



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT HOMA BAY**

**JUDICIAL REVIEW APPLICATION NO. E015 OF 2025**

**IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF  
KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM  
ACT, CAP 26 OF THE LAWS OF KENYA**

**AND**

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

**AND**

**IN THE MATTER OF ORDER 53 RULES 1, 3 & 4 OF THE CIVIL  
PROCEDURE RULES, 2010**

**AND**

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

**BETWEEN**

**CLIFFORD OTIENO OBIERO T/A**

**C. OBIERO & ASSOCIATES ADVOCATES...*EX-PARTE*  
APPLICANT**

**VERSUS**

**THE CLERK,**

**HOMA BAY COUNTY ASSEMBLY.....1<sup>ST</sup>  
RESPONDENT**

**COUNTY ASSEMBLY SERVICE BOARD,**

**HOMA BAY COUNTY.....2<sup>ND</sup>  
RESPONDENT**

**JUDGMENT**

**[1]** The Notice of Motion dated 6<sup>th</sup> January 2026 was filed herein by the *ex parte* applicant, **Clifford Otieno Obiero t/a C. Obiero & Associates Advocates** (herein after, “the applicant”) pursuant to **Order 53 Rule 3** of the Civil Procedure Rules, 2010 for the following orders:

**[a]** That an Order of Mandamus do issue compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, jointly and severally, to pay to the ex-parte applicant the sum of Kshs. 450,000/=, being the decretal sum arising from **Homa Bay High Court Misc. No. E012 of 2025: Clifford Otieno Obiero t/a C. Obiero Associates Advocates v Clerk, Homa Bay County Assembly & 2 Others.**

**[b]** That an Order of Mandamus do issue compelling the 1<sup>st</sup> respondent, being the accounting and administrative officer, to satisfy the said decree pursuant to **Section 21** of the Government Proceedings Act, Cap 40.

**[c]** That interest, if any, accruing on the decretal sum be paid until full settlement.

**[d]** That the costs of this Judicial Review application be provided for.

**[2]** The application was premised on the grounds that a lawful decree and Certificate of Order Against the Government was issued on 27<sup>th</sup> August 2025 and 23<sup>rd</sup> September 2025 respectively in favor of the *ex parte* applicant which were duly served upon 1<sup>st</sup> respondent on 2<sup>nd</sup> October 2025. It was the contention of the applicant that the respondents have failed, refused and/or neglected to satisfy the decree despite demand and service.

**[3]** The applicant further averred that the respondents have a statutory and public duty under **Section 21** of the Government Proceedings Act to settle the decretal sum and that Mandamus is the only remedy available in the circumstances. He contended that the continued failure by the respondents to pay is unlawful, unreasonable, irrational and an abuse of public power; hence the instant application.

**[4]** The application was supported by the applicant's own affidavit, sworn on 6<sup>th</sup> January 2026 in which he averred that the respondents engaged his firm to provide legal representation in **Homa Bay Judicial Review Miscellaneous Application No. E011 of 2022: Japat General Services v Homabay County Assembly Service Board 2 Others**, which instructions were duly executed. He averred that upon completion of the provision of the said legal services, the respondents failed, refused and/or neglected to settle the fees due to him, necessitating the filing of **Homa Bay High Court Misc. Application No. E012 of 2025: Clifford Otieno Obiero t/a C. Obiero & Associates Advocates v Clerk, Homa Bay County Assembly & 2 Others.**

**[5]** It was further the assertion of the applicant that the Advocate/Client Bill of Costs was taxed on 23<sup>rd</sup> May 2025 at Kshs. 450,000/=, and no reference or objection was ever lodged by the respondents; and that following the taxation, the Court issued a Decree in his favour on 27<sup>th</sup> August 2025, and a Certificate of Order Against the Government on 23<sup>rd</sup> September 2025. The applicant added that the said Certificate of Order Against the Government was duly served upon the 1<sup>st</sup> respondent on 2<sup>nd</sup> October 2025 as required by **Section 21** of the Government Proceedings Act, Cap 40.

**[6]** According to the applicant, the respondents have failed, refused and/or neglected to satisfy the decretal sum of Kshs. 450,000/= to date despite proper service, demand, and the lapse of reasonable time; and therefore justification has been made for the issuance of an Order of Mandamus. He pointed out that the respondents have a statutory and public duty to satisfy lawful court decrees, which duty they have abdicated; and that unless the orders sought are granted, the he shall continue to suffer prejudice occasioned by the respondents' continued defiance.

**[7]** The applicant annexed to his affidavit two documents marked Annexure EO1 to back up his averments. The documents are:

**[a]** A copy of the demand letter dated 29<sup>th</sup> September 2025

**[b]** A copy of the Certificate of Order against the Government dated 23<sup>rd</sup> September 2025 in the sum of Kshs. 450,000/=.

**[8]** The respondents opposed the application. They relied on their Replying Affidavit sworn on their behalf on 3<sup>rd</sup> March 2026 by the 1<sup>st</sup> respondent, **Ochieng Hanington Day**. The 1<sup>st</sup> respondent conceded to the existence of the subject Decree as well as their obligation to settle the decretal amount as sums lawfully due to the applicant. He further averred that they have, at all material times demonstrated willingness and commitment to settle the decretal sum amicably and without unnecessary litigation; to which end the parties had engaged in a series of correspondences and engagements with a view of an out of court settlement. The 1<sup>st</sup> respondent annexed copies of the said correspondences evidencing ongoing negotiations and mutual agreement to pursue settlement as Annexure OHD-1 to the Replying Affidavit.

**[9]** The 1<sup>st</sup> respondent further deposed that, in further demonstration of good faith and commitment toward settlement of the decretal sum, an amount of Kshs. 500,000/= had already been deposited as part settlement of the decree; and therefore the orders sought are unwarranted. He averred that the remedy of Mandamus ought only to issue where a public body has refused, neglected, or failed to perform a statutory duty, which is not the case herein as they were actively engaged in settling the decretal amount.

**[10]** In the 1<sup>st</sup> respondent's view, granting the orders sought at this stage would unnecessarily prejudice ongoing negotiations and defeat the parties' mutual intention to conclude the matter amicably and expeditiously. He therefore posited that it is only just and fair that the parties be allowed reasonable time to finalize the out-of-court settlement process, to which they are committed.

**[11]** Directions were given herein on 19<sup>th</sup> January 2026 for the disposal of the application by way of written submissions. There is no indication that the applicant complied as his submissions are not available in the e-filing portal. In their written submissions dated 25<sup>th</sup> March 2026, the respondents contended that the judicial review Order of Mandamus was prematurely sought and reeks of ill motive, the same having been brought notwithstanding the respondents' clear acknowledgment of the decretal obligation and ongoing steps toward settlement. They also submitted that the application does not meet the legal threshold required for the grant of the remedy of Mandamus, and therefore that the Court's coercive jurisdiction has been invoked unnecessarily and without justification.

**[12]** Accordingly, the respondents proposed the following issues for determination:

**[a]** Whether the legal threshold for issuance of an order of Mandamus has been satisfied.

**[b]** Whether Mandamus can issue where payment arrangements exist and compliance has commenced.

**[c]** Whether the application is premature and intended to unjustly inconvenience a public body acting in good faith.

**[13]** The respondents submitted that the applicant's quest for an Order of Mandamus is not only legally unfounded but also premature and unnecessary in the circumstances of this matter. They argued that judicial review remedies are discretionary and equitable in nature, and therefore the applicant was under obligation to demonstrate circumstances that warrant the exercise of such extraordinary jurisdiction. They added that, in the present case, the evidence placed before the Court shows that they have neither refused nor neglected to comply with the decree. In their submission, they have consistently demonstrated willingness, good faith, and active steps toward settlement of the decretal amount; and therefore that the coercive remedy of Mandamus is unwarranted.

**[14]** The respondents made reference to the law governing the issuance of an order of Mandamus as provided for under **Article 47** of the Constitution, **Sections 8 and 9** of the Law Reform Act and the Fair Administrative Action Act, 2015 and submitted that although these provisions empower the Court to issue orders compelling public authorities to perform duties imposed upon them by law, the remedy is not to be granted automatically upon request. In their submission the applicant was required to show

that the duties have been unlawfully withheld by deliberate refusal to act or by neglect.

**[15]** Reliance was placed by the respondents on **Kenya National Examination Council v Republic; GGN & 9 others** (Ex parte) (Civil Appeal 266 of 1996) [1997] KECA 58 (KLR) (21 March 1997) (Judgment), **Republic v Attorney General & Another ex parte James Alfred Koroso** [2013] KEHC 90 (KLR) and **Republic v County Secretary Nairobi City County & Another ex parte Wachira Nderitu Ngugi & Co. Advocates** [2016] KEHC 7682 (KLR) to buttress their argument that Mandamus serves to remedy refusal, not to supervise administrative processes or to accelerate performance where compliance has already commenced.

**[16]** The respondents also urged the Court to take into consideration that public entities cannot disburse funds arbitrarily; and that payments must be processed through established administrative channels and in accordance with public finance procedures. They further pointed out that, owing to existing financial and budgetary constraints attendant to public administration, it has not been feasible to settle the entire decretal sum in a single lump-sum payment. They submitted that it is for this reason that they acted in good faith and with full acknowledgment of the decretal obligation by reaching out to the applicant for an amicable settlement whereby the decretal sum would be liquidated through structured part payments. They asserted that this approach was neither evasive nor dilatory, but

was necessitated by practical financial realities governing public expenditure and was communicated transparently through correspondences annexed to the Replying Affidavit.

**[17]** Hence, the respondents urged the Court to allow the ongoing payment process to progress to completion rather than impose coercive orders where compliance has already begun. They prayed for the dismissal of the application to enable the parties settle the matter in accordance with the administrative processes already commenced.

**[18]** I have given careful consideration to the application dated 6<sup>th</sup> January 2026 together with the affidavits filed in respect thereof. I have similarly taken into account the written submissions filed by learned counsel for the parties. Needless to say that Mandamus is a relief available to litigants under **Article 23(3)(f)** of the **Constitution** and **Order 53** of the **Civil Procedure Rules**. Its scope was well explicated in **Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 1** thus:

**"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual..."**

**[19]** The remedy is particularly efficacious in situations where a decree or a Certificate of Costs has been issued against the Government. This was well-explicated by **Hon. Githua, J.** in

**Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security, Ex Parte Fredrick Manoah Egunza (supra) thus:**

“Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree 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 and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act.

[20] Nevertheless, an elaborate procedure has been set out, not only under **Section 21** of the **Government Proceedings Act**, but also under **Order 29 Rule 3** of the **Civil Procedure Rules** for compliance before an order of Mandamus can issue. For instance, **Section 21** of the **Government Proceedings Act**, 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.”

[21] 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.”

[22] That the aforestated 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.”

[23] 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 Mwandishi, supra)

**[24]** In the instant application, there is no dispute that the applicant has a decree in his favour against the 3<sup>rd</sup> respondent in the sum of Kshs. 450,000/=; or that the said amount is yet to be paid. Additionally, the applicant has presented documentary evidence to demonstrate that, before filing the substantive application, he applied for and obtained leave of the Court in compliance with **Sections 8 and 9** of the Law Reform Act as well as **Order 53 Rule 1** of the Civil Procedure Rules.

**[25]** The applicant also applied for and obtained a Certificate of Order against the Government as required by **Section 21(1)** of the Government Proceedings Act and there is no dispute that the same was served on the respondents. Although the 1<sup>st</sup> respondent averred, at paragraph 8 of the Replying Affidavit that a deposit had been made of Kshs. 500,000/=, the sum due herein is yet to be paid. Indeed, what is manifest from the respondent’s

attachment marked Annexure “OHD-1” is that a Payment Voucher has been raised for Kshs. 500,000/=. There is however no indication that the same has been processed or paid in satisfaction of the Decree herein.

**[26]** Further to the foregoing, **Ochieng Hannington Day**, the affiant in respect of the respondent’s Replying Affidavit, expressly averred that he is the Clerk of the 3<sup>rd</sup> respondent. He is therefore the accounting officer for purposes of **Section 21** of the Government Proceedings Act whose duty it is to ensure the payment of decrees passed against the 3<sup>rd</sup> respondent.

**[27]** In the premises, the applicant has demonstrated compliance with the applicable law governing the payment of debts by the County Government. Consequently, the only issue for determination is whether justification has been shown for the issuance of the Order of Mandamus.

**[28]** In **Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another** [2018] eKLR, **Hon. Mativo, J.** (as he then was) aptly set out the pre-requisites to be satisfied in such cases and 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),<sup>[23]</sup> and, was also discussed in Dragan vs. Canada (Minister of Citizenship and Immigration).<sup>[24]</sup> 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.**

**[29]** In this instance, the respondents averred that they have at all material times demonstrated willingness and commitment to settle the decretal sum amicably; that they have engaged the applicant in a series of correspondences and engagements with a view of an out of court settlement. Among the documents annexed to the respondents' Replying Affidavit is a copy of a letter from the applicant dated 11<sup>th</sup> February 2026 by which he affirmed the negotiations and invited the 3<sup>rd</sup> respondent to:

**"...respond with an amicable way forward as indicated in your email including a structured payment plan if immediate payment is not feasible..."**

**[30]** In the circumstances, it cannot be said that there has been a deliberate refusal to pay on the part of the respondents. Moreover, the applicant's own documents go to show that the Certificate of Order Against the Government was issued on 23<sup>rd</sup> September 2025 and that his demand for payment was sent on 29<sup>th</sup> September 2025. Again, it can hardly be said that there was unreasonable delay to warrant the commencement of the judicial review proceedings by 3<sup>rd</sup> December 2025 as was done herein.

**[31]** In the premises, it is my finding that the applicant failed to demonstrate that the respondents have had sufficient time to pay

and have refused or neglected to satisfy the decree the subject of this suit. Indeed, in **Kenya National Examination Council v Republic; GGN & 9 others** (supra) it was held:

24. The next issue we must deal with is this: What is the scope and efficacy of an Order of Mandamus? Once again we turn to Halsbury's Law of England, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says:-

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

25. What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed...”

**[32]** Similarly, in **Republic v Attorney General & Another ex parte James Alfred Koroso** (supra), it was held that:

“19. ...the institution of judicial review proceedings in the nature of mandamus cannot be equated with execution proceedings. In seeking an order for 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 cast upon him by Parliament...”

**[33]** In the result, it is manifest that no justification has been shown for the issuance of an Order of Mandamus, granted the demonstration by the respondents that they are willing and ready to satisfy the Decree herein and have commenced the payment process. Accordingly, it is my finding that the applicant's Notice of Motion dated 6<sup>th</sup> January 2026 has been filed prematurely. The same is hereby struck out with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY  
OF APRIL, 2026**

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