

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KAKAMEGA
JUDICIAL REVIEW CASE NO. E007 OF 2025

**IN THE MATTER OF JUDICIAL REVIEW APPLICATION FOR
ORDER OF MANDAMUS**

**BY KENYA UNION OF PRE-PRIMARY EDUCATION
TEACHERS**

AND

**IN THE MATTER OF LAW REFORM ACT (CAP. 26) LAWS OF
KENYA AS READ WITH ORDER 53 OF THE CIVIL
PROCEDURE RULES LAWS OF KENYA**

AND

**IN THE MATTER OF EMPLOYMENT AND LABOUR
RELATIONS COURT ACT**

AND

**IN THE MATTER OF JUDGMENT DELIVERED ON 16TH APRIL,
2024 IN FAVOUR OF THE CLAIMANT AGAINST THE COUNTY
GOVERNMENT OF KAKAMEGA IN KAKAMEGA ELRC
CAUSE NO. 09 OF 2023-KENYA UNION OF PRE-PRIMARY
EDUCATION TEACHERS VERSUS KAKAMEGA COUNTY
PUBLIC SERVICE BOARD AND COUNTY SECRETARY,
KAKAMEGA COUNTY GOVERNMENT**

AND
IN THE MATTER OF SECTION 21 OF THE GOVERNMENT
PROCEEDINGS ACT
AND
IN THE MATTER OF CERTIFICATE OF ORDER AGAINST
GOVERNMENT DATED 10TH JUNE, 2025 AND DECREE DATED
20TH MAY, 2025

REPUBLIC

APPLICANT

AND

KENYA UNION OF PRE-PRIMARY
EDUCATION TEACHERSEX-PARTE APPLICANT

VERSUS

COUNTY SECRETARY,
KAKAMEGA COUNTY GOVERNMENT.....1ST RESPONDENT

CEC-MEMBER, KAKAMEGA
COUNTY TREASURY2ND RESPONDENT

CHIEF OFFICER – FINANCE;
KAKAMEGA COUNTY GOVERNMENT.....3RD RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

RULING

I. INTRODUCTION

1. The ex parte applicant (the applicant), through its representative, Samuel. A. Opiyo, filed a notice of motion (the application) dated 8th October 2025 seeking for the following orders –

1) That an order of MANDAMUS do issue compelling the respondents, namely the County Secretary, Kakamega County Government, County Executive Committee Member and County Chief Officer, both INCHARGE OF FINANCE to compute and pay gratuity to the members of the claimant union calculated at the rate of 31% and based on the formula disclosed by Vivien Ayuma in her Affidavit for the contracts of employment at varied dates from 2015 to September 2020 to wit – calculated on the basis of their pensionable emolument which was computed on the basis of 60% of the monthly consolidated remuneration package of the ECDE teachers.

2) That the respondents be committed to jail for six months and pay a fine of Kshs200,000 each for contempt of court in case of failure to comply.

3) That the cost of this application be provided for

2. The application was filed pursuant to leave granted on 25th September 2025 for the applicant to commence judicial review proceedings.

3. The application is based on the grounds on the face of it and supported with the verifying affidavit sworn by Samuel Opiyo on 4th

July 2025 and the statement of facts, all annexed to the chamber summons seeking leave to commence judicial review proceedings filed on 7th July 2025, with several annexures thereto.

4. The respondents entered appearance through the County Attorney and filed a replying affidavit sworn by Lawrence Angola Omuhaka, the 1st Respondent, on 28th October 2025.
5. By consent and upon directions by the court, the application was canvassed by way of written submissions. Mr. Opiyo for the applicant filed written submissions dated 24th November 2025 and Ms. Mbaka, for the respondents filed submissions dated 25th November 2025.

II. THE EVIDENCE

6. In the verifying affidavit and statement of facts, it is deponed that the applicant is a decree holder emanating from the judgement in *Kakamega ELRC No. 9 of 2023* delivered on 16th April 2024.
7. It is deponed that from the date of the said judgement, the respondents were ordered to pay the applicants' members their gratuity within 30 days at a rate of 31% of their consolidated salary.
8. It is further deponed that the respondents have failed to pay the applicant's members despite service upon them of the certificate of order necessitating the present proceedings to compel the respondents to carry out their public duty.

9. In the replying affidavit, the respondents state that they accepted the judgment and did not appeal the same and immediately commenced tabulation and verification of the grievants' records.
10. The respondents further state that they calculated the gratuity in accordance with the judgment and shared the computations with the applicant and the interested party vide a letter dated 8th November 2024 which was also filed in court. They contend that the applicant later filed another application in the same cause challenging the tabulation but the Court dismissed that application on 15th May 2025 thereby confirming that the respondents' formula and computations were in line with the judgment.
11. According to the respondents, the processing and payment of gratuity were delayed by the pendency of the said application, and since the tabulation was under judicial challenge they required clarity from the Court before proceeding with payment.
12. In essence, the respondents' position is that they have complied with the judgment in substance, that any delay was occasioned by ongoing court proceedings initiated by the applicant, and that the application for mandamus is therefore unwarranted because they have been acting in good faith and within the law.
13. It is deponed that as at 15th May 2025 the respondents were unable to process payment of the decretal sums because the 2024/2025 financial year budget had been exhausted, the financial year was

nearing its end, and it was thus not feasible to introduce a supplementary budget at that stage. They contend that any payment without a budgetary provision would have violated **Section 104(1) of the County Governments Act**.

14. It is asserted that once the 2025/2026 budget was approved by the County Assembly and uploaded by the Controller of Budget, the County Government commenced the payment process including preparation of payment vouchers and identification of banks and payees. What remains, according to the respondents is the actual release of funds which depends on exchequer disbursement from the National Treasury through the County Revenue Fund in accordance with **Article 207 of the Constitution** and the **Public Finance Management Act (PFMA)**.

15. The respondents argue that delays in exchequer releases are systemic and nationwide, not deliberate or in defiance of court orders, and arise from budgetary constraints and phased release of equitable share allocations. They maintain that upon receipt of the next exchequer tranche the County Treasury will prioritize settlement of the subject decree.

16. The respondents aver that they do not dispute the judgment or decree and state that compliance is already underway, making the application for orders of mandamus and committal unnecessary, premature, and inequitable. They argue that County Government

officers cannot lawfully authorize payments without funds and proper procedures as doing so would breach the **PFMA** and expose them to personal liability.

17. Further, the respondents contend that the officers cited in the application are not the lawful accounting officers responsible for staff benefits and gratuity under the **PFMA** and the Executive Order No. 1 adduced.
18. On that basis, they argue that the application is misdirected and unsustainable against them and that issuing coercive or contempt-based orders shall be unjust and contrary to the principles of prudent public finance management under **Article 201(d) of the Constitution**.

III. SUBMISSIONS

19. It is submitted for the applicant that the respondents' explanation for non-payment of the decretal sum is contradictory and not candid. It is argued that although the respondents state that they were unable to satisfy the decree as at 15th May 2025, they simultaneously admit that the decretal amount had been factored into the budget for **FY 2024/2025**.
20. It is contended that a financial year runs to the end of July and once funds are budgeted for failure to expend them in accordance with the approved budget amounts to illegality and a violation of the **PFMA**. It is submitted that the respondents cannot rely on the lack of funds after admitting that provision had been made in the budget.

Accordingly, it is submitted that the explanation of “lack of funds” is not genuine and is meant to justify deliberate non-compliance with the decree.

21. It is further submitted that the respondents have acted in bad faith by altering the list of beneficiaries entitled to gratuity under the decree.
22. It is contended that the judgment covered 349 grievants while the respondents’ current computation only reflects 278 beneficiaries with over 78 beneficiaries allegedly dropped and 165 new persons who were not parties to the original proceedings allegedly introduced into the list.
23. It is submitted that the existence of two different lists, both exhibited by the respondents, demonstrates that the respondents are not ready to settle the decree and are instead engaging the applicant in endless verification and authentication processes to delay payment. It is submitted that the respondents know who the rightful beneficiaries are and that the ongoing verification process is a tactic intended to frustrate execution of the decree.
24. Citing **Republic v County Secretary, Government of Nairobi County & 5 others Faram East Africa Limited (Ex parte Applicant) [2025] KEHC 11890 (KLR)**, it is submitted that despite the respondents’ contention that the cited officers are strangers to the responsibility of settling the decree, they characterize this as blame-shifting and back-passing within the County Government.

25. The Court is urged to find that the cited respondents are the proper officers against whom mandamus and committal orders may issue.
26. On the other hand, the respondents' counsel submitted on three issues – *Whether the applicant has established grounds for an order of mandamus in the circumstances presented; Whether the contempt/committal orders sought can issue where the respondents have demonstrated lawful and unavoidable constraints; and Whether the application is properly directed at the respondents in light of statutory provisions governing authorization of public expenditure.*
27. On the first issue, it is submitted that the applicant has not satisfied the legal threshold for issuance of an order of mandamus. It is argued that mandamus can only issue to compel performance of a specific public duty which is already due, lawful, and capable of immediate performance.
28. It is submitted that where performance is subject to statutory procedures and fiscal controls, mandamus cannot be used to compel performance in a manner that violates the law.
29. Citing Kenya ***National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR***, counsel submitted that although the decree is not denied payment is subject to constitutional and statutory public finance procedures, including availability of funds and authorization by the Controller of Budget

and thus an order of Mandamus cannot lawfully compel payment where funds have not been released.

30. On the second issue, it is submitted that the respondents have not refused or neglected to comply with the judgment. On the contrary, it is submitted, they have computed gratuity in accordance with the judgment; communicated the computation to the applicant; obtained judicial confirmation of the computation when the applicant challenged it; and, prepared payment instruments following approval of the budget for Financial Year 2025/2026.
31. They contend that the only outstanding step is actual disbursement, which depends on the release of funds by the national exchequer to the County Government and authorization by the Controller of Budget.
32. They argue that the delay occasioned by statutory fiscal constraints cannot amount to contempt.
33. Relying on the provisions of **Article 207 of the Constitution, Section 109(6) of the Public Finance Management Act**, and **Sections 196 & 197 of the Public Finance Management Act**, the respondents further submit that payment of decretal sums by county governments is governed by the **Constitution** and the **PFMA** and cannot lawfully be done unless funds have been released and authorized. It is submitted that compelling payment in the absence of exchequer release shall

amount to forcing public officers to violate the **Constitution** and expose them to personal liability.

34. Citing ***Kisya Investments Ltd v Attorney General & another (2005) eKLR***, it is submitted that settlement of decrees against government entities must be budgeted for and authorized, and courts should be slow to issuing coercive orders that bypass that framework.
35. On the third issue, counsel relied on ***Section 148(2) of the Public Finance Management Act*** and Executive ***Order No. 1 of 2025*** in asserting that the application is misdirected because the cited respondents are not the designated accounting officers responsible for authorizing the relevant expenditure. They submit that an order of mandamus can only issue against the officer upon whom the law places the duty and not against persons without statutory authority to release funds.
36. As to whether contempt orders should issue, it is submitted that the respondents are not guilty of willful disobedience of the decree; the respondents have taken concrete steps towards compliance; and the delay has been caused by statutory fiscal controls and lack of exchequer releases. It is submitted that contempt jurisdiction cannot be used to compel performance of an act that is unlawful or impossible in the circumstances and that committal of public officers in such circumstances shall be unjust and unconstitutional.

37. It is further submitted that no beneficiaries were unlawfully removed or replaced but rather adjustments were made to remove duplicate names and correct erroneous identification details through the IPPD system, that is centrally managed by the national government and cannot be manipulated at the county level. It is submitted that the applicant also failed to supply corrected details for unverifiable entries.

38. The court is urged to find that the application for mandamus is premature and legally untenable and the Court is urged to grant to the respondents a reasonable period (90 days) to settle the decretal sums upon receipt of the next exchequer disbursement.

IV. ISSUES FOR DETERMINATION

39. The factual background of this matter has been set out by the parties and their respective counsel/representative as per the summary in the preceding part of this ruling. The gist of the application is that the applicant is seeking for an order of mandamus as set out in the introductory part of this ruling. Additionally, the applicant is seeking the committal of the respondents to civil jail if they fail to comply with the order so issued.

40. In my considered view, the issue for determination by the court is –
Whether the applicant has met the threshold for the issuance of an order of mandamus.

41. It is not disputed that the applicant was successful in ***ELRC Cause No 9 of 2023*** and that there is a decree directing the respondents to tabulate and pay the applicant's members' gratuity. The decree dated 20th May 2025 and the certificate of order dated 10th June 2025 against the respondents were attached to the affidavit of service showing that the decree was served upon the County Attorney on 21st May 2025 and upon the 1st and 2nd respondents on 21st May 2025. The certificate of costs was served upon the County Attorney on 11th June 2025.

42. A decree for the payment of money or costs issued against a National or County Government 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 with an immunity from execution and attachment of its property/goods under ***Section 21(4) of the Government Proceedings Act (GPA)***.

43. The condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is in ***Section 21(1) & (2) of the GPA*** which provides that payment shall be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which shall be served upon the Attorney General or the County Attorney in case of a County Government. The certificate of

order against the Government is issued by the court after the expiration of 21 days after entry of judgment.

44. Once the certificate of order against the Government is served on the Attorney General or the County Attorney, ***Section 21(3) of GPA*** imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment on budgetary allocation and parliamentary approval of Government expenditure in the financial year after which Government liability accrues.

45. The respondents state that they calculated the gratuity in accordance with the judgment and shared the computations with the applicant vide a letter dated 8th November 2024. Nonetheless, the applicant later on filed an application in the same cause challenging the tabulation but the Court dismissed that application on 15th May 2025, thereby confirming that the respondents' formula and computations were in line with the judgment. The respondents state that as of 15th May 2025, due to the delay caused by the applicant's said application, the 2024/2025 budget had depleted and thus the decree could not be satisfied but the same is awaiting release of funds under the 2025/2026 budget.

46. The respondents relied on the case of *Kisya Investments Ltd -Vs- Attorney General & Another(supra)* in asserting that satisfaction of decrees by the government is dependent on government expenditure as justification for the delay in settling the decree. The court in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza (2012) KEHC 1643 (KLR)*, wherein the respondents had cited *Kisya Investments Ltd -Vs- Attorney General & Another(supra)* relied on by the respondents herein, the court appreciated the immunity of governments from execution but noted that there was no finding in that case that successful litigants should not move with reasonable speed to enforce payment of decrees issued in their favour against the Government.

47. The applicant's right to payment accrued on 11th June 2025 when it served the County Attorney with a certificate of costs against the County Government of Kakamega under *Section 21 of the GPA*.

48. This court associates itself with the decision in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza (supra)* wherein the court in declining the respondent's claim that the applicant therein should have waited until the start of the next financial year to enforce payment of the decree in his favour was found to be flawed and unsustainable. This is because that

argument has no legal basis and it is the responsibility of the Government to make contingency provisions for its liabilities in each financial year so that successful litigants who obtain decrees against the Government are not left without remedy at any time of the year.

49. The court finds and holds that service of the certificate of order against the County Attorney on 11th June 2025 constituted a demand for payment and the fact that no payment was received by the applicant from the respondents for three months and 27 days before filing this application was sufficient reason for the applicant to construe that the respondents had neglected to perform their statutory duty to pay under **Section 21(3) of the GPA**. The applicant was therefore justified to move to court to seek an appropriate remedy.

50. An order of mandamus shall thus issue against the accounting officer of the 1st respondent who is legally bound to satisfy the decree. The respondents assert that the application is against the wrong parties arguing that the accounting officer responsible is that of the staff benefits and welfare scheme and not the respondents as per the Executive Order No. 1 issued by the Governor.

51. The accounting officers for County Governments are appointed under **Section 148 of the PFMA** through designation by the County Executive Committee Member (CECM) for Finance depending on the sector. **Section 149 of the PFMA** also provides for the

responsibilities of accounting officers designated for the county government entities.

52. As regards the identity of the accounting officers responsible for the satisfaction of the decree, the County Secretary the CECM and the Chief Officer responsible for finance are named. **Section 44 of the County Governments Act** establishes the office of the County Secretary who is secretary to the CECM. She is answerable for the operations of the County Executive whose functions include being head of the County Public Service. **Section 103 of the PFMA** also establishes the County Treasury, comprising the CECM of Finance, the Chief Officer, and the departments of the County Treasury responsible for finance and fiscal matters.

53. Under **Section 103(3) of PFMA**, the CECM for Finance is the head of Treasury and is thus responsible for finance matters in the County. Therefore, all the Respondents are jointly responsible for the satisfaction of Court orders and decrees on payment of money owed by the County Government by virtue of their positions and functions.

54. The court finds and holds that all the respondents have both a statutory and a public duty to satisfy the decree issued by the court in favour of the applicant. It is not disputed that by the time these proceedings were commenced, the respondents herein had failed and/or neglected to fulfil their aforesaid duty to the detriment of the

applicant despite the fact that no appeal was lodged by the County Government against the impugned judgment. Consequently, therefore, the court is satisfied that the applicant has met the threshold for the issuance of an order of mandamus against the named respondents.

55. As to whether the court can issue the orders for committal to civil jail of the respondents and payment of a fine of Kshs200,000/- in the event of default, the court declines to issue any orders as the same shall prejudice the respondents' conduct. Moreover, the applicant shall be free to commence contempt proceedings in the event of default or non-compliance.

56. The application dated 8th October 2025 is therefore partially allowed with costs.

VI. COSTS

57. Costs to the applicant.

VI. ORDERS

a) The Notice of motion by the applicant dated 8th October 2025 is partially allowed as follows –

i) An order of MANDAMUS do issue compelling the respondents, namely the County Secretary, Kakamega County Government, County Executive Committee Member and County Chief Officer, both INCHARGE OF FINANCE to

compute and pay gratuity to the members of the claimant union calculated at the rate of 31% and based on the formula disclosed by Vivien Ayuma in her Affidavit for the contracts of employment at varied dates from 2015 to September 2020 to wit – calculated on the basis of their pensionable emolument which was computed on the basis of 60% of the monthly consolidated remuneration package of the ECDE teachers.

b) Costs to the applicant.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT
KAKAMEGA THIS 19TH DAY OF MARCH 2026.**

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DAVID NDERITU
JUDGE