

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT KISUMU**

**JUDICIAL REVIEW NO. E014 OF 2025**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**EVANS MORARA NYANG'ONGO.....1<sup>ST</sup> EX PARTE**

**APPLICANT**

**CHARLES MORARA MOGUNDE.....2<sup>ND</sup> EX PARTE**

**APPLICANT**

**VERSUS**

**CABINET SECRETARY,**

**MINISTRY OF EDUCATION.....1<sup>ST</sup>**

**RESPONDENT**

**TEACHERS SERVICE COMMISSION.....2<sup>ND</sup>**

**RESPONDENT**

**PUBLIC SERVICE COMMISSION.....3<sup>RD</sup>**

**RESPONDENT**

**RULING**

Before the court for determination is the applicant's Notice of Motion dated 19<sup>th</sup> June 2025 seeking Orders that:-

- 1. An Order of mandamus be granted compelling the respondents herein to pay to the Ex Parte Applicants advocate the sum of Kshs.413,790.00 as per the*

*court Order in Kisumu ELRC Petition No. E007 of 2022 **Evans Morara Nyang'ongo & another V Cabinet Secretary Ministry of Education & 6 others.***

*2. The costs of this application and that of Kisumu MSL JR E008 of 2025 from which leave was sought be provided for.*

The Notice of Motion is expressed under Order 53 Rule 1, 2, 3 of the Civil Procedure Rules and is based on the grounds set out on its face and the Supporting Affidavit of the Applicant who deposes that he was granted leave to apply for Judicial Review Orders.

In the grounds in support of the Notice of Motion, the applicant states that after judgment was entered in his favour with costs, the Bill of costs was taxed on 13<sup>th</sup> August 2024 at Kshs.413,790.00 and a Certificate of Order Against the Government issued on 3<sup>rd</sup> February 2025 and the Certificate together with the Certificate of Costs were served upon the respondents on 5<sup>th</sup> February 2025.

That it was fair that respondents be compelled to pay the *ex parte* applicant the amount due.

## **2<sup>nd</sup> respondent's response**

Mr. Nicholas Mwaniki deponed that he was the Acting Director Finance & Accounts at the Teachers Service Commission and judgment in Kisumu ELRC Petition No. E007 of 2022 was entered in favour of the Petitioners and costs were to be borne by the respondents jointly and severally and the Bill of Costs was taxed clandestinely and learnt of the amount after service.

The affiant deponed that each of the seven (7) respondents was liable to pay Kshs.59,112.85 and the 2<sup>nd</sup> respondent had already paid its portion to the applicant's advocate and had thus discharged its obligation and the Orders sought cannot apply to it.

## **3<sup>rd</sup> respondent's response**

In its grounds of opposition dated 1<sup>st</sup> September 2025, the 3<sup>rd</sup> respondent contended that no demand notice was served prior to filing of the suit and was not entitled to costs and the Bill of Costs was not served.

That the *ex parte* applicant filed several suits from the same subject matter and listed six(6) cases including three (3) at the Nakuru Law Courts.

Other respondents did not respond.

### **Applicant's submissions**

On demand notice, counsel submitted that the judgment and decree were issued by a competent court and had neither been appealed against or reviewed nor set aside and service was moot. Above all, substantive justice prevailed over procedural technicalities.

Reliance was placed on **Republic V Attorney General & another ex parte James Alfred Koros** [2013] eKLR.

As regards service of the Bill of Costs, counsel submitted that the Affidavits of service on record were explicit and none of the respondents had filed a reference and the taxed costs were final and binding.

Reliance was placed on **Premchand Raichand Ltd & another V Quarry Service East Africa Ltd** [1972] EA 162.

Counsel, further submitted that the Certificate of Order Against the Government was served and the amount remained outstanding.

Counsel urged the court to disregard the 3<sup>rd</sup> respondents Grounds of Opposition and grant the Order of *mandamus*.

## **2<sup>nd</sup> respondent's submissions**

As to whether the applicant's application had met the threshold for the Order of *mandamus*, reliance was placed on the decisions in **Kenya National Examinations Council V Republic ex parte Geoffrey Gathenji Njoroge & 9 others** [1977] eKLR and **Republic V Principal Secretary, Ministry of Internal Security Ex Parte Schon Noorani** [2018] eKLR, on the nature of the remedy of *mandamus* and urge that the 2<sup>nd</sup> respondent had paid its portion of the costs.

As regards the 2<sup>nd</sup> respondents liability for the costs counsel cited the decision in **Kenya Bus Service Co. Ltd V Attorney General & 2 others** [2005] eKLR, on the effect of joint and several liability.

Counsel submitted that one respondent could not be compelled to pay the entire sum and the 2<sup>nd</sup> respondent had already paid its portion of Kshs.59,112.85, by simply dividing the amount equally between the respondents.

Reliance was also placed on the decision in **Republic V Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza** [2012] eKLR to urge that the 2<sup>nd</sup> respondent had neither refused nor neglected to perform its duty.

Concerning the taxed costs, reliance was placed on the decisions in **Republic V Attorney General & another ex parte Macharia** [2016] eKLR and **Republic V County Secretary Nairobi City County Ex parte Wachira Nderitu Ngugi & Co. Advocates** [2016] eKLR, to urge that taxation without proper service was a nullity *ab initio* and the 2<sup>nd</sup> respondent was not served.

The 3<sup>rd</sup> respondent did not file submissions.

In his Supplementary submissions, the applicant relied on the decision in **Republic V Kenya Railways Corporation** [2007] eKLR and **Standard Chartered Bank Ltd V Kenya Pipeline Co. Ltd** [2005] eKLR, to urge that where liability was joint and several, the decree holder could recover the full amount from any of the judgment debtors. However, the debtors are free to apportion payment among themselves.

## **Analysis and determination**

It is not in dispute that the *ex parte* applicants obtained a favourable judgment in Kisumu ELRC Petition No. E007 of 2022 and were also awarded costs which were taxed in the sum of Kshs.413,790.00 and significantly, the respondents were jointly and severally liable for the costs.

It is equally not in contest that the applicants sought and were granted leave to file the instant Notice of Motion for the judicial review Order of *mandamus*.

Although the applicants served the Certificate of Costs and Certificate of Order Against the Government upon the respondents, the sum of Kshs.413,790.00 remained unpaid which precipitated the instant application.

Similarly, although the 3<sup>rd</sup> respondent contended that the costs were procured clandestinely because the Bill of Costs was not served, an allegation the applicant countered by relying on the Affidavits of service, the 3<sup>rd</sup> respondent neither appealed the ruling of the taxing officer nor file a reference application for setting aside the ruling or re-assessment of costs.

In the court's view, nothing turns on this issue.

Equally, the contention that no demand notice was served on the respondents for the amount outstanding lacked merit for the simple reason that all the respondents were aware of the judgment dated 18<sup>th</sup> April 2024 which awarded costs against the respondents jointly and severally and the applicants subsequently served the Certificate of Costs and the Certificate of Order Against the Government, which was necessary for purposes of enforcement against the Ministry of Education.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are constitutional commissions under Article 238 of the Constitution of Kenya and are incorporated associations with perpetual succession, common seal and capacity to sue or be sued. Enforcement against them does not require Certificate of Order Against the Government.

It requires no emphasis that the Order of *mandamus* compels a person(s) to perform a public duty.

In **Republic V Jomo Kenyatta University of Agriculture and Technology** [2021] eKLR, Nyamweya J (as she then was) held:

*“The purpose of an order of mandamus is to compel the performance of a public duty or any act contrary to or evasive of the law. It therefore lies against a public officer when some specific act or thing, which the law requires to be done, has been omitted. The conditions for its grant are that it must be shown that the public officer has failed to perform his duty; the court will not grant mandamus where there is an alternative remedy available to the applicant; and that it may be refused if the enforcement of the order will pose implementation challenges that require the Court’s supervision.*

See in this regard **Evanson Jidiraph Kamau & Another V The Attorney General Mombasa H.C. Misc. Application No. 40 of 2000**. It was further been held in **Republic V The Commissioner of Lands & Another Ex-Parte Kithinji Murugu M’agere, Nairobi High Court Misc. Application No. 395 of 2012** that mandamus is employed to enforce the performance of a public duty which is imperative, not optional or discretionary, with the authority concerned. In addition, that mandamus may be issued to enforce mandatory duty which may not necessarily be a statutory

*duty, but which has “a public element” which may take any forms...”*

See also in this regard the sentiments of the Court of Appeal in **Republic V Kenya National Examinations Council Ex Parte Gathenji & 9 others** (supra) citing the Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 1 at page 111 from paragraph 89, Mativo J (as he then was) in **Republic V Principal Secretary Ministry of Internal Security and another** [2018] eKLR and Githua J. in **Republic V Permanent Secretary Ministry of State for Provincial Administration & Internal Security** [2012] eKLR.

In law, once the Certificate of Costs is served upon the accounting Officer of the relevant Ministry or organization he or she is bound to pay the amount due to the applicant.

In **Republic V Attorney General & another Ex Parte Orbit Chemicals Ltd Odunga J** (as he then was) held:

*“It is therefore clear that in applications for mandamus seeking to compel the satisfaction of a decree, it is the accounting officer of the relevant government department that is obliged to satisfy the decree*

*notwithstanding the fact that the said officer was not a party to the trial proceedings and that in fact the only defendant there is was the Attorney General...”*

See also **James Samuel Mburu V Attorney General & another** [2017] eKLR and **Kisya Investments Ltd V Attorney General** [2005] eKLR.

Although the 2<sup>nd</sup> respondent paid the sum of Kshs.59,112.85 to the applicant’s advocates, the amount due to the applicant’s remains outstanding and the 2<sup>nd</sup> respondent’s argument that it is discharged cannot avail it. The 2<sup>nd</sup> respondent cannot discharge itself from an Order of the court where liability is joint and several. Discharge will only take place when the total amount is fully paid by one of the respondents or all of them jointly.

In this case, it is not in dispute that the applicants obtained and served the Certificate of Costs and the Certificate of Order Against the Government on the respondents and the sum remains unpaid, the court is satisfied that the instant application meets the threshold for the grant of the Order of *mandamus* against the three (3) respondents.

The upshot is that the application dated 19<sup>th</sup> June 2025 is merited and is allowed as follows:

- (a) *An Order of mandamus be and is hereby issued directed to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to pay the sum of **Kshs.413,790.00** in Kisumu ELRC Petition No. E007 of 2022 **Evans Morara Nyang'ongo & another V The Cabinet Secretary Ministry of Education and 6 others.***
- (b) *Respondent shall pay the sum of **Kshs.413,790.00** within 60 days failing which the applicants are liberty to execute as necessary.*
- (c) *Parties shall bear their own costs.*

**DATED, SIGNED AND DELIVERED VIRTUALLY AT  
KISUMU ON THIS 27<sup>TH</sup> DAY OF NOVEMBER 2025.**

**DR. JACOB GAKERI  
JUDGE**

### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on

15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**  
**JUDGE**