

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. E003 OF 2024

REPUBLIC.....APPLICANT

AND

**THE PRICIPAL SECRETARY, MINISTRY OF LANDS PUBLIC
WORKS AND URBAN DEVELOPMENT.....**

.....RESPONDENT

AND

MOHAMED KASSAM MOHAMED.....1ST EX-PARTE

APPLICANT

ABDULATIF MOHAMED.....2ND EX-PARTE

APPLICANT

IRSHADALI SUMRA.....3RD EX-PARTE

APPLICANT

AEERALY SUMRA.....4TH EX-PARTE

APPLICANT

AND

**THE LAND REGISTRAR, MOMBASA.....INTERESTED
PARTY**

AND

IN THE MATTER OF: ELCCC NO. 136 OF 2012

BETWEEN

MOHAMED KASSAM MOHAMED.....	1ST
PLAINTIFF	
ABDULATIF MOHAMED.....	2ND
PLAINTIFF	
IRSHADALI SUMRA.....	3RD
PLAINTIFF	
AEERALY SUMRA.....	4TH
PLAINTIFF	
- VERSUS -	
HAMISI MOHAMED MWAWASAA.....	1ST
DEFENDANT	
FANUEL CHAMWONA.....	2ND
DEFENDANT	
THE LAND REGISTRAR, MOMBASA.	3RD
DEFENDANT	
JELLANI BAHASANI SHARIF.....	4TH
DEFENDANT	
PIONEER GENERAL ASSURANCE SOCIETY.....	5TH
DEFENDANT	

JUDGMENT

I. Preliminaries

1. This is a Judgement pertaining to a Judicial Review commenced through filing of a Chamber Summons Application dated 14th February, 2024 seeking for leave of Court to be granted certain prerogative writs by *Mohamed Kassam Mohamed, Abdulatif*

Mohamed, Irshadali Sumra and Aeeraly Sumra, the Ex - Parte Applicants herein - *Robert Kamau* against the *Land Registrar - Kwale*, the Respondent herein.

2. Subsequently, a Notice of Motion Application dated 28th October, 2024 was instituted by them. The Chamber Summons application was premised pursuant to the provision of Order 53 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3A of the Civil Procedure Act, Cap. 21, Sections 8 and 9 of the Law Reforms Act, Cap. 26 of the Laws of Kenya and all enabling Provisions of the Law.
3. On 12th February, 2025, the matter was set down for judgment on 12th February, 2025. However, due to unavoidable circumstances, the said Judgment was deferred to 28th November, 2025.
4. Upon service the Interested Party - the Land Registrar - Kwale. Unfortunately, despite all efforts made, for unclear reasons whatsoever, the Respondents never participated any further way in this matter thereafter.
5. Ideally, therefore, the suit stands unopposed but the Honourable Court still proceeded to deal with the matter on its own merit.

II. The Ex - Parte Applicants' case

6. The Ex - Parte Applicants sought for the following orders raised from the Notice of Motion application:-

a) ***THAT this Honourable Court be pleased to issue a writ of Mandamus against the Principal Secretary, Ministry of Lands, Public Works, Housing and Urban Development compelling him to satisfy the Certificate of Costs dated 27th April, 2022 issued in Msa ELCC No. 136 of 2012, MOHAMED KASSAM MOHAMED AND 3 OTHERS =VS= HAMISI MOHAMED MWASAA & 4 OTHERS.***

b) ***THAT the costs of this Application be borne by the Respondent.***

7. The application herein was premised on the grounds, testimonial facts and averments made out under the 13 Paragraphed Supporting Affidavit (Sic) of - IRSHADALI SUMRA, the 3rd Applicant herein sworn and dated the same day as the Application with six (6) annexures marked "IS - 1 to IS - 6" annexed thereto. The Applicant averred that:-

(a) The Affiant was authorized by the 1st, 2nd and 4th Applicants to swear this Affidavit on his own and their behalf.

(b) On 10th October, 2017, judgment was delivered in their favour in the Civil case of:- ***"Msa ELCC No. 136 of 2017, Mohamed Kassam Mohamed & 3 Others - Versus - Hamisi***

Mohamed Mwawasaa & 4 Others". Exhibited hereto and marked as "IS-1" was a true copy of the Judgement.

(c) In the said Judgment, costs were awarded to them against the 1st to 3rd Defendants jointly and severally.

(d) On 18th December, 2017 a Decree was issued, exhibited in the affidavit and marked as "IS - 2" was a true copy of the said Decree.

(e) On 27th April, 2022 a Certificate of Costs was issued, exhibited in the affidavit and marked as "IS - 3" was a true copy of the said certificate.

(f) On 5th June, 2023, the Certificate of Order against the Government was issued, exhibited in the affidavit and marked as "IS - 4" was a true copy of the said Certificate.

(g) On 9th June, 2023, the Certificate of Order against the Government was served upon the Honourable Attorney General on behalf of the Respondent and the Interested Party, exhibited in the affidavit and marked as "IS - 5" was a true copy of the affidavit of service.

(h) Neither the Respondent nor the Interested Party had settled the said Certificate.

(i) The Respondent herein was mandated in law to satisfy the said Decree.

(j) The Affiant also annexed and exhibited in the affidavit herewith the Application for leave, Verifying Affidavit and Statement of Facts, collectively marked as "IS - 6".

(k) The affiant had read the statement and all the annexures in this Affidavit and the Chamber Summons application and stated that all the facts were true to the best of his own knowledge.

8. Through the Statutory Statement of facts dated 14th February, 2024 the Ex - Party Applicants sought for the following orders:-

i. A writ of Mandamus against The Principal Secretary, Ministry of Lands, Public Works, Housing and Urban Development, compelling him to pay the amount due on the Certificate of Order Against the Government issued in ELCC No. 136 of 2012 in favour of the Applicants.

9. The Application same was premised on the ground that under The Finance Management Act, 2012, the Principal Secretary, Ministry of Lands, Public Works, Housing and Urban Development is the accounting Chief Officer.

III. Submissions

10. On 4th December, 2024 while all the parties were present in Court, they were directed to have the Ex - Parte Applicants application dated 28th October, 2024 be disposed of by way of written submissions. Unfortunately, and as already indicated only the Ex - Parte Applicants obliged. Eventually, Judgment date was reserved and delivered on 28th November, 2025 by Court accordingly.

A. The written submissions of the Applicants

11. The Ex Parte Applicants through the Law firm of Messrs. Kanyi J Advocates filed their undated written submissions. Mr. Maundu Advocate commenced their submissions by stating that the Ex-parte Applicants brought the Notice of motion dated 28th October, 2024, seeking that this Honorable Court be pleased to issue a writ of mandamus against the Principal Secretary, Ministry of Lands Public Works and Urban Development compelling them forthwith to satisfy the Certificate of Costs dated 27th April, 2022 issued in ***“Msa ELCCC No.136 of 2012, Mohamed Kassam Mohamed and 3 Others - Versus - Hamisi Mohamed Mwawasaa & 4 Others”***. The application also sought for costs.

12. The application was based on the grounds set out on the face of the application and the supporting affidavit of the 1st Ex - Parte Applicant sworn on 28th October, 2024, as follows:-

- a. On 10th October, 2017, Judgement was delivered in favour of the Ex-Parte Applicants, with costs in the Civil Case of:-
“Msa ELCCC No. 136 of 2012, Mohamed Kassam Mojamed and 3 Others vs Hamisi Mohamed Mwawasaa & 4 Others.
Annexure 1 on pages 7-16 of the bundles.
- b. Decree in the said matter was issued on 18th December, 2017-Annexure 2 on pages 17 of the bundles.
- c. Costs were taxed on 27th April, 2022 and a Certificate of Costs was issued on 12th May, 2022, Annexure 3 on page 18 of the bundle.
- d. A Certificate of Costs of Order against the Government was issued on 5th June, 2023, Annexure 4 on page 19 of the bundle.
- e. The said Certificate of Costs was served upon the Attorney General on 9th June, 2023, Affidavit of Service - Annexure 5 on page 20 of the bundle.

f. The Respondent had not settled the said Certificate of Costs.

13. On the law, the Learned Counsel submitted that the Ex - Parte Applicants had fully complied with the legal requirements for the issuance of an order of Mandamus. To buttress on this point, the Counsel made reference to the case of:- ***“Republic - Versus - Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex - Parte Fredrick Manoah Egunza 15{2012} eKLR”***:

“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...."

14. The Learned Counsel emphasized that the Ex - Parte Applicant had complied with the provision of Section 21(1) and (2) of the Government Proceedings Act. A certificate of Order Against the government was issued on 5th June, 2023 and served upon the Attorney General on 9th June, 2023 as shown by Annexures 4 and 5 respectively. Additionally, he cited the case of:- **"Republic - Versus - County Secretary, County Government of Mombasa & 2 others Ex - Parte Samuel Mutemi t/a Tudor Paradise (2021) eKLR"** whereby the Court held:-

"14.The Court of Appeal Kenya National Examinations Council v Republic Ex - Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997]eKLR outlined the circumstances under which the judicial review order of mandamus can be issued thus: "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 or 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. The order must command no more than the party against whom the application 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...These principles mean that an order of mandamus 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. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in

excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.

15. Similar position was adopted in Shah v Attorney General (No. 3) Kampala HMC No. 31 of 1969 (1970] EA 543 where Goudie, J expressed himself, inter alia, as follows:

“Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment...With regard to the question whether mandamus will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, mandamus will lie on the application of a person interested to compel them to do so...Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to

direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice.”

15. The Court of Appeal in: **“Principal Secretary Ministry of Regional Development/or its Successor Ministry Through the Office of the Attorney General - Versus - N.K Brothers Ltd (Civil Application E279 of 2023) [2024] KECA 421 (KLR) (26 April 2024) (Ruling)”**

held:

“20....It is the duty of the accounting officer of a government Ministry to act with respect to debts adjudged to be due from the Ministry. The accounting officer of a Ministry is the Principal Secretary. The only person who can be committed to civil jail for failure to obey court orders in the circumstances such as are before us is the person holding the position of the accounting officer.”

16. Further the Learned Counsel relied on the case of ***“Republic - Versus - Attorney General & another; Githua (Ex - Parte Applicant) (Judicial Review Miscellaneous Application E151 of2021) [2023] KEHC 18613 (KLR) (Judicial Review)(14 June 2023) (Ruling)”*** where the court held that:

“This court is further guided and agrees with the findings in the case of Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza (2012) eKLR where it was 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.”

17. Similarly, in the case of **“Republic - Versus - County Government of Kitui Ex - Parte Fairplan Systems Limited (2022) eKLR”**, the court held:

**26...In Solo Worldwide Inter-Enterprises vs County Secretary Nairobi County and Another [2016] eKLR the court held;
“It therefore follows that the person who has the overall financial obligation for the purposes of the affairs of a County**

Government must be the County Executive in Charge of Finance and unless he shows otherwise, he is the one under obligation to pay funds, in the capacity as the accounting officer.....”

18. In conclusion the Learned Counsel averred that they had established that:-

- a. The Ex - Parte Applicants had complied with the legal requirements for issuance of an enforcement order against the government.
- b. That an order of Mandamus was the most appropriate order to issue under the circumstances.
- c. That the Principal Secretary was the accounting officer and the responsible officer against whom the order should issue.

19. The Ex - Parte Applicants prayed also that the costs of this application be awarded to them.

IV. Analysis & Determination.

20. I have carefully read and considered the applications being the Chamber summons dated 25th October, 2023, the Notice of Motion application dated 31st October, 2023 and 2nd November, 2023, the submissions and the myriad of cases cited herein by

the Ex - Parte Applicants herein, the relevant provisions of the Constitution of Kenya, 2010 and statutes.

21. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-

a) Whether the Ex - Parte Applicant has made out a case for the grant of the judicial review orders?

b) Who bears the costs of the Application.

ISSUE No. a). Whether the Applicant has made out a case for the grant of the judicial review orders.

22. Under this Sub - heading, the Honourable Court takes cognizance that the principles that guide the Court when dealing with an application for Judicial Review - the prerogative writs of "**Mandamus**" was stated in the Court of Appeal case of "**Commission on Administrative Justice - Versus -Kenya Vision 2030 Delivery Board & 2 others [2019] eKLR**". Wherein the court stated as follows:-

"As observed by the Judge and correctly so in our view, the principle that guides the High Court when dealing with the scope and efficacy of an order of mandamus was crystalized by the Court in Kenya National Examination Council - Versus - Republic Ex - Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR namely:

“The order of mandamus is of most extensive remedial nature and is in the form of 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 of 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 it may issue in cases where although there is an alternative remedy, yet the mode of redress is not convenient, beneficial and effectual.”

23. This position was reiterated in the English case of ***“R - Versus - Dudsheath, Ex - Parte, Meredith [1950] 2 ALL E.R. 741”*** where it was stated as follows:-

“It is important to remember that “Mandamus” is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it.”

24. The Respondent has both a statutory and public duty to satisfy the decree issued by a competent court in favour of the Ex - Parte Applicant. It is not disputed that by the time these proceedings were commenced, the Respondent had failed, refused and/or neglected to fulfill its aforesaid duty to the

detriment of the Ex - Parte Applicant despite the fact that no appeal had been lodged against the Judgment.

25. On this aspect, the Court is bound to adopt an interpretation that favours enforcement and as far as possible secures accrued rights. The values of the Constitution particularised under the provision of Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159(2)(a) and (b) and the applicant's right of access to justice protected under Article 48 of the Constitution. Hence therefore there is nothing unconstitutional for an Ex - Parte Applicants enforcing his decree that is due against a government entity and the mere fact that the same has not been budged for cannot be a ground for not settling the said decree. On the contrary it will be absurd and contemptuous should the respondent prolong the settlement of the said decree.

26. 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.

27. It is trite law that "**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. - Versus - Canada Attorney General**"), and, was also discussed in "**Dragan - Versus - Canada (Minister of Citizenship and Immigration)**". The eight (8) factors that must be present for the Prerogative writ of "**Mandamus**" to issue are:-

- a. There must be a public legal duty to act;**
- b. The duty must be owed to the Applicants;**
- c. 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;**
- (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.**

28. In the instant case, the Ex - Parte Applicants in obtaining a Decree and subsequently the Certificate of Order against the Government, acquired a specific legal right which gave rise to the Interested Party's statutory obligation through its accounting officer the Respondent to pay a decretal amount of a sum of Kenya Shillings Five Twenty Nine Thousand Four Fifteen Hundred (Kshs. 529,415/-) as specified in the Certificate of Costs against the Land Registrar. As per the Judgment that was delivered in favour of the Ex - Parte Applicants on 10th October 2017 by Hon. Justice A. Omollo , followed by a Decree issued on 18th December 2017. Costs were taxed at a sum of Kenya Shillings Five Twenty Nine Thousand Four Fifteen Hundred (Kshs.

529,415/-) against the 1st, 2nd & 3rd Defendants. A Certificate of Order against the Government was duly issued and served upon the Attorney General on 9th June 2023. Despite service, the Respondent has failed, refused, or neglected to satisfy the decretal sum.

29. Despite service of the said Ruling and Certificate of Costs, the Interested Party has refused/declined to settle the same.

30. The provision of 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."

31. Based on the foregoing, it in my view that the Ex - Parte Applicants were perfectly in order to seek the order of mandamus to compel the Respondent to satisfy the decree. In the circumstances and as aptly submitted by the Ex - Parte

Applicants, the Court is satisfied that they have made out a strong case for grant of the judicial review prerogative writs and orders sought thereof. Under no apparent grounds, do I have any reason to deny them this order.

ISSUE No. d). Who will bear the Costs of application.

32. It is now well established that the issue of costs is discretionary of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

33. The proviso of Section 27 of the Civil Procedure Act, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the

suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

34. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise. See the decisions of Supreme Court ***“Jasbir Rai Singh - Versus - Tarchalan Singh” eKLR (2014)*** and ***Cecilia Karuru Ngayo - Versus - Barclays Bank of Kenya Limited, eKLR (2014)***.
35. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

36. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In **“Morgan Air Cargo Limited - Versus - Evrest Enterprises Limited [2014] eKLR”** the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

37. With respect to the instant application, the Honourable Court has found that the application by the Ex - Parte Applicants is meritorious. Thus the Ex - Parte Applicants are entitled to costs of the suit to be borne by the Respondents accordingly.

V. Conclusion & Disposition

38. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-

a) THAT Judgment be and is hereby entered in favour of the Ex - parte Applicant under the following terms: -

(i) the Honourable Court be pleased to issue a judicial review order in the nature of a writ of Mandamus against the Principal Secretary, Ministry of Lands, Public Works, Housing and Urban Development compelling him to satisfy the Certificate of Costs dated 27th April, 2022 - *"MBA ELCC No. 136 of 2012, Mohamed Kassam Mohamed and 3 others - Versus - Hamisi Mohamed Mwasaa & 4 others"*.

(ii) **In respect to prayer (a) (i) above the same should be settled WITHIN THE NEXT 90 DAYS of the delivery of this Judgment hereof.**

b) THAT the costs of the suit to be awarded to the Ex - Parte Applicant to be borne by the Respondent.

IT IS SO ORDERED ACCORDINGLY.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS28THDAY OFNOVEMBER.....2025.

.....
**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
AT MOMBASA**

Ruling delivered in the presence of:

- a) M/s. Firdaus Mbula, the Court Assistant.
- b) No appearance for the 1st, 2nd, 3rd & 4th Ex - Parte Applicants.
- c) No appearance for the Respondent.
- d) No appearance for Interested Parties.