



**Republic v Director of Finance, Teachers Service Commission;
Mutiso (Ex parte Applicant) (Judicial Review Application
E029 of 2025) [2025] KEELRC 2254 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2254 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION E029 OF 2025**

**B ONGAYA, J
JULY 29, 2025**

**IN THE MATTER OF ARTICLES 47, 165, & 159 OF THE CONSTITUTION OF KENYA, 2010
AND**

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

-AND-

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

-AND-

**IN THE MATTER OF ENFORCEMENT OF JUDGMENT
AND DECREE IN ELRC CAUSE NO. 570 OF 2019**

BETWEEN

REPUBLIC APPLICANT

AND

**DIRECTOR OF FINANCE, TEACHERS SERVICE
COMMISSION RESPONDENT**

AND

VICTOR SAMMY MUTISO EX PARTE APPLICANT

JUDGMENT

1. The ex-parte applicant filed the notice of motion dated 23.05.2025 through Mbaluka & Company Advocates, pursuant to leave granted by this Court on 19.05.2025, and under Articles 10, 22, 23, 47,



48 and 237 of *the Constitution* of Kenya, Sections 4 and 11 of the Fair Administrative Actions Act, 2015, Sections 8 and 9 of the *Law Reform Act*, and all other enabling provisions of the law. He sought for orders:

- i. That an order of mandamus be and is hereby issued directing the Director of Finance of the Teachers Service Commission to cause payments of the decretal sum, plus interests and cost in respect of the judgment issued on 13.03.2023 by Hon. Dr. Jacob Gakeri, Judge of the Employment and Labour Relations in ELRC Cause No. 570 of 2019.
 - ii. That this Honourable Court be and is hereby pleased to issue direction necessary towards ensuring the expeditious disposal of this matter.
 - iii. That any other order that this Honourable Court will be pleased to issue in the circumstances.
 - iv. That costs be in the cause.
2. The application was based on the grounds set out in the substantive motion and supported by the ex-parte applicant's affidavit sworn on 23.05.2025. The ex parte applicant's case was as follows:
- a. The ex-parte applicant worked for the Teachers Service Commission (TSC) from 1994 until March 2019, when the respondent unfairly, unlawfully and wrongfully terminated his employment.
 - b. Consequently, he filed an employment claim against the respondent in Nairobi ELRC Cause No. 570 of 2019, in which the Honourable Court delivered Judgment finding the termination unfair and ordered the respondent to pay him unpaid salary, two months' salary as compensation, one month's salary in lieu of notice, and costs of the suit and interest.
 - c. His advocates served the Decree upon the TSC on 22.03.2023, and the Commission proceeded to file an application at the Nairobi Court of Appeal through Civil Application No. 384 of 2023, seeking stay of execution of the said Judgment, Decree and consequential orders delivered on 13.03.2023 pending the hearing and determination of the application and intended appeal.
 - d. On 03.11.2023, the Court of Appeal delivered a Ruling on the above mentioned application wherein it granted the stay order on condition that the TSC deposits Kshs.2,517,845/- in an interest-earning account with a reputable bank, in the joint names of the parties' advocates, within 30 days.
 - e. Since the TSC failed to deposit the security within 30 days as ordered, their application stands dismissed.
 - f. The Decree and Certificate of Order against the government were issued and served upon the respondent, including several reminders and demand. However, the respondent has refused or failed to comply with the same.
 - g. It is in the interest of justice that this Court issue an order of mandamus compelling the respondent to settle the Decree in Nairobi ELRC Cause No. 570 of 2019. Otherwise, the rights of the ex-parte applicant to access justice will continuously be impaired.
3. The respondent filed the replying affidavit of Cheptumo Ayabei, sworn on 15.07.2025 through Patrick Mulaku Advocate. He urged the Court to dismiss the application with costs to the respondent and averred as follows:



- i. The TSC is a corporate body capable of suing and being sued in its corporate name pursuant to Article 253 of *the Constitution*. Under Section 22 of the TSC Act, the Director in Charge of Finance and/or the holder of the office thereof is exempted from any personal liability while undertaking delegated functions of the Commission.
 - ii. Therefore, the ex-parte applicant has brought the wrong party to Court, and it would be inequitable for the Director of Finance and Accounts, and or the holder of the office thereof, to be sued in these proceedings in total contravention of the principles of a corporate entity, as espoused in Article 253 of *the Constitution*.
 - iii. Without prejudice to this legal position, the Commission’s counsel wrote to the ex-parte applicant’s advocate, following the grant of the conditional stay by the Court of Appeal in Civil Application No. 384 of 2023, forwarding account-opening details to implement the Court Order. However, counsel for the ex-parte applicant declined to respond and/or forward the executed forms.
 - iv. The Commission could not therefore proceed with the account-opening procedure and depositing of funds, owing to the ex-parte applicant’s refusal to fill in and return the forms.
 - v. Furthermore, the Judgment has serious financial implications, requiring written approvals to be sought and obtained from the National Treasury for budget provisions on the settlement of court decrees and judgments. *The Constitution* further provides that the budget of each commission and independent office shall be a separate vote. The TSC Act also obligates the Commission to obtain all its funding from the exchequer.
 - vi. In line with Section 12(2) (k) of the *Public Finance Management Act* (PFMA), the National Treasury issued Circular No. 10/2024 on Guidelines for implementation of the financial year 2024/2025 and the medium-term budget. This meant the Commission could not expend monies outside the guidelines.
4. The ex-parte applicant’s further affidavit sworn on 18.07.2025 was filed through Mbaluka & Company Advocates. He further averred as follows:
- a. Section 22(1) of TSC Act does not exempt a member, officer, staff or agent of the Commission of the liability to pay compensation or damages to any person for any inquiry suffered by them, their property or any of their interests and arising directly or indirectly from the exercise of any power conferred by the Act or by the failure, whether wholly or partially, or from any works.
 - b. An order of mandamus is directed at the office, not at the individual in a personal capacity, unless willful refusal or bad faith is involved, such as where there is deliberate disobedience of court orders.
 - c. The Director in charge of Finance has not demonstrated that he has been acting in good faith to benefit from the protection provided under Section 22(1) of the TSC Act. Since the said Director is the officer with the mandate to process payments on behalf of the TSC, the buck stops with the Director in charge of Finance and Accounts.
 - d. The TSC has contemptuously refused to settle the decree despite service of demand letters for the settlement of the said Decree.
 - e. Notably, the order for stay by the Court of Appeal was issued on 03.11.2023, whereas the respondent’s advocates served the ex-parte applicant’s advocates with the letter forwarding



the account opening details on 07.12.2023, at which time the respondent's application stood dismissed.

- f. Once a certificate of order is served, Section 21(3) of the *Government Proceedings Act* imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled. The said provision does not condition payment on approval of the National Treasury.
5. The parties filed their respective written submissions, including the ex-parte applicant's supplementary submissions dated 18.07.2025. The Court has considered the material on record and returns as follows:
- a. As submitted for the applicant, it is not disputed that the respondent Director is the Commission's officer vested with the duty to process and cause payment of the decretal sum in issue. The applicant appears to have sued the proper party in terms of section 12 of the Employment and *Labour Relations Act* and definition of an "employer" in section 2 of the *Employment Act*.
 - b. It is not in dispute that section 21(3) of the *Government Proceedings Act* imposes a statutory duty on the accounting officer concerned to pay sums specified in the said order to the person entitled and it does not condition payment to approval of the National Treasury. The section provides that if the order provides for the payment of any money by way of damages or otherwise, or any costs, the certificate shall state the amount so payable and the accounting officer for the government department concerned shall, subject as thereafter 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. The certificate was served and the Court finds that the duty to pay has fallen due.
 - c. However, there exist a bar to grant of mandamus because the applicant has not rebutted the respondent's case that while the judgment or decree is in place and a conditional stay was granted, the failure to deposit the decretal sum per the conditional order of stay granted by the Court of Appeal was occasioned by the failure to process the relevant accounts for the deposit. It therefore appears that the failure to comply with the order of conditional stay. To that extent the applicant's failure to cooperate is a valid bar to grant of mandamus as prayed for.
 - d. The Court considers that the parties should be at liberty to take steps to comply with the conditional stay order and related deposit or amicable settlement of decretal sum as may be just and appropriate.
 - e. The Court considers that towards amicable settlement, each party to bear own costs of the application.

In conclusion, the application is hereby dismissed and each party to bear own costs of the application.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS TUESDAY 29TH JULY, 2025.

BYRAM ONGAYA

PRINCIPAL JUDGE

