Republic v Principal Secretary, Ministry of Interior and Coordination of National Government & another; Muchelule (Ex parte Applicant) (Judicial Review Application E007 of 2024) [2025] KEHC 17729 (KLR) (Judicial Review) (2 December 2025) (Ruling)

Neutral citation: [2025] KEHC 17729 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E007 OF 2024

RE ABURILI, J

DECEMBER 2, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT ..... 1ST RESPONDENT

THE HON ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

HON JUSTICE AGGREY MUCHELULE ..... EX PARTE APPLICANT

RULING

1. on 11th June, 2025, this Court rendered judgment determining the applicant's substantive notice of motion dated 29th January, 2024 seeking judicial review orders of mandamus compelling the 1st respondent herein, the Principal Secretary Ministry of Interior and Coordination of National Government to settle certificate of Order for costs awarded to the applicant in HCJR APPL. E112 of 2021.The court in allowing the prayer for mandamus also awarded the applicant costs of the application and assessed the said costs at Kshs 50,000 and further directed that the sum due be settled within 60 days of the date of judgment and in default, the applicant was at liberty to apply. The Court also fixed the matter to be mentioned before the Deputy Registrar on 11th August 2025 to confirm settlement.

2. To date, there is no indication that settlement is forthcoming. It is worth noting that the certificate of order against the government for the assessed costs was issued on 1st December, 2023, in HCCJR APPL E112 OF 2021 is exactly two years and one day today.

3. The applicant has therefore, through his counsel, filed an application dated 8th October, 2025 seeking orders that the 2nd respondent, Dr Raymond Omollo do appear in Court personally at the hearing of this application, to show cause why he should not be held in contempt of the orders of this court as issue don the 11th June, 2025.

4. The applicant also prays that this court do find the said Principal Secretary, Dr Raymond Omollo to be in contempt of court orders of this court issued on 11th June, 2025 and commit him to civil jail for a term not exceeding six months. The applicant equally prays for costs of this application for contempt.

5. The application is predicated on the grounds on the face of the notice of motion and supported by an affidavit sworn by the applicant on 8th October, 2025 reiterating the grounds and providing the history of this matter, culminating in these proceedings, arising from judgment, decree and costs awarded to the applicant in Nairobi Judicial review No. E178 of 2021 Republic v Inspector Gneral of Police & 2 others; Exparte Justice Aggrey [which case number is erroneous] and costs assessed at Ksh 50,000 and certificate of order for costs against the government dated 1st December, 2023 all served upon the respondent seeking settlement but that to date, there has been no such settlement.

6. The respondents filed a replying affidavit sworn on 7th November, 2025 by Kepha Onyiso Deputy Chief State Counsel deposing that the respondents are ready and willing to comply with orders of this Court and have the decretal sum settled but is constrained by lack of budgetary allocation by the National treasury hence the non-settlement of the decree is not intentional adding that there are other claims which need to be settled. Further, that the applicant stands to suffer adversely should the application dated 8th October, 2025 be allowed and tat there is no proof of personal service upon the alleged contemnor, while asking for time to process the payment.

7. The application was argued orally on 10/11/2025 with the respective parties' counsel reiterating the pleaded facts and the response and with the respondent's counsel submitting in addition that the respondent shall settle expeditiously once funds are availed.

Analysis and determination

8. I have considered the application as pleaded and opposition thereto and as argued by the respective parties' counsel. The issue for determination is whether the orders sought are available.

9. Before I determine that sole issue, I note that the applicant in the grounds in support of the application and in the supporting affidavit quotes a case number Nairobi HC JR E178 of 2021 which case number does not relate to the primary proceedings wherein costs were awarded to the applicant. The applicant neither noticed this error during hearing and neither did the respondents raise any issue. This court observes that the matter in which the costs were assessed as per the judgment of the court involving these same parties is in NRB HCJR E112 of 2021. It follows that there is an error in the pleaded fact by the applicant.

10. The question is whether that error is fatal to this application. In my view, that error is curable under section 100 of the *Civil procedure Act* which provides for the general power of the court to amend and the section provides:

100. The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.

11. Order 5 Rule 8 of the Civil Procedure Rules is on general poser to amend and it provides as follows:

> General power to amend [Order 8, rule 5]
>
> (1) For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

12. This court does not see any prejudice that will be occasioned to the respondents if an amendment is done to correct the clerical error citing a wrong case number since all the documents as filed refer to the relevant primary case in which the subject costs and certificate of Order Against the Government was issued. Courts consistently hold that mistakes of counsel which are minor should not lead to their clients' cases be lost unless there was malicious intent to deceive the court. I find no such intention in this case.

13. Onto the merits of the application for citing the 1st respondent for contempt of court, I will first address the issue of lack of personal service raised by the respondents, although they concede that the decree is unsettled and that once the funds are available, they will settle.

14. Therefore, on whether personal service is mandatory where the respondent is found to have been aware of the order, having fully participated in the proceedings whether through counsel, in Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR the Court of Appeal held that in Kenya:

> "... knowledge of a court suffices to prove service and dispense with personal service for the purposes of contempt proceedings, forinstance, LenaolaJ in the case of Basil Criticos v Attorney General and 8 Others [2012] eKLR pronounced himself as follows:
>
> "..the law has changed and as it stands today knowledge supersedes personal service... where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary."

15. Thus, personal service is not mandatory especially where a party alleged to be in contempt has fully participated in the proceedings and like in the present case, the certificate of Order against the government is not personal to the accounting officer but to the office that he or she holds.

16. It is important to note that the decree is not issued against the Principal Secretary personally and therefore service upon him through the central registry of his office as acknowledged is sufficient.

17. A similar issue arose in the Isaiah Ochanda v Attorney General & Permanent Secretary Ministry of Defence (Civil Appeal 212 of 2014) [2016] KECA 42 (KLR) (Civ) (9 December 2016) (Judgment) case in which the respondents claimed that service upon the principal Secretary was not effected personally accompanied by a penal notice on consequences of non-compliance hence not contempt of Court could lie. The High Court agreed with that preliminary objection raised by the respondents.

18. The exparte applicant appealed to the Court of Appeal. Allowing the appeal and setting aside the order dismissing the exparte applicant's application for contempt of court, the Court of Appeal had the following to stated regarding both allegations of lack of service and penal notice:

> " ...The copy of the said accompanying letter bore the official stamp of each of the respondents and signature of the person on whom the documents were served. Neither of the two respondents filed a replying affidavit to the application for committal for contempt either showing cause why the application should not be allowed or denying the service.
>
> Service of the court processes on the Government is prescribed in Order 5 rule 9 Civil Procedure Rules, 2010, thus;
>
> "9
>
> (1). The provisions of this Order shall have effect subject to section 13 of the *Government Proceedings Act*, which provides for the service of documents on the Government for the purpose of or in connection with civil proceedings by or against the Government.
>
> (2) Service of documents in accordance with the said section 13 shall be effected –
>
> (a) by leaving the document within the prescribed hours at the office of the Attorney General, or any agent whom he has nominated for the purpose but in either case, with a person belonging to the office where the document is left; or
>
> (b) .....
>
> (3) All documents to be served on the Government for the purposes of or in connection with any civil proceedings shall be treated for purposes of these rules as documents in respect of which personal service is not required.
>
> (4) In this rule, "documents" includes writs, notices, pleadings, orders, summonses, warrants and other documents, proceedings and written communications.
>
> Section 13 of the *Government Proceedings Act* aforesaid merely provides that all documents required to be served on the Government in civil proceedings shall be served on the Attorney General.
>
> Mr. Ngugi, learned counsel for the appellant submitted in the High Court and still contends in this Court that, actual service was done in the office of the Attorney General – an institution and that personal service was not necessary.
>
> "...The proceedings initiated by the appellant in the High Court were in the nature of civil proceedings for enforcement of a decree for payment of money against the Government. Both the *Government Proceedings Act* and the Civil Procedure Rules specifically provide that personal service is not required in such proceedings. Furthermore, the application before the court was for civil contempt as opposed to criminal contempt which would have necessitated a specific charge by the prosecuting authority, it is apparent that the court relied on general rules which do not specifically provide for service of court documents

including court orders on the Government. As rule 3 of Orders aforesaid expressly provides all documents to be served on the Government, documents relating to civil proceedings are excluded from personal service. The specific provisions in our law prevail over the general rules on question of service.

The appellant's counsel further submitted in the High Court that the letter dated 23rd November 2012 forwarding the Ruling and order constituted a penal notice. The letter is a notice to the government to pay within seven days and in default, contempt proceedings would be instituted.

That notice letter is for all intents and purposes an effectual penal notice as the object of the general rules has been substantially achieved.

The effect of the dismissal of the application is to require the appellant to take further steps and file fresh proceedings with resultant delay in realization of the fruits of the judgment. The appellant has severally demanded payments without success and filed several proceedings already since the judgment was entered in his favour. The principle purpose of the inherent jurisdiction bestowed on the courts is to vindicate the authority of the court so that its orders are obeyed for the proper administration of justice. The procedural protection in the nature of personal service and penal notice in the general rules are designed to give the alleged contemnor a fair hearing in view of the fact that contempt proceedings attract criminal sanctions. However, the procedural protection should not be construed in a manner that abrogates or renders the jurisdiction of the court to punish for disobedience of its order practically inoperative. In an appropriate case, the court retains the discretion to dispense with procedural protection in the interest of justice, more so now that Article 159(2)(d) of *the Constitution* ordains that justice shall be administered without undue regard to procedural technicalities. Had we found that personal service was required and was not done or that penal notice was not given, we would have in the circumstances of this case, dispensed with general rules.

It is our finding that the High Court fell into error by dismissing the application on the grounds that no personal service was effected nor penal notice given..."[emphasis added]

19. In this case, the respondents are ably represented by the Attorney General throughout these proceedings and they were also served by the applicant's counsel in their official capacity. Vide a letter dated 21/8/2022 received on 22nd August 20925 forwarding decree for mandamus.

20. Court orders are not mere suggestions. Where decrees are involved, the decree holder has a constitutionally guaranteed proprietary right in the decree that right is protected and guaranteed under Article 40 of *the Constitution*.

21. It follows that a party cannot claim that they were not personally served with the order where they are participants in the proceedings as is in the instant case where counsel for the respondent has at all times been participating in the proceedings including on the judgment day when mandamus compelling settlement was issued against the 1st respondent who is the accounting officer of the Ministry of Interior and Coordination of National Government.

22. Section 5 of the *Judicature Act* provides that the High Court and Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

23. In Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR, the Court of Appeal recognised that English law, especially Rules 81.4 relating to committal for breach of a

judgment, order or undertaking to do or abstain from doing an act, is applicable under Section 5 of the *Judicature Act*.

24. On the threshold for contempt, in Mutitika v Baharini Farm Limited [1985] KLR 227, it was held that for contempt to be established, the following elements must be proved:

    a. The order must be clear and unambiguous

    b. The alleged contemnor must have had proper notice of the terms of the order

    c. The breach must be proved beyond reasonable doubt

    d. The contemnor must be shown to have acted in breach of the order deliberately and wilfully

25. Later in Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR, the court underscored that contempt proceedings are quasi-criminal in nature and the standard of proof is higher than the balance of probabilities but not as high as beyond reasonable doubt.

26. In Stewart Brown Investment Ltd. Et al v. National Import Export Bank of Jamaica Ltd. Et al. [2020] eKLR the court stated that:

> " In order for the test relating to contempt of court to be satisfied, the following requirements must be met: (a) the order itself must be clear and unequivocal and not open to various interpretations; (b) in order to satisfy the criminal nature of the contempt proceedings, the party disobeying the order must do so in a deliberate and wilful fashion; and (c) in considering the evidence as to whether there has been a deliberate breach of the court order, it must be proven beyond reasonable doubt. Contempt of court is an offence of a criminal nature involving the liberty of the subject and therefore having regard to gravity of the charge, guilt must be proved beyond reasonable doubt."

27. In Gatharia K. Mutikika – vs Baharini Farm Ltd (Supra) it was further held that-

> " A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily..... it must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.
>
> However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be heard to process contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject..... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."

28. In the instant case, I am satisfied that there is a clear mandamus order which arose from primary proceedings where costs were awarded in Judicial review case No E112 of 2021 and that the

respondents have at all times been aware of and participated in the said proceedings wherein a certificate of order for costs against the government was issued and served before mandamus was instituted. By their own affidavit in reply to the application for contempt, there is clear admission of knowledge of the decree for mandamus and which has not been settled on account that there is no budgetary allocation, that there are other matters pending settlement and that they are waiting for budgetary allocation from the National treasury hence they seek more time to process payment.

29. In Five Star Agencies Limited & another v National Land Commission & 2 others (Civil Appeal E290 & 328 of 2023 (Consolidated)) [2024] KECA 439 (KLR) (12 April 2024) (Judgment), the Court of Appeal had this to say, citing Odunga J (as he then was):

> " 96. In the case of Republic v Permanent Secretary Office of The President Ministry of Internal Security & Another ex-parte Nassir Mwandihi [2014] eKLR, Odunga, J (as he then was), held as follows:"...It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the *Government Proceedings Act* have been complied [with] with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule...The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view, is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court." [Emphasis added]
>
> 96. Similarly, in Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security [2012] eKLR, the Court held thus:
>
> > "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."

97. We adopt the reasoning of the court in both Republic v Permanent Secretary Office of The President Ministry of Internal Security & Another ex-parte Nassir Mwandihi and Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (supra). It is our view that only after the procedure as laid down under section 21 of the *Government Proceedings Act* has been complied with and a demand for payment made that a cause of action accrues for the purposes of an application for an order of mandamus against the Government.

30. I have cited the above case in extenso to demonstrate that before mandamus was obtained, there was an elaborate procedure that the applicant had to comply with, these being proceedings against the government. There was no trial by ambush and the decree for mandamus did not just emerge from the skies. It was obtained after the respondents failed to settle the awarded costs way back in 2023 which is over 2 years ago.

31. It follows that the question of personal service and or budgetary allocation does not arise since there is no evidence that the respondents even sought for budgetary allocation to settle this and other decrees but that the request was declined. That in itself is indicative of brazen disobedience of the orders of the court.

32. For the above reasons, I am satisfied that the applicant has demonstrated to the standard required and beyond reasonable doubt that the 1st respondent office holder and accounting Officer, Ministry of Interior and Coordination of National Government is in contempt of Court orders of mandamus issue don 11th June, 2025 for deliberately failing to settle costs awarded to the applicant in JRE112 of 2021 plus costs awarded in the order for mandamus. He is found to be in contempt of court orders dated convicted as such.

33. The Permanent Secretary/ accounting officer, Ministry of Interior and Coordination of National Government, Dr Raymond Omollo to appear in court for mitigation and sentencing on 20/1/2026.

34. In order to avoid escalation of costs and burden the Kenyan taxpayer, I order that each party bear their own costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2025

R.E. ABURILI

JUDGE