

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU

JUDICIAL REVIEW NO. E016 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

REPUBLIC.....

APPLICANT

VERSUS

COUNTY GOVERNMENT OF TRANSZOIA...1ST

RESPONDENT

THE COUNTY SECRETARY OF

TRANSZOIA.....2ND

RESPONDENT

THE CEC FINANCE COUNTY OF

TRANSZOIA.....3RD

RESPONDENT

THE CHIEF FINANCE OFFICER

TRANSZOIA.....4TH

RESPONDENT

AND

JOHN LEWIS NDOMBI.....EX PARTE

APPLICANT

RULING

Before the Court for determination is the *Ex Parte* Applicant's Notice of Motion dated 7th July 2025 filed under Certificate of Urgency seeking Orders that:

1. *Spent.*
2. *The Judicial Review Order of mandamus be issued in favour of the ex parte applicant against the 1st respondent, County Government of Transzoia, County Secretary, The CEC Finance and The Chief Finance Officer Transzoia to pay the applicant the sum of Kshs.9, 168,500.00 awarded to the applicant against the County Government of Transzoia in Kisumu ELRC Petition No. 20 of 2015 and in terms of Certificate of Order against the Government issued on 5th October 2022.*
3. *The Honourable Court be pleased to set a timeline and/or duration within which the respondents will settle the decretal sum.*
4. *In the alternative the court be pleased to make an Order of committal to civil jail of the 2nd, 3rd and 4th respondents for a period not less than there (3) months.*
5. *Costs of this application be provided for.*

The Notice of Motion was expressed under Article 47 of the Constitution of Kenya, Sections 8 and 9 of the Law

Reform Act, Sections 7, 8, 9 and 11(1)(f) and (2) of the Fair Administrative Action Act and Order 53 Rule 2 of the Civil Procedure rules and is based on the grounds set forth on its face and the statutory statement, Verifying Affidavit and annextures.

The *ex parte* applicant's case is that he obtained judgment against the respondents on 29th September 2022 and an Order was extracted on 5th October 2022 and served on the respondents.

That a Certificate of Order Against the Government was also obtained and served upon the respondents but no payment had been made and the respondents were in contempt of court.

Respondent's Reply

By a Replying Affidavit sworn on 12th January 2026, Truphosa Amere deponed that the respondent had extended a reasonable proposal to the *ex parte* applicant informed by mandatory internal public finance processes and the Public Finance Management Act at Kshs.400,000 per month pending approval of the next supplementary budget when provision shall be made for settlement of the outstanding balance.

The affiant further deponed that the respondents operated strictly within the budget and legitimate and competing public obligations and all funds had to be appropriated by the County Assembly.

That payment of the Certificate of Order Against the Government was legally impermissible as the money was not budgeted for.

The affiant deponed that an Order of *mandamus* does not compel the performance of an act not capable of immediate performance in law.

Finally, the affiant deponed that there had been no refusal or wilful disobedience of court orders by the respondents but a lawful delay occasioned by budgetary requirements and the respondents were committed to satisfying the certificate.

The affiant urged the court to disallow the application.

Applicant's submissions

As to whether the application met the threshold for the grant of an Order of *mandamus*, counsel for the applicant

submitted that the threshold had been attained because a public body with a duty to perform a public duty had failed to do so.

Reliance was placed on the sentiments of the court in **R V Kenya National Examination Council Ex Parte Geoffrey Gathenji & 9 others**, Section 21(4) of the Government Proceedings Act and the decision in **R (Regina) V Dudshealth, ex parte Meredith** [1950] 2 ALLER 741 at 743 on the essence of *mandamus* and urge that the applicant had complied with the law.

Further reliance was placed on the sentiments of the court in **Republic V Permanent Secretary Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza** [2012] KEHC 1643 (KLR) and **Republic V Attorney General & another Ex Parte James Alfred Koroso** [2013] KEHC 90 (KLR) James Alfred Koroso to urge that payment of lawful debts and court decrees was not discretionary and the respondents were obligated to settle the amount outstanding.

According to counsel, the most efficacious way to ensure payment of a money decree against the County

Government was an Order of *mandamus* as held in **Republic V Attorney General & another ex parte James Alfred Koroso** (supra) to submit that the Judgment of the court remained unsatisfied and the respondents silence was notable.

Respondents submissions

Concerning the threshold for *mandamus* counsel submitted that, it had not been met on account that County financial obligations were discharged in accordance with the provisions of the Public Finance and Management Act and the respondent had proposed a lawful and pragmatic approach to satisfy the Certificate of Order on record as lump sum payment was outside the budgetary process and judicial review Orders were not granted as of right.

Reliance was placed on the sentiments of the court in **Newton Gikaru Githiomi V Attorney General Public Trustee** HCJR 472 of 2014 to urge that the respondents had not refused or neglected to pay and an Order compelling the respondents to pay the sum of Kshs.9,168,500 would be unlawful, and futile and the court ought to decline the invitation to decree *mandamus*.

Reliance was placed on the decision in **Republic V Attorney General & another Ex Parte Ongata Works Ltd** [2016] KEHC 5242 (KLR) to urge that *mandamus* should not issue if there was another remedy open to the party seeking it.

The singular issue for determination is whether the *ex parte* applicants notice of motion dated 7th July 2025 is merited.

It is common ground that the *ex parte* applicant sued the respondents in Kisumu ELRC Petition No. 20 of 2015 and Judgment was entered in his favour on 29th September 2022 in the sum of Kshs.9,168,500.00 and both the Order and Certificate of Order against the Government obtained thereafter were served upon the respondent but the amount awarded remained unpaid which precipitated the instant application.

Although the respondent submitted that the instant application did not meet the threshold for the grant of *mandamus*, it did not set out the requirements which the applicant had not fulfilled other than stating that it was still desirous of paying the amount.

It is trite law that for an application to qualify for an award of the Order of *mandamus* it must satisfy the prescribed criteria set out in the Canadian case of **Apotex Inc Canada (Attorney General) & Dragan K Canada (Minister of Citizenship and Immigration** cited in other decisions such as **Republic V Principal Secretary Ministry of Internal Security and another Ex Parte Schon Noorani & another** [2018] eKLR namely;

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.

See also **Republic V Jomo Kenyatta University of Agriculture & technology Ex Parte Elijah Kamau Mwangi** [2021] eKLR, **Jidraph Kamau & another V Attorney General** Mombasa Misc. App. No. 40 of 2000 and **Republic V Commissioner of Lands and another Ex Parte Kithinji Murugu Magere** Nairobi High Court Misc. App. No. 395 of 2012.

The purpose of the Order of *mandamus* is to compel compliance or payment in a case such as this one. In **Republic V Principal Secretary Ministry of Transport & Infrastructure & another Ex Parte Justion Pitias [2016]** the court held:

“...This court’s jurisdiction is restricted to compelling the respondent to pay based on the judgment decree and the certificate of Order... In other words, where there is a condition precedent necessary for the duty to accrue an Order of mandamus will not be granted until the condition precedent comes to pass. Therefore, where there is a genuine dispute as to the exact sums payable, the court

will not by an Order of mandamus compel the respondents to exercise that duty until the dispute is sorted out”.

See also in this regard **Republic V Attorney General & another Ex Parte Orbit Chemicals Ltd** [2017] eKLR **Susan Wayua V Attorney General & another** [2019] eKLR and **Attorney General & another V Ongata workers Ltd** [2016] eKLR.

In **Republic V Jomo Kenyatta University of Agriculture & Technology Ex Parte Elijah Kamau Mwangi** (supra), the court held:

The purpose of an order of mandamus is to compel the performance of a public duty or any act contrary to or evasive of the law. It therefore lies against a public officer when some specific act or thing, which the law requires to be done, has been omitted. The conditions for its grant are that it must be shown that the public officer has failed to perform his duty; the court will not grant mandamus where there is an alternative remedy available to the applicant; and that it may be refused if the enforcement of the order will pose implementation challenges that require the Court’s intervention...

In addition, that mandamus may be issued to enforce mandatory duty which may not necessarily be a statutory

duty, but which has “a public element” which may take any forms...”

See the sentiments of the Court of Appeal in **Republic V Kenya National Examination Council Ex Parte Gathenji & 9 others** (supra) citing the Halsbury’s Laws of England 4th Edition Volume I at page 111 from paragraph 89.

Section 21 of the Government Proceedings Act prescribe the conditions precedent for an Order of *mandamus* to be made.

Under Section 21

(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days

from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

- (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.
- (3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon: Provided that the court by which any such

order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.

The foregoing provisions leave no doubt that court orders against the Government or Government department can only be enforced against the Accounting Officer through an Order of *mandamus*.

In Republic V Permanent Secretary Ministry of State for Provincial Administration and Internal

Security Ex Parte Fredrick Manoah (supra) Githua J. held *inter alia*;

“...The only requirement which services as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (herein after referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon. Attorney General...”

In the instant application, it is not in dispute that the applicant had fulfilled the foregoing requirements prior to instituting the instant application.

The respondents failure to honour the Orders of the court as well as the Certificate of Order Against the Government is evident although counsel submitted correctly that the Order of *mandamus* was only awardable where there was no alternative remedy and posited that the respondent had made a proposal to pay by instalments, such a proposal, though creditable is to all intents and purposes not an alternative remedy, properly so-called and in any case the applicant rejected it for being too low.

As correctly submitted by the respondent's counsel the Order of *mandamus* is discretionary and cannot be made where circumstances militate against its issuance and in particular if its issue would be inequitable.

The court is enjoined to consider all relevant circumstances in determining whether or not to decree the Order.

In the instant application, the court is satisfied that the applicant has demonstrated on a balance of probabilities that the respondents have failed to perform a public duty even after being accorded time to do so.

In the upshot, the *ex parte* applicant's notice of Motion dated 7th July 2025 is allowed as follows:

- (a) *An Order of mandamus be and is hereby issued against the 1st, 3rd and 4th respondents' to pay the applicant the sum of Kshs.9,168,500.00 awarded in Kisumu ELRC Petition No. 20 of 2015 in terms of the Certificate of Order Against the Government within four (4) months.*
- (b) *Parties shall bear their own costs.*

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 18TH DAY OF FEBRUARY, 2026**

**DR. JACOB GAKERI
JUDGE**

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate

just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI
JUDGE

ORIGINAL