



Ondieki v Kisii County Assembly Service Board & 2 others (Judicial Review E027 of 2024) [2025] KEELRC 511 (KLR) (25 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 511 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E027 OF 2024
JK GAKERI, J
FEBRUARY 25, 2025**

BETWEEN

SAMUEL KEROSI ONDIEKI APPLICANT

AND

KISII COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT

CLERK, KISII COUNTY ASSEMBLY 2ND RESPONDENT

KISII COUNTY GOVERNMENT 3RD RESPONDENT

RULING

1. Before the court for determination is the Ex Parte applicant’s Notice of Motion dated 12th September, 2024 filed under Certificate of Urgency seeking Orders that: -
 1. An order of mandamus to issue against the respondents herein namely; Kisii County Assembly Service Board, Clerk Kisii County Assembly to compel them to pay out of the Decretal sum of Kshs.8,529,030 only being Kisumu ELRC No. 87 of 2019 judgment delivered on 15th February, 2023.
 2. The court be pleased to set timelines and/or duration within which the respondents will settle the Decretal sum with interest till payment.
 3. The applicant be at liberty to apply for all necessary and/or consequential Orders that the court may deem fit and just to grant.
 4. Costs of the application be provided for.
2. The Chamber Summon is expressed under Order 53 Rule 1(2) of the Civil Procedure Rules and is based on the grounds set forth on its face, statement of the facts and a Verifying Affidavit by the applicant sworn on 31st July, 2024. The affiant deposes disposes that he is the claimant in Kisumu



ELRC No. 87 of 2019 and served the decree on the Clerk County Assembly Kisii on 7th May, 2024 and receipt was acknowledged but despite several calls no payment has been made hence the need for an Order of mandamus and it is in the interest of justice that the application be allowed.

Respondent's case

3. By a Replying Affidavit sworn by Nyaega Brenda Moraa on 13th December, 2024, the affiant deposes that the application has been overtaken by events as the gratuity claimed had already been paid together with the decretal amount owing and the application lacked merit.

Applicant's submissions

4. The applicant grounds his case on the provisions of Section 21(1) and (3) of the Government Proceedings Act and Article 10 of the Constitution on national values and principles of governance.
5. On the appropriateness of an Order of mandamus, the claimant cites the sentiments of the court in Republic V National Examination Council Ex Parte Githengi & 8 Others Civil Appeal No. 234 of 1996 and the Halsburys Laws of England 4th Edition, Volume I at page 111 from paragraph 89 to urge that it was appropriate in the instant circumstances as the respondents have refused to honour a judgment leaving the applicant with no other option and the respondent is the Accounting Officer.
6. On prejudice to the respondent's, the applicant urges that the only way to realise the decree was by way of mandamus to compel the respondents to pay.
7. Reliance was made on Mucimi Mbaka & Co. Advocates V Town Clerk City Council of Nairobi [2012] eKLR on the essence of the Order of mandamus as were sentiments of the court in Republic V Town Clerk Kisumu Municipality Ex Parte East Africa Engineering Consultants [2007] eKLR and Republic V Permanent Secretary, Ministry of state for Provincial Administration & Internal Security Ex Parte Fredrick Manoah, to urge that internal government procedures cannot excuse non-compliance with court Orders and the respondent had no discretion but to pay the decretal sum.
8. Reliance was also made in Havi V Kenya Revenue Authority [2024] KEHC [2006] eKLR, Republic V Attorney General & Another Ex Parte Alfred Koroso [2013] eKLR and Shah V Attorney General (No.3) Kampala HMC No. 31 of 1969 [7970] ea 543.
9. As to whether it is in the interest of justice for the court decree mandamus, reliance was made on Republic V Kenya National Examination's Council ex parte Githengi & 8 Others (supra).
10. That the applicant stands to suffer prejudice if the Order is not granted.

Respondent's submissions

11. As to the purpose and scope of the Order of mandamus, the respondent cites the sentiments of Nyamweya J. (as she then was) in Republic V Jomo Kenyatta University of Agriculture and Technology Ex Parte Elija Kamau Mwangi [2021] eKLR.
12. According to the respondents the Notice of Motion singles out the 1st and 2nd respondents and no such distinction is made for other reliefs yet the judgment singles out the 1st respondent as the one to compute and pay the amount due to the applicant and mandamus cannot issue contrary to the provisions of the judgment and as such, it cannot issue against the 2nd and 3rd respondents but could issue if it has crystallized against the 1st respondent.
13. The respondents contend that mandamus is conditional upon computation of gratuity by the 1st respondent as directed by the court and the applicant had not averred that the respondent computed



the gratuity due or that the sum claimed was computed by the 1st respondent or inclusive of other heads and had not denied that the sum of Kshs.3,078m961.00 was paid under LAPFUND.

14. The respondents argue that mandamus has not crystallized nor is it due and cannot be decreed.

Analysis and determination

15. When the matter came up for directions on 5th August, 2024 the court granted the Ex Parte Applicant leave to file for Judicial Review within 30 days and the Ex Parte Applicant complied.
16. During the mentions on 12th August 2024 before the Deputy Registrar and 2nd October, 2024 before the court respectively, none of the parties attended court and it was not until 28th October, 2024 when counsels for the parties appeared in court.
17. Relatedly, the respondents took inordinately long to respond to the application.
18. It is common ground that the claimant sued the respondents and obtained judgment in his favour on 15th February, 2023.
19. From the judgment of Radido J. dated 15th February, 2023, it is discernible that the applicant served as the Speaker of the Kisii County Assembly from 2013 to September, 2017 when he allegedly resigned but did not avail a resignation letter and sued the respondents on 4th October, 2019.
20. In its judgment, the court awarded the applicant as follows: Travel reimbursement Kshs.109,082.00 NM-Practical allowance Kshs.540,000.00 1st respondent to compute and pay the claimant 31% gratuity based on his last basic salary. Costs awarded on half scale and was taxed at Kshs.133,556.00.
21. The singular issue for determination is whether the applicant's Notice of Motion dated 12th September, 2024 is merited.
22. Evidence on record reveals that the respondents were served via email on 18th June, 2024 and the instant suit was filed on 2nd August, 2024.
23. It is common ground that mandamus is one of the prerogative Orders or writs whose object is to facilitate performance of public a duty.
24. In the words of Pauline Nyamweya J (as she then was) in Republic V Jomo Kenyatta University of Agriculture & Technology Ex Parte Elijah Kamau Mwangi.

“The purpose of an order of mandamus is to compel the performance of a public duty or any act contrary to or evasive of the law. It therefore lies against a public officer when some specific act or thing, which the law requires to be done, has been omitted. The conditions for its grant are that it must be shown that the public officer has failed to perform his duty; the court will not grant mandamus where there is an alternative remedy available to the applicant; and that it may be refused if the enforcement of the order will pose implementation challenges that require the Court's supervision. See in this regard the decision in *Evanson Jidraph Kamau & Another vs. The Attorney General Mombasa H.C. Misc. Application No. 40 of 2000.*

25. It was further held in *Republic vs The Commissioner of Lands & Another Ex-Parte Kithinji Murugu M'agere, Nairobi High Court Misc. Application No. 395 of 2012* that mandamus is employed to enforce the performance of a public duty which is imperative, not optional or discretionary, with the



authority concerned. In addition, that mandamus may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has “a public element” which may take many forms...”

26. In Republic V Kenya National Examinations Council ex parte Gathengi & 9 Others [1997] eKLR, the Court of Appeal cited Halsbury’s Law of England 4th Edition Volume I at page 111 from paragraph 89 as follows

“The order must command no more than that 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.

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...”

27. The rendition of Mativo J (as he then was) in Republic V Principal Secretary Ministry of Internal Security & Another Ex Parte Schon Nooroni & Another [2018] eKLR are also instructive and in particular the core elements, such as existence of a public legal duty, owed to the applicant, clear right to performance of the duty, all conditions precedent satisfied and a prior demand for performance, reasonable time to comply with the demand express or implied refusal to honour the demand and, no other remedy is available among others.

28. Finally, the sentiments of Githua J in Republic V Permanent Secretary, Ministry of State for provincial Administration & Internal Security Ex Parte Fredrick Manoah (Supra) are worth rehashing thus:

“Unlike in other civil proceedings, where decrees for the payment of money or costs has 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](#). The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the [Government Proceedings Act](#) (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General...”

29. The court is in agreement with the foregoing sentiments.

30. In the instant case, the ex parte applicant prays for an Order of mandamus against the 1st and 2nd respondents for the sum of Kshs.8,529,030.00 as the decretal sum.

31. For unexplained reasons, the ex parte applicant has not shown how the sum of Kshs.8,529,030.00 was arrived at bearing in mind that the court only awarded a total sum of Kshs.649,082.00 as travel reimbursement and non-practice allowance and gratuity at 31% was to be computed by the 1st respondent based on the ex parte applicant’s basic salary which the court could not as no paylip was availed and therefore unclear to the court and as submitted by the respondent’s counsel, how the figure claimed was arrived at.



32. Regrettably, the ex parte applicant could have made this relatively easy by providing an itemised claim in the Notice of Motion but opted not to.
 33. A court of law is guided by the law and facts of the case and in this case the sum of Kshs.8,529,030.00 has not been elaborately accounted for and in particular, the sum claimed as gratuity.
 34. However, contrary to the respondents contention that a sum of Kshs.3,078,961.65 was paid, the same was not part of gratuity but pension as clearly shown by the documents attached to the Replying Affidavit as LAPFUND runs a contributory pension scheme.
 35. The court awarded gratuity by virtue of Gazette Notice No. 288 of 1st March, 2013 which provided for gratuity at 31% of basic salary for each year served for County State Officers.
 36. Although the applicant avers that he served the decree on 7th May, 2024, the same ought to have been accompanied by or followed up by a demand letter to pay the amount due and a subsequent follow up to demonstrate that the respondents have expressly or impliedly refused to pay even after being accorded reasonable time.
 37. The allegation that the applicant made calls to the Clerk of the County Assembly have not been substantiated by demonstrable evidence.
 38. Finally, and significantly, the court directed the 1st respondent to compute and pay gratuity at 31% of the applicant's basic salary as at the date of separation.
 39. Puzzlingly, the 1st respondent has not demonstrated or shown any inclination towards fulfilling its obligation as directed by the court.
 40. Balancing the interests of the parties and having regard to the absence of particulars as to how the sum of Kshs.8,529,030 was arrived at and the 1st respondents want of commitment to compute and pay gratuity, the court is persuaded that the Orders that commend themselves are:
 - a. the 1st respondent shall compute the applicant's gratuity as directed by the court in its Judgment delivered on 15th February, 2023 and file the same in court within 21 days from the date hereof for adoption, failing which;
 - b. an order of mandamus be and is hereby issued to compel the 1st respondent to pay the ex parte Applicant the sum of Kshs.8,529,030.00 being the decretal sum awarded to the ex parte Applicant in Kisumu ELRC No. 87 of 2019 together with the taxed costs of Kshs.133,550.00.
4. Since the application is only partially successful there shall be no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 25TH DAY OF FEBRUARY, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments



and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

