



Adul & 49 others v Clerk, County Assembly of Kisumu & 2 others (Judicial Review E035 of 2024) [2025] KEELRC 1473 (KLR) (19 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1473 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E035 OF 2024**

JK GAKERI, J

MAY 19, 2025

BETWEEN

ANNE ATIENO ADUL & 49 OTHERS & 49 OTHERS & 49 OTHERS APPLICANT

AND

CLERK, COUNTY ASSEMBLY OF KISUMU 1ST RESPONDENT

KISUMU COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT

LOCAL AUTHORITY FUND (LAPF) 3RD RESPONDENT

RULING

1. Before the court for determination is the Applicant’s Notice of Motion dated 18th March, 2025 seeking orders that: -
 1. An Order of Judicial Review in the nature of mandamus be issued against the respondents compelling them to pay the ex parte applicant the sum of Kshs.338,783.00 being the certified costs in Kisumu ELRC CAUSE NO. 382”A” of 2018 and interest at 14% per annum from 24th April, 2024 until payment in full.
 2. Costs of this application be provided.
2. The Notice of Motion is expressed under Rule 7(1) and (2) of the Employment and Labour Relations Court (Procedure) Rules, 2024 and Order 53 Rule 3 and 4 of the Civil Procedure Rules and is based on the grounds set out on its face and the Supporting Affidavit of Agnes Akinyi Advocate sworn on 18th March, 2025.
3. The affiant deposes that her firm was instructed to file a suit against the respondents on 3rd December, 2018 and secured a consent Judgment against the respondent on 4th December, 2019 and the party and



party Bill of costs was taxed on 24th April, 2024 at Kshs.338,783.00 and a certificate of taxation issued on 2nd May, 2024 and the respondent was aware of the taxation and was present on the date of taxation.

4. The affiant further deposes that the respondent has without justification been reluctant to make payment and as a public entity it is under a constitutional and legal duty to comply with the law and orders of the court.

Response

5. By a Replying Affidavit sworn by Owen Eliud Ojuok, on 2nd April, 2025, the affiant deposes that the instant application is defective in law and contravenes Order 53 of the Civil Procedure Rules as it fails to disclose the identities of the applicants in violation of law and prejudices the respondent's ability to respond adequately.
6. The affiant further deposes that the application lacks a verifying affidavit to demonstrate the absence of any other concurrent suit nor has such an affidavit been executed by the applicants and the affidavit provided by the applicant's advocate was procedurally inappropriate and consequently, the application is premature, legally deficient and in contravention of law.

Applicants submissions

7. As to whether the substantive motion is merited, the applicant's counsel submitted that it was and cited the sentiments of the court in Republic V Kenya National Examinations Council ex parte Gathenji and 9 others [1997] eKLR on the Order of mandamus and its requirements as highlighted in Republic V Principal Secretary Ministry of Internal Security and another ex parte School Noorani [2018] eKLR to urge that the instant application had satisfied all conditions namely (i) prior demand for performance (ii) reasonable time to comply with the demand unless outrightly refused (iii) express refusal or an implied refusal through unreasonable delay (iv) no other remedy is available to the applicants (v) order 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.
8. As to whether the respondents are under a public duty to satisfy the decree in favour of the ex parte applicant, counsel cited the provisions of Section 24 of the *Government Proceedings Act* to urge that the 2nd respondent, the Kisumu County Assembly Service Board created by Section 12 of the *County Governments Act* was recognized as a distinct level of government, and relied on the sentiments of Odunga J (as he then was) in Republic V Attorney General & another ex parte Stephen Wanyee Roki [2016] eKLR to urge that the respondents are under an obligation to satisfy the decree.
9. Finally, as to whether the respondents were duly bound to pay the decretal sum, reliance was placed on the sentiments of the court in Republic V Town Clerk of Webuye County Council & another HCCC 448 of 2006, to urge a decree holder is entitled to enjoy the fruits of his judgment.

Respondent's submissions

10. As to whether the application is merited, counsel argued that it was not as it was legally deficient and contravened legislative provisions as it omits the identities of the 49 applicants, absence of a Verifying Affidavit as provided by Order 53 Rule (1)(2)(b) of the Civil Procedure Rules 2010, a foundational document and cited the decision in Ibrahim & another V GD C Saving and Co-operative Society Ltd [2022] KEHC 14643 (KLR) where the absence of a Verifying Affidavit was deemed to render a suit incurably defective.



Analysis and determination

11. It is common ground that the ex parte applicants sought leave to apply for an Order of Judicial Review in the nature of mandamus vide Chamber Summons application dated 16th October, 2024 filed under certificate of urgency. The 1st and 2nd respondent filed Notice of Preliminary Objection which was canvassed by way of written submissions and dismissed vide ruling delivered on 5th December, 2024, and by a ruling delivered on 17th January, 2025, the court granted the ex parte applicant's leave to file a motion for judicial Review Orders, and the same was filed on 19th March, 2025 more than 2 months after leave had been granted and contrary to the provisions of Order 53 Rule 3(1) of the Civil Procedure Rules, 2010.
12. Strangely, the 1st and 2nd respondents cited the absence of Verifying Affidavit, prematurity of the suit and absence of identities of the ex parte applicants as its response urging that the provisions of Order 53 of the Civil Procedure Rules were not complied with.
13. The ex parte applicant's Chamber Summons seeking leave had a statement of facts and a Verifying Affidavit sworn by Agnes Akinyi Advocate.
14. In its Ruling on the grant of leave, dated 17th January 2025, the court examined the provisions of Order 53 Rule 1 and 2 in the context of decided cases and in particular the sentiments of Kasango J in Ahmed Eddle Ibrahim and another V GDC Saving and Co-operative Society Ltd (Supra) cited by the 1st and 2nd respondent's counsel where the learned Judge found that the absence of authority for a director to swear a verifying affidavit was not fatal to the claim.
15. Further, the court relied on the more elaborate rendition of Ringera J in Microsoft Corporation V Mitsumi Computer Garage Ltd & another [2001] eKLR, that:

“Rules of procedure are the hand maidens and not the mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances, the Court should rise to its higher calling to do justice by saving the proceedings in issue. In the matter at hand I am of the view that the error manifest in the verifying affidavit neither goes to the jurisdiction of the Court nor prejudices the defendants in any fundamental respect. Indeed, no prejudice has been alleged”.
16. As found in that ruling, the sentiments of Ringera J apply on all fours to the circumstance of the instant Notice of Motion.
17. Contrary to the 1st and 2nd respondent's averment that the absence of identities of the applicants prejudices their ability to respond adequately, the two respondents were named as the principal respondents in the statement of claim and were represented by counsel and agreed that the suit be withdrawn and were both liable to make good the sum of Kshs.13,719,887.00 and because costs were not agreed upon but taxed, both respondents are liable.
18. It is trite law that the purpose of an Order of mandamus is to compel the performance of a public duty.



19. In Republic V Jomo Kenyatta University of Agriculture and Technology ex parte Elijah Kamau Mwangi [2021] eKLR Nyamweya J (as she then was) stated:
- “The purpose 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 Jidiraph Kamau & Another V The Attorney General Mombasa H.C. Misc. Application No. 40 of 2000.
20. 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 any forms...”
21. See Republic V Kenya National Examinations Council ex parte Gathenji and 9 Others (supra) citing Halburys Laws of England 4th Edition Volume I at page 111 from paragraph 89, Republic V Principal Secretary Ministry of Internal Security & another ex parte Schon Noorani and another [2015] eKLR, Mativo J (as he then was) on the elements of mandamus.
22. This case turns on whether the appellants have fulfilled all requirements of mandamus for the Order to issue.
23. Interestingly, although the applicant’s counsel rehashed the provisions of Section 21 in her submissions, it was not submitted that the provisions had complied with, other than urging that the 1st and 2nd respondents were under an obligation to satisfy the decree in Kisumu ELRC Cause No. 382 ‘A’ of 2018.
24. It is trite law that County Governments are a creation of the Constitution of Kenya and each County in Kenya has a Government and such a Government is a body corporate with perpetual succession with power to discharge its functions as ordained by the Constitution of Kenya and the County Governments Act and has capacity to contract, acquire, purchase or lease land and sue or be sued as exemplified by myriads of cases.
25. Instructively, since the Government Proceedings Act predates the Constitution of Kenya, 2010, which ushered in the new dispensation of two levels of Government, it applies to both the National and County Governments in proceedings and in particular, for purposes of this suit, satisfaction of orders against the Government.
26. The provisions of Section 21(5) of the Government Proceedings Act are unambiguous on the application of 21 to County Governments.
27. 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.
 5. 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.
28. The provisions of Section 21 of the [Government Proceedings Act](#) provides for an essential procedural requirement in the enforcement of awards and cost against the National and County Governments and there are no other mechanisms of enforcement against the Government, County Government or Government Department.
29. 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 [2012] eKLR as follows:

Unlike 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.



30. The court is in agreement with these sentiments.
31. In the instant application, and as adverted to elsewhere, in this ruling, although the applicant's counsel reproduced the provisions of Section 21 of the [Government Proceedings Act](#) in her submissions, neither the grounds set out on the face of the Notice of Motion dated 18th March, 2025 nor the Supporting Affidavit sworn on even date demonstrate that the provisions of Section 21 of the [Government Proceedings Act](#) had been complied with.
32. Under Order 29 Rule 3 of the Civil Procedure Rules, the party seeking to enforce an order against the Government must make an application to the registrar or the court, in the case of a subordinate court, to secure the certificate, which is in a prescribed form (Appendix A No. 23).
33. The applicants tendered no evidence of having obtained the Certificate of Order for costs Against the Government or having served a copy on the County Attorney or any other person on behalf of the respondents.
34. Put in the alternative, whereas the applicants furnished a copy of the Certificate of Taxation dated 2nd May, 2024, they did not avail a copy of the Certificate of Order for costs Against the Government issued under Section 21(1) of the [Government Proceedings Act](#) without which the applicants cannot levy execution or other process of such nature for enforcing payment by the Government of the amount claimed herein.
35. From the foregoing, it is discernible that the instant application is bereft of merit on account of non-compliance with the provisions of Section 21 of the [Government Proceedings Act](#).
36. In the court's view a decree of the Order of mandamus at this stage would amount to an exercise in futility for want of the Certificate of Order for costs Against the Government.
37. The Notice of Motion dated 18th March, 2025 is dismissed with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 19TH DAY OF MAY, 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

