

REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ELC JR APPLICATION NO. E003 OF 2024
IN THE MATTER OF AN APPLICATION FOR LEAVE (sic) TO APPLY FOR
ORDERS OF JUDICIAL REVIEW (ORDER OF MANDAMUS)**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT 2015

AND

**SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF
KENYA AND THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA**

AND

**IN THE MATTER OF EXECUTION OF JUDGEMENT AND DECREE IN
KERICHO ELC PETITION NUMBER 1 OF 2029 (sic) JOEL KIPRONO
MUTAI VS COUNTY GOVERNMENT OF KERICHO**

AND

IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

**THE COUNTY GOVERNMENT OF KERICHO.....1ST
RESPONDENT**

**THE CHIEF OFFICER FINANCE,
COUNTY GOVERNMENT OF KERICHO.....2ND
RESPONDENT**

**THE CHIEF OFFICER ROADS
COUNTY GOVERNMENT OF KERICHO.....3RD
RESPONDENT**

**THE COUNTY SECRETARY
COUNTY GOVERNMENT OF KERICHO.....4TH
RESPONDENT**

**THE EXECUTIVE COMMITTEE OF ROADS
COUNTY GOVERNMENT OF KERICHO.....5TH
RESPONDENT**

THE EXECUTIVE COMMITTEE OF FINANCE

COUNTY GOVERNMENT OF KERICHO.....6TH
RESPONDENT

AND

JOEL KIPRONO MUTAI.....EX PARTE
APPLICANT

JUDGEMENT.

INTRODUCTION.

1. Pursuant to the leave of Court granted on 7th May, 2024, the *Ex parte* Applicant filed the Notice of Motion application dated 16th May, 2024. The said application is expressed to be brought under **Order 53 Rule 3(1)** of the Civil Procedure Rules.

2. The application seeks the following orders;
 - a. ***That an order of Mandamus do issue against the Respondents jointly and severally compelling the Respondents to jointly and/or severally pay to the Applicant the sum of Kenya Shillings four million and eighteen thousand five hundred and twenty (Kshs.***

4,018,520/-) inclusive of interest effective 20th May, 2020 which summarises out of judgement and decree of the honorable Court in Kericho Environment and Land Court Petition Number 1 of 2019 Joel Kiprono Mutai vs County Government of Kericho.

b. That in default of compliance with the orders of mandamus and failure to pay the debt now in the sum of Kenya Shillings four million and eighteen thousand five hundred and twenty (Kshs. 4,018,520) which sum continue to accrue interest at 14% per annum, the orders of mandamus be deemed as sufficient notice to the persons holding offices (sic) of the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents and requiring them to show cause why contempt of Court proceedings should not be commenced against them within thirty (30) days effective date (sic) of the service of the order of mandamus.

c. That in default of compliance with the order of mandamus and failure to pay

the debt now in the sum of Kenya Shillings four million and eighteen thousand five hundred and twenty (Kshs. 4,018,520/) which sum continue to accrue interest at 14% per annum thirty (30) days (sic) upon service of the order of mandamus and failure to show sufficient cause for non-compliance with the orders of mandamus, the Applicant be at liberty to commence contempt of Court proceedings against the persons holding the offices of the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents and for them to personally be summoned to Court and be committed to civil jail for contempt of Court orders.

d. That the Respondents be condemned to bear the costs of this suit.

- 3.** The application is based on the grounds on its face and the supporting affidavit of **Joel Kiprono Mutai** sworn on 16th May, 2024.

FACTUAL BACKGROUND.

4. The *Ex parte* Applicant filed the Chamber Summons application dated 12th February, 2024 seeking for leave to commence judicial review proceedings.

5. On 7th May, 2024 the application was allowed and the *Ex parte*

Applicant directed to file the substantive motion within thirty days.

6. The *Ex parte* Applicant filed the application dated 16th May, 2024 which application was mentioned for directions on 19th November, 2024 and the Court directed that it be served upon the Respondents.

7. The matter was mentioned severally to confirm service upon the Respondents and on 13th March, 2025 the Court

confirmed that there was evidence of proper service. It was then reserved for judgement.

THE EX-PARTE APPLICANT'S CONTENTION.

- 8.** The Ex-parte Applicant contends that this Court delivered judgement in Kericho Environment and Land Court Petition No. 1 of 2019 i.e. Joel Kiprono Mutai vs County Government of Kericho wherein he was awarded Kshs. 2,445,998/= as compensation.
- 9.** He also contends that a decree was issued on 9th November, 2023.
- 10.** He further contends that costs were taxed at Kshs. 237,655/= and a certificate of costs issued.
- 11.** It is his contention that his advocates have made several requests to the Respondents for payment but they have refused to pay. He adds that the decretal sum, costs and interest stand at Kshs. 4,018,520/=.

- 12.** It is also his contention that the interest rate is 14% per annum effective from the date of judgement which interest continues to accrue.
- 13.** It is further his contention that he has been advised by his advocates on record that the Respondents have refused to pay the said sum of money despite reasonable notices and demands being issued to them.
- 14.** He contends that there is no other remedy available to him other than the one sought because it is not possible for him to execute against the government. He goes on to state that the orders he is seeking are practical in nature and there exists no equitable bar to the relief sought.
- 15.** He also contends that the order of mandamus should be issued in his favor in order to compel the Respondents to pay the sum of Kshs. 4,018,520/= which amount continues to attract interest.

- 16.** He further contends that he is aggrieved by the Respondents unwillingness to pay the said sum of money and that he has no other avenue to seek justice and compliance with the payment of the decretal sum, costs and interest as was granted in Kericho ELC Petition No. 2 of 2019 Joel Kiprono Mutai vs County Government of Kericho.
- 17.** It is his contention that he has filed the present application in a timely manner and in good faith. He goes on to state that the Respondents will not suffer any prejudice if the orders sought are granted.
- 18.** It is also his contention that this Court can in the interest of justice hear the application and grant the orders sought.
- 19.** It is further his contention that unless the application under consideration is heard and determined, he will be greatly prejudiced as the continued delay in payment will lead to a

denial of justice thereby subjecting him to suffer irreparable loss.

20. He contends that the Respondents failure to pay the said sum of money derogates them from their obligation under **Section 21** of the Government Proceedings Act.

21. He ends his deposition by stating that he has read the contents of the application together the accompanying statement and documents and adds that they are correct.

22. Despite service, the Respondents did not file any response to the application. An affidavit sworn by **Enock Kimutai Bett** on 22nd February, 2025 and filed on 13th March, 2025 speaks to service upon the Respondent

23. Neither the *Ex parte* Applicant nor the Respondents filed their submissions.

ANALYSIS AND DETERMINATION.

- 24.** I have considered the *Ex parte* Applicant's application. My view is that the only issue that arises for determination is whether the application dated 16th May, 2024 has merit.
- 25.** It is the *Ex parte* Applicant's contention that he sued the 1st and 3rd Respondent in Kericho ELC Petition No. 1 of 2019.
- 26.** It is also the *Ex parte* Applicant's contention that judgement was delivered in his favour on 20th May, 2020 and he was awarded Kshs. 2,445,998/= together with costs and interest.
- 27.** It is further the *Ex parte* Applicant's contention that costs were taxed at kshs. 237,655/= and that as at the time of filing of the application under consideration, the total money owed plus interest stood at Kshs. 4,018,520/=.
- 28.** It is the *Ex parte* Applicant's contention that despite demand, the Respondents have refused to pay the said sum of money and he therefore seeks for an order of mandamus to compel them to pay.

29. In the judicial decision of **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR** the Court held as follows;

“The next issue we must deal with is this: What is the scope and efficacy of an Order of Mandamus? Once again we turn to Halsbury’s Law of England, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may

be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. (Emphasis mine)

30. In the judicial decision of **Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another [2018] eKLR** the Court set out the following requirements that must be met before the Court issues an order of mandamus;

“29. Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in Apotex Inc. vs. Canada (Attorney

General), and, was also discussed in Dragan vs. Canada (Minister of Citizenship and Immigration). The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. The Applicants have satisfied all conditions precedent; and

b. There must have been:

i. A prior demand for performance;

ii. A reasonable time to comply with the demand, unless there was outright refusal; and

iii. An express refusal, or an implied refusal

through unreasonable delay;

(iv) No other adequate remedy is available to the Applicants;

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.” (Emphasis mine)

31. Section 21 of the Government Proceedings Act provides as follows;

“(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.”

32. In the judicial decision of **Republic (sic) V Permanent Secretary, Ministry of State For Provincial Administration And Internal Security Ex parte Fredrick Manoah Egunza [2012] eKLR** the Court held that execution proceedings against the government under the Government Proceedings Act can only be commenced against the Accounting Officer of the said government as that is the officer who is under a statutory duty to satisfy a

judgement made by the Court. The Court also held as follows;

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in

favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act.

The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the Court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the Court after

expiration of 21 days after entry of judgment.

Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.

(Emphasis mine)

- 33.** The *Ex parte* Applicant has attached to his affidavit in support of the application a copy of the judgement delivered on 20th May, 2020 in Kericho ELC Petition No. 1 of 2019 Joel Kiprono Mutai v County Government of Kericho & another. A

copy of the decree issued in the said matter on 9th November, 2023 has also been attached.

34. The *Ex parte* Applicant has attached a copy of the Certificate of Costs dated 6th July, 2023 issued in Kericho ELC Petition No. 1 of 2019 Joel Kiprono Mutai vs County Government of Kericho & another. It states that costs were taxed at Kshs. 237,655/=

35. A copy of a letter dated 7th July, 2023 has been attached to the *Ex parte* Applicant's affidavit in support of the application. It is written by one **Kirwa Jonah** and addressed to Kamau Lagat & Company Advocates on a without prejudice basis. The subject of the letter is "*Kericho ELC Petition No. 1 of 2019 Joel Kiprono Mutai vs The County Government of Kericho and the Chief Officer Roads County Government of Kericho.*"

36. The letter requests for payment of the decretal sum of Kshs.

2,445,998/=, interest of Kshs. 1,084,395/= and costs of Kshs. 237,655/=. The total sum sought for is Kshs. 3,768,045/=. The letter also contains bank account details.

- 37.** The *Ex parte* Applicant has attached a copy of a letter dated 14th November, 2023 written by **Kirwa Jonah** the Managing Partner Mwakio Kirwa & Company Advocates and addressed to Kamau Lagat & Co. Advocates on a without prejudice basis. The subject of the letter is “*Kericho ELC Petition No. 1 of 2019 Joel Kiprono Mutai vs Kericho County Government.*”
- 38.** The letter states that it has enclosed the decree and certificate of costs. The letter requests for payment of Kshs. 3,882,192/= and has set out bank account details.
- 39.** I note that the *Ex parte* Applicant has not attached a Certificate of Order against the government.

40. In the judicial decision of **Republic (sic) V Permanent Secretary, Ministry Of State For Provincial Administration And Internal Security Exparte Fredrick Manoah Egunza (supra)** cited above, the Court held that it is upon service of the Certificate of Order against the Government that **Section 21(3)** of the Government Proceedings Act obligates the relevant accounting officer to pay. The Court further held as follows;

“In my view, the service of the certificate of order against the Government on the Attorney General on 1st December 2011 constituted a demand for payment and the fact that no response or payment was received by the Applicant from the Respondent for two months was sufficient reason for the Applicant to construe that the Respondent had neglected to perform his statutory duty to pay under Section 21(3) of the Government Proceedings Act. The Applicant was therefore entitled

to move to Court to seek an appropriate remedy.” (Emphasis mine)

41. In the present matter, the *Ex parte* Applicant has not demonstrated that he obtained the certificate of order against the government, that it was served upon the Respondents and that the Respondents failed to pay the sums specified therein. This is a crucial first step that subsequently obligates the relevant accounting officer to pay failure of which orders of mandamus may issue.

42. The *Ex parte* Applicant has only attached letters sent on a without prejudice basis requesting for payment.

43. Given the said circumstances, my view is that an order of mandamus cannot issue.

44. This Court notes that under prayers 2 and 3 of the application under consideration, the *Ex parte* Applicant seeks

that in the event the Respondents fail to comply with the orders of mandamus, they (Respondents) should show cause why contempt of Court proceedings should not be commenced against them and/or why they should not be cited for contempt and be committed to civil jail.

45. In the judicial decision of **Republic v Attorney General Ex partes Miriam Wairimu Wambugu & another [2021] eKLR** the Court held as follows;

“...However, it is notable in this respect as regards the prayer for issue of a Notice to Show Cause against the Respondent to show cause why he should not be cited for contempt of Court, the same is premature as the ex parte Applicants have not shown evidence of service and disobedience of this Court’s order, and resultant contempt of Court proceedings.” (Emphasis mine)

46. As was held in the above cited judicial decision, I find that the prayer for issuance of a Notice to Show Cause against the Respondents to show cause why they should not be cited for contempt of Court is premature. This is hinged on the fact that the legal requirements in respect of extracting and service of the certificate of order against the government has not been complied with; this is a crucial first step in issuance of orders of mandamus.

47. Taking into account that an order of mandamus has not been granted, it follows that the prayer for issuance of a notice to show cause why contempt of Court proceedings should not be commenced against the Respondents and/or why they should not be cited for contempt and be committed to civil jail cannot be considered at this stage.

DISPOSITION.

48. In the result, I find that the *Ex parte* Applicant's application dated 16th May, 2024 lacks merit and it is hereby struck out with costs.

49. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO
THIS 9TH DAY OF OCTOBER, 2025.**

**L. A. OMOLLO
JUDGE.**

In the presence of: -

Mr. Kirwa for the Applicant.

No appearance for the Respondents.

Court Assistant; Mr. Joseph Makori.