

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ELC JUDICIAL REVIEW NO E002 OF 2024

REPUBLIC

APPLICANT

= VERSUS =

PATRICK BENSON MWATO EX-

PARTE

THE COUNTY GOVERNMENT

OF BUSIA INTERESTED

PARTY

= AND =

R U L I N G

1. This ruling is in respect to two applications. The first is the chamber summons by **PATRICK BENSON MWATO** (herein the Ex-parte Applicant) dated 21st November 2024 and the second is the Notice of Motion dated 1st September 2025 by the **COUNTY GOVERNMENT OF BUSIA** (herein the Interested Party).
2. The genesis of the two applications are the proceedings in **BUSIA CHIEF MAGISTRATE’S COURT ELC CASE NO E66** wherein the Ex-parte Applicant obtained a judgment against the Interested Party in the sum of Kshs.213,919 on 29th August 2022 which, together with interest, has now risen to Kshs.215,919 and which remains un-paid despite promises by the Interested Party to do so. The Ex-parte Applicant has now approached this Court seeking leave to file for a writ of mandamus. The Interested Party, on the other hand, seeks

an order for stay of the proceedings and execution herein pending a determination of a review application filed in **BUSIA CMC ELC NO E66 of 2020** to set aside an order for the personal arrest and committal to civil jail of the County Member for Finance and County Secretary to the Interested Party. I shall consider the applications in that sequence. When the applications were placed before me for directions. I directed that I would consider them together.

1. EX-PARTE APPLICANT'S CHAMBER SUMMONS DATED 21ST NOVEMBER

3. By his chamber Summons premised under **Order 53 Rules 1(1) and (7)** of the **Civil Procedure Rules** and other enabling provisions of the **Civil Procedure Rules** and **Article 159** of the Constitution, the Ex-parte Applicant seeks the following orders:

- 1) That leave be granted to the Ex-parte Applicant enabling him to file a writ of mandamus compelling the Interested Party which is the County Government of Busia to settle the decretal sum of Kshs.215,919 plus costs and interest of 14% p.a. since 4th August 2022 within a specified period.**
- 2) That costs of this application and of the main suit be met by the County Government of Busia.**

The application is based on the Ex-parte Applicant's affidavit, statement of facts and verifying affidavit. The gist of the application is that judgment was entered for the Ex-parte Applicant against the Interested Party on 20th August

2022 in **BUSIA CMC ELC NO E66** of **2020** in the sum of Kshs.231,919 and a decree was drawn for settlement. However, despite several correspondences, the Interested Party has refused to settle the decree although at one time it sought 30 days to do so. This is a case of refusal to settle rather than inability to pay. In the circumstances, an order compelling the Interested Party to pay would be appropriate.

4. Annexed to the application are the following documents:

- 1) Copy of certificate of order against the Interested Party.
- 2) Copy of a letter dated 4th October 2022 from the Interested Party to **MR ASHIOYA ADVOCATE** requesting for a copy of the judgment delivered on 29th August 2027.
- 3) Copy of a letter dated 15th December 2023 addressed to the Interested Party by **MR ASHIOYA ADVOCATE** notifying them of the Ex-parte Applicant's intention to apply for warrant of arrest for the **COUNTY SECRETARY, CHIEF OFFICER FINANCE** and **COUNTY EXECUTIVE COMMITTEE MEMBER FINANCE** for the non-payment of Kshs.215,919.
- 4) Copy of a similar letter to (3) above dated 12th September 2023.
- 5) Copy of a letter dated 18th October 2022 addressed to **MR ASHIOYA ADVOCATE** by the Interested Party stating that it has made progress towards payment of the decretal sum in **BUSIA CMC ELC NO E66** of **2020**.

5. The application is opposed and **MR EGESA WAMBURA** the Interested Party's Principal Legal counsel has filed a replying affidavit dated 3rd March 2025 in which he has deposed, inter alia, that there is an active review application dated 3rd October 2023 pending in **BUSIA CMC ELC NO E66 of 2022** seeking, inter alia, the setting aside of the judgment in that case. That this application by the ex-parte Applicant is designed to delay the application by the Interested Party in **BUSIA ELC NO E66 of 2020** in which it is claimed that the Interested Party was denied an opportunity to be heard as it was not served. That the review application in **BUSIA CMC ELC NO E66 of 2020** has been delayed because the trial magistrate has declined or resisted to proceed with it and neither has the Interested Party received the judgment of the subordinate Court in that case. That the Interested Party has not committed itself to pay the Ex-parte Applicant as purported. That if the orders sought herein are granted, the effect will be to render the Interested Party's review application in **BUSIA CMC ELC NO E66 of 2020** a non-starter thus prejudicing its case. It is therefore of necessity that the Ex-parte Applicant's chamber summons seeking leave be put in abeyance or struck out pending the hearing and determination of the Interested Party's application for review in **BUSIA CMC ELC CASE NO E66 of 2020**.
6. Annexed to the replying affidavit are the following documents:
- 1) Copy of the Notice of Motion dated 3rd October 2023 seeking orders of stay of execution and

- review of the orders issued in **BUSIA CMC ELC NO E66 of 2020.**
- 2) Copy of order issued on 6th October 2020 in **BUSIA CMC ELC NO E66 of 2020.**
 - 3) Copy of proceedings in **BUSIA CMC ELC NO E66 of 2020.**
 - 4) Copy of decree issued in **BUSIA CMC ELC NO E66 of 2020.**
 - 5) Copy of a letter dated 21st December 2022 addressed to the Chief Magistrate's Court Busia from the Interested Party's solicitor seeking certified copy of the judgment in **BUSIA CMC ELC CASE NO E66 of 2020.**
 - 6) List of authorities filed by the Interested Party in **BUSIA CMC ELC NO E66 of 2020.**
7. This Motion has been canvassed by way of written submissions filed by **MR ASHIOYA** instructed by the firm of **ASHIOYA & COMPANY ADVOCATES** for the Ex-parte Applicant and by **MR EGESA WAMBURA** the Interested Party's Principal legal counsel.
8. I have considered the Ex-parte Applicants application for leave to file Judicial Review order of mandamus as well as the replying affidavit and submissions by counsel.
9. **Order 53 Rule 1** of the **Civil Procedure Rule** provides that no application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with the rule. The purpose for seeking leave was set out by **WAKI J** (as he then was) in the case of **R.V. COUNTY COUNCIL OF KWALE & ANOTHER EX-PARTE KONDO & 57 OTHERS MOMBASA HIGH**

COURT MISC CIVIL APPLICATION NO 384 of 1996 [1998 KEHC 2 KLR] where at paragraph 12 he said:

12: “The purpose of the 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 Judge then went on cite **LORD DIPLOCK** in the case of **R. V. INLAND REVENUE COMMISSIONERS EX-PARTE NATIONAL FEDERATION OF SELF EMPLOYED AND SMALL BUSINESS LTD 1982 AC 617** where he said 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.”

Emphasis mine.

WAKI J (as he then was) went on to add in paragraph 13 of the case of **R.V. COUNTY COUNCIL OF KWALE & ANOTHER EX-PARTE KONDO & 57 OTHERS** (supra) that:

“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 Courts discretion but as always it has to be exercised judicially.” Emphasis mine.

Has the Ex-parte Applicant herein satisfied the above principles? Or is it in the interest of justice, as deposed in paragraph 15 of the replying affidavit by **MR EGESA WAMBURA**, that the Ex-parte Applicant’s Judicial Application be struck out or be put in abeyance pending the hearing and determination of the Interested Party’s application for review in **BUISA CMC ELC CASE NO E66 of 2020**? That is the issue I need to interrogate at this stage.

10. Given the principles set out in the above precedents, I am not in the least, persuaded that the ex-parte Applicant’s complaint falls under the definition of those **“by busy bodies with misguided or trivial complains or administrative error”**. If anything, I am persuaded **“that there is an arguable case for granting the relief claimed.”** Further, the Ex-parte Applicant has surmounted **“the test being whether there is a case fit for further investigation at a full inter partes hearing.”** To begin with, it is not in doubt that the Ex-parte Applicant holds a decree issued by a competent Court for execution against the Interested Party in the sum of Kshs.215,919 going back

to the year 2020 and which was never appealed. It has never been settled to date either.

11. Secondly, the Interested Party vide its letter dated 18th October 2022 and addressed to counsel for the Ex-parte Applicant stated the following in paragraphs 2, 3 and 4 thereof:

“Busia CMC ELC Case NO 66E of 2020 - Patrick Benson Mwato -v- Busia County Government on which there are issues. We will raise, the County has made progress in payments of the decretal sums in other cases and will continue to do so. However, in light of the transition, further payments will, as you are aware, be subject to specific supplementary budgets. We respectfully suggest that you revisit these matters in another thirty (30) or so days when new officers are expected to settle in office.”

Counsel for the Interested Party has submitted in paragraph 21 of his submissions that by that letter, the Interested Party did not expressly undertake to settle the Ex-parte Applicant's claim. That may be so that there was no express undertaking to settle the claim. However, even after the expiration of the thirty (30) days, the Interested Party had not made any attempt to **“revisit these matters”** prompting counsel for the Ex-parte Applicant to write to the Interested Party on 15th December 2023 threatening to apply for warrants of arrest against the Interested Party's Officers. There was also no express denial about the existence of the decree in **BUSIA CMC ELC NO E66 of 2020** until that court was moved by the Interested

Party's Motion dated 3rd October 2023 seeking to review the judgement. That is a live application pending in another Court and so I must steer away from making any comments which may pre-empt the decision in that Court. I am satisfied that the chamber summons application dated 21st November 2024 is for allowing. Directions shall be made shortly.

2. INTERSTED PARTY'S NOTICE OF MOTION DATED 1ST SEPTEMBER 2025:

12. By this Motion, the Interested Party seeks an order of stay of these Judicial Review proceedings pending the hearing and determination of it's application dated 3rd October 2023 filed in **BUSIA CMC ELC NO E66** of **2020**. The gist of the application is that the Interested Party has filed an application to review the decision in **BUSIA CMC ELC NO E66** of **2020** and it is only fair that these proceedings are stayed pending the hearing and determination of that application. In his affidavit in support of the Motion, MR **EGESA WAMBURA** Principal Legal counsel for the Interested Party has deposed, inter alia, that the Interested Party has opted to seek a review rather than an appeal against the judgment delivered in **BUSIA CMC ELC NO E66** of **2020**. That the Interested Party will be prejudiced if this Motion is not granted. Annexed to the Motion are the following documents:

- 1) Copy of the Motion dated 3rd October 2023 and filed in **BUSIA CMC ELC NO E66** of **2020**.
- 2) Copy of the order issued on 6th October 2023 in **BUSIA CMC ELC NO E66** of **2020**.

- 3) Copy of proceedings in **BUSIA ELC NO E66** of **2020**.
- 4) Copy of letter by the Interested Party addressed to the Chief Magistrate Busia seeking copy of judgment in **BUSIA CMC ELC NO E66** of **2020**.

This Motion was not specifically responded to by the Ex-parte Applicant who also did not file any submissions. The Interested Party however filed their submissions in respect to this Motion just as it filed submissions in respect to the Ex-parte Applicants chamber summons. That notwithstanding, this Court is enjoined to consider the merits or otherwise of any application in accordance with the law and judicial precedents. **RINGERA J** (as he then was) in the case of **GLOBAL TOURS & TRAVELS LTD NAIROBI HIGH COURT WINDING UP CAUSE NO 43** of **2000** had this to say on stay of proceedings:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice

the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factor as the need for expeditious disposal of cases, the prima facie merits of the

intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

Emphasis mine.

The Interested Party also seeks an order for stay of execution herein. No appeal has been filed against the judgment in **BUSIA CMC ELC NO E66** of **2020**. In principal therefore, and in accordance with the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** which sets out the threshold of granting an order of stay of execution pending appeal, it must be clear that there can be no basis for granting an order of stay of execution. Besides, the prayer for an order of stay of execution is also pending in **BUSIA CMC ELC NO E66** of **2020** being the Motion dated 3rd October 2023. The Motion before this Court seeking a similar prayer is essentially therefore sub-judice. **Section 6** of the **Civil Procedure Rules** provides that:

"No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed."

If the Interested Party's Notice of Motion is still pending determination in **BUSIA CMC ELC NO E66** of **2020**, then

the Motion herein and which seeks the same remedy of stay is clearly sub-judice. If that Motion has been heard and determined, then this Motion is res judicata. Either way, this Court is estopped by law from determining the Motion herein.

13. It must also be remembered that the remedy of stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the right to access to justice, the right to be heard without delay and overall, the right to a fair trial. Therefore, the test for stay of proceedings is higher and stringent - **KENYA WILDLIFE SERVICES -V- HJAMES MUTEMBEA CIVIL APPEAL NO 40 of 2018**. The judgment giving rise to this Motion was delivered on 4th August 2022 some three (3) years before this Motion was filed in September 2025. It has not been brought "**expeditiously**" as required by the above precedents. Again, I must refrain from touching on the merits or otherwise of the Motion pending in **BUSIA CMC ELC NO E66 of 2020**.
14. The bottom line, however is that weighing the pros and cons of the Motion by the Interested Party including the need for expeditious disposal of disputes and the optimum utilization of judicial time, I am not persuaded that I should exercise my discretion in allowing the Motion. The same is for dismissal.
15. The up-shot of all the above is that having considered the Exparte Applicant's chambers summons dated 21st November 2024 as well as the Interested Party's Notice of Motion dated 1st September 2025, I issue the following disposal orders:

1. **The Interested Party's Notice of Motion dated 1st September 2025 is dismissed with costs.**
2. **The Ex-parte Applicant's chamber summons dated 21st November 2024 is allowed in the following terms:**
 - a) **Leave is granted for the Exparte - Applicant to file and serve the substantive Motion seeking an order of mandamus upon the COUNTY GOVERNMENT OF BUSIA and any other Interested Party within 21 days from to-day.**
 - b) **Costs in the cause.**

**BOAZ N. OLAO
JUDGE**

6TH NOVEMBER 2025

**Ruling dated, signed and delivered on this 6th day of
November 2025 by way of electronic mail.**

**BOAZ N. OLAO
JUDGE**

6TH NOVEMBER 2025