



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT KISII**

**JUDICIAL REVIEW APPLICATION NO. E004 OF 2025**

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR  
JUDICIAL REVIEW ORDERS OF MANDAMUS

**AND**

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

**AND**

IN THE MATTER OF THE LAW REFORM ACT, CAP 26

REPUBLIC.....

.....**APPLICANT**

**VERSUS**

CLERK KISII COUNTY ASSEMBLY.....**1<sup>ST</sup>**

**RESPONDENT**

DIRECTOR OF FINANCE,

KISII COUNTY  
**RESPONDENT**

ASSEMBLY.....**2<sup>ND</sup>**

**AND**

JERUSA MILLICENT

NYABUTO.....**EX-PARTE**

**APPLICANT**

**RULING**

1. By way of Chamber Summons dated 25<sup>th</sup> March 2025 the Ex-Parte Applicant seeks leave to apply for an order of Mandamus to compel the Respondents to pay the decretal amount and costs awarded in Kisii ELRC No. E007 of 2021. She states that despite judgment having been delivered on 27<sup>th</sup> June 2024, awarding her a decretal amount of Kshs. 337,480/- and costs subsequently being taxed at Kshs. 133,975/-, the Respondents have failed to settle the amount despite numerous reminders.

2. In support of the application, the Ex Parte Applicant swore a verifying affidavit in which she averred that, following delivery of judgment, the Certificate of Order against the Government, decree, and certificate of costs were duly served upon the 1<sup>st</sup> Respondent on 3<sup>rd</sup> March 2025. Despite

service, the Respondents have refused, neglected, or ignored to make payment. She contends that they have abdicated their statutory duty and that an order of mandamus is the only available remedy to compel compliance.

3. In response, the Respondents, vide a replying affidavit sworn by Mr. Jacob M. Oneko, argued that the parties sued in Kisii ELRC No. E007 of 2021 were the Kisii County Assembly, the Kisii County Assembly Service Board, and Hon. Evans Omwansu Mokoro, and not the Respondents herein in their personal capacities. He explained that the Kisii County Assembly Service Board is a body corporate with legal capacity to sue and be sued. He further contended that the decretal sum was owed collectively by the Assembly, the Kisii County Assembly Service Board, and Hon. Mokoro, yet the Ex Parte Applicant had omitted to enjoin Hon. Mokoro to these proceedings.

4. The Respondents also stated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are essentially the same entity and cannot be compelled to make double payment. According to them, the

amount owed was Kshs. 235,757.50, which they were willing to pay subject to budgetary allocation and approval by the Controller of Budget. They therefore urged the Court to stay or decline the Chamber Summons to allow time for the financial process to be completed and for all liable parties to be properly joined.

5. In a further affidavit sworn on 17<sup>th</sup> July 2025, the Ex-parte Applicant maintained that the application was properly before the Court for purposes of execution against the government, citing **Kungu v County Government of Nairobi (Judicial Review Miscellaneous Application E034 of 2023) [2024] KEHC 3265 (KLR)**. She argued that the 1<sup>st</sup> Respondent, as the accounting officer of the Kisii County Assembly, was under a statutory duty to pay the decretal amount pursuant to section 148(4) of the Public Finance Management Act, 2012. She further argued that the execution procedure provided under section 21 of the Government Proceedings Act did not apply to Hon. Mokoro, explaining why he was not enjoined to this suit. She maintained that the Respondents were jointly and severally liable for the decretal sum and that the payment was long

overdue, as one year had lapsed since judgment. In support, she relied on the case of **Republic v Town Clerk of Webuye County Council & another HCCC 448 of 2006 (unreported)**, which underscored the importance of courts ensuring that the right of a successful litigant to enjoy the fruits of judgment is not curtailed.

6. Pursuant to directions issued on 18<sup>th</sup> June 2025 both parties filed written submissions.

#### Ex-Parte Applicant's Submissions

7. The Ex Parte Applicant submitted that she had met the threshold for the grant of leave under Order 53 of the Civil Procedure Rules, having served the Respondents with the decree, certificate of costs, and certificate of order against the government. She relied on the decision in **Republic v County Council of Kwale & another; Kondo & 57 others (Exparte) (Miscellaneous Civil Application 384 of 1996) [1998] KEHC 2 (KLR) (2 February 1998) (Ruling)**, as cited in **Republic & another v Kisii County Assembly & 2 others (Miscellaneous Case E013 of**

**2024) [2024] KEHC 9494 (KLR) (17 July 2024) (Ruling),**

where the Court held that the purpose of leave is to eliminate frivolous and vexatious applications at an early stage. She further submitted that, as the legislative arm of the Kisii County Government, the Respondents are subject to section 21 of the Government Proceedings Act. She relied on the decision in the case of **Republic v Principal Secretary, Ministry of Internal Security & another Ex-parte Schon Noorani & another [2018] eKLR**, which outlined the principles for grant of mandamus as: the existence of a public duty, a clear right to performance of that duty, a prior demand and refusal or neglect to honour it, lack of an alternative remedy, and that on a balance of convenience, mandamus should issue.

8. The Ex Parte Applicant emphasized that under section 148(4) of the Public Finance Management Act, the Clerk to the County Assembly is the accounting officer and therefore responsible for satisfying court decrees. She cited the case of **Republic v Town Clerk of Webuye County Council & another (supra)**, where the Court stressed the importance

of interpreting legal provisions in a manner that promotes enforcement and aligns with Articles 10 and 159(2)(a) & (b) of the Constitution, which guarantee access to justice without undue delay. She therefore urged the Court to allow the application with costs.

### Respondents' Submissions

9. The Respondents submitted that leave should be denied for non-compliance with section 21 of the Government Proceedings Act and for misjoinder and non-joinder of parties. They asserted that no valid Certificate of Order against the Government had been provided, and hence no statutory duty to pay had arisen. Additionally, they submitted that neither the County Assembly Service Board, being a separate legal entity nor Hon. Mokoro had been enjoined to this suit making it fatally defective. They maintained that the Director of Finance is also not the statutory addressee for a Certificate of Order against the Government as envisaged by section 21 of the Government Proceedings Act.

10. The Respondents relied on section 148(4) of the Public Finance Management Act, which designates the Clerk to the County Assembly as the Accounting Officer and the decision in **Kungu v County Government of Nairobi (JR Misc App. EO34 of 2023) [2024] KEHC 3265**, that prescribes; issuance of a certificate of order against the government, indication of the amount payable, and service upon the appropriate officers as conditions precedent to liability. They also relied on **Kenya National Examinations Council v Republic Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR**, which held that mandamus compels performance of a statutory duty and does not command what the law does not require. Further, they emphasized that leave under Order 53 is not automatic but acts as a filtering mechanism to weed out frivolous claims.

11. On the issue of non-joinder, the Respondents submitted that excluding Hon. Mokoro from these proceedings would unfairly absolve him from liability despite being a debtor. They asserted that the Ex-parte Applicant was attempting to use mandamus to circumvent proper allocation of liability. For these reasons they urged the court to decline leave or,

alternatively, to limit any leave granted to the sums specified in the certificate of order against the government and directed only to the Clerk.

### Disposition

12. The arguments and decisions cited have been considered.

In essence, what is objected to is the issuance of a certificate of order against government since there are parties that have been excluded in the proceedings before this Court.

The Applicant seeks a **certificate of order against**

**Government** and not just a decree or order. Hon. Mokoro is

NOT Government nor does he hold any Government funds

that can be used to settle a decree or order of payment

against the Government. He therefore was not a proper nor

necessary party. He could conveniently be excused from

participating in proceedings where a certificate of order

against Government is sought. It is my finding that the

Applicant has not attempted nor managed to circumvent the

process of *mandamus* to compel the Government to settle

the debt due. The amount owed is a sum of Kshs.

235,757.50, a sum which the Respondents assert they were

willing to pay subject to budgetary allocation and approval

by the Controller of Budget. The 1<sup>st</sup> Respondent is the accounting officer of the Kisii County Assembly and is under a statutory duty to pay the decretal amount pursuant to section 148(4) of the Public Finance Management Act, 2012. The 2<sup>nd</sup> Respondent is the arm of the accounting officer and the proceedings could have excluded him with no effect on the outcome. He cannot make any additional payment but only that which was decreed.

13. The foregoing is sufficient to reveal that a basis exists for the issuance of the leave to the Applicant to commence judicial review proceedings in the nature of *mandamus* to compel the payment of the debt due by the Respondents. As the Respondents have admitted the debt is due and that they are willing to pay it subject to allocation. Leave is hereby granted and such leave permits the Applicant to seek through the substantive motion for a Certificate of Order against Government to issue compelling the Respondents to jointly pay the sum owed to the Ex Parte Applicant. The motion must be filed within 21 days of today in a distinct file as this was the application for leave which the Ex Parte

Applicant has successfully managed to surmount. The Respondents shall be liable for costs on this present application.

Orders accordingly.

**Dated and delivered at Kisii this 14<sup>th</sup> day of October**

**2025**

**Nzioki wa Makau, MCI Arb.  
JUDGE**

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