

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION NO. E212 OF 2025

**IN THE MATTER OF: AN APPLICATION BY KOBBY TECHNOLOGIES LIMITED
(THE EX PARTE APPLICANT) FOR AN ORDER OF PROHIBITION AND MANDAMUS
PURSUANT TO LEAVE GRANTED ON 7/7/2025**

IN

MILIMANI HCJR.E090/2025

AND

IN THE MATTER OF: A DECREE OF THIS HONOURABLE COURT IN MILIMANI COMMERCIAL HCCOMMARB/E063/2022 DATED 18/7/2024, AND A CERTIFICATE OF ORDER COSTS AGAINST THE GOVERNMENT DATED 8/4/2025

**BETWEEN
KOBBY TECHNOLOGIES LIMITED**

VERSUS

KINGSWAY BUSINESS SYSTEMS LIMITED

AND

THE NATIONAL TREASURY, OFFICE OF THE PRINCIPAL SECRETARY (AS THIRD GARNISHEE)

AND

**IN THE MATTER OF:
THE GOVERNMENT PROCEEDINGS ACT, SECTION 23 CAP. NO. 40
LAWS OF KENYA**

BETWEEN

REPUBLIC APPLICANT

AND

**THE ATTORNEY GENERAL1ST
RESPONDENT**

**THE NATIONAL TREASURY AND PLANNING, OFFICE
OF THE PRINCIPAL/CABINET SECRETARY.....2ND
RESPONDENT**

EX PARTEKOBBY TECHNOLOGIES
LIMITED
KINGSWAY BUSINESS SYSTEMS LIMITEDINTERESTED
PARTY

JUDGMENT

1. This Judgment determines the Notice of motion dated 16th July 2025 is brought under the provisions of (Order 53 Rule 3, Order 29 Rule 4(2) of the Civil Procedure Rules, 2020, Section 8(2) of the Law Reform Act, CAP. 26, of the Laws of Kenya and all other enabling provisions of the Law.
2. The application was filed pursuant to leave of this Court granted on 7/7/2025 by this Court in HCJR E090 of 2025.
3. The ex parte applicant seeks the following substantive orders:
 - a. ***THAT this Honourable Court be pleased to issue an order of Prohibition against the 1st Respondent and 2nd Respondent restraining and barring the payment of all monies which are due and owing from the 2nd Respondent to the Interested Party under Tender No. TNT/049/2019 – 2020, the Addendums thereunder and the 4th Addendum dated 14/5/2024 of Tender No. TNT/049/2019-2020 and the said debt be applied towards the settlement of the Garnishee Order Absolute dated 24/2/2025 passed against the 2nd Respondent and the Certificate of Order and Costs Against the Government dated 8th April 2025 as entered in MILIMANI COMMERCIAL HIGH COURT COMMARB/E063/2022 - KOBBY THECHNOLOGIES LIMITED VERSUS KINGSWAY BUSINESS SYSTEMS LIMITED in favour of the ex parte Applicant against the Interested Party.***

b. THAT this Honourable Court be please to issue an order of Mandamus against the 1st Respondent and the 2nd Respondent compelling them to pay to the ex parte Applicant forthwith the decretal sum of Kshs.212,755,850/= in settlement of the Garnishee Order Absolute dated 24/2/2025 which was passed against the 2nd Respondent and the Certificate of Order and Costs against the Government dated 8th April 2025 in MILIMANI COMMERCIAL HIGH COURT COMMARB/E063/2022 KOBBY THECHNOLOGIES LIMITED VERSUS KINGSWAY BUSINESS SYSTEMS LIMITED out of the debt which is due and owing from the 2nd Respondent to the Interested Party (Kingsway Business Systems Limited) under Tender No.TNT/049/2019 – 2020, the Addendums thereunder, and the 4th Addendum dated 14/5/2024 of Tender No.TNT/049/2019-2020.

c. THAT the costs of this Application be awarded to the Ex-parte Applicant.

4. The application is predicated on the grounds and matters set out in the applicant's Statutory Statement dated 8th April 2025, its supporting documents as annexures and the Verifying Affidavit sworn by Bico Norris Hamala on 8th April 2025 which were all filed on 8th April 2025 accompanying the chamber summons for leave in Milimani HCJR/E090/2025, the Supporting Affidavit, further affidavit and the written submissions filed by the applicant's counsel. The main grounds forming the basis for the application can be summarized as set out below.

5. The ex parte applicant pleads that or about 25/1/2021, the 2nd Respondent awarded Tender No. TNT/049/2019 – 2020 to an Interested Third Party, Inplenion Eastern Africa Limited and the ex parte Applicant herein, for a period of thirty-six months with effect from March 2021 to March 2024 at a consideration of Kshs.647,064,000.00 out of which the ex parte Applicant's fees was Kshs.303,888,768.00.
6. It is pleaded that the 2nd Respondent is under a contractual duty to pay the Contract sum under Tender No. TNT/049/2019 – 2020 to the parties to the contract, the ex parte Applicant included.
7. That the Interested Third Party and the ex-parte Applicant entered into a Sub-Contracting Agreement that was founded on Tender No. TNT/049/2019-2020 on 7th March 2021 for a period of thirty-six months.
8. That the Interested Party breached the Sub-contracting agreement between the Interested Third Party and the ex-parte Applicant, as a result of which a dispute arose, which dispute was referred to Arbitration in accordance with the parties Sub – contracting agreement and a Final Arbitration Award was issued on 17/10/2022.
9. Thereafter, that the ex-parte Applicant instituted Milimani Commercial H. C. Commercial ARB/E063/2022 - Kobby Technologies Limited Vs Kingsway Business Systems Limited, seeking recognition and enforcement of the Final Arbitration Award as a decree of the Court, wherein Judgement was entered in favour of the ex Parte Applicant and a decree dated 18/7/2024 for the principal sum of Kshs.165,832,388/=, plus interest at the rate of twelve per cent (12%)

per annum with effect from 16/11/2022 until payment in full, plus costs of the suit was issued by the High Court Commercial Division Court. That subsequently, the Party and party costs were taxed on 16/1/2025 at Kshs.237,169.25 cents.

10.It is averred by the exparte applicant that on 7th February 2025, the ex parte Applicant commenced Garnishee proceedings in Milimani Commercial H.C.COMMARB/E063/2022-Kobby Technologies Limited Vs Kingsway Business Systems Limited against the 2nd Respondent inter alia, for the attachment of the debt due from the 2nd Respondent to the Interested third Party under Tender No. TNT/049/2019-2020 and under the 4th Addendum dated 14/5/2023 Tender No. TNT/049/2019-2020, subsequent to which a Garnishee Order Absolute dated 24/2/2025 and a Certificate of Order and Costs Against the Government dated 8th April 2025 for the payment of Kshs.212,755,850/= was issued.

11.The exparte applicant further asserts that in the course of the proceedings in Milimani Commercial H.C.COMMARB/E063/2022 Kobby Technologies Limited Vs Kingsway Business Systems Limited, on or about 23/10/2025, the Interested Third Party filed a Replying Affidavit wherein the deponent, Mr. Kenneth Kadenge, its Business Development Manager unequivocally stated under oath that in respect of Tender No. TNT/049/2019-2020, t the 2nd Respondent was indebted to the Interested Party in the sum of Kshs.91,542,000/= which was due and owing under the said contract and a

further sum of Kshs.46,464,500.00 under the 4th Addendum dated 14/5/2023 of Tender No. TNT/049/2019-2020.

12. It is further alleged by the exparte applicant that in a further confirmation that the Interested Third Party was owed by the 2nd Respondent under Tender No.TNT/049/2019-2020, on 26/3/2025, the Interested Third Party allegedly attempted to coerce the ex parte Applicant to override the existing Garnishee Order Absolute of 24/2/2025 and to authorize the 2nd Respondent to release the decretal sum to it. However, that the ex parte Applicant rejected the proposal.
13. Additionally, the exparte applicant avers that the 2nd Respondent was served with the Garnishee Order Absolute dated 24/2/2025 and a demand letter dated 24/2025 to no avail, hence making the filing of these proceedings necessary, after serving Notice of intention to sue upon the 1st respondent Attorney General on 1st April, 2025.
14. The exparte applicant asserts that the 2nd Respondent is truly indebted to the Interested Third Party under Tender No. TNT/049/2019-2020, and the 4th Addendum dated 14/5/2023 of Tender No. TNT/049/2019-2020, while the 2nd Respondent is indebted to the ex parte Applicant under the Garnishee Order Absolute dated 24/2/2025 issued in Milimani Commercial H.C. COMM. ARB/E063/2022-Kobby Technologies Limited vs Kingsway Business Systems Limited which debt remains unpaid to date.
15. It is further urged that despite being aware of the Garnishee Order Absolute dated 24/2/2025, the Interested Third Party has taken overt actions to pursue

the payments that are due to it from the 2nd Respondent under Tender No. TNT/049/2019-2020 and the 4th Addendum dated 14/5/2023 of Tender No. TNT/049/2019-2020 and that it is paramount that this Court or bar the 2nd Respondent from releasing any payment to the Interested Part until the debt owed under the Garnishee Order Absolute dated 14/5/2025 is settled in full.

16. The ex parte applicant further asserts that the 1st and 2nd Respondents are government entities and that therefore the only remedy that is available under the law to the ex parte Applicant is to secure and obtain settlement of the decree dated 18/7/2024 and the Garnishee Order Absolute dated 24/2/2025 from the 1st and 2nd Respondents by the issuance of the prerogative writs of Prohibition and Mandamus by this Court.

Joint Response by the Respondents

17. The Respondents filed grounds of opposition dated 13th November, 2025 in response to the Notice of motion dated 16th July, 2025. The Respondents oppose the Notice of Motion on the grounds that the Application is frivolous vexatious and an abuse of court Process; that the Application does not meet the threshold of issuing the order of mandamus sought; and that the Attorney-General is not the accounting officer in National Treasury, relying on **Republic v Attorney General Ex parte Miriam Wairimu Wambugu & another [2021] eKLR**).

18. Further grounds are that there is no legal/statutory duty against the Attorney-General and /or the 2nd Respondent; that there is no legal obligation that the 2nd respondent has refused to perform to warrant issuance of a compelling Order;

that the Applicant is enforcing the Judgment against the wrong party and finally, that it is only fair and just that this Application be dismissed with costs to the Respondents.

Response by the Interested Party

19. In response to the ex parte applicant's Notice of Motion dated 16th July, 2025, the interested party filed a replying affidavit sworn by Kennedy Kadenge, the Business Development Manager of the interested party company and also acting as the Project Representative from Kingsway Business System Limited [interested party] with respect to the sub-contracting agreement dated 7/3/2021, stating that he was familiar with the facts and circumstances leading up to the present judicial review proceedings.
20. Mr. Kadenge deposes, adopting and reiterating the contents of his Replying Affidavit sworn on the 12/5/2025 and the annexures thereto at the leave stage in High Court Judicial Review Case No. E090 of 2025 as well as the contents of the Notice of Motion Application dated 29/7/2025 together with his Supporting Affidavit, in which the interested party sought for Review of the Ruling delivered in HCJR No. E090 of 2025.
21. He further deposed that he wholly reiterated and adopted the contents of the further affidavit sworn on the 8/10/2025 in HCJR E090 of 2025.
22. In response to the further affidavit filed by the ex parte applicant, the interested party's deponent swore a supplementary affidavit reiterating the contents of its Replying Affidavit sworn on the 28/10/2025 in its entirety.

23. In response to paragraph 5 of the Ex-parte Applicant's Further Affidavit sworn by BICO NORRIS HAMALAH, the interested party stated that the Arbitration Award is the subject matter of High Court Arbitration Case No. 687 of 2022 which seeks to set aside the said Award and is pending before Justice Ado at the Commercial and Tax Division of the High Court.

24. Further in response to paragraph 5 through to paragraph 12 of the Ex-parte Applicant's Further Affidavit sworn by BICO NORRIS HAMALAH, the interested party asserts that all the issues raised therein are the subject matter of High Court Arbitration Case No. 687 of 2022 which seeks to set aside the Arbitration Award.

25. In response to paragraph 13 of the Ex-parte Applicant's Further Affidavit sworn by Bico Norris Hamalah, the interested party avers that the Ruling delivered on 18/7/2024 in Milimani Commercial Court – H.C. Arbitration Case No. E063 of 2022 by Justice Mulwa enforcing the Award is the subject matter of Court of Appeal Case No. E573 of 2024 between Kingsway_Business Systems Ltd -vs- Kobby Technologies Ltd

26. It was further deposed that the interested party has always held the position that H.C. Case No E687/2022 and High Court Arbitration E063 of 2022 ought to have been consolidated and/or that H. Court Case No E687/2022 which was filed first in time ought to have been dealt with before High Court Arbitration E063 of 2022 to avoid conflicting decisions emanating from the same High Court and that this would have prevented the quagmire we are now in and the

numerous matters lodged before the same High Court over the same subject matter.

27. Further deposition is that the Principle of Res Judicata ought to be suspended pending the hearing and determination of High Court Case No. E687 of 2022 which seeks to set aside the award and Civil Appeal Case No. E573 of 2024 which seeks to halt the enforcement of the Award and set it aside pending the hearing and determination of High Court Case No. E687 of 2022.

The Ex Parte Applicant's Further Affidavit in Response to the Interested Party's Replying Affidavit Sworn on 28/10/2025

28. Pursuant to leave of court, the ex parte applicant filed a further affidavit in response to the interested party's replying affidavit sworn on 28/10/2025. In the said affidavit sworn by Bico Noriss Hamalah who is the Managing Director of the ex parte Applicant and duly authorized by the Board of directors of the ex parte applicant to swear the Further Affidavit for and on its behalf, he deposes, in reiteration of the contents of the Supporting Affidavit that he swore on 16th July 2025.

29. The deponent asserts that the contents of paragraph Nos 5, 6, and 7 of the Interested Party's Replying Affidavit sworn on 28/10/2025 and produced as Exhibit 'KK-1' on page no. 2 is an attempt to re-litigate issues which were in formerly in contention in the Arbitration leading to the Final award dated 17/10/2022, between the parties and hence, it is not only an abuse of the court process but is also *res judicata*.

30. Further, that the Interested party alleged in its Replying Affidavit of 28/10/2025, that the *Ex parte* Applicant recalled its members of staff from the National Treasury on 15/4/2021 which resulted in non-performance of the latter's obligations under the Sub-Contracting Agreement dated 7/3/2021, and failure to take any remedial steps, which caused the interested party to hire the required consultants to perform the work.

31. It is deposed that during the Arbitration, the Interested Party herein filed a defence and Counterclaim dated 8/4/2021 where it claimed in paragraph Nos 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, and 21 that the *Ex Parte* Applicant had breached the Sub-Contracting Agreement dated 7/3/2021 through withdrawal of the latter's members of staff from IFMIS, as shown by annexed copy the defence and Counterclaim marked as Exhibit BNH -5.

32. Further deposition is that the *Ex parte* Applicant strongly and successfully rebutted the accusations of non-performance of its obligations or any breach of the Sub-contracting Agreement dated 7/3/2021 through its annexed pleadings marked as Exhibit BNH-6 namely: the claimant's supplementary witness statement filed pursuant to leave granted on 15/8/2022" dated 16/8/2021 and Reply to defence and defence to Counterclaim dated 12/8/2021.

33. That contrary to the Interested Party's averment that no remedial measures were taken to redeploy the members of staff who were withdrawn on 16/4/2021, the applicant attached the Claimant's List of documents dated 12/8/2022 marked as Exhibit 'BNH-7', which the *Ex parte* Applicant filed in the Arbitration Referencee, and drew this court's attention to an email dated

Thursday 22nd April 2021 09:24 at page no.26, 27, 28 where the deponent wrote as follows: “*RE: KBS INVOICE*

Kadenge,

Decision to redeploy was done yesterday. Please give us update on the pending invoice payment. I hope we are still on track to having it made this week.

Regards,

BICO NORISS HAMALAH

Managing Director”

34. The ex parte applicant’s deponent further asserts that Mr. Kenneth Kadenge of the Interested Party confirmed that the issue of withdrawal of the *Ex parte* Applicant’s members of staff was resolved through his email: Kenneth.kadenge@kingsway.co.ke on 29th April 2021 11:02 when he wrote as follows:

“RE: KBS invoice

Dear Bico

Well received.

As per tel. conversation this morning, I would like to assure you that matters salary for the staff in respect of the IFMIS project is being worked on and will update you accordingly when the same is effected.

Thanks”

35. Further, that in paragraph No.10 of the *Ex parte* Applicant’s Reply to defence dated 12/8/2021, it was pleaded; “*However, even without any payment being made by the Respondent, the Claimant redeployed the withdrawn personnel on 22/4/2021 and has continued to maintain its personnel on site to date.*”

36. It was deponed that according to the Amended Final Arbitration Award dated 17/10/2021 at page No. 22, paginated no. 73, 74, 83, 84, 85, 86 and 87, the Arbitrator heard the Interested Party's Defence and Counterclaim and held with regard to the claim for breach of contract by the Ex parte Applicant on page No. 22, paginated as 116 the Arbitrator held as follows: "21.3.2. I therefore DECIDE and DETERMINE on the evidence before me that in so far as issue No. 3 is concerned that the Respondent is not entitled to its counterclaim against the Clamant AND my decision thereon is final."

37. That in view of issuance of orders for the recognition and enforcement of the Final Arbitration Award dated 17/10/2021 as a judgment of the court vide the Ruling delivered on 18/7/2024 in Milimani Commercial Court - H.C.COMARB. /E063/2022 Kobby Technologies Limited Versus Kingsway Business Systems Limited, the principle of *Res Judicata* stripes this court of jurisdiction to revisit matters that were previously conclusively heard and determined by a court of competent and concurrent jurisdiction.

38. Further, that paragraphs 18, 19, 20 of the Replying Affidavit confirm that the issue of whether H.C.COMMMISC.E687/2022 ought to have been heard together with H.C.ARB./E063/2022 Kobby Technologies Limited Versus Kingsway Business Systems Limited, was raised before Justice Mr. P. Mulwa, who according to the court proceedings which form part of Ex parte Applicant's exhibits on page no. 185 – 186 (page 2/3 & 3/3), parties submitted on this issue and the court proceeded to issue a Ruling date for the cause that was before it.

39. That after the Court fixed the Ruling date of 18/7/2024 in HCCOMM ARB./E063/2022, the Interested party did not challenge the court's order or refusal for the two matters to be heard together, but instead it proceeded to file the application for reconstruction of the court file in H.C.COMMMISC.E687/2022 on 22/4/2024, as shown by its Exhibit KK-1 on pages 34 – 41.

40. Regarding the Interested Party's Exhibit KK-1 on pages 83 – 85 of the Replying Affidavit of Samson Wangusi sworn on 23/6/2025 in H.C.ARB./E063/2022, which the Interested party has resorted to, to substantiate allegations of non-performance of the Sub-Contracting Agreement dated 7/3/2021 and that the sums due under the contract are not payable, the applicant asserts that despite alleging that the payments under the tender Contract were only payable on completion of the agreed milestones and accusing the Contracting parties of non-performance of contractual obligations, Mr. Samson Wangusi's produced Exhibit "SW-2" which is the "CONTRACT AGREEMENT between THE NATIONAL TREASURY and M/S KINGSWAY BUSINESS SYSTEMS LIMITED (Lead Bidder) IN CONSORTIUM WITH M/S KOBBY TECHNOLOGIES LIMITED AND M/S INPLENION EASTERN AFRICA LIMITED dated 9/2/2021, but failed to produced a "WRITTEN NOTICE OF DEFAULT" or a Notice for termination for breach as expressly provided in Clause 3.7.3. page 93 and Clause 3.11 at pages 93 -94] which provides as follows:-

SECTION III GENERAL CONDITIONS OF CONTRACT [p.91]

3.7 Inspection and Tests

3.7.3. *“Should any inspected or tested services fail to conform to the Specifications, the Procuring Entity may reject the services, and the tenderer shall either replace the rejected services or make alterations necessary to meet specification requirements free of costs to the procuring entity.*

3.11. *“Termination for breach*

The procuring entity may, without prejudice to any other remedy for breach of Contract, by written notice of default sent to the tenderer terminate, this Contract in whole or in part.”

- a) *If the tenderer fails to provide any or all of the services within the period(s) specified in the Contract, or within an extension thereof granted by the Procuring entity.*
- b) *If the tenderer fails to perform any other obligation(s) under the Contract.*
- c) *If the tenderer, in the Judgment of the Procuring entity has engaged in corrupt or fraudulent practices in competing for or in executing the Contract.*

In the event the Procuring Entity terminates the Contract in whole or in part, it may procure, upon such terms and in such manner as it deems

appropriate, services similar to those undelivered, and the tenderer shall be liable to the procuring entity for any excess costs for such similar services.”

41. The applicant denies the allegations of non-performance and breach as alleged in the Replying affidavit of Mr. Samson Wangusi and asserts that the allegations of breach of contract by Mr. Samson Wangusi in the absence of independent supporting evidence of compliance with Clause 3.7 and 3.11 by the National Treasury, are *mala fides*, scandalous and mischievous to say the least.

42. Further, that the duration of the Contract was 3 years with effect from 9/2/2021 to 8/2/2024 and that the said Contract expired through effluxion of time and not through termination, which, according to the exparte applicant, further compounds the absurdity of Mr. Samson Wangusi's claims of non-performance.

43. The exparte applicant further denies allegations at paragraph 15 of the Replying Affidavit of Mr Samson Wangusi, that another Contractor was engaged to complete the works under the tender contract.

44. Concerning Mr. Samson Wangusi's exhibit SW-3, the exparte applicant asserts that the contracted works thereunder are fundamentally different in all material particulars from the works covered by the contract of 7/3/2021. That the Contract of 7/3/2021 was for *“Provision of Onsite Support For IFMIS applications, enhancement of IFMIS E-Procurement and independent Integrated Financial Management Information System For Semi-Autonomous*

Government Agency (SAGA): Lot 1: Provision of Onsite Support For IFMIS Applications and Enhancement of IFMIS E-Procurement; while ‘SW-3’ defines the contracted services as “ Provision of Onsite Support for IFMIS Applications, Enhancement of Oracle Hyperion Budgeting and Planning Module for National and County Treasuries.”

45. Additionally, that Clauses 4.2 at page 106 and 4.3 – 4.5 of Contract; TNT/049/2019-2020 outlined the objectives and scope of the contracted works.

46. Further, that Clause 4.6 “Duration of the Assignment” provided that: “*The duration of this assignment shall be Twelve (12No.) months on development, go live, and stabilization. Support shall be 24 months (2No.) years in line with support for existing applications.*”

47. According to the ex parte applicant, all due process and rules of natural justice were adhered to in all proceedings leading up to the issuance of; the Amended Final Award dated 17/10/2022; the decree dated 18/7/2024; the Garnishee Order Absolute dated 24/2/2025 and the Certificate of Order and costs against Government dated 8/4/2025.

48. It maintains that the the only legal means available to the ex parte Applicant to obtain compliance by the Respondents with lawful orders of this Court is by grant of the prerogative remedies of prohibition and mandamus, which the deponent implores this Court to grant.

The ex parte applicant’s submissions

49. The ex parte applicant also filed written submissions providing the procedural history of this matter from the time that leave to apply was sought and obtained vide Milimani HCJR.E090/2025, on 7/7/2025, to date, highlighting directions given by this court. On the Interested party's replying affidavit sworn on 28/10/2025, which however was not traceable on the Judiciary E-filing portal for this matter as of 5th November 2025, nor was there record of a payment for it on the CTS, it was submitted that the Judiciary Court Fees Assessment Schedule in the First Schedule Section D, "High Court (Commercial and Tax Cases) at paragraph No. 6 on page No. 7, prescribes a court filing fees of Kshs.750/- for filing of an Affidavit or grounds of opposition. That the 'The Judiciary Court Fees Assessment Schedule' was published in the Kenya Gazette Notice Vol. CXXIII-No. 144, of 9th July 2021, Gazette Notice No. 6830 and became effective on 1st July 2021, with the its preamble expressly stating in mandatory terms as follows: "IT IS HEREBY NOTIFIED for the general information of the public fees set out in the schedule hereto shall apply to the lodging or filing of the respective documents in the relevant proceedings before specified Courts and Tribunals.

50. This Court was therefore invited to draw guidance from the decision in the case of; **Parkesh Kamlakar Naik & Another Versus Cabinet Secretary Ministry of Interior and Co-Ordination Of National Governments And 2 Others [2017] eKLR**, at paragraph 10, where the court held as follows with respect to failure pay court filing fees:

“Failure to pay court filing fees is not a procedural technicality as it goes to the substance of the main pleading which cannot be deemed to be filed without court filing fees being paid and an acknowledgment receipt issued to that effect unless exempted by law or by the court on application.”

51. And that at paragraph No. 21 of the above decision, the court held that: ***“This court cannot be complicit in such misdeeds. In the premises, I have no option but to declare the notice of motion dated 11th July 2016 and filed in court on 12th July 2016 incompetently filed. I proceed and strike it out.”***

52. It was therefore submitted that in the absence of a properly filed Replying Affidavit and the failure by the Respondents to file a response to the application within the stipulated time or by the time these submissions were prepared, this Court should to allow the ex parte applicant’s application as an opposed in accordance with the provisions of Order 51 Rule 14(4) of the Civil procedure Rules.

53. The ex parte applicant’s counsel further provides a history of the dispute culminating in the HCCOMMARB/E063/2022 DATED 18/7/2024, AND A CERTIFICATE OF ORDER COSTS AGAINST THE GOVERNMENT DATED 8/4/2024 arising from Tender Contract No. TNT/049/2019-2020 to Inplenion Eastern Africa Limited, the Interested Party and the ex parte Applicant for the consideration of Kshs.647,064,000.00 pursuant to which the ex parte Applicant and the Interested Party entered into a Sub-Contracting Agreement on 7/3/2021 for the performance of a tender contract; TNT/049/2019-2020 wherein it was expressly agreed that the ex parte

Applicant professional fees was Kshs.303,888,768/= to be paid out of the contract sum of the mother contract. Due to a breach of contract by the Interested Party, a dispute arose from the Sub-contracting Agreement and was referred to Arbitration and an Arbitration Award was published on 17th October 2022 -pages 51 – 136; and how the Decree order absolute was arrived at by the Commercial Division of the High Court., which documents were affectively served upon the respondents herein for compliance as required under section 21 of the Government Proceedings Act and only after the 2nd respondent failed to comply that the ex parte applicant filed which led to the filing of Garnishee proceedings on 7/2/2025 and these judicial review proceedings.

54. It was submitted that in any event, only the 1st respondent opposed the application for leave to apply in MILIMANI HCJR/E090/2025 being an application for leave to apply for an Order of Prohibition and Mandamus against the 1st and 2nd Respondent, in which this Court observed at paragraph 12 of the ruling that there was no challenge of the existence of valid court orders that are yet to be satisfied and as to whether there is an appeal or application for setting aside or not, this court had not been shown any order of stay of the orders adopting the final award.

55. The ex parte applicant submitted that in the alternative and without prejudice to the position taken with regard to the Interested Party's unfilled Replying Affidavit, in the unlikely event that this Court is inclined to consider the same, that the said replying affidavit raises the issue of non-performance of the sub-contracting agreement by recall of staff members, which the ex parte Applicant

has demonstrated through the Further Affidavit of 5/11/2025 and documentary evidence marked as Exhibit 'BNH-7 not to be true as members of staff were redeployed within 6 days after recall. Secondly, that the issue of recall of staff members is an attempt to relitigate matters that were litigated during the arbitration proceedings as shown by the Statement of defence and Counterclaim dated 8/8/2022 and the Reply to defence and defence to Counterclaim dated 12/8/2022 which were produced through the Further Affidavit dated 5/11/2025 as Exhibit BNH-6 at pages 16 – 28 and which were conclusively determined by the Final Arbitration Award on 17/10/2022.

56. It was submitted that the principle of *Res Judicata* bars the court from entertaining such litigation as expressed in Section 7 of the Civil Procedure Act and that therefore this court lacks the jurisdiction to entertain a hearing over the same. Reliance was placed on the decision in **Henderson Versus Henderson [1948-1960] ALL. E. R. Page 378**, where the principle of Res judicata was enunciated thus:

“ Where a given matter becomes the subject of litigation, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except in special circumstances, permit the same parties to open the same subject of litigation in respect of matter, which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even

accident, omitted part of their case. The plea of Res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce the judgement but to every point which properly belonged to the subject of litigation in which the parties, exercising reasonable diligence, might have brought forward at the time.”

57.Thirdly, the ex parte Applicant submitted that given that the Tender Contract: TNT/049/2019-2020 was for a three year term which expired on 8/2/2024, the posthumous claims of breach without a previously issued proper notice of breach of contract or termination of contract in accordance with the SECTION III GENERAL CONDITIONS OF CONTRACT clause No.3.7 and 3.11 without corroborative proof, as purported by the Replying Affidavit of Mr. Samson Wangusi for the first time by a witness from the bar is untenable, *mala fides*, actuated by malice and bereft of any factual or contractual foundation.

58.Fourthly, that given the observation of this Court in its Ruling of 7/7/2025 in Milimani HCJR/E090/2025 about the existing unchallenged court orders and that the Section 23 of the government proceedings Act empowers attachment of third-party debts which are owed by government, the only issue which remains for this court to determine is whether the ex parte Applicant has met the requirements for the grant of the Judicial Review remedies of Prohibition and Mandamus.

59. It was submitted in reiteration that the the ex parte Applicant obtained a valid arbitration award and a decree of the court for the same and that through the Garnishee Order absolute dated 24/2/2025, the 2nd Respondent was ordered to pay to the ex parte Applicant the amount due under the decree dated 18/7/2024 to no avail. That the decretal sum is also certified by the Certificate of Order and Costs Against Government dated 8/4/2025 which despite being served on the 2nd Respondent, it remains unsatisfied to date and that therefore the only legal means that is available to the ex parte Applicant to obtain compliance by the Respondent of the court orders issued in his favour is through the grant of the remedy of Mandamus by this Court.

60. It was submitted that the ex parte applicant's BNH-8 of the Verifying Affidavit dated 8/4/2025 at pages 190 – 192 is proof of overt attempts by the Interested party to obtain payment of the attached funds from the 2nd Respondent and that therefore, there is need for an Order of Prohibition being issued to stop any payments being made to the Interested Party until the Certificate of Order and Costs against Government dated 8/4/2025 is fully settled in favour of the exparte applicant.

61. Reliance was placed on **Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another [2018] KEHC 9433 (KLR)**, where JM Mativo J (as he then was) is said to have outlined the threshold to obtain the Judicial Review remedy of Mandamus.

62. It was submitted that the 2nd Respondent is a public officer charged with the function of formulation and implementation of economic and financial policies,

overseeing government financial operations and managing public finance while the 1st Respondent is a public officer who acts as the principal legal advisor to the national government on all legal matters.

63. That the 1st Respondent failed to perform its duty to provide sound legal guidance to the 2nd Respondent regarding respect of court orders and to ensure compliance with the Garnishee Order Absolute dated 24/2/2025 and the certificate of order and costs against government. It was submitted that both the 1st and 2nd Respondents owe a public duty to the ex parte Applicant which requires compliance with the court order issued in its favour.

64. Further submission was that once a certificate of Order and Costs against Government pursuant to Section 21 of the Government Proceedings Act, is issued, the Respondents are required to comply with the Constitutional duty of upholding the public rights, through effecting payment thereof and that failure to honour a court order is a violation of a constitutional right of the decree holder and which violation can be redressed through Judicial Review.

65. The ex parte applicant reiterated that due to the statutory bar of execution against the Government, the only legal remedy that is available to the ex parte applicant to procure compliance with orders issued in its favour is the grant of an order of Mandamus and prohibition to prevent diversion of the money to the Interested Party. The ex parte Applicant relied on the case of: **Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza [2012] Kehc 1643(KLR)** to support this proposition.

66. Further reliance was placed on the cases of **Republic v Attorney General Ex Parte Italbuild Imports Limited [2017] KEHC 2873 (KLR)** at paragraph No. 17 cited **Shah vs. Attorney General (No.3) Kampala HCMC No.31 of 1969 [1970] EA 543** and **Republic v Nairobi City County Government Ex parte Crown Motors Group Limited [2021] KEHC 889 (KLR)** on the necessity of the court to issue an order of Mandamus.

67. Responding on the the allegations of breach of contract by the Interested Party are invitation to the to delve into the merits of unchallenged court orders. Counsel relied on **Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another**, (supra) where it was held that Judicial review proceedings are not a forum for challenging the merits of the decisions whose enforcement is sought, but it is for considering the process undertaken to obtain them.

The Respondents' Submissions

68. The Respondents filed joint submissions dated 13th November, 2025 framing the following issues for determination

i. *Whether the 1st Respondent are under a public duty and obligation to satisfy the orders issued*

ii. *Who should bear the cost of the application?*

69. On whether the Respondents are under a public duty and obligation to satisfy the orders issued, the respondents cited Section 21 (3) of the Government Proceedings Act provides as follows:

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.

70. The respondents submit that an Accounting Officer is provided for under Section 2 of the Public Finance Management Act which further provides under Section 67(2) of who an accounting officer is with regards to the national institution or government entity. It provides that;

“Except as otherwise stated in other legislation, the person responsible for the administration of a Constitutional Commission or institution or Independent Office shall be the accounting officer responsible for managing the finances of that Commission, institution or Independent Office.”

71. Further submission is that the person responsible for the Administration of the Ministry of The National Treasury is the Principal Secretary concerned hence,

going by the Government Proceedings Act and Public Finance Management Act, the Principal Secretary should be the accounting officer. It is the Respondent's submission therefore, that the Attorney-General is not the accounting officer of the Ministry of the National Treasury.

72. The respondents rely on the case of **Republic V Attorney General Ex Parte Mirriam Wambugu & Another [2021] eKLR** where Nyamweya J (as she then was) held that, Execution proceedings against a government or public authority under the Government Proceedings Act can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body.

73. The respondents maintain that the Government Proceedings Act provides that once a certificate of order against the Government is issued a copy of the same may be served by the person in whose favor the order is made 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.

74. They therefore submit that the orders sought against the Attorney-General are improper and thus makes the application defective and the same should be dismissed. The 1st respondent Attorney-General specifically submits that for an order of mandamus to issue, there must be a specific legal duty owing which is not the case in the circumstances thus the application must fail.

75. On Who should bear the Cost of the Application, the respondents submit, relying on the case of **Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 Others**, where the court is said to have held that:

“...it is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial judge is given discretion... But this is a judicial discretion and must be exercised upon grounds of which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party is a rule that should not be departed from without the exercise of good grounds of doing so.”

76. It is their submission that in the event this Court is inclined to uphold the ex parte applicant's prayers, then the Respondents should not be condemned to pay costs.

The Interested Party's Submissions

77. The interested party submitted that the weighty issues raised in the interested party's Replying Affidavit of 28/10/2025 inform the Ex-parte Applicant Submission that Court fees on the same was not duly paid is a desperate attempt to have the critical issues raised in the Replying Affidavit not to be considered as they put the present case in clear perspective.

78. That the Replying Affidavit of 28/10/2025 simply relied on the interested party's Replying Affidavit sworn on the 12/5/2025 and the annexures thereto at the leave stage in High Court Judicial Review Case No. E090 of 2025 together with the contents of the Notice of Motion Application dated 29/7/2025 seeking Review of the Ruling delivered in HCJR No. E090 of 2025 together with the interested party's Supporting Affidavit sworn therein on the 29/7/2025 and the annexures supporting our position therein as they are relevant to these present proceedings.

79. The interested party urged this Court to peruse the proceedings in HCJR 090 of 2025 and particularly the sworn Affidavit of Samson P. Wangusi, of the 23/6/2025 filed in the High Court Arbitration Case No. E063 of 2022 and produced before this Court. It was submitted that the Notice of Motion dated 16/7/2025 lacks merit and that the same ought to be dismissed with costs.

Ex-Parte Applicant's Reply submissions To The Respondents' Submissions

80. In a rejoinder to the respondents' written submissions, the exparte applicant filed further submissions contending that the Respondents' Grounds of opposition are misconceived, frivolous and an abuse of the due process of this Court as far as they claim that: The application dated 16/7/2025 does not qualify for issuance of Orders of Mandamus and Prohibition; and that the 1st Respondent is wrongly sued; the Respondents are under no statutory obligations to satisfy the decree and orders made in HCCOMMISC.ARB.E063/2022.

81. The ex parte Applicant reiterates its previously filed submissions dated 6/11/2025 adding that the issue of whether or not the 1st Respondent could be enjoined in Judicial Review proceedings for enforcement of the decree in Milimani - HCCOMMMISC.ARB.E063/2022 was raised in Milimani HCJR/E090/2025, where this Court held on page No. 5 in the Ruling dated 7/7/2025 that: *“1. For the above reasons, I find and hold that the joinder of the Attorney General to these proceedings does not render the application defective. Her presence is consistent with her constitutional role as the Principal Legal Advisor and therefore the legal representative of the national government. Furthermore, no prejudice arises from the fact that no substantive orders can be directed at her office, other than her duty to advise the national Treasury in this case, to settle the decretal sum due to the judgment debtor by paying to the decree holder in the proceedings pending before the Commercial division of the High Court, as provided for under section 23 of the Government Proceedings Act.”*

82. The exparte applicant submits that this court’s finding in the Ruling dated 7/7/2025 regarding the joinder of the Attorney General in the enforcement of the decree in MILIMANI - HCCOMMMISC.ARB.E063/2022, stands unchallenged to date and that the instant attempt to relitigate the same is an affront to the said Ruling as well as Section 7 of the Civil Procedure Act which lays down the principle of Res Judicata.

83. The ex parte Applicant reiterates its submissions dated 6/11/2025 at paragraph No. 11 with regard to the principles laid down in the English case of

HENDERSON -VS- HENDERSON [1948 – 1960] ALL E.R. on page 378 on the application of the principle of *Res Judicata* and urges this Court to find the Respondents' objection on joinder to be an abuse the court process.

84. The ex parte applicant invokes the Ruling dated 7/7/2025 which distinguishes that the capacity under which the Attorney General is sued is in accordance with Section 12 of the Government Proceedings Act. CAP. 40, while the 2nd Respondent's role is clearly spelt out in the Certificate of Order and costs against Government dated 8th April 2025.

85. It was submitted that the 1st and 2nd Respondents' office are established by Articles 155 and 156 of the Constitution respectively. Article 155 establishes the office of Principal Secretary, which is an office in the public service and that each State department shall be under the administration of a Principal Secretary. On the other hand, that Article 156 of the Constitution establishes Office of Attorney-General who is the the principal legal adviser to the national Government and who shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and shall perform any other functions conferred on the office by an Act of Parliament or by the President; and shall promote, protect and uphold the rule of law and defend the public interest.

86. That Articles 155 and 156 of the Constitution are indicative that the 1st and 2nd Respondents are public offices charged with a public duty. Further, that Article 156 (6) behoves the 2nd Respondent to promote, protect and uphold the rule of law. That a judgment of the Court as presented in the Certificate of Order and

Costs Against Government whose enforcement is sought presents the end product of adherence to the rule of law by the ex parte Applicant, and the 2nd Respondent per the Constitution is mandated to ensure that orders of the court are complied with.

87. Further submission is that section 21(3) of the Government Proceedings Act, merely distinguishes who is vested with the obligation to make payment while the procedure for instituting proceedings against the Government are explicitly set out in sections 12, 13 and 19 of the Government Proceedings Act, which require that the Attorney General as the Principal Legal Advisor of the Government is made a party in suits against Government and is not kept in the dark on suits by or against government. That the specific duty of the 1st Respondent's in this matter is to ensure the Rule of Law is upheld in line with its Constitutional duty.

88. It was therefore submitted that the Respondents' objection is solely based on joinder, but that they do not challenge the Orders whose enforcement is sought, neither is there any contention on breach of due process or invalidity of the Court decree whose enforcement is sought.

89. Accordingly, the ex parte Applicant urges this Court to grant the reliefs sought in the Notice of motion dated 16/7/2025 as prayed.

Analysis And Determination

90. I have considered all the parties' pleadings, responses and submissions and the sole issue for determination is whether the application by the exparte applicant

is merited. There are other ancillary questions that this Court will endeavour to resolve.

91. The ex parte applicant in its notice of motion dated 16th July 2025 seeks two main judicial review orders of prohibition and mandamus. Commencing with the prayer for mandamus, it is important to find out whether the threshold for mandamus has been met by the ex parte applicant.

92. In **Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another [2018] KEHC 9433 (KLR)**, J.M Mativo J (as he then was) outlined the threshold to obtain the Judicial Review remedy of Mandamus. as follows:

“29. 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. vs. Canada (Attorney General),[23] and, was also discussed in Dragan vs. Canada (Minister of Citizenship and Immigration).[24] The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) 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.

93. The necessity of the court to issue an order of Mandamus was underscored by the Court in **Republic v Attorney General Ex Parte Italbuild Imports Limited** [2017] KEHC 2873 (KLR) at paragraph 17 citing **Shah vs. Attorney General (No.3) Kampala HCMC No.31 of 1969 [1970] EA 543** as follows:

“Whereas mandamus may be refused where there is another appropriate remedy, there is no discretion to withhold mandamus if no other remedy remains. When there is no specific remedy, the court will grant a mandamus that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a mandamus is to go, then mandamus will go...

94. In **Republic v Nairobi City County Government Ex parte Crown Motors Group Limited [2021] KEHC 889 (KLR)**, it was held that:

“14. An order of mandamus will therefore issue when an officer or an authority by compulsion of law or statute is required to perform a duty, and that duty, despite demand in writing, has not been performed. In addition, execution proceedings against a government or public authority under the Government Proceedings Act can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body.”

95. Applying the above principles as set out in the cited cases to this case, it is not in dispute that there is a Certificate of Order Against the Government dated 8th April 2025 following decree arising from Arbitration proceedings award as adopted in Milimani HC COMMARB/E063/2022 - **KOBBY THECHNOLOGIES LIMITED VERSUS KINGSWAY BUSINESS SYSTEMS LIMITED** in favour of the ex parte Applicant against the Interested Party.

96. There is also no dispute that the ex parte applicant commenced garnishee proceedings against the 2nd respondent in the same matter, seeking to recover the amounts due to it, owed by the interested party as awarded by the Arbitrator and adopted by the Court in the Commercial Division of the High Court in HC COMMARB/E063/2022. In the garnishee proceedings, the Court allowed the

application by the exparte applicant herein to attach the debt owed by the 2nd respondent to the interested party.

97. There is further no dispute that there is no stay of that decree adopting the arbitral award, despite the interested party claiming that they have applied for setting aside of the arbitral award.

98. Additionally, despite allegations of there being an appeal against the garnishee orders, there is no stay of proceedings in respect of the Garnishee proceedings.

99. Further, there is no dispute that the respondents were served with the garnishee proceedings and the certificate of order against the government, including the taxed costs.

100. Section 23 of the Government Proceedings Act Concerns Attachment of moneys payable by the Government and it provides that:

(1) Where any money is payable by the Government to some person who, under any order of any court, is liable to pay any money to any other person, and that other person would if the money so payable by the Government were money payable by a subject, be entitled under rules of court to obtain an order for the attachment thereof as a debt due or accruing due, or an order for the appointment of a receiver to receive the money on his behalf, the High Court may, subject to the provisions of this Act and in accordance with rules of court, make an order restraining the first-mentioned person from receiving that money and directing payment thereof to that other person, or to the receiver:

Provided that no such order shall be made in respect of—

(a) deleted by Act No. 6 of 1979 , Sch.;

(b) money which is subject to the provisions of any written law prohibiting or restricting assignment or charging or taking in execution; or

(c) money payable by the Government to any person on account of a deposit in the Kenya Post Office Savings Bank.

(2) The provisions of subsection (1) of this section shall, so far as they relate to forms of relief falling within the jurisdiction of a subordinate court, have effect in relation to subordinate courts as they have effect in relation to the High Court.

101. From the above provisions, it is clear that although there can be no execution of decree against the government by way of attachment and sale of its assets, attachment of debts owed by the government to third parties can be attached.

102. In this case, the applicant successfully applied and was granted orders attaching a debt owed by the 2nd respondent to the exparte applicant via garnishee proceedings and a decree order absolute was issued by a court of competent jurisdiction. This was after the applicant had obtained a decree against the interested party, arising from arbitration proceedings. The Arbitral award and decree still remain in place and so is the garnishee order absolute order, obtained following interpartes hearing.

103. There is no stay of any of those two orders or decrees and therefore the issues raised by the interested party that there was breach of contract by the ex parte applicant do not arise. Neither can the interested party be heard to challenge before this Court, the propriety or otherwise of that the decree following arbitration proceedings or garnishee order absolute, this not being an appellate court or forum for ventilating decisions made by courts of concurrent jurisdiction.

104. Secondly, although the interested party claims that it has appealed against the Garnishee order, this is not the court that issued the garnishee absolute orders and therefore the issue of stay can only be raised before the Court that issued that order or the Court of Appeal.

105. Thirdly, albeit the interested party alleges that it applied for setting aside of the Arbitration Award, only the court dealing with the matter in question has the power to address the question of stay and not this Court.

106. On the respondent's contention that the 1st respondent is not an accounting officer of the National Treasury, this issue was already resolved in the ruling for leave to apply vide HCJR E090 of 2025 when this Court made it clear that indeed, the Attorney general is only enjoined in her capacity as the Principal Legal Advisor to the national Government and by virtue of section 21 of the Government Proceedings Act which mandate the decree holder to effect service of the Certificate of Order Against the Government, upon the Attorney General and the Attorney General is expected to advise the accounting officer of the relevant Government Ministry or Department to settle the decree. This is

exactly what the exparte applicant did in this case and there is no dispute that it effected service of the said orders upon the Attorney general and the 2nd respondent, seeking settlement.

107. As to whether the decree holder can execute against the government, the Court in the case of **Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] KEHC 1643(KLR)** stated that:

“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.”

108. Therefore, on the issue of whether mandamus can issue against the 1st respondent, it is trite that mandamus can only issue against an entity that has a statutory or legal duty to perform a specific duty.

109. In this case, the Decree Order Absolute was issued by the Commercial Court, against the 2nd respondent accounting officer who owed the interested party the money as per the subject tender and the decree of the Court issued pursuant to the Arbitral Award. That being the case, a legal duty fell on the 2nd respondent to settle decree of the court and therefore, by virtue of section 21 of

the Government proceedings Act which mandates accounting officers to settle decrees issued against the Ministries or Government Departments, the *exparte* applicant was right in enjoining the 2nd respondent to these proceedings and accordingly, *mandamus* would only issue against the accounting officer, not the principal legal advisor, the Attorney General.

110. Accordingly, I find the issue raised by the respondents on the joinder of the 1st respondent to these proceedings and which issue had been already been settled in the ruling for leave to apply is spent and this Court would not make any other different determinations on the same at this substantive stage.

111. Similarly, this Court has no jurisdiction to revisit or review matters which were determined in the Milimani HCCOMMARB/E063/2022 giving rise to a decree dated 18/7/2024 and a Certificate of Order for Costs against the Government Dated 8/4/2025 issued in the said case which adopted the Arbitration Award and granted the Garnishee Absolute Orders giving rise to these judicial review proceedings. Neither can this Court suspend the doctrine of *res judicata* where it rightly applies in proceedings before it, as suggested by the interested party.

112. The questions of indebtedness of the interested party to the *exparte* applicant and or alleged breach of contract were settled in the arbitration award as adopted as decree of the court and so was the issue of the 2nd respondent's indebtedness to the interested party, through garnishee proceedings, which determinations have not been set aside or stayed and this court cannot stay

garnishee or arbitration proceedings which are within the jurisdiction of other courts of concurrent and competent jurisdiction.

113. The applicant also raised the issue of non-payment of court fees by the interested party in its filing of the replying affidavit and that the respondents did not file their responses and submissions within the requisite time hence those documents are not properly on record and that therefore the application dated 16th July 2025 be deemed to be unopposed and be granted. The interested party simply stated that the replying affidavit was procedurally filed, relying wholly on another affidavit sworn in response to the application for leave to apply in HCJR E090 of 2025.

114. In my view, and as stated herein above, whether court fees was paid by the interested party on the filing of the replying affidavit which relied on another replying affidavit in response to the application for leave or not and whether the grounds of opposition and submissions by the respondents were filed out of time, do not alter the position which is apparent in this case. Needless to state that a document which is chargeable and which a party in their self-assessment decides not to assess and pay court fees due for it, is not a filed document. Secondly, a document which is filed out of the time granted by the court and where no leave is sought and granted to allow it on record would be improperly on record. I need not, however, belabor much on those issues which would not change the legal and factual position that I have set out in this matter.

115. Onto the second prayer, and as to whether prohibition should issue in this case, it was submitted that the ex parte applicant's BNH-8 of the Verifying

Affidavit dated 8/4/2025 at pages 190 – 192 is proof of overt attempts by the Interested party to obtain payment of the attached funds from the 2nd Respondent and that therefore, there is need for an Order of Prohibition being issued to stop any payments being made to the Interested Party until the Certificate of Order and Costs against Government dated 8/4/2025 is fully settled in favour of the exparte applicant. I agree.

116. In Kenya **National Examination Council v Republic; Njoroge & 9 others (Ex parte) (Civil Appeal 266 of 1996) [1997] KECA 58 (KLR) (21 March 1997) (Judgment)**, the Court of Appeal stated as follows on when the judicial review order of prohibition would issue:

“...What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY’S LAW OF ENGLAND, 4th Edition, Vol.1 at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such

an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.”

117. I find and hold that the ex parte applicant in the instant case has satisfied the conditions for grant of prohibition to safeguard its interests in that should the 2nd respondent pay the interested party the amount due on the tender subject of the Arbitration proceedings and the Garnishee proceedings, it will take another set of litigation after litigation to recover the debt already adjudicated upon.

118. In addition, as mandamus is the only remedy that the applicant has under section 21 of the Government proceedings Act, to recover decreed money held by the government, since execution against the Government by way of attachment of its assets is prohibited by law, under section 25 of the Government proceedings Act as read with Order 29 Rule 2 of the Civil procedure Rules. I find that the applicant has demonstrated that it is entitled to the prayer for mandamus.

119. In the end, I find the Notice of motion dated 16th July 2025 merited. I allow the prayer for prohibition to the extent that the 2nd respondent, the Principal Secretary for the National Treasury and Planning is hereby prohibited from paying to the interested party herein sums due in respect of Tender No. TNT/049/2019 – 2020, the Addendums thereunder and the 4th Addendum

dated 14/5/2024 of Tender No. TNT/049/2019-2020, which prohibition is only in respect of the extent of indebtedness of the 2nd respondent to the interested party as per the decree and certificate of order against the Government and certificate of order for costs as well as the garnishee Order Absolute issued in Milimani Commercial High Court COMMARB/E063/2022 - Kobby Technologies Limited versus Kingsway Business Systems Limited, together with costs of these proceedings assessed at Kshs 80,000 to be defrayed from the balance of the debt due to the interested party by the 2nd respondent in respect of the aforesaid tender.

120. I further issue judicial review order of mandamus compelling the 2nd respondent, Principal Secretary for the National Treasury and Planning herein, who is the accounting officer for the National Treasury and Planning to settle decree and certificate of order against the government and certificate of order for costs issued in Milimani Commercial High Court COMMArb/E063/2022 - Kobby Technologies Limited Versus Kingsway Business Systems Limited and as per the Garnishee order absolute dated 24/2/2025 issued in the said case between the exparte applicant herein and the interested party to the extent of the amount due and claimed in the garnishee order absolute dated 24/2/2025 together with costs of the garnishee proceedings and costs of these proceedings assessed at Kshs 80,000, which shall be settled from the amount owed by the 2nd respondent to the interested party, before the 2nd respondent can release to the interested party any balance of monies due and owing to the interested party by the 2nd respondent in respect of the Tender No.

TNT/049/2019 – 2020, the Addendums thereunder and the 4th Addendum dated 14/5/2024 of Tender No. TNT/049/2019-2020.

121. Decree to issue in this matter.

122. Mention on 10/2/2026 for further directions.

123. I so order.

Dated, Signed and Delivered at Nairobi this 31st Day of December, 2025

R.E. ABURILI

JUDGE

ORIGINAL