Republic v County Executive Committee Member for Finance & Economic Planning, County Government of Homa Bay; Caterlink Investments Limited (Ex parte Applicant) (Judicial Review E018 of 2024) [2026] KEHC 630 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KEHC 630 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

JUDICIAL REVIEW E018 OF 2024

OA SEWE, J

JANUARY 30, 2026

BETWEEN

REPUBLIC ..... APPLICANT

AND

COUNTY EXECUTIVE COMMITTEE MEMBER FOR FINANCE & ECONOMIC PLANNING, COUNTY GOVERNMENT OF HOMA BAY ..... RESPONDENT

AND

CATERLINK INVESTMENTS LIMITED ..... EX PARTE APPLICANT

JUDGMENT

1. The Notice of Motion dated 6th November 2024 was filed by the ex parte applicant, M/s Caterlink Investments Ltd (hereinafter, "the applicant"). It was filed pursuant to Sections 8 and 9 of the *Law Reform Act*, Chapter 26 of the Laws of Kenya, Sections 1A, 1B, 3 and 3A, of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Section 2, 21(3) and (5) of the *Government Proceedings Act* and Order 53 Rules 1(2), (3) (4), of the Civil Procedure Rules, 2010, among other provisions of the law. It prayed for the following orders:

   (a) That an order of Mandamus do issue compelling the respondent to satisfy the decretal amount of Kshs 17,113,125.25 being the judgment delivered on 28th June 2024 and costs assessed on 20th September 2024 by the Chief Magistrate in Homa Bay Chief Magistrate Court Civil Case No. E127 of 2021.

   (b) That the Costs of this application be provided for.

2. The application is supported by the affidavit sworn on 6th November 2024 by an employee of the applicant, George Aim Muga. He averred that the applicant sued the County Government of Homa Bay in Homa Bay CMCC No. 127 of 2021 and obtained judgment in its favour in the sum of Kshs. 16,573,610/= together with interest and costs. The applicant averred that the costs were thereafter assessed in the sum of Kshs. 539,515.25, after which the Decree and Certificate of Costs were extracted and served upon the County Government of Homa Bay.

3. The applicant further deposed that since the County Government of Homa Bay had declined to pay the decretal sum, it was left with no option but to file the instant application for an Order of Mandamus to compel payment. The applicant attached to the Supporting Affidavit copies of the Decree and Certificate of Costs as well as a copy of the Affidavit of Service, among other documents to demonstrate that the orders sought by it are warranted.

4. The respondent opposed the application and initially filed a Notice of Preliminary Objection dated 2nd December 2024 contending that:

   (a) The application dated 6th November 2024 is an affront to the rules of procedure and therefore ought to be struck out with costs.

   (b) The application dated 6th November 2024 is incompetent, fatally and incurably defective, and is an abuse of the process of the Court in that it has been instituted contrary to the mandatory provisions of Section 21(1) and (3) of the *Government Proceedings Act*.

5. The respondent also relied on the Replying Affidavit sworn on 15th January 2025 by its Principal Legal Counsel, Vincent Otieno Mboya. The respondent thereby contended that the circumstances giving rise to the judgment upon which these proceedings are premised were grossly irregular as the County Government never got the opportunity to defend itself against what was, in its view, a frivolous and baseless claim. The respondent contended that the County Government of Homa Bay (the judgment debtor) was never served with the Plaint; and that upon learning of the ex parte proceedings, it instructed the firm of Wilberforce Akello Advocates to file an application for stay and setting aside of the ex parte judgment.

6. It was further the contention of the respondent that, at the instance of the judgment debtor, the default judgment was set aside on condition that thrown away costs of Kshs. 30,000/= be paid by the judgment debtor within 30 days. It explained that it was ready to comply with the order of the court save that it was constrained by the procedures pertaining to the management of public funds as provided for in the *Public Finance Management Act*. In the premises, the respondent averred that it is only fair that the judgment debtor be given an opportunity to defend the primary suit for a determination on the merits.

7. The respondent also impugned the instant application contending that it is incompetent in so far as it was filed without a Certificate of Order against the Government, which is a mandatory requirement under Section 21(3) of the *Government Proceedings Act*. Therefore, it was the respondent's prayer that this suit be dismissed with costs.

8. With leave of the Court, the applicant filed a Supplementary Affidavit sworn by George Aim Muga to confirm that it applied for and obtained a Certificate of Order against the Government which was duly served on the judgment debtor. A copy thereof was annexed to the Supplementary Affidavit and is dated 4th October 2024. Thereupon the respondent opted to abandon its Notice of Preliminary Objection.

9. Directions were thereafter given that the application be canvassed by way of written submissions. Consequently, the applicant filed its written submissions dated 26th March 2025 and raised several

issues. Firstly, it was the contention of the applicant that the respondent's Replying Affidavit is defective in so far as it was purportedly sworn at Homa Bay but commissioned by a Commissioner of Oaths in Nairobi. The applicant relied on Section 5 of the *Oaths and Statutory Declarations Act* and the cases of Mary Gathoni & another v Frida Ariri Otolo & another [2020] eKLR, Regina Munyiva Ndunge v Kenya Commercial Bank Limited [2005] eKLR and CMC Motors Group Ltd v Bengeria arap Korir Trading as Marben School & another [2013] eKLR to support its argument that there is no valid response to the application in the circumstances.

10. Secondly, the applicant submitted that the affiant had no authority duly signed by the County Government of Homa Bay and annexed to his affidavit giving him power to swear the said affidavit. In this regard, the applicant relied on Order 1 Rule 13(2) of the Civil Procedure Rules as well as Sections 5, 7, 8, 9 and 14 of the Office of the County Attorney Act, Cap 265E which specifically gives the County Attorney the power to legally represent a county government. On the merits, the applicant pointed out that the respondent's Replying Affidavit adverted to matters that ought to have been raised before the lower court and therefore are irrelevant to the instant application. It urged the Court to ignore those assertions.

11. In response to the assertion by the respondent that it did not comply with the requirements of Section 21 of the *Government Proceedings Act*, the applicant reiterated its stance that it fully complied and supplied copies of the requisite certificate. The applicant urged the Court to find that the applicant has deliberately failed to satisfy the decree and therefore that it is entitled to the reliefs sought herein.

12. There is no indication that the respondent filed written submissions. I have nevertheless taken into consideration the averments made by him in the Replying Affidavit in the light of the submissions made by the applicant. The first point to consider is the validity of the Replying Affidavit. As pointed out herein above, that affidavit was sworn on 15th January 2025 by Vincent Otieno Mboya on behalf of the respondent. At paragragh 1 of his affidavit, Mr. Mboya averred that he is the Principal Legal Counsel, serving in the judgment debtor's office of the County Attorney. His affidavit was impugned on the grounds that the jurat is questionable and on account of lack of authority to make the sworn declaration. The applicant relied on Order 1 Rule 13(2) of the Civil Procedure Rules, which states:

> "...the authority shall be in writing signed by the party giving it and shall be filed together with the case."

13. It is immediately plain that that provision does not support the argument advanced by the applicant. First and foremost, it is in relation to institution of suit by several plaintiffs or defendants and has nothing to do with the swearing of a Replying Affidavit. Indeed, put in context, the provision states as follows:

    (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

    (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.

14 It is therefore my finding that the objection is untenable in the circumstances. As to whether authority in writing was required, the applicant placed reliance on the provisions of the Office of the County Attorney Act to propound the argument that since the County Attorney is the only duly authorized legal representative of the judgment debtor herein, authority in writing ought to have been given for Vincent Otieno Mboya by the County Attorney. Although the applicant made reference to several provisions of the Office of the County Attorney Act to demonstrate that a County Attorney is the

duly authorized legal representative of a county government. However, it failed to specify which of those provisions require that only the County Attorney can make depositions on behalf of the County Government. As a matter of fact, Section 14 of the Act permits delegation by the County Attorney.

15. Moreover, it is significant to note that Section 14 is specific to the powers and functions of the County Attorney that are specifically provided for. It states:

    (1) The County Attorney may, either generally or otherwise as provided by the instrument of delegation, by writing under the County Attorney's hand, delegate to the County Solicitor or any County Legal Counsel all or any of the powers and functions under any written law, except the power of delegation.

    (2) A power or function delegated under subsection (1) may be exercised or performed by the County Solicitor or County Legal Counsel in accordance with the instrument of delegation.

    (3) A delegation under subsection (1) may be revoked at will and does not prevent the exercise of a power or performance of a function by the County Attorney.

16. Having found that the making of a deposition is not specifically provided for in the provisions cited by the applicant, not much turns on the applicant's contention that the affiant of the Replying Affidavit was not authorized. Likewise, the applicant failed to demonstrate the basis for its assertion that written authority by the County Attorney, if any, ought to have been annexed to the Replying Affidavit. It can only be presumed that the argument was premised on the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules. It provides:

> " Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."

17. It is significant therefore that, in this instance, the impugned affidavit was filed in response to the applicant's motion. Accordingly, the position taken by the Court of Appeal in Saraf Limited v Augusto Arduin [2016] eKLR would be apt. The Court of Appeal held:

> " ...We know of no law that makes it a requirement for a limited liability company that has been sued to furnish proof or to demonstrate that its Board of Directors or its shareholders have authorized it to defend the suit. If this were the law, logistical reasons would render it difficult or near impossible for companies to defend suits having regard to the strict time-lines within which appearance and defence must be filed.

18. The mischief sought to be prevented by Rule 1(4) was well explicated by the Court of Appeal in Spire Bank Limited v Land Registrar & 2 others [2019] eKLR as follows:

> " It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be

utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized."

19. It was therefore sufficient for Mr. Mboya to aver that he had been duly authorized to make the deposition; which he did at paragraph 2 of the impugned affidavit. In Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another [2015] eKLR, the Court of Appeal held:

> " ...In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorised by it. It was therefore sufficient for the deponents to state that "they were duly authorised." It was then up to the appellants to demonstrate by evidence that they were not so authorised..."

20 Accordingly, the evidential burden shifted to the applicant to prove that Mr. Mboya had no such authority, which burden was not discharged herein.

21. Lastly, the applicant submitted that although the deposition is purported to have been made in Homa Bay, the Commissioner who attested thereto was based in Nairobi. It was therefore the contention of the applicant that the defect in the jurat is fatal. It relied on Section 5 of the *Oaths and Statutory Declarations Act*, Chapter 15 of the Laws of Kenya, in mind. That provision is explicit that:

> " Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

22. The applicant placed reliance on CMC Motors Group Limited v Bengeria arap Korir trading as Marben School & Another [2013] eKLR in which it was held:

> " The merit as I find it in respect of Waudo's affidavit is that the affidavit does not seem to have been sworn before a Commissioner for Oaths. For avoidance of doubt the Black's Law Dictionary defines an oath as follows –
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> 'Oath is a solemn declaration accompanied by a swearing to God or a revered person or thing that one's statement is true or that one will be bound to a promise ... The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false.'
>
> ... Bearing that definition the question that needs to be answered is whether Waudo took an oath before a Commissioner for Oaths. Looking at her affidavit it would seem that she signed the affidavit in Nairobi and the Commissioner for Oaths signed it in Mombasa. It will therefore seem that her affidavit fails to conform to the requirements of Section 5 of Cap 15. It is not an affidavit which is under oath. That being so the same is hereby struck out."

23. In this case, the jurat indicates that the deposition was made at Homa Bay. There is no indication that the Commissioner signed it in Nairobi. I therefore find no basis in the applicant's technical objection to the validity of the Replying Affidavit. The same is hereby dismissed.

24. Turning now to the merits of the application dated 6th November 2024, there appears to be no dispute that the applicant obtained a Decree in its favour in Homa Bay CMCC No. E127 of 2021; and that the costs were thereafter assessed and certified. The decretal sum stood at Kshs.17,113,125.25 as at the time of filing of this suit. The respondent has indicated in its Replying Affidavit that it was intent on challenging the judgment and applied for its setting aside. It however conceded that it failed to comply with the conditions set by the subordinate court for setting aside. Accordingly, that judgment stands and remains unsatisfied to date.

25. Where, as in this case, the accounting officer fails to pay the due debts of a public entity, an order of Mandamus would be the most appropriate remedy. The remedy is provided for in Article 23(3)(f) of *the Constitution* and Order 53 of the Civil Procedure Rules. Its scope was well explicated in Halsbury's Laws of England, 4th Edition, Volume 1 thus:

> " 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..."

26. That the remedy is particularly efficacious in situations where a decree and a Certificate of Costs has been issued against the Government was well-explicated by Hon. Githua, J. in Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security, Ex Parte Fredrick Manoah Egunza [2012] eKLR thus:

> " 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*."

27. Similarly, in the case of Republic v the Attorney General & Another, Ex parte James Alfred Keroso [2013] eKLR the point was made that:

> " ...Unless something is done, he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of *the Constitution* which enjoins the state to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya..."

28 In connection with the Certificate of Order against the Government provided for in Section 21(1) of the *Government Proceedings Act*, Order 29 Rule 3 of the Civil Procedure Rules, requires that:

> " Any application for a certificate under section 21 of the *Government Proceedings Act* (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and

such certificate shall be in one of Form Nos. 22 and 23 of Appendix A with such variations as circumstances may require."

29. There is no dispute here that the applicant also applied for and obtained a Certificate of Order against the Government as provided for Section 21 of the *Government Proceedings Act*. Section 21(4) of the *Government Proceedings Act* is explicit that:

> (4) ...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."

30. In the premises, Section 21 of the *Government Proceedings Act* sets out the applicable procedure for settlement of debts against the Government as follows in Subsections (1), (2) and (3):

> (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.
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> (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.

31 That the above provisions are equally applicable to County Governments is explicit in Subsection (5). It states:

> (5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.

32. The rationale for this stringent procedure was well captured in Kisya Investments Ltd v Attorney General & Another [2005] 1 KLR 74 thus:

> "History and rationale of Government's immunity from execution arises from the following:- Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of
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> (i). The raising of revenue- (by taxation or borrowing);
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> (ii). its expenditure; and
>
> (iii). The audit of public accounts.
>
> The satisfaction of decrees or judgements is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government's expenditure. It is for this reason that section 32 of the *Government Proceedings Act* provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorised by statute, and any unauthorised payment may be recovered. See Halsbury's Laws Of Engaland 4TH Edn Vol. 11 Para 970, 971 AND 1370.As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. See Auckland Harbour Board v .R (1924) AC 318, 326. The second situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the ministry of Finance, Treasury, Comptroller and Auditor General etc. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their "own" funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer's hammer. No Government can possibly survive such an onslaught. The Government and therefore the state operations will ground to a halt and paralyzed and soon the Government will not only be bankrupt but it's Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the Law that prohibits execution against and attachment of the Government assets and property." (also see Republic v Permanent Secretary Office of the President Ministry of Internal Security & Another, Ex Parte Nassir Mwandihi, supra)

33. I have perused the documents annexed to the applicant's Verifying Affidavit and noted that the applicant annexed, inter alia, copies of the Decree and Certificate of Costs as well as Certificate of Order against the Government. Indeed, the respondents conceded service of all the documents aforementioned. In the premises, the applicant is entitled to the orders sought.

34. For the reasons aforementioned, I am satisfied that the application dated 6th November 2024 is meritorious. The same is hereby allowed and orders granted as follows:

    (a) That an order of Mandamus be and is hereby issued compelling the respondent to satisfy the decretal amount of Kshs 17,113,125.25 being the decretal sum in respect of the judgment delivered on 28th June 2024 and costs assessed on 20th September 2024 by the Chief Magistrate in Homa Bay Chief Magistrate Court Civil Case No. E127 of 2021.

    (b) That the Costs of this application be borne by the respondent.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JANUARY 2026

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OLGA SEWE

JUDGE