiring them to pay Kshs 792,329/=
 - b. The costs of the application be provided for.
2. The application was premised on the following grounds:
 - a. That the respondent failed to appreciate the existing statutory and constitutional provisions of law on the right to fair hearing and consequences thereof under Article 47.
 - b. That the applicant's costs herein were on June 6, 2017 taxed at Kshs 792,329/=



- c. That the respondents have failed to comply with the decree despite the judgment of the court.
 - d. That the rejection and negligence to pay is deliberate and perpetuated by the respondent.
 - e. That the failure is causing injustice to the decree holder.
3. The respondent did not respond to the application but instead filed a preliminary objection premised on ground that the application is frivolous, vexatious and constitutes a gross abuse of court process and is premature in the circumstance since no certificate of order and costs were extracted in Homa Bay Miscellaneous Civil Application No 70 of 2018 and served upon the accounting officer in terms of the provisions of section 21 (1) & (2) of the [Government Proceedings Act](#), cap 40.
 4. A preliminary objection must be on a point of law and nothing more. This was clearly stated in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969]EA 696. At page 700 paragraph D-F Law JA as he then was, stated:

...A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.
 5. Section 21 (1) & (2) of the [Government Proceedings Act](#), cap 40 Laws of Kenya provides:
 - 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.
 6. My reading of section 21 (2) of the [Government Proceedings Act](#), indicates that the requirement thereof is optional. However, subsection 1 is mandatory. The applicant has not demonstrated that a certificate of costs in the prescribed form was served on the respondent.
 7. I therefore sustain the preliminary objection and dismiss the application. Each party to bear own costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 16TH DAY OF FEBRUARY, 2023

KIARIE WAWERU KIARIE

JUDGE

