



Republic v Defence Council, Ministry of Defence & 2 others; Irai (Ex parte Applicant) (Judicial Review Application E009 of 2025) [2026] KEELRC 103 (KLR) (26 January 2026) (Ruling)

Neutral citation: [2026] KEELRC 103 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E009 OF 2025**

**M MBARŪ, J
JANUARY 26, 2026**

BETWEEN

REPUBLIC APPLICANT

AND

THE DEFENCE, COUNCIL MINISTRY OF DEFENCE 1ST RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF DEFENCE 2ND RESPONDENT

THE HON ATTORNEY GENERAL REPUBLIC OF KENYA . 3RD RESPONDENT

AND

DICKSON MICHENI IRAI EX PARTE APPLICANT

RULING

1. The ex parte applicant filed an application dated 14 October 2025 under the provisions of Rule 7(2) of the Employment and Labour Relations Court (Procedure) Rules, Order 53 rule 3 of the Civil Procedure Rules, sections 8 and 9 of the *Law Reform Act* and seeking orders:
 1. An Order of Certiorari to remove into the court and quash the decision of the 2nd respondent contained in the letter dated 23 April 2025.
 2. An Order of Madamus directed at the 1st and 3rd respondents, their employees, officers, agents and persons working under their instructions to compute and pay the ex parte applicant his pension dues.
 3. Costs and incidental to this application be provided for.
 4. Such further or other relief that the court may deem just and fit to grant.



2. The ex parte applicant supports the application by affidavit, stating that he was enlisted in the Kenya Defence Forces (KDF) on 4 May 1990 and was attached to the RTS for Basic Military Training. He was then posted to the Kenya Navy Headquarters and attached to KNTS for Seamanship Part IV. He was categorised as a Tech M Elect on completion and trained to grade one.
3. The ex parte applicant avers in his affidavit that on 8 August 2007, he requested discharge from service on completion of 18 years of colour service, with effect from 3 May 2008. The request was considered by his fleet Commander, who recommended his discharge. The Navy Commander, in a letter dated 27 August 2007, stated that the request for discharge had been approved.
4. On 6 September 2007, the Navy Commander authorised the ex parte applicant's discharge from service and indicated that he was entitled to his service pension.
5. On 5 April 2011, the ex parte applicant's clearance with the respondent was authorised; however, to date, no payment has been received.
6. The ex parte applicant avers that section 244 of the *Kenya Defence Forces Act* entitles him to receive his pension. Regulation 4 of the KDF (Pension and Gratuities) (Officers and Service Members) Regulations grants the 1st respondent powers to grant pensions to service members of the KDF.
7. On 11 February 2025, the 1st respondent had not responded to the letter. The ex parte applicant wrote to the 3rd respondent, giving the office 30 days' notice of intention to sue for the recovery of the pension dues.
8. The notice of intention to sue prompted the 2nd respondent to respond to the letter of 11 February 2025, indicating that the ex parte applicant had been dismissed from the KDF and was therefore not entitled to terminal benefits. However, the ex parte applicant was not dismissed as alleged. He was properly discharged from service upon his request.
9. In the circumstances, the 1st and 2nd respondents acted arbitrarily and unreasonably by failing to hear the ex parte applicant before making their decision. The respondents acted irrationally and unreasonably by disregarding the decision of the Navy Commander authorising the ex parte applicant's discharge from service and indicating that he was not entitled to a service pension.
10. In reply, the respondents filed the Replying Affidavit of Major Mohammed Ali Mwinyi, Staff Officer II in charge of records at the KDF head office, and custodian of personnel records, who is also authorised to reply to the application. He avers that the ex parte applicant was enlisted in the KDF on 4 May 1990, during which he received training.
11. On 8 August 2002, the ex parte applicant requested discharge from service on completion of his colour service, which was due to expire on 3 May 2002. The request to be discharged from service was approved, and the ex parte applicant was granted 18 days privilege leave from 17 January to 3 February 2008 and 90 days terminal leave from 4 February to 3 May 2008. His official last date of service was on 3 May 2008.
12. Major Ali Mwinyi avers that the ex parte applicant absented himself from his place of work without official leave on 16 September 2007, and a notice was issued on 3 December 2007 to OCPD Meru to assist in apprehending him.
13. During the ex parte applicant's absence from work, his unit convened a Board of Inquiry to establish the circumstances under which he had absented himself from work before the due date of terminal leave. On 10 March 2011, the ex parte applicant reported back to work in Mtongwe, having been absent for 1271 days.



14. Major Ali Mwinyi avers that on 11 March 2011, the ex parte applicant appeared before the Commanding Officer and the Fleet Commander for summary disciplinary action, where he was charged with the offence of desertion contrary to section 31(1)(a) of the Armed Forces Act (repealed). He was found guilty and was awarded punishment of dismissal from Service under section 82 (4) (a) (i) of the Armed Forces Act and 1271 days' auto forfeiture of pay.
15. Upon the ex parte applicant's dismissal on disciplinary grounds, instructions were issued revoking the earlier communication approving his discharge from service, dated 30 March 2011.
16. On 13 April 2011, new discharge instructions were issued indicating that the reasons for discharge from service of the ex parte applicant were dismissal. On 17 May 2008, the ex parte applicant submitted a redress request seeking revocation of his deserter status, explaining that he had absented himself from service because he had been offered a new job in Houston. The request was declined on 22 May 2008 due to the gravity of the offence and the military's zero-tolerance policy on desertion.
17. The ex parte allegations that he was not dismissed from service and not accorded a chance to be heard are false, malicious and misleading. He was procedurally and adequately tried by his commanding officer, given the opportunity to defend himself, and found guilty and dismissed from service.
18. Major Ali Mwinyi avers that at the time of his exit from service, the Armed Forces Act, the Armed Forces (Officers and Servicemen) (Pension and Gratuity) Regulations 1980, and the Kenya Armed Forces Terms and Conditions of Service, 1997, were applicable. Section 227 of the Armed Forces Act, the Defence Council may make regulations with respect to such pensions and gratuities determined by the Treasury in consultation with the Defence Council.
19. Under the law, the ex parte applicant is not entitled to terminal benefits because he was dismissed from service due to disciplinary misconduct. The failure to pay pension and other terminal benefits to the ex parte applicant is a matter within the terms and conditions of service. As such, the prayers sought should be addressed under a substantive suit or claim for wrongful and unlawful dismissal.
20. The ex parte applicant filed his Supplementary Affidavit and avers that, in the Replying Affidavit of Major Ali Mwinyi, paragraph 6 contains the wrong date for the date he sought to be discharged. His request was on 8 August 2007 and not 8 August 2002 as indicated.
21. The ex parte applicant avers that the allegations that he absented himself from work without official leave are false.
22. The ex parte applicant avers that during service, the ex parte applicant took many classified assignments both locally and internationally. He cannot divulge where he was at any given time because that is classified security material. However, he continued performing his duties until 3 May 2008, when his contract was terminated, and he was officially discharged from service. This is confirmed by copies of pay slips from August to December 2007 and January to May 2008. If there was an absence from duty, the employer should have stopped salary payments and would not have been allowed to clear or issue the Certificate of Clearance on 5 April 2011.
23. The ex parte applicant avers that he was never taken before the Commanding Officer for any charges, nor did he write the redress letter dated 17 April 2008, as alleged. The allegations that the Commanding officer procedurally charged him before dismissal are false. There is no record of his charge appearing before the Court Martial to face any charges of desertion.
24. The records submitted by the respondent in the letter dated 16 September 2007, the Convening Order, and the Board's findings on the alleged unlawful desertion are contradictory. One shows that the Board of Inquiry was convened on 22 October 2007 to investigate the circumstances of suspected desertion



from 16 September 2007, before the date of terminal leave, while the other shows that on 3 December 2007, the ex parte applicant had already been declared a deserter.

25. Section 74(1) (a) and 74(2) (e) of the *Kenya Defence Forces Act* provides that a person deserts if he is absent without leave for a continuous period of 90 days. These provisions do not apply to him because he never deserted. The records submitted by the respondents do not show an absence of 90 days and are a mere fabrication.
26. The ex parte applicant submitted that he seeks an order of certiorari to quash the decision of the 2nd respondent, as set out in the letter dated 23 April 2025. He seeks an order of mandamus directed at the 1st and 2nd respondents to compute and pay his pension dues. In *Republic v Registrar of Trade Unions; Hamadi (ex parte applicant); Kenya County Government Workers Union & another (Interested party); Murongoro (Proposed interested party)* [2024] eKLR, the court held that in judicial review proceedings, what matters is the objective for which the court procedures are being utilised because the nature of judicial review proceedings is concerned with the manner and not the merits of any decision-making process. The power to grant a review of the lawfulness of the decision, action or failure to act in relation to a public function.
27. In this case, the respondents refused to compute and pay the ex parte applicant his pension dues without justification. The decision taken was arbitrary and unreasonable and should be quashed.
28. There is no dispute regarding the employment period on 4 May 1990, nor regarding the application for discharge from service on 6 September 2007. The dispute is that, although the ex parte applicant served until 3 May 2008 and was discharged, the respondents claim that he deserted his duties from 16 September 2007 to 10 March 2011.
29. The ex parte applicant had paid all his salaries during the period of alleged desertion to support the fact that he was at work. Had it been deserted, the payment would not have been possible. Indeed, the respondents have produced contradictory records to support the alleged desertion. The period under review did not constitute the 90 days required by section 74 of the *Kenya Defence Forces Act* for the offence of desertion.
30. The ex parte applicant did not author the alleged letter of redress dated 17 April 2008. The respondents allege that he deserted duty from 16 September 2007 to 10 March 2011, and was therefore unavailable to write the letter of redress on 17 April 2008.
31. The ex parte applicant was cleared by a letter dated 5 April 2011, which shows that he served for 18 years with colour. The case of desertion is a mere fabrication, and the orders sought should issue.
32. The respondents submitted that the ex parte applicant was enlisted into KDF on 4 May 1990. He was dismissed from service for desertion and is therefore not entitled to pension dues.
33. On 6 February 2014, the ex parte applicant was dismissed from service after being charged with the offence of desertion under section 31 of the Armed Forces Act. On 16 September 2007, he deserted his duties until 10 March 2011. An investigation found him culpable. The dismissal was fair and lawful.
34. Upon reporting back on 10 March 2011, the ex parte applicant was taken through the summary disciplinary trial and then dismissed. He cannot justify his claim for payment of pension, which is not due in the given case, as he did in *Gift Kambu Marandu v Kenya Defence Forces Council & another* [2017] eKLR.
35. The court lacks jurisdiction to entertain the applications as held in *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* [2019] eKLR. All pension claims should be addressed in accordance with the scheme's rules and regulations. Where any statute regulates a party regarding access



to pension dues, such a mechanism must be applied before invoking the judicial process. The ex parte applicant has failed to address his claim under the correct regime regulating payment of pension dues.

Determination

36. The ex parte applicant is seeking orders of certiorari to quash the decision of the 2nd respondent dated 23 April 2025. He further seeks a mandamus order against the respondents to compute and pay his pension dues.
37. An order of certiorari is a discretionary remedy that the Court may or refuse to grant, even when the requisite grounds for its issuance exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The Court's judicial discretion, being a judicial one, must be exercised based on evidence and sound legal principles, as held in *Mutiso v Kitonyi & 2 others* [2025] KECA 2127 (KLR).
38. The ex parte applicant has challenged the 2nd respondent's decision, as reflected in the letter dated 23 April 2025, declining his request for payment of his pension dues. In the letter, the 2nd respondent has responded that:

Terminal Benefits in Respect of 32853 Ex-SSGT Dickson Micheni Irai

Reference is made to your letter dated 11th February, 2025.

The above-named ex-Service member requested to be discharged on 8 August 2007 on completion of his colour service, which was due on 2nd May, 2008. The request was approved, and he was to begin his terminal leave on 4th February, 2008. However, the ex-Service member absented himself without official leave (AWOL) for a period of 1271 days from 16th September, 2007 to 10th March, 2011.

On his return, he appeared before his Commanding Officer and was found guilty of the offence of desertion contrary to section 31 (1) of the Armed Forces Act (repealed). The ex-service member was then dismissed on 28th March, 2011 and earlier instructions approving his discharge from service were revoked.

The above-named ex-service member, having been properly dismissed from the KDF, is not entitled to terminal benefits as per Section 244 of the *Kenya Defence Forces Act* and Regulation 6 of the KDF Pensions and Gratuities Regulations, 2021.

39. The KDF is one of the disciplined services. Records kept by the KDF follow the same impeccable style.
40. The 2nd respondent admits in the letter dated 23 April 2025 that indeed, the ex parte applicant requested discharge on 8 August 2007, which was due on 2 May 2008. However, they allege that he absented himself without official leave from 16 September 2007 to 10 March 2011 a period of 1271 days.
41. However, on record is letter dated 27 August 2007 by the Navy Commander approving the discharge from service. The Navy Commander, in a letter dated 6 September 2007, confirmed that the ex parte applicant's pension dues should be processed.
42. There is a clearance letter dated 5 April 2011.
43. The ex parte applicant was attached to the RTS for Basic Military Training, posted to the Kenya Navy Headquarters and attached to KNTS for Seamanship Part IV. His Commanding Officer approved his discharge, recommended payment of pension dues, and issued clearance. This is the primary officer with the ex parte applications work attendance records.



44. The respondents assert that from 16th September, 2007 to 10th March, 2011 the ex parte applicant had deserted duty. He only returned on 10 March 2011.
45. Under the court's judicial review jurisdiction, the respondents' records before the court lack a rational, consistent, or reasonable account of events. Whereas the respondents allege that the ex parte applicant deserted duty and was taken through summary disciplinary action for misconduct and discharged due to desertion, Major Ali Mwinyi, in his affidavit dated 17 November 2025 at paragraph (7) avers that;
- The request to be discharged from service was approved, whereupon the applicant was granted 18 days' privilege leave from 17 January 2008 to 3 February 2008 and 90 days terminal leave from 4 February to 3 May 2008. His official last date of service was on 3 May 2008.
46. Where there was a discharge through a letter dated 27 August 2007, approved by the Commanding Officer in charge of the section the ex parte applicant was serving, such discharge released him. The clearance was a matter of course for payment of pension dues.
47. The respondents' averments that the ex parte applicant deserted duty from 16 September 2007, after his commanding officer officially discharged him on 27 August 2007, can only mean one thing. The ex parte applicant had no basis to stay within the station of duty. A senior officer had discharged him.
48. The return on duty on 10 March 2011 is acknowledged with clearance for payment of pension dues.
49. The respondents' decision not to process and pay his ex parte pension dues was anchored in an erroneous foundation. The alleged desertion of duty from 16 September 2007 failed to acknowledge that on 6 September 2007, the Navy Commander had already authorised the discharge from service and indicated that he was entitled to a service pension. This letter and record have not been challenged. The attendant summary disciplinary procedures lacked a legal basis.
50. A public officer must operate within the confines of the law and ensure fair administrative action as held in *Inhemeter Africa Company Limited v Public Procurement Administrative Review Board & 3 others* [2025] KECA 2023 (KLR).
51. As such, the impugned decision of the 2nd respondent on 23 April 2025 is unlawful and is hereby quashed by this court.
52. The mandate for the order of mandamus is defined in the case of *Kenya National Examination Council v Republic Ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] KECA 58 (KLR) to include that;
- The order of mandamus is of a most extensive remedial nature. It 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 like a public duty. Its purpose is to remedy the defects of justice. 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. It may arise in cases where, although there is an alternative legal remedy, that mode of redress is less convenient, beneficial and effectual.
53. In effect, this means that an order of mandamus will compel the performance of a public duty imposed on a person or body of persons by a statute 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. An



applicant must establish the right in law, and the public officer's failure to perform the duty imposed by law.

54. On the question of whether an order should issue for the computation of pension dues, in view of the findings above, the decision not to pay is quashed; an order of mandamus compelling and directing the respondents to process, tabulate, and pay the ex parte applicant his pension dues is imperative.
55. The respondents submitted and challenged the jurisdiction of the court to hear the matter on the basis that in the case of *Albert Chaurembo & 7 Others v Maurice Munyao & 148 Others* [2019] eKLR where it held that when jurisdiction is vested in a body, a dispute falling within that jurisdiction must first be determined by the body established by law to hear and pronounce itself on the legal issues. This being a claim for pension dues, the court lacks jurisdiction, as the ex parte application ought to have been made to the statutory body dealing with pensions. However, judicial review proceedings are a special procedure; once invoked, unless there is a justification, the court must address the matter accordingly. Indeed, in the cited case of *Albert Chaurembo and Others*, the Supreme Court ruling did not address the substantive issue but rather the forum applied by the applicants.
56. On costs, the analysis above shows that the ex parte application was well-founded. He is entitled to costs.
57. In the end, the orders of certiorari are granted as prayed, and the letter dated 23 April 2025 is recalled and quashed. An order of mandamus is hereby issued, compelling and directing the respondents to process, tabulate, and pay the ex parte applicant his pension dues. Costs awarded to the ex parte applicant.

DELIVERED IN OPEN COURT AT MOMBASA, THIS 26TH DAY OF JANUARY 2026.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

