



**Republic v National Government Constituency Development Fund (Karachuonyo Constituency); Bolo (Exparte Applicant) (Judicial Review Application E016 of 2024) [2025] KEHC 7229 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 7229 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
JUDICIAL REVIEW APPLICATION E016 OF 2024**

**OA SEWE, J**

**MARCH 27, 2025**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF ORDER 53 RULE 3(1) AND (2) OF THE  
CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF SECTION 2 AS READ WITH SECTION  
21(3) & (5) OF THE GOVERNMENT PROCEEDINGS ACT, NO.**

**35 OF 2015**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND  
(KARACHUONYO CONSTITUENCY) ..... RESPONDENT**

**AND**

**JOSHUA OCHIENG BOLO ..... EXPARTE APPLICANT**

**JUDGMENT**

1. The Notice of Motion dated 23<sup>rd</sup> October 2024 was filed by the ex parte applicant Christopher Ogembo Adhanja through his Attorney Joshua Ochieng Bolo, pursuant to Section 1A, 1B, 3 and 3A



of the Civil Procedure Act, Sections 2, 21(3) and (5) of the Government Proceedings Act, No. 35 of 2015, and Order 53 Rule 1(1) and (2) of the Civil Procedure Rules. The applicant thereby asked for the following orders:

- (a) That an order of Mandamus be issued to compel the Fund Account Manager, National Government-Constituency Development Fund (Karachuonyo Constituency) to satisfy the decretal amount of Kshs. 1,908,993/= pursuant to the judgment delivered on 23<sup>rd</sup> November 2023 and costs assessed on 31<sup>st</sup> July 2024 by Hon. S. Okore, Senior Resident Magistrate, in Oyugis Principal Magistrates Environment and Land Case No. E014 of 2021.
  - (b) That costs of the application be provided for.
2. The application was premised on the grounds that the applicant herein sued the respondent in Oyugis Principal Magistrate's Court in ELC No. E14 of 2021; and that judgment was entered in favour of the applicant as against the respondent in the sum of Kshs. 1,507,990/=. The applicant further averred that the costs of the suit were thereafter assessed at Kshs. 401,003/= on 31<sup>st</sup> July 2024.
  3. The applicant further deposed that the decree and certificate of costs were extracted and served upon the respondent for purposes of payment; but that the respondent has failed and/or refused to satisfy the sums due as per the decree and certificate of costs. It was therefore the contention of the applicant that the only way of realizing the decretal sum is by way of an order of Mandamus. The aforesaid grounds were expounded on in the Supporting Affidavit sworn on 23<sup>rd</sup> October 2024 by Joshua Ochieng Bolo, to which the applicant annexed copies of the Power of Attorney, Complaint, Decree, Certificate of Costs and the application and order granting leave to file the substantive application.
  4. The application was unopposed, despite proof of service on the respondent. Accordingly, the application was heard ex parte in the manner provided for under Order 12 Rule 2 of the Civil Procedure Rules. The applicant thereafter filed his written submissions dated 7<sup>th</sup> March 2025 contending that the respondent is not keen to satisfy the said decree; and that under Section 21(4) of the Government Proceedings Act, the only way of enforcing payment is through an Order of Mandamus. The applicant relied on *Jotham Mulati Welamondi v The Electoral Commission of Kenya* [2002] 1 KLR 4 to buttress his submissions.
  5. As to the rationale for the elaborate procedure provided for in Section 21 of the Government Proceedings Act, the applicant relied on *Republic v Permanent Secretary Office of the President, Ministry of Internal Security and another, Ex Parte Nassir Mwandishi* [2014] eKLR in which it was held that:

“The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy the decree and orders of the court.”
  6. In his Supplementary Affidavit filed the 4<sup>th</sup> December 2024 the applicant demonstrated that it took out a Certificate of Costs as well as a Certificate of Order Against the Government for payment and duly served the same on the respondent. He also filed Affidavits of Service in proof thereof. In the premises, it was the contention of the applicant that it has fully complied with the procedure set out in Section 21 of the Government Proceedings Act; and is therefore entitled to the orders prayed for. He added, on the authority of *Republic v The Attorney General & another, Ex Parte James Alfred Koroso, Judicial Review Miscellaneous Application No. 44 of 2012*, that he has no other option of realizing the fruits of the judgement delivered by the lower court.



7. In the premises, the single issue for determination is whether the applicant is deserving of an order of Mandamus.
8. Mandamus is a relief available to litigants under Article 23(3)(f) of the Constitution as well as Order 53 of the Civil Procedure Rules. Its scope was well explicated in Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 1 thus:

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual...”

9. As was pointed out in Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security, Ex Parte Fredrick Manoah Egunza [2012] eKLR, the applicant has no other way of realizing the decree passed in its favour. In that case, Hon. Githua, J, aptly pointed out that:

“Unlike in other civil proceedings, where decrees for the payment of money or costs had 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 certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”

10. Similarly, in Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another [2018] eKLR, Hon. Mativo, J. (as he then was) held: -

29. Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in Apotex Inc. vs. Canada (Attorney General),[23] and, was also discussed in Dragan vs. Canada (Minister of Citizenship and Immigration).[24] The eight factors that must be present for the writ to issue are:-

- (i) There must be a public legal duty to act;
- (ii) The duty must be owed to the Applicants;
- (iii) There must be a clear right to the performance of that duty, meaning that:



- a. The Applicants have satisfied all conditions precedent; and
  - b. There must have been:
    - I. A prior demand for performance;
    - II. A reasonable time to comply with the demand, unless there was outright refusal; and
    - III. An express refusal, or an implied refusal through unreasonable delay;
  - (iv) No other adequate remedy is available to the Applicants;
  - (v) The Order sought 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.
11. There being no response to the application, it is plain that the respondent is indeed indebted to the applicant and that, in spite of notice to pay, the respondent is yet to satisfy the decretal sum in respect of a judgment passed on 23<sup>rd</sup> November 2023. There is similarly no dispute that a reasonable time has been allowed for payment.
12. Further to the foregoing, the applicant demonstrated, vide his Further Affidavit, that it duly complied with Section 21 of the *Government Proceedings Act*. That provision states as follows in Sub-Sections (1) and (2):
- “(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.”
13. Moreover, Subsections (3) and (4) of Section 21 of the *Government Proceedings Act* state:
- “(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.”

14. Order 29 Rule 3 of the Civil Procedure Rules, provides for the applicable procedure for obtaining a Certificate for purposes of Section 21 of the [Government Proceedings Act](#). It requires that:

“Any application for a certificate under section 21 of the [Government Proceedings Act](#) (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and such certificate shall be in one of Form Nos. 22 and 23 of Appendix A with such variations as circumstances may require.”

15. The rationale for this stringent procedure was well captured in *Kisya Investments Ltd v Attorney General & Another* [2005] 1 KLR 74 thus:

“History and rationale of Government’s immunity from execution arises from the following:- Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i). The raising of revenue- (by taxation or borrowing); (ii). its expenditure; and (iii). The audit of public accounts. The satisfaction of decrees or judgements is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government’s expenditure. It is for this reason that section 32 of the [Government Proceedings Act](#) provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorised by statute, and any unauthorised payment may be recovered. See Halsbury’s Laws of England 4<sup>th</sup> EDN Vol. 11 PARA 970, 971 and 1370. As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government



expenditure. See *Auckland Harbour Board vs.R* (1924) AC 318, 326. The second situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the ministry of Finance, Treasury, Comptroller and Auditor General etc. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their “own” funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer’s hammer. No Government can possibly survive such an onslaught. The Government and therefore the state operations will ground to a halt and paralyzed and soon the Government will not only be bankrupt but it’s Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the Law that prohibits execution against and attachment of the Government assets and property.” (also see *Republic v Permanent Secretary Office of the President Ministry of Internal Security & Another, Ex Parte Nassir Mwandihhi, supra*)

16. In the light of the foregoing, I find merit in the Notice of Motion dated 23<sup>rd</sup> October 2024. The same is hereby allowed and orders granted as hereunder:

- (a) That an order of Mandamus be and is hereby issued to compel the Fund Account Manager, National Government-Constituency Development Fund (Karachuonyo Constituency) to satisfy the decretal amount of Kshs. 1,908,993/= pursuant to the judgment delivered on 23<sup>rd</sup> November 2023 and costs assessed on 31<sup>st</sup> July 2024 by Hon. S. Okore, Senior Resident Magistrate, in Oyugis Principal Magistrates Environment and Land Case No. E014 of 2021.
- (b) That costs of the application be borne by the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 27<sup>TH</sup> DAY OF MARCH 2025**

**OLGA SEWE**

**JUDGE**

