



**Republic v Machakos County Assembly Service Board & 2 others; Mutisya & 106 others (Ex parte) (Judicial Review Application E001 of 2025) [2025] KEELRC 3731 (KLR) (17 December 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3731 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
JUDICIAL REVIEW APPLICATION E001 OF 2025**

**JW KELL, J  
DECEMBER 17, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**MACHAKOS COUNTY ASSEMBLY SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**

**THE CLERK OF THE COUNTY ASSEMBLY SERVICE BOARD –**

**MACHAKOS ..... 2<sup>ND</sup> RESPONDENT**

**THE SPEAKER OF MACHAKOS COUNTY ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**NELLY ITUMBI MUTISYA & 106 OTHERS & 106 OTHERS ..... EX PARTE**

**JUDGMENT**

**Introduction**

1. The Ex-Parte Applicants commenced this suit vide a Notice of Motion dated 28<sup>th</sup> May 2025 seeking:-
  - a. An order of mandamus be granted directed to the Respondents herein, by themselves and or their successor in office to settle decrees against the County Assembly service Board of Machakos in Machakos ELRC No. 4 of 2018 as consolidated with 106 others by paying to the subjects/Applicants the sum of Kshs. 35,231,259/= with interest from the date of decree and further interest until the date of full payment.
  - b. The court does limit the time within which the said payment will be paid failure to which Notice to Show Cause does issue.
  - c. Costs of this application be granted to the Applicants/subjects.



2. The Notice of Motion was supported by the verifying affidavit of Nelly Itumbi Mutisya filed under Exparte Application seeking leave to file the instant application for judicial review order of Mandamus and dated 28<sup>th</sup> March 2025.
3. In response to the said Motion for Judicial Review Orders, the 1<sup>st</sup> to 3<sup>rd</sup> Respondents filed a Replying affidavit of Anne Kiusya sworn on 3<sup>rd</sup> June 2025 and of Denis Mutui sworn on 9<sup>th</sup> June 2025.

#### **he Ex -Parte Applicant's case in summary**

4. The Ex-Parte Applicants' case is that they filed suit against the Respondents who had unfairly terminated them from employment claiming salary arrears and other employment benefits arising from their employer/employee relationships, in the primary consolidated suit with 106 others being claims Numbers 4, 6-58, 61, 63-102 and 104-108 all of 2018; and 6-11 all of 2020. The Ex-Parte Applicants obtained judgments on liability and quantum in their favour after full inter-partes hearing. They subsequently extracted decrees and served the same on the Machakos Assembly service Board vide demand letters dated 30<sup>th</sup> April 2024, which were ignored by the Respondents.
5. The Ex-Parte Applicants now seek an order of mandamus for payment of the decretal sums against the 2nd & 3rd Respondents, as they are the accounting officers of the Machakos Service Board under Section 12 of the County Government Act, 2012 hence responsible for the satisfaction of court orders and payment of money decrees.

#### **Respondents' case in brief**

6. The Respondents explain the proceedings in the primary suit by stating that the substantive claim comprised a complex matter involving 107 Claimants who filed their claims separately but later the claims were consolidated. The claim by Nelly Itumbi, the 1<sup>st</sup> Ex-Parte Applicant, was chosen as the test case. Some of the claimants withdrew their instructions from their advocate and pursued their matters separately. The same claimants petitioned the Senate over the same claims. The hearing of the primary suit was delayed ostensibly due to a number of factors including the Covid 19 pandemic, but the case was eventually heard on 21st September 2021. The parties were instructed to file submissions and judgement was slated to be given on notice. By September, 2022, one year down the line, the Court had not delivered the judgment or communicated the status of the matter. The Assembly wrote to its advocate on record enquiring on progress. On 7th November, 2022, following communication from the claimants' advocate indicating that judgment on liability had been delivered on 14<sup>th</sup> October 2022, the advocate for the Assembly then on record emailed the claimants' advocate protesting the delivery of the said judgement without notice either from the court or the claimants' advocate. By the time they were informed of the delivery of the judgment, 24 days had lapsed, hence they were outside the mandatory period for lodging an appeal by 10 days.
7. Via an email dated 21<sup>st</sup> November 2022, the advocate for the claimants forwarded a copy of the judgement to the advocate for the Assembly. This was 37 days after the delivery of the judgement. On the same day the judgment was forwarded to the Assembly via email and the Assembly's advocate sought further instructions. The advocate for the Assembly indicated that the delivery of judgment had been scheduled for 26<sup>th</sup> January 2022 but the judgement was not ready.
8. It is the Respondents' case that the legal entity for the Assembly is the County Assembly Service Board (CASB), the 1<sup>st</sup> Respondent herein. Following the 9th August, 2022 general elections, a new CASB came into office and by the time of the said judgement the new CASB was still in its infant stage. When it considered the dispute between the Assembly and the Ex-Parte Applicants, the CASB directed that a new advocate be procured for purposes of appeal. It must be noted that procurement processes



in government take time and involve several stages which were undertaken as follows: in December 2022, the Assembly took a decision to procure the services of another advocate; on 4<sup>th</sup> January 2023, a requisition was prepared for the procurement of legal services; an evaluation report was prepared; a professional opinion on the procurement of the provision of legal services was prepared; a letter of award was subsequently issued; the contract with the new advocate M/S Mulekyo was signed on 27<sup>th</sup> February 2023; and finally, an instruction letter was issued.

9. While all the foregoing was happening, the Assembly sought to acquire the client file from its first advocate who declined to surrender the same, and formally communicated this position by a letter dated 11<sup>th</sup> January 2023 where she stated that she would not release the client file until she was paid. The Respondent further explains that government payment processes are lengthy and involve a whole range of bureaucracies per the [Public Procurement and Asset Disposal Act](#) and the [Public Finance Management Act](#).
10. The Respondents have therefore experienced many challenges when dealing with the dispute with the Ex-Parte applicants including the unavailability of the court file, the transfer of the judge to Eldoret, and the pending ruling on costs. Even filing of court documents presented a challenge to counsel for the Assembly, occasioning it great injustice, as orders have been issued by the court without considering documents already filed but not placed in the Court file.
11. The Respondents are emphatic that if the orders sought are granted, they will suffer irreparable loss and prejudice since the operations of the Assembly will be grossly disrupted. They argue that such orders will render any intended appeal or review of the judgement nugatory; they will adversely affect the financial status of the Assembly considering that the Assembly does not collect its own revenue and entirely depends on the national share which is limited; and the decretal amounts are substantial and are not budgeted for in this financial year, since it was not clear when the matter would be determined. The Respondents alert the court to the facts that under the [Public Finance Management Act, 2012](#), any spending of government funds without an approved budget or beyond the approved budgetary allocations is considered illegal and constitutes financial misconduct; and the Assembly operates on a pre-determined cashflow and monies are paid directly to the respective recipients. To illustrate the foregoing, personal emoluments go directly to the employees and payment for supply of goods, services and works goes directly to the vendors.
12. The Respondents aver that the Assembly not only has an arguable Appeal, but also an appeal with high chances of success in view of the following:
  - a. The Court erred in fact and law by finding that the Claimants had continued to work between October 2017 and February 2018 which is implausible considering that the new Ward office staff had already assumed office as demonstrated by the Clerk's letter to MCAs dated 25<sup>h</sup> September, 2017;
  - b. The Assembly cannot possibly be required to pay two salaries to different ward staff for the same period, since for the period that the claimants are seeking salaries for, the Assembly was already paying the new ward staff who had already occupied office, as demonstrated by a bundle of excerpts from the payroll. Tthe Commission on Revenue Allocation could not allocate double the amount of money in the budget to pay for the same service;
  - c. The Court erred in law and in fact by not finding that the Assembly as from October 2017 had been provided with the contracts of the new ward staff and started facilitating their payment;
  - d. The Court erred in law and in fact by finding that the Claimants worked between October 2017 and February 2018 when the Claimants themselves acknowledged receipt of a



notification in October 2017 requiring them to hand over office to the new Ward office staff effectively marking the end of their engagement with the MCAs;

- e. The Court erred in law and in fact by finding that the Claimants worked between October,2017 and February 2018 when there was no evidence of whether they were reporting to work and who they were answerable to.
  - f. The Court erred in law and in fact by failing to consider the Assembly's evidence that all the Ward staff were sourced and recruited by their respective MCA.
  - g. The Court erred in law and in fact by finding that the alleged appointments did not have a definite expiry date and that the phrase "expiry of the current assembly" did not have a definite meaning when it is a matter of notoriety that Assemblies expire five years after the general elections and that the date of the general elections after the first Assembly was on 8th August,2017.
  - h. The Court erred in law and in fact by failing to consider the fact that the Claimants were gambling with the judicial process as they originally claimed to be permanent and pensionable.
  - i. The Court erred in law and in fact by finding that the Claimants continued to work at the ward office beyond the 2017 general elections while the Claimants themselves admitted that they were aware that they continued to be in office between August and September 2017 for the sole purpose of assisting in the to the new MCA and their new staff.
  - j. The Court erred in law and in fact in not considering that the original claim by the Claimants was only for the October 2017 salary.
13. The remedy awarded in ELRC. No. 4 of 2018 at Machakos varies in quantum by over 808% from that in ELRC Causes Nos 59,60, 62 and 103 of 2018 at Machakos despite both being based on similar facts and circumstances in which the claimants were colleagues. Justice Maureen Onyango issued a judgement in ELRC. NO. 4 of 2018 at Machakos on liability on 14th October 2022 and a judgement on quantum on 21<sup>st</sup> June 2023 which were in favour of the claimants, to the tune of Kshs. 202,187.40 per claimant, comprising of gratuity for November 2017-February 2028, leave pay and one month's salary in lieu of notice; while Justice Byram Ongaya issued judgement on 15th of November, 2024 in ELRC Causes Nos 59,60.62 and 101 at Machakos in which the claimants were colleagues to the Ex-Parte Applicants/subjects herein, to the tune of Kshs. 25,000.00 per claimant being partial costs of the suit. The Respondents herein are convinced that the Court will adopt a similar position as that in ELRC Causes Nos 59, 60, 62 and 103 of 2018 at Machakos when the appeal in ELRC.NO.4of 2018 at Machakos materializes.
14. Finally, the Respondents state that they have filed an application for review of the orders declining the Assembly's application for extension of time to file a notice of appeal against judgement which is pending.

### **Determination**

15. Following directions by the court that the application be canvassed through written submissions, both parties complied.

### **Issues for determination**

16. The Ex-Parte Applicants identified one issue for determination in their submissions dated 13<sup>th</sup> June 2025, namely, whether the application is merited.



17. Conversely, the Respondents identified the following issues for determination in their submissions dated 3<sup>rd</sup> July 2025 namely:-
- i. Whether the Applicants have met the legal threshold for the issuance of an order of mandamus against the Respondents.
  - ii. Whether the court can limit the time within which the said payment should be made.
  - iii. Whether the Applicants are entitled to costs of the application.
18. The court finds the issue for determination to be whether the application was merited.

### **Whether the Application is merited**

#### **The Exparte Applicant's submissions**

19. The scope and efficacy of mandamus and its legal elements are now settled as quoted in case of Republic Vs Jomo Kenyatta University Of Technology Ex-parte Elijah Kamau Mwangi [2021] eKLR that requires the ex-parte applicant to demonstrate to AGRICULTURE & the court: -
- i. The Applicant must have legally enforceable right to the performance of the duty in question.
  - ii. The duty must be one imposed on a public body or official by law.
  - iii. The public body or official must have failed to perform the duty, despite a legal obligation to do so.
  - iv. There should be no other remedy available to the applicants to compel the performance of duty. It's the ex-parte submission that they have sufficiently satisfied the above elements as demonstrated hereunder.
20. The applicant has deponed in the verifying affidavit the basis of this application and annexed decrees totaling Kshs. 35,231,259/=. Before filing this judicial Review application, the advocate for the Ex-parte applicants demanded payment but the Respondents failed and/or ignored to pay. It's not denied that the 2<sup>nd</sup> & 3<sup>rd</sup> Respondent are the 1<sup>st</sup> Respondent Accounting officers obligated under the provisions of Section 21 of the Government Proceeding Act to pay decrees thereto. It's submitted that the 1<sup>st</sup> Respondent County Assembly Service Board is a public body established under Section 12 of the County Government Act and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are respectively responsible & accountable officers of the 1<sup>st</sup> Respondent. Further it submitted under Section 21 of the Government Proceeding Act obligates the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to pay money decrees awarded by the court to the Advocate for the claimants. Further it is not disputed there is no other remedy that exist to compel payment of decrees against the 1<sup>st</sup> Respondent as order 29 Rule 4 of Civil Procedure Rule, 2010 and Section 21(4) of Government Proceeding Act expressly prohibit execution of decrees against either National or the County Government. In summary the ex-parte applicants have shown that the Respondents are legally obligated to pay the decretal amount totaling Kshs. 35,231,259/= with further interest until full payment, that the Respondents are not willing to pay despite demand notice being issued to the detriment of the ex-parte applicants and that no other remedy exists to compel payment of the decretal sum. This application should be allowed with costs.

#### **The Respondent's submissions**

21. Whether the Applicants have met the legal threshold for the issuance of an Order of Mandamus against the Respondents-the Court of Appeal in Republic v Kenya National Examinations Council exparte



Gathenji and 9 Others, [1997] eKLR in considering the nature of the remedy of mandamus held that: "The next issue we must deal with is this: What is the scope and efficacy of an Order of Mandamus? Once again we turn to Halsbury's Law of England, 4th Edition Volume 1 at page 111 from Paragraph 89. That learned treatise says: "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. "At paragraph 90 headed "the mandate" it is stated: "The order must command no more than the party against whom the application is made 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." What do these principles mean? They mean that an order of mandamus will 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...." Similarly in Republic v Principal Secretary, Ministry of Internal Schon Noorani & Another another ex parte [2018] eKLR Mativo J. (as he then was) further elaborated on the requirements for an order of mandamus to issue, stating as follows: "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. v Canada (Attorney General), and, was also discussed in Dragan v Canada (Minister of Citizenship and Immigration). The eight factors that must be present for the writ to issue are: -

- 1) There must be a public legal duty to act;
- 2) The duty must be owed to the Applicants;
- 3) 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, unless there was outright refusal; and
    - 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

22. That it is contention that the Respondents are public bodies within the meaning of the [County Governments Act](#) and are therefore subject to public duties, including judicial compliance and financial accountability under the [Public Finance Management Act](#). It is equally true that decrees of the court



must ultimately be respected and satisfied. However, the remedy of mandamus is exceptional and must be reserved for cases where there is clear refusal or inexcusable inaction in the face of a legal duty as rightfully captured in the aforementioned cases.<sup>12</sup> In this instance the Respondents have provided a factual and credible account of the challenges they have encountered, both administratively and legally, in executing the judgment. Their position is clearly laid out in the affidavits sworn by Anne M. Kiusya and Denis Mutui, which confirm that. Firstly, the Respondents only became aware of the judgment after considerable delay attributed to failure by previous counsel to inform or update them on the status of the suit. Secondly, it is undisputed that the Respondents have taken immediate and active steps upon becoming aware of the decree. These steps include procuring new legal representation in accordance with the *Public Procurement and Asset Disposal Act*, retrieving the court file and certified copies of the judgment, and filing an application for review and extension of time to appeal. These actions are inconsistent with willful defiance or refusal to act, and instead point to a public body grappling with structural and procedural constraints. Notably, the delay has also been compounded by transition challenges, including a breakdown in cooperation from the outgoing legal team who failed to release critical case documents. This severely hampered the Respondents' ability to comply with the decree in a timely manner, a fact that cannot be ignored in assessing whether their conduct amounts to unjustified inaction.

23. Having established the legal framework for the issuance of an order of mandamus as discussed earlier with reference to the decisions in *Republic v Kenya National Examinations Council ex parte Gathenji* [1997] eKLR and *Republic v Principal Secretary, Ministry of Internal Security ex parte Schon Noorani* [2018] eKLR. Among other things, the Applicant must demonstrate a clear right, an outright refusal or unreasonable delay, no alternative remedy, and no equitable bar to the relief sought. In the current case, several of these criteria are not satisfied. Firstly, there is no express or implied refusal to perform the duty. Secondly, the Respondents have shown that there are budgetary and legal constraints that prevent immediate compliance, all of which are subject to statutory oversight mechanisms and financial controls. That compelling payment through cannot be used to override the discretion afforded to public bodies in discharging financial obligations. The holding in Precedents enumerated above is clear: where a duty is general, or where discretion is conferred as to the timing and manner of performance, the court cannot prescribe a specific mode or time frame for discharge. (emphasis' added by the Respondent's) In the present case, the Respondents ability to pay is subject to budgetary approval processes, which fall under the oversight of the County Assembly and Controller of Budget, pursuant to the *Public Finance Management Act*. Your Lordship, we humbly submit that it would be contrary to the letter and spirit of the *Public Finance Management Act* to issue a mandamus order compelling the Respondents to unlawfully reallocate or release funds outside the approved budget, as doing so would expose public officers to personal liability and contravene Articles 201 and 226 of *the Constitution* regarding public finance. Moreover, this Honourable Court must weigh whether the balance of convenience and equities favour the issuance of mandamus at this stage. The Applicants, while holding a valid decree, have not shown that the Respondents have acted in bad faith or with reckless indifference. On the contrary, the facts on record demonstrate a public institution that is actively trying to remedy its position, and one that has been delayed by systemic challenges not by malice or neglect. In view of the foregoing, we submit that the request for an order of mandamus is premature, inequitable, and legally unsustainable. The Respondents are acting within the framework of law and have demonstrated ongoing efforts to resolve the matter lawfully, including pursuit of judicial review of the decree. Accordingly, the application for mandamus should fail on the grounds that the legal threshold has not been met, and that there is an equitable bar to the issuance of the order sought.



24. Whether the court can limit the time within which the said payment should be made- the Applicants have prayed that this Honourable Court not only issue an order of mandamus compelling payment of the decretal sum but also limit the time within which such payment should be made, failing which a notice to show cause do issue. It is our respectful submission that such a request is not only legally untenable but also contrary to established principles of public finance law and the constitutional framework governing public expenditure. It is well established in law that while a court may compel the performance of a public duty through mandamus, it may not dictate how or when such duty should be discharged, particularly where the performance involves statutory discretion or budgetary processes as articulated in *Republic v Kenya National Examinations Council ex parte Gathenji* [1997] eKLR, above. The Respondents, being public bodies, are bound by the *Public Finance Management Act* and *the Constitution*, particularly Articles 201 and 226, which require that no public funds be spent except as authorized by law. The payment of the decretal sum must therefore follow a legally sanctioned process involving budget approval and disbursement controls, including clearance by the Controller of Budget. Imposing a rigid court deadline for payment would be inconsistent with this legal framework and would expose public officers to personal liability for unauthorized expenditure. Moreover, the Applicants have not demonstrated any malice, inaction, or bad faith on the part of the Respondents to justify the exceptional remedy they seek. The Respondents have, on record, provided credible evidence of their attempts to comply with the court judgment, including change of legal representation, procurement processes, recovery of the court file, and application for review. These steps negate any suggestion of deliberate delay or refusal to act. Accordingly, we submit that while the Applicants hold a valid decree, this Honourable Court should not limit the time within which payment is to be made. Doing so would undermine statutory financial procedures and constitutional safeguards on public spending. It is the Respondents Humble submission that the prayer should therefore be declined, and the Respondents be allowed to comply with the decree within the confines of the law.
25. Whether the Applicants are entitled to costs of the application- the question of costs in judicial review proceedings lies within the discretion of the Court, guided by the principle that such discretion must be exercised judiciously and not capriciously. While costs generally follow the event, this principle is subject to exception in public law matters where parties act in pursuit of their statutory mandates. In the present case, the Respondents, as public bodies, have responded to the application in good faith, explaining in detail the procedural and administrative challenges that delayed compliance with the decree. They have neither obstructed justice nor acted in bad faith to warrant an adverse award of costs.<sup>26</sup> The conduct of the Respondents throughout this litigation has been measured, accountable, and responsive. They have filed sworn affidavits detailing efforts to procure legal representation, recover the court file, and seek review of the judgment steps that reflect procedural diligence rather than defiance or negligence. Importantly, the Respondents did not initiate the application before this Honourable Court and should not be penalized for defending a position legitimately arising from structural and statutory constraints. My lord, it is our Humble submission that costs should not be used to punish a party that has actively sought to comply with the law under challenging circumstances. Furthermore, awarding costs against the Respondents would have the effect of burdening public funds and may inadvertently penalize a public institution operating within tight fiscal limitations imposed by *the Constitution* and the *Public Finance Management Act*. Article 201 of *the Constitution* underscores the need for prudent and responsible use of public resources. In this regard, we respectfully urge this Honourable Court to exercise its discretion by denying the Applicants costs of the application, as the circumstances do not justify such an award and no misconduct or unreasonable conduct has been attributed to the Respondents.



## Decision

26. The Judgment debtor is a county government, hence under the [Government Proceedings Act](#) applies. Execution does not issue against the government but the procedure to apply is as per the [Government Proceedings Act](#) to wit- section 21 ‘Satisfaction of orders against the Government
- (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.”
27. I have perused the annexures in support of the application for Mandamus to compel the performance of the Decree being the judgment , decree, notice to institute writ of mandamus and certificate of costs. The court did not find a certificate to government according to 21(3) of the [Government Proceedings Act](#) that –‘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:”(emphasis given).
28. The certificate order against the government is mandatory. The Supreme Court In re National Land Commission (Reference E001 of 2024) [2025] KESC 12 (KLR) (21 March 2025) (Advisory Opinion) held that the certificate of costs under the [Government Proceedings Act](#) is mandatory. The Supreme Court upheld the Court of Appeal decision in Five Star Agencies Limited vs. National Land Commission and National Bank of Kenya, Nairobi Court of Appeal No. E290 of 2023 as follows-‘[36] In the Five Star Agencies case (supra) the trial court issued an order of mandamus and also ultimately found that the NLC is a government agency and subject to the [Government Proceedings Act](#) and therefore garnishee proceedings could not issue. At the Court of Appeal one of the main issues for determination was Whether execution against the NLC can proceed by way of garnishee



proceedings contemplated under Order 23 rule 1 of the Civil Procedure Rules 2010. The Court of Appeal determined that the certificate of order against the government is a mandatory condition precedent, the same was not obtained, and it thus follows that the trial court ought not to have issued an order of mandamus directed at the NLC.” The Court of Appeal decision is found in Paragraphs 98 – 100 of the decision , which aptly captures the appellate court’s position on that issue as follows: “98. In the present circumstances, Five Star did not obtain Certificate of Order against the Government from the trial court, which it was required to. Instead, it obtained a copy of the decree which it served upon the NLC. The obtaining of the said certificate was a condition precedent to the making and issuance of an order of mandamus. In our view, the trial court could only issue an order of mandamus after satisfying itself that the said certificate was issued and served. 99.....Five Star ought to have commenced execution proceedings against the NLC in strict adherence with the provisions of section 21 of the Government Proceedings Act.”

29. In the instant case, there was no evidence of any certificate of Order against Government annexed to the application. The exparte applicant has not complied with the procedure under section 21 of the Government Proceedings Act and thus the Judicial Review proceedings are held as premature. The application is struck out for being premature with costs to the respondent.

30. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17<sup>TH</sup> DAY OF DECEMBER, 2025.**

**J.W. KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Ex-Parte Applicants: Ndolo

Respondents – Absent

