



REPUBLIC OF KENYA



KENYA LAW
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**Ayugi v Omondi & 2 others (Judicial Review E026 of 2024)
[2025] KEELRC 929 (KLR) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 929 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E026 OF 2024**

**JK GAKERI, J
MARCH 26, 2025**

BETWEEN

STEPHEN ONYANGO AYUGI APPLICANT

AND

INSPECTOR AGGREY OMONDI 1ST RESPONDENT

**CABINET SECRETARY INTERIOR AND COORDINATION OF NATIONAL
GOVERNMENT 2ND RESPONDENT**

STATE LAW OFFICE 3RD RESPONDENT

RULING

1. Before the court for determination is the applicant's Notice of Motion dated 16th August, 2024 filed under Certificate of Urgency seeking Orders that: -
 1. Spent.
 2. The court be pleased to grant an Order of mandamus compelling the 1st, 2nd, 3rd, and 4th respondents to comply with the Judgment of Justice Nduma Nderi dated 21st February, 2019 in ELRC Kisumu Petition No. 367 of 2017 Stephen Onyango Ayugi V Commissioner of Police, The Principal Secretary Internal Security and Others requiring them to pay Kshs.3,500,000.00.
 3. The court be pleased to grant an Order of mandamus compelling the 1st, 2nd, 3rd, and 4th respondents to comply with the judgment of Justice Nderi dated 21st February, 2019 in ELRC Kisumu Petition No. 367 of 2019 Stephen Onyango Ayugi V Commissioner of Police, The Permanent Secretary Internal Security and others requiring them to pay interest from date of judgment amounting to Kshs.2,641,166.70.
 4. The court be pleased to grant an Order of mandamus compelling the 1st, 2nd, 3rd and 4th Respondents to comply with the Judgment of Justice Nduma Nderi dated 21st February, 2019



in ELRC Kisumu Petition No. 367 of 2019 (Stephen Onyango Ayugi V Commissioner of Police, The Principal Secretary Internal Security and Others) requiring them to pay taxed costs at Kshs.616,535.00.

5. The court be pleased to grant an Order of mandamus compelling the 1st, 2nd, 3rd and 4th respondents to comply with the judgment of Justice Nduma Nderi dated 21st February, 2019 in ELRC Kisumu Petition No. 367 of 2019 (Stephen Onyango Ayugi V Commission of Police, The Principal Secretary Internal Security and Others) requiring them to pay interest on costs amounting to Kshs.302,102.15.
6. Costs of and incidental to this Application together with interest and any other Order the Honourable Court deems fit and just to grant in the circumstances.
2. The Notice of Motion is expressed under Order 53 Rule 1, 2 and 3 of the Civil Procedure Rules, *Law Reform Act*, Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual, High Court Practice and Procedure Rules 2006, Section 134 of the *County Governments Act* read with Section 129 of the *Public Finance Management Act* and is based on the grounds set out on its face and the Supporting Affidavit of Mr. Stephen Onyango Ayugi who deposes that the judgment by Justice Mathew Nduma Nderi awarded costs and interest and the bill was taxed at Kshs.616,535 and the Certificate of Order was served upon the Attorney General on 23rd November, 2022 but no payment had been made and the court authorized the filing of a motion for Judicial Review.
3. The affiant further deposes that the instant Application was made in good faith and without undue delay and ought to be allowed in the interest of justice.

Respondent's case

4. The respondents opposed the Application vide grounds of opposition dated 15th November, 2024.
5. The respondents' counsel posits that the instant application is premised on the mistaken belief that the respondents have declined to pay the decretal amount.
6. Counsel states that the process of payment was delayed by the absence of a certified copy of the judgment.
7. That although the decree, Certificate of Order and costs were served by the Applicant's Advocate the judgment was not.
8. Counsel avers that although he sought a copy of the Judgment vide letter dated 4th April, 2023 addressed to the Registrar and receipt was acknowledged on 5th April, 2023 a certified copy of Judgment was not issued and there was no follow up by either side until the instant application was made.
9. The respondents' advocate admits that the application herein is justifiable, the misconception notwithstanding.
10. To buttress the respondents' case, their advocate filed two letters dated 4th April, 2023 to the Deputy Registrar of the ELRC, Kisumu requesting for a Certified Copy of the Judgment and another dated 15th November, 2024, to the Solicitor General as a brief on the suit and the instant application.
11. When the matter came up for hearing on 24th October, 2024, only the applicants advocate was in court and the court adjourned the hearing, with consent of the advocate to accord the respondents time to salvage its case and hearing was slated for 12th November, 2024 when none of the parties was present in court but Mr. Mwamu appeared at 9:57am saying that he had diarised the matter for 13th



November and wrote to the court on the issue. The court record was clear on the hearing date fixed on 24th October, 2024.

12. Hearing was again slated for 19th November, 2024 when both counsels were present and Mr. Kanjo for the respondents requested time to follow up on the payment and a mention was slated for 21st January, 2025 by consent, when Mr. Kanjo asked for another mention on the ground that a letter on the issue was awaiting the signature of the solicitor General. Mr. Kanjo did not attend the mention on 25th February, 2025 and hearing of the Application was slated for 12th March, 2025 when owing to Mr. Kajos absence the file was placed aside at 9:21am for Mr. Mwamu to contact Mr. Kajo but reported that he was unsuccessful and hearing proceeded. Parties were accorded two (2) days to file and exchange submissions and ruling reserved for 26th March, 2025.

Applicants submissions

13. As to whether the 1st and 2nd respondents are under a public duty to satisfy the Orders of made in favour of the Ex Parte applicant, counsel underscored the requirements of an Order of mandamus and cited the decisions in *Evanson Jidraph Kamau & Another V Attorney General Mombasa HC Misc. App. No. 40 of 2000* and *Republic V Commissioner of Lands & Another Ex parte Peter Kithinji Murugu Magere HC Misc. App. No. 3957 of 2012* to urge that mandamus is issued for the performance of public duty which is imperative.
14. The sentiments of the court in *Republic V Kenya National Examination Council Ex Parte Gathenji & 9 Others [1997] eKLR* were also relied upon to urge that mandamus cannot issue where the statute leaves discretion as to the mode of performing the duty.
15. Reliance was also placed on the provisions of Section 21 of the *Government Proceedings Act* as were the decisions in *Republic V Principal Secretary, Ministry of Internal Security & Another Ex Parte Schon Noorani & Another [2018] eKLR* and *Republic V Attorney General & Another Ex Parte Stephen Wanyee Roki [2016] eKLR*.
16. As to whether the respondents were under are under a duty to pay the decretal sums, reliance was made on the sentiments of Githua J. in *Republic V Permanent Secretary Ministry of State for Provincial Administration & Internal Security [2012] eKLR* to urge that an of mandamus was the only way to enforce payments against the government.
17. Counsel submits that the decretal sum is undisputed by the respondent and the costs had neither been renewed nor set aside.
18. Counsel further submitted that the Certificate of Order was served on the Attorney General on 23rd November, 2023.
19. Reliance was also made on the decisions in *Republic V Town Clerk of Webuye County Council & Another HCCC 448 of 2006* and *Ibrahim Mungara Mwangi V Francis Ndegwas Mwangi [2014] eKLR*, to urge the court to grant the application.

Respondent's submissions

20. The respondents did not file submissions.
21. It is common ground that Mr. Stephen Onyango Ayugi sued the respondents in Kisumu ELRC No. 367 of 2017 and judgment was delivered on 21st February, 2019 in favour of the claimant as follows:
 - a. Kshs.120,750.00 as special damages against the 1st respondent.



- b. Kshs.3.5 million general damages against the 3rd, 4th and 5th respondent. Total award Kshs.3,627,500.00.
- c. Interest at court rates from date of judgment till payment in full.
- d. 1st, 3rd, 4th and 5th respondent to pay costs of the suit.

Costs were assessed at Kshs.616,535.00.

- 22. Strangely, the documents filed in this court do not have a 5th respondent.
- 23. It is unclear to the court why the claimant's advocate omitted the 1st respondent from the instant Application yet the trial court found it liable to pay special damages and costs.
- 24. A closer scrutiny of the Judgment reveals that the claimant sued 5 persons including the Attorney General and the 2nd respondent was not held culpable and no liability attached on him.
- 25. The instant application is misleading as to the respondent being referred to.
- 26. How could the Order of mandamus issue against the 2nd respondent Inspector Aggrey Omondi bearing in mind that the court did not find him liable?
- 27. The singular issue for determination is whether the Applicant's Notice of Motion dated 16th August, 2024 is merited.
- 28. From the documents filed by the respondents, it is discernible that no action was taken by the respondent's counsel after 4th April, 2023 until 15th November, 2024, more than 11/2 years, despite the fact that the applicant's counsel served the Certificate of Orders on 23rd November, 2022.
- 29. The respondent's advocate is blaming the absence of a certified copy of the Judgment for the inordinate delay yet the request for the same was made more than four (4) months after the Certificate of Order was served on the Attorney General.
- 30. Contrary to the respondent's assertion that the instant application is based on the mistaken belief that the respondents have declined to pay the decretal sum, the respondents have not shown any indication that they are indeed preparing to pay the sum as no proposals for payment have been made.
- 31. Significantly, counsel's brief to the Solicitor General was written almost four (4) months ago and there is no evidence to show that a letter has been written to the other respondents to shoulder their responsibility under the judgment dated 21st February, 2019.
- 32. The totality of the respondents Ground of Opposition dated 15th November, 2024 is that the respondents have neither disputed the sums claimed by the applicant nor refused to pay.
- 33. Finally, counsel for the respondent admitted that the application was justifiable.
- 34. As correctly submitted by the applicant's counsel, the Order of mandamus compels a party or parties to perform a public duty.
- 35. The rendition of Nyamweya J (as she then was) in Republic V Kenyatta University of Agriculture and Technology Ex Parte Elijah Kamau Mwangi [2021] eKLR are instructive thus:

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 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 an Order will pose implementation challenges that require the court's intervention. See in this regard the decision in *Evanson Jidraph Kamau & Another V Attorney General Mombasa HC Misc. Application No. 40 of 2000*.

It was further held in *Republic V The Commissioner of Lands and Another Ex Parte Kithinji Murugu M'agere Nairobi High Court M/s Application No. 395 of 2012* that mandamus is employed to enforce the performance of a public duty which is imperative but not optional or discretionary with 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 any forms..."

36. See in this regard the sentiments of the Court of Appeal in *Republic V Kenya National Examinations Council Ex Parte Gathenji & 9 Others (Supra)*, citing Halbury's Laws of England 4th Edition Volume I at page 111 from paragraph 80.
37. Similarly, in *Republic V Principal Secretary Ministry of Internal Security & Another Ex Parte Schon Noorani & Another (Supra)* Mativo J (as he then was) itemised the elements of mandamus 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, no other remedy is available among others.
38. Section 21 of the *Government Proceedings Act* provides:
 - (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.
 - (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.

39. The foregoing provisions provide a road map on how money payable by the Government or a Government department is recoverable by the person entitled to it and there is no other method of enforcement against the Government or Government department for money decrees.
40. The foregoing is fortified by the sentiments of Githua J in Republic V Permanent Secretary Ministry of State for Provincial Administration and Internal Security Ex Parte Fredrick Manoah as follows:

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...”

The court is in agreement with these sentiments.

41. In the instant application, the applicant’s counsel submitted that the provisions of Section 21 of the [Government Proceedings Act](#) were complied with as the Certificate of Order was issued by the court and submitted to the Attorney General and costs were taxed.
42. In other words, the applicant has complied with the requisite provisions of law and has been awaiting compliance by the respondents and as adverted to elsewhere in this Judgment, although counsel for the respondents stated that they had not declined to pay, he did not provide cogent evidence to demonstrate what the respondents have been doing in furtherance of the process since 23rd November, 2022 when the Certificate of Order was served upon the Attorney General.
43. The argument that it took long to secure a certified copy of the Judgment cannot avail the respondents.
44. In the Canadian case of Apotex Inc V Canadian Attorney General [1993] Can LII 3004(F.C.A), [1994] I.F.C 742 (CA) cited by Mativo J. (as he then was) in Republic V Principal Secretary, Ministry of Internal Security & Another Ex Parte Schon Noorani & Another (Supra) the court stated that one of the eight essential elements for mandamus to issue is “An express refusal, or an implied refusal through unreasonable delay”.
45. In this case the respondents delay since November 2022 cannot, in the court’s view qualify as reasonable.
46. Finally, it is common ground that the Order is mandamus is of an equitable nature and thus discretionary.
47. The court is enjoined to consider all the relevant circumstances and the law and determine whether it is the most efficacious relief in the circumstances.



48. In this regard, see the sentiments of Mativo J. (as he then was) in Republic V Principal Secretary, Ministry of Internal Security & Another Ex Parte Schon Noorani & Another (Supra).
49. For the foregoing reasons, the court is satisfied that the applicant has demonstrated on a preponderance of probabilities that the respondents have failed to perform a public duty. The court is satisfied that the applicant's application dated 16th August, 2024 is merited and is allowed in the following terms:
- a. An Order of mandamus be and is hereby issued directed to the 3rd, 4th and 5th respondents to pay the sum of Kshs.3,500,000.00 ordered by Nduma Nderi J. in Kisumu ELRC Petition No. 367 of 2017 in Stephen Ayugi V National Housing Corporation and 4 Others.
 - b. An order of mandamus be and is hereby issued directed to the 1st, 3rd, 4th and 5th respondents to pay to the Applicant the sum of Kshs.2,641,166.70 being interest accrued from the date of Judgment in Kisumu ELRC Petition No. 367 of 2017, Stephen Ayugi V National Housing Corporation & 4 Others.
 - c. An Order of mandamus be and is hereby issued directed to the 1st, 3rd, 4th and 5th respondents to pay to the Applicant the sum of Kshs.616,535 being costs of the suit in Kisumu ELRC Petition No. 367 of 2017 Stephen Ayugi V National Housing Corporation & 4 Others.
 - d. The 1st, 3rd, 4th and 5th respondents shall bear the costs of this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 26TH DAY OF MARCH, 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

