



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Attorney General & another (Judicial Review E008 of 2020)
[2025] KEELRC 230 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 230 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW E008 OF 2020
MN NDUMA, J
JANUARY 30, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF DEFENCE 2ND RESPONDENT

JUDGMENT

1. Serving before court is a notice of motion application dated 25th December 2020 seeking orders of mandamus to compel the 2nd Respondent to pay a sum of six hundred and ninety-six million nine hundred and thirty-three thousand eight hundred and eighty-five shillings (696,933,885.00) plus costs and interest from 1st April 2016 until payment in full emanating from judgement in ELRC Cause No. 2212 of 2012.
2. The applicant states that the application was served on the Respondents and they filed a replying affidavit sworn to on 7/7/2013.
3. The Exparte Applicants states that judgment was entered in ELRC Cause No. 2212 of 2012 Samuel Gitau Chege and 283 others versus The Hon. Attorney General in the sum of Kshs. 696,933,885.00 plus costs and interest as from 15/4/2016 till payment in full. A certificate of order against the Government dated 10/8/2020 was issued and the amount awarded inclusive of interest was Kshs. 1,077,091.98.
4. That the 2nd Respondent the Principal Secretary in the Ministry of Defence was aware of the said orders issued having been duly served with the same through the office of the Attorney General.
5. That judgement was appealed against by the Respondent in Civil Appeal No. E093 of 2023 which was subsequently dismissed on 24/11/2023.



6. That the outstanding figure inclusive of costs and interest as of 24/11/2023 was Kshs. 1,362,841,770.00 (one billion three hundred and sixty-two million, eight hundred and forty-one thousand seven hundred and seventy Kenya shillings).
7. The Exparte Applicants state that vide their advocates on record have on numerous times requested payment from the Respondents herein but none was forthcoming prompting this action.
8. The Exparte Applicants posit that the Respondents have frustrated the Exparte Applicants from obtaining the fruits of their judgment.
9. The Applicant has submitted that the only way to compel payment of the decretal sum is through an order of mandamus against the 2nd Respondent.

The Applicants seek costs of the application.

10. The Respondents raise a preliminary objection that the current application is time barred and is ripe for dismissal by dint of section 9(1) of the [Law Reform Act](#), Cap 26 of the Laws of Kenya, as read with section 9(2) which states that the rules of court made under subsections may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months from the date the cause of action arose. That the Exparte Applicants have not sought the leave of the court to enlarge time within which to commence the instant proceedings against the Respondents.
11. The Respondents state that the cause of action arose on 15/4/2016 when the judgment in Nairobi ELRC Cause 2212 of 2012 between Samuel Gitau Chege and 283 others versus Attorney General was delivered.
12. That nothing barred the Applicants from instituting the instant proceedings in the four years since the cause of action arose and the Exparte Applicants have not demonstrated or illustrated in the pleadings any hardship they may have encountered in filing the application outside the prescribed statutory period or sought leave of court to file the instant application out of time.
13. The Respondent relies on the decision in *Raila Odinga and 6 others versus Nairobi City Council Nairobi HCC No. 899 of 1993 (1990-94) EA 482* where the court held:

“...order 53 contains the procedural rules made in pursuance of section (1) of the [Law Reform Act](#) section 9(2) of the Act states that the rules made under subsection (1) may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such shorter period as may be prescribed. Thus, it will be seen that on one hand section 9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed the rules. On the other hand, order 53 rule 2(1) which is a procedural rule made under that very section says that the court may for good reason extend the period of six months. The rules of court made under the Act cannot defeat or override the clear provisions of section 9(2) of the Act. An Act of Parliament cannot be amended by subsidiary legislation. The parliament in its wisdom has imposed this absolute period of six months and it is the parliament alone which can amend it. The court’s duty is to give effect to the law as it exists. Thus, that part of Order 53 Rule 7 as amended by [Legal Notice No.164 of 1997](#) which reads “unless the High Court considers that there is good reason for extending the period within which the application shall be made” is ultra vires section 9(2) of the Act. Thus, an application for Judicial review, may it be for an order of mandamus, prohibition



or certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose...”

14. The Respondents prays that the application be dismissed by the court for want of jurisdiction since to entertain the same as was stated by the Court of Appeal in Civil Appeal No. 103 of 2016 Jamal Salim versus Yusuf Abdullahi Abdi and another [2018] eKLR is not tenable as follows:

“Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of parties.”

15. The Respondent further relies on Supreme Court decision in Samuel Kamau Macharia and another versus Kenya Commercial Bank Limited and others [2012] eKLR where the court stated: -

“...A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law...”

Determination

16. The court has considered the decision in *Republic versus The Attorney General and another exparte James Alfred Kosono [MISC. Application JR. No. 44 of 2012]* where judge G. V. Odunga in similar application stated:

“...in the present case the Exparte Applicant has no other option of realizing the fruits of his judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that he has been awarded is realized. Unless something is done, he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current constitutional dispensation in light of the provisions of Article 48 of *the Constitution* which enjoins the state to ensure access to justice for all persons. Access to justice cannot be said to have ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a court of competent jurisdiction is, in my view unacceptable in a democratic society. Public officers must remember that under Article 129 of *the Constitution* executive authority derives from the people of Kenya and is to be exercised in accordance with *the Constitution* in a manner capable with the principle of service to the people of Kenya, and for their wellbeing and benefit...The institution of judicial review proceedings in the



nature of mandamus cannot be equated with execution proceedings. In seeking an order of 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 ad duty cast upon him by parliament. The fact that the accounting officer is not distinct from the state of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In mandamus cases it is recognized that when statutory duty is cast upon a public officer in his official capacity and the duty is owed not to the state but to the public any person having a sufficient legal interest in the performance of the duty may apply to the courts for an order of mandamus to enforce it. In other words, mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the state, the republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of mandamus, his/her action amounts to insubordination and contempt of court hence and action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the court’s displeasure at the failure by a servant of the state to comply with the directive of the court given at the instance of the republic, the employer of the concerned public officer and to uphold the dignity and authority of the court.”

17. Further, the court has considered the case of Canadian Metal Co. Ltd versus Canadian Broadcasting Corporation (No. 2) [1975] 48 D.L.R (30) where the court stated:

“To allow court orders to be disobeyed would be to tread the road towards anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the court grant to correct... wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into destruction of our society.”

18. The court has noted that the decision of ELRC delivered on 15/4/2016 was timeously appealed against by the Respondents in the Court of Appeal in Civil Appeal No. E093 of 2023, which appeal was subsequently dismissed on 24th November 2023.
19. The Exparte Applicants have deposed that they have through their advocates on record wrote numerous times requesting payment from the Respondents herein but none was forthcoming prior to filing of this exparte application dated 20th July 2024.
20. The judgment of the Court of Appeal is valid and the Respondents are obliged to make good the judgment by paying in full the decretal amount set out in the ELRC judgment and the Court of Appeal.
21. As stated in the supplementary affidavit of the Exparte Applicants dated 14/12/2023, the Respondents have not applied for stay of execution of the judgment of the Court of Appeal delivered on 24th November 2023.



22. That the Applicants followed the provisions of the Civil Procedure Act to obtain the decree and certificate of costs within the time frame provided in the Act and obtained approval of the draft order of the Court of Appeal.
23. It is the court's considered finding that a judgment of the court remains valid and ready for execution for the period it is prescribed to be valid by law from date of delivery. That provided the judgment of the court is valid, it is and remains ripe for execution in the manner permissible by law and in the case of Government by an application for mandamus as in this matter.
24. Time within which the judgment of the court may be executed does not run and expire provided the judgement remains valid and ready for execution.
25. Indeed, this application for the execution of the judgment of the Court of Appeal delivered on 24/11/2023 was timeously filed within the period of validity of the judgment and the question of limitation of time as posited by the Respondents does not arise at all in respect of a valid judgment of the court. There is no cause of action strictu sensu for the plea of time bar to be raised in the manner done by the respondents herein.
26. Accordingly, the legal objection on the jurisdiction of the court to hear and determine this application is misconceived and lacks merit.
27. The Exparte Applicants are within their right to move the present application so as to enjoy the fruits of their judgment after waiting for many years for their case to be heard and determined.
28. Accordingly, the application is granted and the court issues the following orders as against the 1st and 2nd Respondents:
 1. That an order of mandamus be and is hereby issued to compel the Principal Secretary in the Ministry of Interior and Coordination of National Government to pay Exparte Applicants a sum of six hundred and ninety-six million, nine hundred and thirty three thousand, eight hundred and eighty five Kenyan shillings [Kshs. 696, 933,885.00) plus costs and interest thereon at court rates (12% p.a.) from the 15th April 2016, the date of the award, to the date of payment in full, the sum being the decretal sum arising out of Nairobi Milimani ELRC 2212 of 2012.
 2. That the respondents to meet the costs of the application.

DATED AT NAIROBI THIS 30TH DAY OF JANUARY 2025

MATHEWS NDUMA

JUDGE

Appearance:

Mr. Kune for Exparte Applicant

Ms. Nyonje for Respondents

Mr. Kemboi – Court Assistant

