

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISII

MISCELLANEOUS NO. E016 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

PROF. TOM OJIENDA &
ASSOCIATES.....APPLICANT
VERSUS
COUNTY GOVERNMENT OF
MIGORI.....RESPONDENT

RULING

Before the court for determination is the applicant's Notice of Motion dated 8th October 2025 seeking Orders that:-

- 1. This Honourable Court be pleased to issue an Order of mandamus compelling the Respondent to pay the applicant the sum of Kshs.1,652,306.00 together with interest to run from the date of entry of Judgment, 24th July 2025 until payment in full.*
- 2. In default, Notice to Show Cause do issue against the Respondents to show why they should not be cited for contempt of court Order.*

3. The costs of this application be borne by the Respondents.

The Notice of Motion is expressed under Order 53, Rule 3 of the Civil Procedure Rules and is based on the grounds enumerated on its face and the Supporting Affidavit of the applicant.

The applicant's case is that his Bill of Costs dated 17th January 2025 against the County Government of Migori was taxed at Kshs.1,652,306.00 vide ruling delivered on 13th May 2025 and a Certificate of taxation issued on 25th June 2025 and Judgment was entered against the County Government of Migori (incorrectly stated as Nairobi) on 25th July 2025 and a Certificate of Order Against the County Government dated 1st September 2025 was issued for the sum of Kshs.1,652,306.00 and was served on the respondent with reminders but the amount remained outstanding was thus and seeking the Order of *mandamus* against the County Government of Migori.

Respondent's case

In their Grounds of Opposition dated 19th November 2025 and filed on 16th November 2025, the respondents averred that they were not accorded adequate time and

opportunity to satisfy the decree dated 23rd July 2025 and the Certificate of Order was served on 4th September 2025.

They contend that the alternative Order to have the respondents cited for contempt of court was speculative, remote and baseless and they were bound by the Public Finance Management Act and the application was premature, devoid of merit and was for dismissal with costs.

Applicant's submissions

As to whether the applicant had met the threshold for grant of the Order of *mandamus*, counsel relied on the sentiments of the court in **Republic V County Secretary, County Government of Meru & 4 others. Joseph Mwingi Kabura t/a Mwirigi Kabura & Co. Advocates** [2025] eKLR, to underscore the essentials of *mandamus* namely; public legal duty, owed to the applicant, clear right to performance of the duty, prior demand, reasonable time to comply, express or implied refusal, no other adequate remedy available, Order has some practical value or effect, no equitable bar to the reliefs sought.

Reliance was further placed on the sentiments of the court in **Republic V County Secretary, Nairobi City County & 3 others; Koceyo & Co. Advocates** [2020] eKLR, **Republic V Permanent Secretary, Ministry for Provincial Administration and Internal Security Ex Parte Fredrick Manoa Egunza** [2012] eKLR **Shah V Attorney General** (No.3) Kampala HC MC No. 31 of 1969 [1970] EA 543 and **Republic V Attorney General & another Ex Parte James Alfred Koroso** to submit that the applicant had met all the conditions precedent for the grant of an Order of *mandamus* as he had a judgment in his favour and had served the necessary documents upon the respondents and the amount of Kshs.1,652,306.00 remained unpaid.

Respondent's submissions

Counsel for the respondents cited the decision in **Republic V Principal Secretary Ministry of Internal Security & another Ex Parte Schon Noorani & another** [2018] eKLR to urge the criteria for the Orders of *mandamus* to issue and submit that although the respondents were served on 4th September 2025, the delay in payment had neither been unreasonable nor deliberate and the application was filed one (1) month

after service yet there were procedural processes to be complied with.

Reliance was also placed on the Public Finance Management Act to urge that County Government Expenditure must be approved by the County Assembly and the applicant had not accorded the respondents sufficient time, the issue was not ripe for the court's determination and the respondents had neither refused nor declined to pay the decretal sum.

Counsel submitted that the respondents ought to have been accorded reasonable time to comply.

Analysis and determination

It is common ground that applicant's Bill of costs was taxed in January 2025 and a Certificate of Taxation issued in June 2025 and judgment was entered against the respondents on 23rd July 2025 and the Certificate of Order against the Government dated 1st September 2025 was served on the respondents on 4th September 2025.

Although the respondent averred and counsel submitted that the applicant had not met the criteria for grant of the Order of *mandamus* because he had not accorded the

respondents adequate time and opportunity to satisfy the decree, its Ground of Opposition were loudly silent on the duration it required to satisfy the decree or the steps it had taken, if any, in its endeavour to liquidate its liability.

A letter to the applicant seeking his indulgence on time would have clearly shown the respondent's willingness to pay the decretal sum.

Clearly, reliance on the provisions of the Public Finance Management Act on payments by County Governments would not ameliorate the respondent's position as a Judgment Debtor.

It is equally not in dispute that to qualify for the Order of *mandamus*, the prescribed criteria must be satisfied and both counsels have ably demonstrated the criteria in the Canadian Cases of **Apotex Inc V Canada (Attorney General)** and **Dragan V Canada (Minister of Citizenship) and Immigration)** cited in other decisions such as **Republic V Principal Secretary Ministry of Internal Security & another Ex parte Schon Noorani and another** (supra) namely;

- (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;*
- i. *The Applicants have satisfied all conditions precedent;*
 - ii. *The must have been:*
 - *A prior demand for performance*
 - *A reasonable time to comply with the demand, unless there was outright refusal; and*
 - *An express refusal, or an implied refusal through unreasonable delay.*
 - iii. *No other adequate remedy is available to the Applicants.*
 - iv. *The Orders sought must be of some practical value or effect;*
 - v. *There is no equitable bar to the reliefs sought.*

See also **Republic V Jomo Kenyatta University of Agriculture & Technology Ex Parte Elijah Kamau Mwangi [2021] eKLR**, **Jidraph Kamau & another V Attorney General Mombasa** Misc. Application No. 40 of 2000, **Republic V Commissioner of Lands and another Ex Parte Kithinji, Murugu Magere** Nairobi High Court Misc. App. No. 395 of 2012, **Republic V Kenya National Examinations Council Ex Parte**

Gathenji & 9 others [1997] eKLR and **Republic V Principal Secretary Ministry of Internal Security and another Ex Parte Schon Noorani & another** (supra).

It is trite that the objective *mandamus* is to compel compliance or payment.

In **Republic V Principal Secretary Ministry of Transport & Infrastructure & another Ex Parte Justino Pitias** [2016] eKLR the court held:

“...This court’s jurisdiction is restricted to compelling the Respondent to pay based on the judgment decree and Certificate of Order...”

In other words where there is a condition precedent necessary for the duty to accrue, an Order of mandamus will not be granted until that condition precedent comes to pass. Therefore, where there is a genuine dispute as to the exact sums payable the court will not by an Order of mandamus compel the respondents to exercise that duty until the dispute is sorted out”.

See also **Republic V Attorney General & another Ex Parte Orbit Chemicals Ltd** [2017] eKLR, **James Samuel Mburu V Attorney General & another** [2017]

eKLR, **Kisya Investments Ltd V Attorney General** [2005] eKLR, **Susan Wayua V Attorney General & another** [2019] eKLR and **Attorney General & another V Ongata Works Ltd** [2016] eKLR.

In the instant case, there is no dispute between the parties as the decretal sum is not contested. Indeed, the respondent conceded that the requirements of Section 21 of the Government Proceedings Act had been complied with as held in **Republic V Permanent Secretary Ministry of State for Provincial Administration & Internal Security Ex Parte Fredrick Manoah** [2012] eKLR, and had been served.

The only contest was timing of the instant application but as adverted to elsewhere, in this ruling, the respondent made no reference to what it considered reasonable time or how much time it required to satisfy the decree, and remained silent after it was served on 4th September 2025.

The absence of such critical details from a judgment/debtor diminished the good faith and credibility of the assertions.

Since the Order of *mandamus* is of an equitable nature, as correctly submitted by the respondent's counsel, and thus discretionary, the court is enjoined to consider, not only the law but all other relevant circumstances and determine whether it was the most efficacious relief in those circumstances. See the sentiments of Mativo J. (as he then was) in **Republic V Principal Secretary, Ministry of Internal Security & another Ex Parte Schon Noorani & another** (supra).

For the foregoing reasons, the court is satisfied that the applicant has demonstrated on a preponderance of probabilities that the respondent has failed and/or neglected to perform a public duty owed to him.

Consequently, the application dated 8th October 2025 is merited and is allowed as follows:

- (a) *An Order of mandamus be and hereby issued to compel the respondents to pay the Applicant the sum of Kshs.1,652,306.00 as per the Certificate of Order Against the Government dated 1st September 2025 within ninety (90) days failing which the applicant will be at liberty to execute.*
- (b) *Parties shall bear their own costs.*

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 11TH DAY OF DECEMBER 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 15th March 2020 and subsequent directions of 21st 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

ORIGINAL