

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ELC JUDICIAL REVIEW E013 OF 2025

REPUBLIC.....

.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....1ST

RESPONDENT

CECM, FINANCE & ECONOMIC AFFAIRS,

MOMBASA COUNTY.....2ND

RESPONDENT

CHIEF OFFICER, REVENUE ADMINISTRATION,

MOMBASA COUNTY.....3RD

RESPONDENT

THE COUNTY SECRETARY, MOMBASA COUNTY.....4TH

RESPONDENT

COUNTY ATTORNEY, MOMBASA COUNTY.....5TH

RESPONDENT

CHIEF OFFICER, FINANCE/COUNTY

TREASURER, MOMBASA COUNTY.....6TH

RESPONDENT

AND

MILLER AND COMPANY ADVOCATES.....EX PARTE

APPLICANT

JUDGMENT

A. INTRODUCTION

1. The ex parte applicant brought a chamber summons dated 01.10.2025 seeking leave to apply for an order of mandamus against the respondents. The application was based on the grounds set out on the face of the application and the contents of the supporting affidavit sworn by Cecil Miller, the ex parte applicant.
2. On 12.10.2025 when the application came up for hearing, the court granted the ex parte applicant leave to apply for the judicial review orders as prayed.

B. EX PARTE APPLICATION

3. The applicant filed a notice of motion dated 04.11.2025 and sought an order of mandamus directed to the respondents to compel them to jointly and severally pay the law firm Kshs 2,721,861.36 being the decretal amount awarded in *ELC Misc application E049 of 2024* together with costs and interest.
4. The application was based on the grounds set out on the face of the application and the contents of the supporting affidavit sworn by Cecil Miller, the ex parte applicant. It was contended that on 16.11.2021 the applicant was instructed by the respondents to act for the 1st respondent in ELC Petition No. E049 of 2021. The applicant continued to act until the

respondents failed to provide instructions necessitating the ex parte applicant to cease acting. The applicant pleaded that it submitted a fee note to the respondents who refused to settle it prompting the applicant to file a bill of costs which was taxed on 22.01.2025 at Kshs 2,721,861.36/= and a certificate of costs dated 23.01.2025 was served upon the respondents.

5. Following the taxation the applicant made an application to this court to adopt the certificate of costs as a judgment. On 30.07.2025, the said application was allowed and the court entered judgment against the respondents in the sum stated in the certificate of costs with interest. In addition, the court adopted the certificate of costs dated 23.01.2025 as the decree of the court and granted the applicant liberty to execute. The said order of the court was extracted on 26.08.2025 and a certificate of order against the government was issued on 01.09.2025.

6. It was the applicant's case that despite serving the respondents with the said certificate of order they had refused to settle the amount. It was argued that the respondents were protected by law against execution and the only viable relief

against them was an order of mandamus. The court was urged to allow the application as prayed.

C. THE RESPONDENTS' RESPONSE

7. The respondents opposed the application for mandamus with a replying affidavit sworn by Murtaza Tajbhai on 03.12.2025. He deposed that save for the 2nd respondent, the other respondents were wrongly enjoined in the suit since it's only the 2nd respondent who had the statutory mandate to authorize expenditure from the county treasury.
8. It was pleaded that the application for mandamus was premature and defective as no evidence had been adduced that the respondents had refused to satisfy the decretal sum and costs awarded in ELC Misc No. E049 of 2024. It was argued that the applicant had not demonstrated that service was effected upon the County Executive Committee Member for Finance and Economic Planning who was the head of county treasury and the lawful accounting officer responsible for payment of county funds.
9. It was contended that issuing of mandamus against persons without the statutory obligation to pay will be unlawful interference with the management of the county. It was

further contended that the 2nd respondent is bound by the Public Finance Management Act on how to plan, budget, appropriate and expend the county budget. It was argued that since the applicant did not effect service, the 2nd respondent had not appropriated nor sought the approval from the County Assembly of Mombasa for the payment of the said account. It was argued that since the decretal sum had not been included in the current financial budget, the 2nd respondent could not pay the applicant. It was maintained that the decretal sum could only be paid after it had been factored into the forthcoming budget cycle and approved by the County Assembly. It was further maintained that any payment by the 2nd respondent outside the budget was prohibited by the law. The court was urged to find that the application was incompetent, an abuse of the court process and dismiss the same with costs.

D. DIRECTIONS ON SUBMISSIONS

10. When the application was listed for *inter-partes* hearing, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective

submissions. The record shows that the applicant filed submissions dated 23.01.2026 while the respondents filed submissions dated 26.01.2026.

E. ISSUES FOR DETERMINATION

11. The court has perused the application, the response thereto and the material on record. The court is of the view that the following key issues arise for determination herein:

- a. Whether the respondents were properly served.*
- b. Whether the court should grant an order of mandamus against the respondents.*
- c. Who shall bear the costs of the application.*

F. ANALYSIS AND DETERMINATION

a. Whether the respondents were properly served

12. The ex parte applicant has adduced evidence that on 09.02.2025, they sent an email to the office of the County Attorney attaching the Court order and Certificate of order against the government demanding the settlement of the same. In addition, the ex parte applicant served the said office with the application for leave and mandamus on 09.10.2025 and 14.11.2025 respectively.

13. The office of the county attorney, as established by the Mombasa County Office of the County Attorney Act 2017, is the principal legal adviser to the County Government and is responsible for advising all the County Government departments and agencies on legislative and other legal matters. The court is of the view that the ex parte applicant sufficiently served all the respondents by effecting service upon the 5th respondent, who is obligated not only to represent the county government in court proceedings but to advise all departments and agencies on legal issues. The ex parte applicant has thus demonstrated to the court that they served the respondents with the demand for the settlement of the decree and certificate of order against the government.

b. Whether the court should grant an order of mandamus against the respondents

14. The requirements for an order of mandamus were discussed in *Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another* [2018] KEHC 9433 (KLR), where it was held;

“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) (ii) The duty must be owed to the Applicants;*
- (iii) There must be a clear right to the performance of that duty, meaning that:
 - 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.*

15. There is no doubt from the material on record that the 1st respondent is truly indebted to the applicant. There is no

indication on record of any pending reference or appeal on the issue of the county government's liability to settle the applicant's claim. The court is satisfied that the 1st defendant was duly made aware of the certificate of order against the government through the office of the county attorney. Neither the 1st nor the 2nd respondent has made any effort this far to settle the decretal amount. It is also clear from the content of the replying affidavit that they are not prepared to do so without a coercive order to that effect. The court is satisfied that the 2nd respondent has a statutory duty to settle the decretal amount as required by law and that an order of mandamus should arise. However, the court is of the view that no order should issue against the 1st, 3rd, 4th, 5th and 6th respondents since the specific duty of payment falls upon the 2nd respondent.

16. The material on record shows that the respondents have failed to settle the decretal amount despite the reasonable notice that was issued to them three months before the application for mandamus was made. The court is of the view that the respondents are merely trying to invoke technicalities of procedure in order to evade their obligation

to settle the decretal amount. They do not have a genuine and bonafide defence to the applicant's claim. As rightfully submitted by the ex parte applicant, they have no other adequate remedy other than mandamus since they cannot execute against the respondents. There is no compelling reason why the respondents should not settle the decretal amount.

c. Who shall bear the costs of the application

17. Although the costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded the costs of an action unless the court, for good reason, directs otherwise. However, since the applicant has succeeded against only one of the 6 respondents the applicant shall not be awarded any costs.

G. CONCLUSION AND DISPOSAL ORDER

18. The upshot of the foregoing is that the court finds and holds that the ex parte applicant has made out a case for the grant of an order of mandamus against the 2nd respondent only. As a

consequence, the application dated 04.11.2025 is hereby allowed in the following terms;

- a. *An order of Mandamus be and is hereby issued directed to the 2nd respondent, namely, County Executive Committee Member for Finance and Economic Planning to pay the ex parte applicant Kshs 2,721,861.36 together with interest of 14% per annum from 22.01.2025 till payment in full.*
- b. *The said order is hereby suspended until 1st July 2026 to enable the 2nd respondent to make necessary arrangements for payment of the decretal amount.*
- c. *The claim against the 1st, 3rd, 4th, 5th and 6th respondents is hereby dismissed.*
- d. *Each party shall bear its own costs.*

Ruling dated and signed at Mombasa and delivered virtually via Microsoft Teams on this 19th day of March 2026.

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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Ms. Kimanthi for the applicant

Ms. Anguche for the 1st to 6th respondents