

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT HOMA BAY**  
**JUDICIAL REVIEW APPLICATION NO. E009 OF 2023**  
**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**  
**ORDER OF MANDAMUS**  
  
**AND**  
**IN THE MATTER OF ARTICLE 47 & 48 OF THE**  
**CONSTITUTION OF KENYA**  
  
**AND**  
**IN THE MATTER OF SECTION 21 OF THE GOVERNMENT**  
**PROCEEDINGS ACT, CAP 40**  
  
**AND**  
**IN THE MAATTER OF EXECUTION OF THE JUDGMENT &**  
**DECREE IN HOMA BAY CHIEF MAGISTRATE’S CIVIL ASE NO**  
**41 OF 2018 ISSUED ON 28<sup>TH</sup> OCTOBER 2019**

**BETWEEN**

**REPUBLIC.....**  
**APPLICANT**

**VERSUS**

**THE COUNTY SECRETARY**  
**HOMA BAY COUNTY GOVERNMENT.....1<sup>ST</sup>**  
**RESPONDENT**

**THE CHIEF OFFICER, MINISTRY OF FINANCE,**  
**HOMA BAY COUNTY GOVERNMENT.....2<sup>ND</sup>**  
**RESPONDENT**

**THE CHIEF OFFICER,**  
**DEPARTMENT OF TRANSPORT AND INFRASTRUCTURE,**  
**HOMA BAY COUNTY GOVERNMENT.....3<sup>RD</sup>**  
**RESPONDENT**

**THE COUNTY GOVERNMENT OF HOMA BAY.....4<sup>TH</sup>  
RESPONDENT**

**AND**

**AYUNGO GENERAL CONTRACTORS.....EX PARTE  
APPLICANT**

**JUDGMENT**

**[1]** Before the Court for determination is the Notice of Motion dated 7<sup>th</sup> August 2024. It was filed by the *ex parte* applicant pursuant to the leave of the Court granted on 20<sup>th</sup> March 2024, which was extended on 31<sup>st</sup> July 2024. The *ex parte* applicant, **Ayungo General Contractors**, (hereinafter, “the applicant”) thereby move the court under **Order 53 Rule 3** for the following orders:

**[a]** The Court be pleased to issue an order of Mandamus against the respondents compelling them forthwith to release to the applicant a sum of Kshs. 2,698,816/= or thereabout, being the balance of the decretal sum exclusive of interest in Homa Bay Chief Magistrate’s Civil Case No. 41 of 2018; which sum is being withheld by the respondents.

**[b]** That costs of the application be provided for.

**[2]** The application was premised on the grounds that the applicant filed a suit namely **Homa Bay CMCC No. 41 of 2018** against the respondents for, *inter alia*, a liquidated sum of Kshs. 5,300,544/= being the remaining balance for services rendered by the applicant as the tendered contractor for the construction of various roads within the County of Homa Bay. The applicant

further averred that thereafter, the court (**Hon. T. Obuttu, PM**) entered judgment on the 29<sup>th</sup> October 2019 against the respondents in the total sum of Kshs. 5,300,544/= to be paid as follows:

**[a]** Kshs. 1,500,000/= on or before 30<sup>th</sup> November 2019

**[b]** Kshs. 1,500,000/= on or before 31<sup>st</sup> December 2019

**[c]** Kshs. 2,300,544/= on or before 31<sup>st</sup> January 2020

**[3]** The applicant further averred that thereafter, a decree was extracted dated 28<sup>th</sup> November 2023; and that the respondents did not challenge the said judgment or the decree within the statutory timelines provided for in the Civil Procedure Act. The applicant added that, upon the lapse of the duration within which the respondents could challenge the said judgment, it served the respondents with the said decree and thereafter engaged them by way of correspondences and physical visits with a view of having the decretal sum settled; but the debt is yet to be fully paid.

**[4]** The applicant conceded that the debt had been partially paid, leaving a balance of Kshs. 2,698,816/= exclusive of interest as at 29<sup>th</sup> October 2019. The applicant further averred that on the 29<sup>th</sup> October 2019 the parties entered into a consent which was adopted as an order of the Court for the payment of Kshs. 400,000/=, being the applicant's Advocates costs.

**[5]** The applicant pointed out that, under **Section 21(4)** of the Government Proceedings Act, Chapter 40 of the Laws of Kenya, no execution by way of attachment of property can issue against the County Government of Homa Bay; and therefore the only option available was an application for an order of Mandamus. The applicant placed reliance on its Amended Statement of Facts dated 17<sup>th</sup> January 2024 which accompanied the application for leave as well as the Verifying Affidavit sworn on its behalf by **Ismael Onyango Onyiego** on 17<sup>th</sup> January 2024.

**[6]** The applicant also relied on its affidavit sworn by **Ismael Onyango Onyiego** on 7<sup>th</sup> August 2024 and filed herein in support of the substantive application. To that affidavit, the applicant annexed copies of the Certificate of Order of Judgment and Costs against the Government dated 28<sup>th</sup> November 2023 among other pertinent documents.

**[7]** In response to the application, the respondents relied on the Replying Affidavit sworn on 30<sup>th</sup> September 2024 by **Mr. Solomon Obiero**, the 4<sup>th</sup> respondent's County Executive Committee Member for Finance and Economic Planning. The respondents took issue with the fact that the applicant filed an Amended Chamber Summons for leave. They contended that the amendment was done without leave of the Court. They further contended that the said application was heard and determined on 20<sup>th</sup> March 2024 in the absence of their counsel.

**[8]** It was further the contention of the respondents that even the application for extension of time to file the substantive judicial review application dated 18<sup>th</sup> July 2024 was allowed notwithstanding lack of service upon the 4<sup>th</sup> respondent. They further impugned the Consent Judgment entered on 29<sup>th</sup> October 2019 in **Homa Bay CMCC No. 41 of 2018**, contending that it was recorded by their Advocate without authority.

**[9]** The foregoing notwithstanding, the respondents conceded that the Consent Judgment has not been set aside; and that they have made partial payments within the constraints of the 4<sup>th</sup> respondent's fiscal budget, leaving a balance of Kshs. 2,698,816/=. They contended that the delays in payment are not as a result of willful neglect but rather a reflection of the financial limitations faced by the 4<sup>th</sup> respondent. They added that it is not in the public interest to compel the respondents to pay the decretal sum, granted the constraints aforementioned.

**[10]** The respondents also challenged the Supporting Affidavit sworn by **Mr. Ismail Onyango Onyiego** on the ground that the deponent had no capacity to make the deposition on behalf of the applicant. In particular, they took issue with the fact that the applicant did not present any letter of authorization given by the applicant company. At paragraphs 18 and 19 of their Replying Affidavit, the respondents purported to challenge the debt contending that the lower court suit was not supported by contractual documents or evidence; and therefore did not comply with the law on procurement and public finance management.

**[11]** It was therefore the prayer of the respondents that the application be dismissed with costs.

**[12]** The application was canvassed by way of written submissions, pursuant to the directions given herein on 30<sup>th</sup> September 2024. Accordingly, the applicant filed written submissions dated 18<sup>th</sup> October 2024 in which it reiterated the factual background of the application and proposed a single issue for determination, namely, whether an Order of Mandamus should issue as prayed by the *ex parte* applicant. The applicant relied on **Section 21** of the Government Proceedings Act, Cap 40 of the Laws of Kenya and the cases of **Kisya Investments Ltd v Attorney General** [2005] 1 KLR 74 and **Permanent Secretary Office Of The President Ministry Or Internal Security & another, Ex Parte Nassir Mwadhihi** [2014] eKLR for the proposition that the rules applicable to normal execution proceedings are not necessarily applicable to enforcement of decrees against the Government.

**[13]** As to the scope of an Order of Mandamus, the applicant relied on the decision of the Court of Appeal in **Republic v Kenya National Examination Counsel Ex Parte Gathenji & Others** [1997] eKLR. It further submitted that, in addition to the Decree issued by the lower court in **Homa Bay CMCC No. 41 of 2018** the applicant exhibited a Certificate of Order against the Government and demonstrated that although partial payment has been made, the debt is yet to be fully settled.

**[14]** In the premises, it was the submission of the applicant that it had demonstrated compliance with the provisions of **Section 21** of the Government Proceedings Act. In its view, the respondents have not given any satisfactory reason as to why the decree has not been fully satisfied. It relied on **Republic v County Secretary Migori County Government & Another** [2019] eKLR and **Republic v County Secretary, Narok County Government & Another Ex Parte Sec & M Company Limited** [2022] eKLR, among other authorities, to buttress its arguments. In conclusion, the applicant urged the Court to grant the orders sought to enable it realize and enjoy the fruits of its judgment.

**[15]** On their part, the respondents relied on their written submissions dated 2<sup>nd</sup> December 2024. They submitted that, whereas the applicant is entitled to seek remedies for the unpaid decretal sum, it has failed to meet the statutory requirements for the issuance of an Order of Mandamus. They further reiterated their assertions in their Replying Affidavit to underscore their contention that, in spite of its diligent efforts to satisfy the consent judgment, the 4<sup>th</sup> respondent has been hampered by significant financial constraints. They also faulted the Supporting Affidavit for various reasons. Consequently, the respondents proposed the following issues for determination:

**[a]** Whether the deponent of the Supporting Affidavit dated 7<sup>th</sup> August 2024 had the capacity.

**[b]** Whether lack of demand notices before institution of proceedings was fair.

**[c]** Whether the consent judgment entered by the Advocate has merit.

**[d]** Whether the applicant is entitled to the orders sought.

**[e]** Whether the applicant will suffer prejudice if the prayers sought are not granted.

**[16]** The respondents relied on **Order 1 Rule 13(1)** of the Criminal Procedure Rules and the cases of **Leo Investments Ltd v Trident Insurance Co. Ltd** [2014] eKLR, **Affordable Homes Africa Ltd v Ian Henderson & 2 others** [2004] eKLR and **East African Portland Cement Ltd v Capital Markets Authority & 4 others** [2014] eKLR, among others, to support their submission that the deponent of the Supporting Affidavit was obliged to demonstrate that he was duly authorized to make the deposition by attaching a letter of authority to his affidavit. The respondent was of the posturing that, having failed to demonstrate such authority, the affidavit is incompetent for lack of *locus standi*.

**[17]** The respondents also submitted that, by failing to issue a demand notice prior to the filing of the present application, the applicant violated **Article 47** of the Constitution and **Section 4(3)(a)** of the Fair Administrative Action Act, 2015 in terms of the right to procedural fairness. The respondents contended that the applicant's failure to comply with the above provisions denied them the opportunity to address the perceived grievance to avoid

litigation. They relied on **Republic v Town Clerk of Webuye County Council & another** [2014] eKLR and **Paul Njuguna v Barclays Bank of Kenya Limited** [2016] eKLR in support of their submissions.

**[18]** In impugning the consent judgment entered on 29<sup>th</sup> October 2019 in **Homa Bay CMCC No. 41 of 2018**, the respondent contended that in so far as their Advocate acted without authority, the same is void *ab initio*. They relied on **Order 9 Rule 9** of the Civil Procedure Rules for the proposition that an advocate can only act with the express authority of the client; and that such authority ought to have been filed alongside the consent. In support of this argument, the respondents relied on **Brooke Bond Liebig (T) Ltd v Mallya** [1975] EA 266 and **Kenya Commercial Bank Ltd v Muiri Coffee Estate Ltd** [1990] KLR 459 and urged the Court to find that the consent judgment dated 29<sup>th</sup> October 2019 is void and is for setting aside.

**[19]** On whether the applicant is entitled to the remedy of Mandamus, the respondents submitted, on the authority of **Kenya National Examinations Council v Republic, Ex Parte Geoffrey Gathenji Njoroge** (*supra*) that the applicant was under duty to demonstrate that it had exhausted other legal or administrative options available to it. In their submission, any expenditure of public funds, including payment of decretal sums, must comply with the established statutory procedures provided for in the Public Finance Management Act of 2012 as well as **Section 21** of the Government Proceedings Act.

**[20]** In sum, the respondents urged the Court to find that the applicant has failed to meet the legal threshold for granting an Order of Mandamus; having failed to demonstrate that it has exhausted alternative remedies.

**[21]** A perusal of the application, the Supporting Affidavit and the documents annexed thereto confirms that judgment was entered by consent in favour of the applicant in Homa Bay **CMCC No. 41 of 2018: Ayungo General Contractors v County Secretary, County Government of Homa Bay & 3 others** for the sum of KES. 5,300,544/= together with costs in the sum of KES. 400,000/=. The parties further agreed that the said sums be paid by monthly instalments with effect from 30<sup>th</sup> November 2019. Copies of the Decree and the Certificate of Order and Costs against the Government dated and issued on 28<sup>th</sup> November 2023 were exhibited as annexures to the Supporting Affidavit

**[22]** There being no indication that the said Judgment or the Certificate of Taxation were set aside on appeal or review, I find as a fact that the sums aforementioned are indeed owing from the 1<sup>st</sup> respondent to the applicant. It is certainly not within the ambit of this suit for the respondents to contend, as they did, that the Consent Judgment entered on 29<sup>th</sup> October 2019 in **Homa Bay CMCC No. 41 of 2018** was recorded by their Advocate without authority; or that the lower court suit was not supported by contractual documents or evidence and therefore did not comply with the law on procurement and public finance

management. Those are issues that the respondents ought to have raised before the lower court but opted to not pursue.

**[23]** The respondents argued that the application is incompetent in so far as the deponent of the Supporting Affidavit did not seek or obtain the authority of the 4<sup>th</sup> respondent to make the deposition on its behalf. In this regard, the respondents relied on Order 1 Rule 13(1) of the Civil Procedure Rules, which provides that:

**(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.**

**[24]** In this instance there is only one applicant and therefore the provision is not applicable. More importantly, it bears repeating that judicial review proceedings are *sui generis* proceedings that are subject to their own peculiar rules. Hence, in **Wellamondi v The Chairman, Electoral Commission of Kenya**, [2002]1 KLR 286, **Ringera J.** (as he then was) held:

**“...Judicial Review Proceedings under Order 53 of the Civil Procedure Rules are a special procedure. The provisions of the order are invoked whenever orders of certiorari, mandamus, or prohibition are sought. That may be so in either civil or criminal proceedings. So in the exercise of its power under the order, the court is exercising neither a civil nor a criminal jurisdiction in the strict sense of the word. It is exercising a jurisdiction sui generis. It follows therefore that it is incompetent to invoke the provisions of section 3A and order 1 rule 8 of the Civil Procedure rules. It is equally incompetent to invoke section 42, 79 and 80 of the constitution of Kenya...”**

**[25]** Similarly, in **Republic v Kahindi Nyafula, ex parte Kilifi South East Farmers’ Cooperative**, High Court, Malindi, Jud. Rev. 3 of 2013 (2014) eKLR, the point was underscored thus:

**“Judicial Review proceedings under Order 53 of the Civil Procedure Rules are a special procedure. A party, other than invoking the provisions of Order 53 cannot invoke the provisions of the civil Procedure Act and the Rules made thereunder.”**

**[26]** I therefore find that objection to be of no consequence to the application. That said, the only issues for determination are:

**[a]** whether the applicant has fulfilled the requirements of **Section 21** of the **Government Proceedings Act**.

**[b]** Whether the respondents have any duty to pay the sums due to the applicant for purposes of **Section 21(3)** of the Government Proceedings Act.

**A: On whether the applicant complied with Section 21 of the Government Proceedings Act:**

**[27]** **Section 21** of the **Government Proceedings Act**, sets out the procedure preceding payment of a debt owed by either the Government. It stipulates thus in **Sub-Sections (1) and (2)**:

**“(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.”**

**[28]** Further to the foregoing, **Subsections (3) and (4)** of **Section 21** of the **Government Proceedings Act** state:

**“(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.”**

**[29]** That the aforesaid provisions apply to County Governments such as the 4<sup>th</sup> respondent is not in doubt; for **Subsection (5) of Section 21** is explicit that:

**“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.”**

**[30]** 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 (i). The raising of revenue- (by taxation or borrowing); (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 ENGLAND 4<sup>TH</sup> 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 VS.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 Mwandih, supra)

[31] Accordingly, I have perused the documents annexed to the applicant’s Supporting Affidavit and noted that, in addition to the Judgment, the Decree, the applicant annexed a Certificate of Order against the Government dated 28<sup>th</sup> November 2023. The said Certificate clearly indicates the judgment sum, interest thereon and costs due from the judgment debtor for purposes of **Order 29 Rule 3** of the **Civil Procedure Rules**, which 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.”

**B. Whether the 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> respondents have any duty to pay the sums due to the applicant for purposes of Section 21(3) of the Government Proceedings Act:**

[32] Needless to mention that the duty bearer for purposes of **Section 21** of the Government Proceedings Act is the Accounting Officer. In **Council of Governors & Others v The Senate** [2015] eKLR, at paragraphs 134 to 137, a three judge bench of the High Court grappled with the question as to who is an accounting officer for purposes of the County Government entities. Here is what the Court had to say:

“134. The Petitioners have also sought the interpretation of the term “Accounting Officer”. In that regard, Article 226 of the Constitution provides;

(1) Act of Parliament shall provide for -

(a) ...

(b) The designation of an accounting officer in every public entity at the national and county level of government

(2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

Pursuant to this provision, Parliament enacted the Public Finance Management Act. The appointment and designation of a County Government Accounting Officer is provided for under Section 148 of that Act, as follows;

1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.

2. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.

135. It therefore follows that “an accounting officer” for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the Public Finance Management Act. Indeed, Section 148 (3) of the Public Finance Management Act mandates the County Executive Committee Member for Finance to ensure that each County government entity has an accounting officer as provided for under Article 226(2) of the Constitution.

136. As regards the accounting officer for the County Assembly, Section 148(4) of the Public Finance Management Act provides that;

**“The Clerk of the County Assembly shall be the accounting officer of the County Assembly”.**

**137. Having found as we have, it follows that the question posed by the Petitioners as to whether the County Governor is an Accounting Officer, must be answered in the negative. He is not an Accounting Officer and we have said why.”**

**[33]** It is plain therefore that, in the absence of proof of appointment by the County Executive Committee member for Finance of the Accounting Officer for the County Government of Homa Bay, as is the case herein, the proper person to look to for the settlement of debts owing from the County Government of Mombasa is the County Executive Committee member for Finance. In **Republic v Kisii County Government Ex-Parte Peter Kaunda Nyamosi & 2 others** [2018] eKLR, it was held that:

**“25. It is therefore clear that the accounting officer for the County Government is the County Executive Member for Finance. Since the order of mandamus was against the County Government, I do not think that this is fatal as the order of mandamus remains alive and the court may issue a notice to show cause against the accounting officer, upon whom the statutory duty is imposed, to ensure that its decision is enforced (see *Consolata Kihara & 21 Others v Director of Kenya Trypanosomiasis Research Institute* [2003] KLR 582 and *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi)* NBI HC Misc. App. 222 of 2016 [2018] eKLR).”**

**[34]** The same position was taken in **Soloh Worldwide Inter-Enterprises v County Secretary Nairobi County & another** [2016] eKLR thus:

**“17. It therefore follows that the person who has the overall financial obligation for the purposes of the affairs of a County Government must be the County Executive in Charge of Finance and unless he shows otherwise, he is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In an application for mandamus where orders are sought to compel the satisfaction of a decree against a County Government, the proper person to be a respondent ought to be the said**

**County Executive in Charge of Finance unless he discloses that he had in fact appointed an accounting officer for that purpose..."**

**[35]** Consequently, the County Secretary (the 1<sup>st</sup> respondent), the Chief Officer, Ministry of Finance (the 2<sup>nd</sup> respondent) and the Chief Officer, Transport and Infrastructure (the 3<sup>rd</sup> respondent) were wrongly impleaded herein. Indeed, in **Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another** [2018] eKLR, **Hon. Mativo, J.** (as he then was) held:

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.

**[36]** In so far as this suit has been brought against the wrong persons, it cannot be said that the duty to pay has arisen. It is my

finding, therefore, that the instant application is premature and is accordingly struck out with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY  
OF FEBRUARY 2026**

.....  
**OLGA SEWE**  
**JUDGE**