

REPUBLIC OF KENYA  
**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**JUDICIAL REVIEW NO. E012 OF 2024**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
BY WAY OF ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM  
ACT CHAPTER 26 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF ORDER 53, RULE 1(1) AND (2) OF THE  
CIVIL PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF SECTION 21 OF THE GOVERNMENT  
PROCEEDINGS ACT CHAPTER 40 LAWS OF KENYA**

**BETWEEN**

**TEDDY MUDANYE TOBIKO (Suing as the Administrator  
Of the Estate of ALLAN AMUGUNE TOBIKO).....  
APPLICANT**

**AND**

**C.E.O NATIONAL POLICE  
SERVICE COMMISSION.....1<sup>ST</sup>  
RESPONDENT  
INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup>  
RESPONDENT  
PRINCIPAL SECRETARY, MINISTRY OF  
INTERIOR AND COORDINATION OF  
NATIONAL ADMINISTRATION.....3<sup>RD</sup>  
RESPONDENT**

## **RULING**

### **A. Application**

1. Vide a Motion application dated 7<sup>th</sup> January 2025, the Applicant herein, decree holder, seeks judicial review orders of mandamus to compel the Respondents herein to settle the decretal sum arising from the judgement delivered on 21<sup>st</sup> July 2023 in **Kisumu Civil Appeal No. 26 of 2018 Teddy Mudanye Tobiko and Ministry of Interior & Coordination of National Government & Others** and as comprised in the Certificate for Order against Government issued on 7<sup>th</sup> November 2024 and all accruing interest until payment in full, plus costs of the application.
2. The application for mandamus, pursuant to leave granted by the Court is dated 28<sup>th</sup> November 2024, supported by the statutory statement, verifying affidavit and annexures which include the original decree, the certificate of order against the Government and the certificate of taxation issued on 7<sup>th</sup> November 2021.
3. The application was served on the Respondents.
4. The Respondents were nonetheless granted the opportunity to file their Replying Affidavit to the application and on my perusal of the Court record only the 1<sup>st</sup> Respondent filed its Replying Affidavit sworn on 7<sup>th</sup> March 2025, by Peter Leley. He averred that as the 1<sup>st</sup> Respondent herein and that the order of mandamus ought to be directed towards the 2<sup>nd</sup> Respondent as the role of the National Police Service Commission does not entail assignment of duties to police officers and that the terms of operation of the National Police Service Commission is envisaged under Section 246 (3) of the Constitution.

5. He urged this Court to find the application dated 25<sup>th</sup> February 2025, to be incompetent, vexatious and an abuse of Court process.
6. The application was canvassed by way of written submissions.

### **B. Determination**

7. I have considered the application for mandamus as pleaded and argued by the Applicant and the 1<sup>st</sup> Respondent. The issue for determination is whether the application is merited.
8. There is no dispute that a decree exists in favour of the Applicant against the Respondents herein and that the Attorney General was only sued in the primary proceedings pursuant to the provisions of the Government Proceedings Act, Cap 40 Laws of Kenya, as the Government's legal representative in civil proceedings.
9. No execution of decree by way of attachment and sale can be made against the Government. **Section 21(4)** of the **Government Proceedings Act** pronounces that position clearly as follows:  
  
**“Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the government of any such money or costs as aforesaid, and no person shall be individually liable 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.”**
10. The rationale for this law was succinctly stated in **Kisya Investments Ltd vs Attorney General & Another**

**[2005] 1 KLR 74** by the High Court comprising Ibrahim and Visram JJ(as they were then) as follows:

**“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 three fold and is exercised in respect of (i) The raising of revenue (by taxation or borrowing);(ii)Its expenditure; and (iii) The audit of public accounts. The satisfaction of decree or judgments 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 monies provide 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 authorized by statute, and any unauthorized payment may be recovered. 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 judgments- 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. The second situation, which arises from the above, is that once a decree or judgment is obtained against the government, it would require some reasonable time to have it forwarded to the Ministry of Finance, Treasury, Controller 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 judgments and will be inundated with executions and attachments of its assets day in day out. Its buildings will be attached and its plans and equipment will be attached, its vehicles , aircraft, ships 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 paralysed and soon the government will not only be bankrupt but its 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.”**

11. Thus, the Civil Procedure Act and Rules, in line with the above provisions of the law as pronounced by the Courts do

not permit execution against the Government including County Governments and therefore the only remedy available to the decree holders against the Government is the remedy of Judicial Review by way of an order of mandamus to compel the Government and more particularly the Accounting Officers of the relevant State Departments to settle the decree of the Court.

12. In **Republic V Attorney General Exparte James Alfred Koroso JR 44/2012** Odunga J (as he then was in the High Court) added his voice to the question of how a decree against the Government can be settled through execution process and stated:

**“...in the present case, the exparte applicant has no other option of realizing the fruits of this judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that he has been awarded is realized. 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 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 judgments due to road blocks placed on their paths by actions or inactions of public officers. Public officers, 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. To deny a citizen his or her lawful rights which**

have been decreed by a court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution, Executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well being and benefit...The institution of Judicial Review proceedings in the nature of mandamus cannot be equated with execution proceedings. In seeking an order of mandamus the applicant is seeking, not relief against the Government, but to compel a government official to do what the government, through Parliament, has directed him to do. The relief sought is not execution or attachment or process in the nature thereof. It is not sought to make any person "individually liable for any order for any payment," but merely to oblige a government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty case upon him by Parliament. The fact that an Accounting Officer is not distinct from the state of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In mandamus cases it is recognized that when statutory duty is case upon a public officer in his official capacity and the duty is owed not to the state but to the public, any person having a sufficient legal interest in the performance of the duty may apply to the courts for an order of mandamus to enforce it.

**In other words, mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the state, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of the order of mandamus, his/her action amounts to insubordination and contempt of court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the court's displeasure at the failure by a servant of the state to comply with the directive of the court given at the instance of the Republic employer of the concerned public officer and to uphold the dignity and authority of the court."**

13. From the above statutory and judicial pronouncements, which restate the law, it is clear that the only remedy available to such a decree holder as the *ex parte* Applicant herein against the Government is judicial review remedy of mandamus to compel the Accounting Officer of the relevant Ministry or State Department to settle the material decree.
14. In the instant case, the 1<sup>st</sup> Respondent does not dispute the decree, but only the aspect of execution of the same against it.
15. The applicant who is the decree holder has rights which have crystallized, to enjoy the fruits of his lawful judgment and those rights must not be curtailed. That right must be safeguarded and enforced by the court as espoused in Article 159(2) (a) and (b) of the Constitution that justice shall be administered without delay, and the applicant's right to

access Justice under Article 48 of the Constitution as guaranteed must be respected and protected by all.

16. It is not in doubt that the 3<sup>rd</sup> Respondent herein is under a public duty to settle decree of the Court made in favour of the Applicant against the Respondent.
17. It is expected that judgment debtors settle decrees once judgment is rendered and, in this case, an appeal was preferred by the Applicant, which appeal was allowed on 21<sup>st</sup> July 2023. To date, the Respondents are yet to settle decree. What an irony and a mockery of justice? Is it right to make a justice seeker to remain a mere pious explorer in their pursuit of justice and remain in the corridors of justice forever?
18. Sadly, the Courts will continue to bear the brunt of alleged delayed justice as decrees against the Governments remain unsettled forever. Courts adjudicate over disputes and determines the merits thereof upon which decrees are executed in the manner provided for in law.
19. In this case, the law provides that where there is no payment made, only mandamus can issue to ensure that justice may eventually be served because there is no other remedy available to the decree holder/ Applicant.
20. The decretal sum due to the exparte Applicant continues to increase due to the accruing interest and costs, which figure is skyrocketing at the expense of the Kenyan citizen and tax payer, as long as the decree remains unsettled.
21. As aforesaid the settlement of decretal sum by the Government whether National or County should be prompt.

Making funds available for settlement of decrees is the responsibility of the accounting officer who has been sitting on this decree. Has the accounting officer not been doing his duties at the Ministry over the years, does the accounting officer not audit the cases that are pending in Court and know which ones have been determined and where settlement is not made, a matter is followed through for funds to be made available for settlement?

22. In **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012** this Court pronounced itself as follows:

**“I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly, I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein.”**

23. In other words, it cannot be said that this Court has given the Respondents ample time to settle the decree but the Respondents appear to be disinterested and their actions as it frustrates the decree holder from realizing the decree.
24. Thus, a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it

to settle its obligations even by instalments while staying afloat. A payment plan would be the best. This Court does not rejoice in seeing public officers being held in contempt of Court orders and warrants of arrest being issued time and again.

25. It follows that financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the 3<sup>rd</sup> Respondent herein being the accounting officer to settle a sum decreed by the Court to be due from the Ministry.
26. That being the case, the order that commends itself in these Judicial Review proceedings is a Judicial Review order of mandamus compelling the 3<sup>rd</sup> Respondent Principal Secretary, Ministry of Interior and Co-ordination of National Government to settle decree in the sum of Kshs 3, 926,766/= being an award made inclusive of costs on appeal.
27. A decree for mandamus to issue plus a certificate of order against the government in these proceedings. The 3<sup>rd</sup> Respondent is hereby given 90 days of today to settle the decree and in default, the Applicant is at liberty to apply for appropriate penal orders as provided for in the law noting that the interest and costs of filing further applications for contempt presents more financial burdens to the tax payers.
28. The Applicant will have costs of these judicial review proceedings.

Orders accordingly.

**Delivered, Signed and Dated at Bungoma this 29<sup>th</sup> day of January 2026.**

**Mwanaisha .S. Shariff**  
**Judge**

**In the presence of:**

**Mr Najoyo h/b for Peter Wanyama for Applicant**

**N/A .for 1<sup>st</sup> Respondent**

**N/A or 2<sup>nd</sup> Respondent**

**N/A for 3<sup>rd</sup> Respondent**

**Peter Machoni Court Assistant**