



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

JUDICIAL REVIEW MISCELLANEOUS NO. E018 OF 2025

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS OF MANDAMUS

BETWEEN

KENYA COUNTY GOVERNMENT
WORKERS

UNION

(KCGWU)

.....**APPLICANT**

VERSUS

COUNTY GOVERNMENT OF KISII.....**1ST**

RESPONDENT

THE COUNTY SECRETARY, COUNTY
GOVERNMENT OF KISII.....**2ND**

RESPONDENT

THE COUNTY EXECUTIVE COMMITTEE
MEMBER OF FINANCE (CECM FINANCE),

COUNTY GOVERNMENT OF KISII.....**3RD**

RESPONDENT

THE CHIEF OFFICER FINANCE,
COUNTY GOVERNMENT OF KISII.....**4TH**

RESPONDENT

THE KISII COUNTY PUBLIC
SERVICE BOARD.**5TH**

RESPONDENT

RULING

1. By way of Chamber Summons dated 7th October 2025, the Applicant seeks leave to apply for a Judicial Review order of Mandamus to compel the Respondents to settle the decretal sum of Kshs. 217,317,562/- arising from Kisumu ELRC No. E007 of 2021. The Applicant also seeks costs of the application. The Applicant contends that it was awarded the decretal sum on 18th April 2024, after which it extracted a decree on 24th May 2024. Despite the Respondents seeking stay of execution before the Court of Appeal, the application was denied in a ruling dated 20th December 2024. Following this denial, the Applicant obtained a certificate of order against the Government dated 27th January 2025 and forwarded it together with the decree and court order to the Respondents on 6th February 2025. The Applicant asserts

that notwithstanding these efforts, the Respondents have refused to pay the decretal amount, thereby necessitating the present Judicial Review proceedings.

2. In opposition, the Respondents filed a replying affidavit sworn on 10th November 2025 by Mr. Ernest Rachami Osoro, the 1st Respondent's acting Head of Public Service. He deposed that the application was incurably defective, as the Applicant had improperly sought leave within the substantive remedies in the statement of facts. He further contended that the application was an abuse of process, given that the issues raised were already pending before the Court of Appeal in **Kisumu Civil Appeal Application No. E064 of 2024** (where interim orders had been issued) and **Kisumu Civil Appeal No. E133 of 2024**. He further deposed that the Applicant had offended the doctrine of *sub judice*, pointing to his failure to disclose that it had filed a Notice of Cross-Appeal challenging the same judgment it sought to enforce. He maintained that granting leave would prejudice the Respondents, who were themselves pursuing their appellate rights. In conclusion he urged the Court to dismiss the application with costs.

3. Both parties filed written submissions in support of their respective positions.

Applicant's Submissions

4. The Applicant submitted that the pendency of an appeal did not, by itself, bar execution, and maintained that execution could only be halted by an order of stay. It asserted that the Respondents had already been denied stay by the Court of Appeal, therefore in the absence of any subsisting stay orders, nothing prevented it from seeking leave to commence judicial review proceedings. In view of the foregoing, it averred that the doctrine of *sub judice* did not apply.

5. On the Respondents' argument that the statement of facts improperly sought leave instead of a substantive order of *mandamus*. The Applicant submitted that it was misguided, vexatious, and a waste of judicial time. It highlighted that a plain reading of paragraph 3.0 of the statement of facts shows that the prayer is clearly one for *mandamus*. The Applicant further submitted that, at the leave stage, the

court is only required to satisfy itself that there is a *prima facie*, arguable case without delving into the merits. It relied on **Republic v Motor Vehicle Examiner (NTSA-Thika); Swaleh (Ex parte Applicant); Director of Public Prosecution (Interested Party) (Judicial Review Application E007 of 2024) [2025] KEHC 14159 (KLR)**, where it was stated:

“At leave stage all the Applicant has to do is place before the court materials to demonstrate that he has a prima facie and arguable case. The test as to whether leave should be granted to an Applicant for judicial review is whether, without examining the matter in any depth there is an arguable case that the reliefs might be granted on the hearing of the substantive application.”

6. It also cited the case of **Kimeu v Principal Registrar National Registration Bureau (Judicial Review E023 of 2023) [2025] KEHC 15087 (KLR)** which in referencing **Republic v County Council of Kwale & another Ex Parte Kondo & 57 others, Mombasa HCMCA No. 384 of 1996**, held:

“The purpose of 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 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...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 the court's discretion but as always it has to be exercised judicially"

7. In view of the foregoing, the Applicant maintained that the application was not frivolous, as it is only through judicial review that the Respondents can be compelled to settle the decree. Moreover, it asserted that the Respondents' failure to settle the decretal amount despite service of the decree and certificate of order against the Government, justified an order of *mandamus* compelling settlement of the judgment debt. In conclusion, the Applicant urged the court to grant leave to enable filing of the substantive notice of motion.

Respondents' Submissions

8. The Respondents maintained that the Chamber Summons was incompetent as the Applicant had improperly sought leave within the substantive prayers in the Statement of facts. They relied on **Republic v Deputy County Commissioner - Tigania Central & 2 others, Mukonathu (Ex Parte Applicant); Karithi (Interested Party), Environment and Land Judicial Review CASE**

E016 OF 2025 [2025] KEELC 7424 (KLR), which underscored that where a statement of facts fails to plead the substantive reliefs intended to be sought, the entire application becomes stillborn and incapable of being cured by amendment. The Respondents further relied on **Commissioner of Excise and Customs v Silvanus Onema Owaki T/A Marenga Petrol Station [2002] eKLR**, in which it was emphasized that in judicial review proceedings the verifying affidavit, and not the statement, is the document of evidential value, and that the statement should contain only the applicant's particulars, the reliefs sought and the grounds thereto. On *sub judice*, the Respondents submitted that the application was improper because the subject matter was already pending before the Court of Appeal in **Kisumu Civil Appeal Application No. E064 of 2024** and **Kisumu Civil Appeal No. E133 of 2024**, where interim orders on stay had been issued. They asserted that the Applicant's failure to disclose the cross-appeal amounted to forum shopping and inviting this Court to determine matters already before a superior court. Additionally, they averred that the application offended the

doctrine of *sub judice* under section 6 of the Civil Procedure Act.

9. The Respondents further submitted that granting leave sought would prejudice them by undermining their constitutional right to appeal and to a fair hearing under Articles 10, 27, 47, 48, and 50 of the Constitution. They asserted that the court's jurisdiction had been invoked in bad faith as the Applicant had simultaneously lodged an appeal while seeking to enforce the same decision. Conversely, they submitted that the Applicant would suffer no prejudice if leave is denied, as the matter was still actively being litigated before the Court of Appeal. In conclusion the Respondents urged the court to dismiss the application.

Disposition

10. The Court has considered the pleadings, the law and submissions of parties in coming to this determination. Before me is a particularly interesting matter. The *ex parte* Applicant seeks judicial review orders of *mandamus* for the payment of a princely sum of Kshs. 217,317,562/- arising

from Kisumu ELRC No. E007 of 2021. The Applicant also seeks costs of the application.

11. The issues raised are stated to be pending before the Court of Appeal in **Kisumu Civil Appeal Application No. E064 of 2024** and **Kisumu Civil Appeal No. E133 of 2024**. The Respondents assert the Applicant had offended the doctrine of *sub judice*, pointing to his failure to disclose that it had filed a Notice of Cross-Appeal challenging the same judgment now sought to be enforced. The Respondents assert granting leave would prejudice them as they themselves are pursuing their appellate rights.

12. The Court is invited to make a determination on a matter that is intriguing. Intriguing because it has been the subject of myriad motions before this Court and the Court of Appeal. We cannot lose sight of the assertions that the issues raised herein are pending before the Court of Appeal.

13. The doctrine of *sub judice* is availed as the reason to decline the application for leave. The term *sub judice* is a Latin phrase that literally means “under a judge” and means

a particular matter or case is under consideration by a judge or court. It means in plain English, that the case is pending adjudication and therefore ought not be under consideration elsewhere and it at the same time prohibits the discussion of the case.

14. The application seeking leave to apply for an order of *mandamus* directed at the Respondents so as to enforce the decree and order of this Court is the bone of contention and the Court of Appeal rendered itself on the matter as follows in **County Government of Kisii & 2 others v Kenya County Government Workers Union (Civil Application E064 of 2024) [2024] KECA 1810 (KLR) (20 December 2024) (Ruling)**

We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, the appeal is arguable, in particular with regard to the computation of the emoluments.

14. On the second limb, the applicant contends that the execution of the judgment and ruling would cause financial hardship and disrupt the operations of the 1st respondent. That the payment of the decretal amount

cannot be reversed. That the respondent in any event does not have the means to repay the same should the intended appeal succeed.

15. We note that this is a money decree. In the case of **Kenya Shell Limited vs. Kibiru & Another [1986] KLR 410**, this Court held that execution of money decrees is rarely stayed; and should there be such need, the applicant must show that the respondent would be unable to refund the decretal amount if the appeal succeeds. In the present case, the applicants have not provided any evidence to suggest that the respondent would be unable to refund the decretal amount if the appeal is successful. The respondent is a union representing a huge number of members who remit their monthly subscriptions and therefore have the financial muscle to refund the amount. In our view, the applicant has not shown that if what it fears upon execution of the decree comes to pass, it cannot be undone or adequately compensated by an award of damages. In **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others (supra)**, the Court expressed itself thus, on such an issue:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

While the appeal is arguable, the applicant has failed to demonstrate that the appeal would be rendered nugatory if the stay is not granted.

16. The upshot then is that the application dated 24th May 2024 is dismissed. Costs shall abide the outcome of the intended appeal.

[Emphasis supplied]

15. The above is clear that the orders sought of *mandamus* would lie where the Court is appropriately moved.

16. By way of obiter, it bears repeating that substantive motions cannot be filed in an application for leave as many in this current constitutional dispensation have been happy to do much to their dismay when the matters are dismissed.

17. In conclusion, the merits of this case are that the money decree is not one I can stay in clear view of the decision of the Court of Appeal on the point, which decision I hasten to add, is binding on this Court. As such the application is one for allowing. The substantive motion must be filed within 21 days of today. Costs to abide the outcome of the motion for orders of *mandamus*.

Orders accordingly.

Dated and delivered at Kisii this 10th day of December

2025

**Nzioki wa Makau, MCI Arb.
JUDGE**