

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION NO. E320 OF 2025
IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM
ACT
AND
IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE
RULES, 2010
AND
IN THE MATTER OF: ARTICLES 47 & 50 OF THE CONSTITUTION
OF KENYA, 2010
AND
IN THE MATTER OF: THE GOVERNMENT PROCEEDINGS ACT
CAP 40 LAWS OF KENYA
AND
IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY
FOR ORDERS OF MANDAMUS
BETWEEN
EDWARD AKONG’O OYUGI.....1ST APPLICANT
KAMOJI WACHIRA.....2ND APPLICANT
JOSEPH OTIENO MALO.....3RD APPLICANT
VERSUS
THE ATTORNEY GENERAL.....RESPONDENT
RULING ON LEAVE TO APPLY

1. The Applicants by their chamber summons dated 8th October, 2025 seek leave of this Court to apply for judicial review orders of mandamus to compel the Honourable Attorney-General to satisfy a decree and certificate of order against the government issued on 11th February, 2019 and 1st August 2025 respectively in Nairobi High Court Constitutional and Human Rights Petition No. 441 OF 2015, for a cumulative sum of Kshs 87,259,828 inclusive of costs as taxed and interest.

2. The applicant also seeks leave to apply for mandamus to compel the respondent to pay further interest as accrued following the issuance of the certificate of order against the government on 1st August, 2025.
3. The chamber summons is grounded on the statutory statement and verifying affidavit sworn by the 1st applicant, Edward Akong'o Oyugi on 8th October, 2025 and the annexures thereto which include the judgment by Mativo J, decree and certificate of order against the government.
4. When the application first came before me, I did not certify it as urgent and instead directed the applicant to serve the respondent for interpartes hearing on 10/11/2025.
5. The record reveals that in the primary suit which was a constitutional petition filed in our sister Constitutional and Human Rights division of the High Court at Nairobi, the only named respondent was the Attorney-General.
6. The pleadings are not annexed to the affidavit. However, when counsel for the applicants appeared in court and I inquired from him whether it was the Attorney General that was to settle the decree, he submitted that it was the Ministry of Interior. Further, that the applicants had sued the Attorney General hence the application is against the Attorney General who was the sole party to the Constitutional Petition.
7. From the explanation by the applicants' counsel and from the detailed judgment by justice Mativo rendered on 11th February, 2025 by P. Nyamweya J (as she then was), it is clear that the the alleged acts of torture

against the applicants were attributable to officers of the Ministry of Interior and Coordination of National Government, which the Attorney-General was presumed to represent.

8. Despite service of the application as directed by this Court on 9/10/2025, the Attorney-General did not enter appearance or file a response to this application for leave. This Court therefore permitted the applicant's counsel to argue the application as scheduled ON 10TH November, 2025, since even in undefended judicial review applications, the Court must still satisfy itself that the order sought lies as a matter of law.

Analysis and determination

9. I have considered the application as filed and argued by the applicants' counsel and the fact that it was undefended despite service. In my humble view, the main issue for determination is whether the Attorney-General can be compelled by way of mandamus to settle a decree issued in a case where:
 - (a) he was sued solely in his representative capacity; and
 - (b) the relevant ministry or department was not directly enjoined in the original suit.
10. The Attorney-General is established under Article 156 of the Constitution as the principal legal adviser to the national government and represents the national government in civil proceedings.
11. Section 12(1) of the Government Proceedings Act, Cap 40 provides that:

(1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Office of the Attorney-General, as the case may be.

12. This provision, however, merely prescribes the procedural form of suits involving the Government. It does not confer substantive liability on the Attorney-General for all decrees arising from government operations.

13. In addition, Section 21(3) of the Government Proceedings Act provides that ***(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.***

14. In other words, the section mandates that when a decree is issued against the Government, ***the accounting officer for the department concerned shall, subject to any appeal, pay to the person entitled the amount appearing by***

the certificate to be due out of the vote or other moneys provided and appropriated for that purpose.

15. The statutory duty to satisfy a decree therefore lies with the accounting officer of the specific government ministry or department concerned and not the Attorney-General who is merely sued in representative capacity, unless the decree is against the Office of the Attorney-General itself, in which event, it is doubtful that the Attorney General would be the accounting Officer of that Office in terms of settlement of decrees of the Court, noting that the Attorney General serves at the level of the Cabinet Secretary whereas the Solicitor General serves at the level of the Principal Secretary.
16. In the instant proceedings, although the Applicant sued the Attorney-General, the subject matter clearly concerned acts of torture meted out on the applicants by officers that fall under the Ministry of Interior. The Applicant did not enjoin the Ministry of Interior or its Principal Secretary as a defendant in the original proceedings. Although the omission to enjoin them was not fatal, the legal effect of such omission is that while the Attorney-General properly appeared as the representative of the Government pursuant to section 12(1) of the Government Proceedings Act, and whereas I am aware that Constitutional Petitions and Judicial Review matters are neither civil nor criminal, section 5 of the Office of Attorney General Act provides the functions of the Attorney General to be, among others:

representing the national Government in all civil and constitutional matters in accordance with the Government Proceedings Act (Cap. 40).

17. Accordingly, the Attorney General was sued in a representative capacity only, not as the party that would bear liability on behalf of the national government or its officers. The substantive liability rests with the relevant Ministry of Interior, assuming that is the relevant Ministry for purposes of these proceedings as stated by the applicant's counsel from the bar, whose accounting officer, the principal Secretary, would be responsible for satisfying the decree as contemplated in section 21 of the Government Proceedings Act.

18. This Court is aware that mandamus proceedings are independent of execution proceedings which come later but the fact remains that mandamus for settlement of a decree must be commenced against a relevant party who is under a statutory duty to settle the decree, noting that the Court cannot compel the Attorney General to settle decrees issued against other Government Ministries or departments.

19. It is important to highlight that the Attorney-General's non-appearance to oppose the instant proceedings does not change this legal position. This Court is bound to determine mandamus applications on the basis of statutory duty, not default or silence of the respondent.

20. The courts have consistently held that mandamus will only issue against a person or office upon whom the law imposes a specific public duty. In

Republic v Attorney-General & Another ex parte James Alfred Koroso

[2013] eKLR, G.V. Odunga J (as he then was) stated:

“19.... It follows therefore that the institution of judicial review proceedings in the nature of mandamus cannot be equated with execution proceedings. In seeking an order for mandamus the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his government employer. In mandamus cases, it is recognized that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it. In other words,

mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform.”

21. The Court in the above case emphasized that the duty to pay a decree is placed upon the accounting officer of the relevant ministry or department. In the said case, the applicant had nonetheless enjoined the Principal Secretary of the relevant Ministry as a principal party to the application for mandamus whereas only the Attorney General had been sued in the main suit. In the instant case, however, the accounting officer of the relevant Ministry is neither a party to the primary suit nor to these proceedings.

22. In my humble view, the Attorney-General, being sued only in a representative capacity, cannot be compelled to satisfy a decree issued in respect of acts done by a particular government entity, for example if torture upon the applicants was done by government agents, then the government agents must have an identifiable Ministry responsible for that command such as the Police or Military and what the Court expects of the applicant is to bring on board the accounting officer of the relevant Ministry to settle the decree.

23. I reiterate that the accounting officer of the relevant Ministry bears the legal duty to settle government decrees. This is what section 21 (3) of the Government Proceedings stipulate.

24. For all the above reasons, I find and hold that since the decree subject of these proceedings arose from acts attributable to the Ministry of Interior and Coordination of National Government or its successor in title, the Attorney-General was sued only in a representative capacity and therefore no legal or statutory duty lies upon the Attorney-General to satisfy a decree for which he is not the accounting officer.

25. Accordingly, even though the Attorney-General did not file a response, the order of mandamus cannot issue against her. The proper respondent in such proceedings would be the Principal Secretary, Ministry of Interior, or of any other relevant ministry, as the accounting officer of the concerned department, as submitted by Mr. Juma Counsel for the applicant

26. In the end, the Chamber summons dated 8th October, 2025 is hereby found to be incompetent and the same is hereby struck out with no orders as to costs with the result that the applicant is at liberty to apply afresh enjoining the relevant accounting officer of the relevant Government Ministry on whose behalf the Attorney General was sued in the Constitutional petition No. 441 of 2015.

27. This file is closed.

Dated, Signed and Delivered at Nairobi this 12th Day of November, 2025

**R.E. ABURILI
JUDGE**