REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC APPLICATION NO. E251 OF 2025

BENSON KANGARA T/A PINKSTONE ENTERPRISES…..APPLICANT

VERSUS

CHIEF FINANCIAL OFFICER NAIROBI CITY COUNTY……RESPONDENT

RULING ON LEAVE TO APPLY

1. The applicant herein Benson Kangara trading as Pinkstone Enterprises, by his chamber Summons dated 8th August 2025 seeks leave of Court to apply for judicial review orders of mandamus to compel the respondent Chief Financial Officer, Nairobi City County to settle decree and certificate of Order Against the Government issued pursuant to judgment delivered vide Nairobi HCCCOM Civil Suit No. 502 of 2016 on 20th November, 2019 in the sum of Kshs 25,180,000 together with interest at 12% per annum from the date of filing suit until payment in full plus costs of the suit.
2. The suit and judgment were against the Nairobi City County as the defendant.

3. The application is supported by the verifying affidavit sworn by the applicant, the statutory statement and annextures thereto which include decree, judgment, certificate of orders against the government dated 24th March 2025 and a demand letter for settlement dated 16th April 2025 addressed to the Chief Financial officer/the Chief Accounting Officer, Nairobi City County.
4. The application was not opposed despite the service having been effected upon the respondent.
5. The application was argued orally this morning by the applicant's counsel Mr. Gekonge who reiterated the contents of the application and the grounds in support thereof.
6. I have carefully considered the application as filed and argued. The issue for determination is whether the application is competently before this court.
7. The requirement for leave under Order 53 of the Civil Procedure Rules was explained by a three-judge bench comprising Bosire, Mbogholi-Msagha & Oguk, JJ in **Matiba v Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which prima facie appear to be abuse of the process of the Court or those applications which are statute barred.
8. Similarly, in **Republic v Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321, Nyamu,J** (as he then was) held that leave should be granted, if on the material available, the court

considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic v The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**

9. In **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** Waki, J (as he then was), on the other hand, put it thus:

> ***"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or***

administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived… Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".

10. This position was confirmed by the Court of Appeal in **Meixner & Another v Attorney General [2005] 2 KLR 189** in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

11. Additionally, the circumstances which guide the grant of leave to apply for judicial review remedies were enumerated **in Mirugi Kariuki v Attorney**

General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8

as follows:

> ***"The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power…the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter… It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person's legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an***

assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers…In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for the orders sought."

12. In **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199,** the Court of Appeal was of the view that

leave should be granted if, on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave.

13. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK),** the Court stated:

> ***"Application for leave to apply for orders of judicial review are normally ex parte and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review***

remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him….Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs. Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."

14.17. From all the above authorities, it is clear to this Court that leave to apply for judicial review orders is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to demonstrate to the court that he/she has a prima facie arguable case for grant of leave. Whereas he or she is not required at that stage delve deep into the merits of the intended application, he/she has to show that he/she has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. As was held in **Re: Kenya National Federation of Co-Operatives Ltd & Others [2004] 2 EA 128** based on Judicial Review Handbook (3 Ed) by Michael Fordham:

"A claimant for permission is under an important duty to make frank disclosure to the Court of all material facts and matters and

it is especially important to draw attention to matters which are adverse to the claim, in particular: (1) any statutory restriction on the availability of judicial review; (2) any alternative remedy; (3) any delay/ lack of promptness and so need for an extension of time. In facing up to adverse points, the claimant will have an early opportunity to explain why those points are not fatal and why the case should be permitted to proceed (that is a "confess and avoid"). The duty of "full and frank" disclosure harks back to the time when permission for judicial review was ex parte."

15.. In this case, and as earlier stated, the judgment debtor in the Commercial case judgment and decree vide HCCOM Civil Case No. 502 of 2016 is Nairobi City County.

16. Execution against Count Governments is prohibited by law under section 21 of the Government Proceedings Act which stipulates 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."

17. The Court of Appeal in **Five Star Agencies Limited v National Land Commission and Another, Civil Appeal No. E390 of 2023** (Musinga, Mumbi Ngugi & Ngenye, JJA) reiterated the law under section 21 of the Government Proceedings Act regarding execution proceedings against

government. The Court held that government assets cannot be attached in satisfaction of a decree and that the only method of execution open to a successful party is obtaining a Certificate of Order and Certificate for Costs against Government and then issuing a 21 days' notice before filing Judicial Review application seeking satisfaction of the decree.

18. In **Kisya Investments Ltd v Attorney General & Another (2005) eKLR** the High Court declined to declare section 21 of the Government Proceedings Act unconstitutional holding that to do so would be against public interest as persons would be at liberty to execute against Government thereby impeding the activities of Government in running the affairs of a country.

19. Section 21 of the Government Proceedings Act mandates the Accounting Officers of the relevant government or agency to settle court decrees. The question is whether the respondent in the present application is the accounting officer of the judgment debtor.

20. Section 148 of the Public Finance Management Act, 2012 provides for Designation of accounting officers for county governments by the County Executive Committee Member for finance.

21. Under the said section 148:

(1) A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to

be responsible for managing the finances of the county government entities as is specified in the designation.

(2)Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.

(3) An Executive Committee member for finance shall ensure that each county government entity has an accounting officer in accordance with Article 226 of the Constitution.

(4) The Clerk to the county assembly shall be the accounting officer of the county assembly.

(5) A county government may, in order to promote efficient use of the county resources, adopt, subject to approval by the county assembly, a centralised county financial management service.

22. Clearly, from the above statutory provision, an accounting officer in a county government is one that is designated by the County Executive Committee Member for Finance. Their primary responsibility under section 149 of the Public Finance Management Act is the proper management of public resources within their department, including public procurement and asset disposal. They are accountable to the County Assembly for the

management of their entity's resources. They must ensure all public funds are used properly and report on financial performance.

23. In the instant application, the person or office holder cited to be the accounting officer of the judgment debtor is Chief Financial Officer. There is a whole difference between a chief financial officer in an establishment and the statutory Chief Officer responsible for finance or an accounting officer designated by the County Executive Committee member for finance. The former is simply a junior staff who has no specific statutory mandate as would be, for example, a Chief Officer responsible for finance where such designation as an accounting officer is done by the County Executive Committee member for finance.

24. It would therefore not serve any purpose or assist the applicant if this court were to make an order against the financial of finance officer of the county Government directing them to settle decree yet the law under section 21 of the Government Proceedings Act as read with sections 148 and 149 of the Public Finance Management Act are clear that only accounting officers are responsible for ensuring that decrees are settled. There is more than sufficient jurisprudence on this and the applicant can benefit from the same as it is readily accessible from Kenyalaw as he is ably represented by Counsel.

25. For the above reasons that the applicant has cited a person who is not the accounting officer of the County Government judgment debtor, I find the

application for leave to apply for judicial review order of mandamus to be incompetent.

26. In the end, the chamber summons dated 8th August, 2025 is hereby struck out with no orders as to costs and this file is closed.

Dated, Signed and Delivered at Nairobi this 22nd Day of October, 2025

R.E. ABURILI
JUDGE