



**Republic v Principal Secretary, Ministry of Agriculture, Livestock and Fisheries & another; Nkari (Exparte Applicant) (Judicial Review E129 of 2024) [2025] KEHC 3960 (KLR) (Judicial Review) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3960 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW E129 OF 2024  
RE ABURILI, J  
MARCH 26, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE PRINCIPAL SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK AND FISHERIES ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ELIAS MUTWIRI NKARI ..... EXPARTE APPLICANT**

**JUDGMENT**

1. By a notice of motion dated 26<sup>th</sup> July 2024 pursuant to leave to apply granted on 23<sup>rd</sup> July 2024, the exparte applicant Elias Mutwiri Nkari seeks from this court Judicial Review order of mandamus to issue compelling and directing the respondents The Principal Secretary, Ministry Of Agriculture, Livestock And Fisheries to pay to the exparte applicant through his advocates the decretal sum of kshs 21,313,096.47 as decreed by the Hon. D.W.Mburu, Principal magistrate at Milimani Nairobi Chief Magistrate’s Court in Civil suit No. 4360 of 2017 issued vide judgment delivered on 8/2/2019 together with costs of the suit as taxed on and interest at 12% per annum from 8/2/2019 to date.
2. The notice of motion is supported by the statutory statement and verifying affidavits sworn by the exparte applicant Elias Mutwiri Nkari on 26<sup>th</sup> July, 2024 together with annextures thereto which include judgment delivered on 8/2/2019, Notice of entry of judgment dated 11/2/2019, decree dated 21<sup>st</sup> June, 2019 and certificate of costs, certificate of order against the Government dated 13<sup>th</sup>



- February 2020 pursuant to Order 29 Rule 3 of the Civil Procedure Rules and section 21 of the *Government Proceedings Act*, numerous demands for settlement of the decree and evidence of service of the certificate of order against the Government vide letters dated 21/6/2019, 16/9/2019, 3/2/2020, 10/5/2022, 26/10/2020, 13/2/2023.
3. This court did grant to the ex parte applicant's leave to institute Judicial Review proceedings on 23/7/2024 and ordered that the said substantive motion be filed and served upon the respondents within 14 days of the date of leave.
  4. The substantive motion was dutifully filed within 14 days on 30<sup>th</sup> July, 2024.
  5. The facts giving rise to the cause of action herein are that the ex parte applicant was in a road traffic accident on 25<sup>th</sup> January, 2017 involving motor cycle KMCZ 105B and motor vehicle registration number GK X747 belonging to the Ministry of Agriculture, Livestock and Fisheries.
  6. The ex parte applicant herein files suit against the respondents herein seeking general and special damages for the injuries that he sustained in the said accident wherein he blamed the respondents for negligence of their driver, agent or servant then driving the accident motor vehicle.
  7. That the case was heard on merit with judgment being entered against the respondents on 8/2/2019 in the sum of kshs 750,000 general damages and kshs 241,496 special damages plus costs and interest at court rates.
  8. Costs were assessed at Kshs 153,265. A decree and certificate of costs was issued and the certificate of order against the government were issued and all served upon the respondents as evidenced above.
  9. The ex parte applicant's counsel then embarked on demands for settlement of decree and certificate of order against the government in vain hence the filing of these proceedings since in law, there can be no execution by way of attachment and sale of government property in execution of decree.
  10. The record shows that even after filing of these proceedings for mandamus, the respondents kept promising to settle and sought more time including the date of hearing but there was no evidence of commitment to settle the decree.
  11. The application was canvassed orally with Mr. Kisia counsel for the ex parte applicant relying on the grounds, statement of facts, verifying affidavit and annexures filed while Mr. Munene for the respondents submitted that advisories for payment had been made to the concerned Ministry and that in the event that judgment is entered, they prayed for 90 days to settle decree, which continues to attract interest at court rates until payment in full.

### **Analysis and Determination**

12. I have considered the ex parte applicant's notice of motion, the supporting documents, statutory statement and verifying affidavit. I have also considered the oral submissions by both parties' counsel. The issue for determination is whether the orders sought are available to the ex parte applicant.
13. Section 21(4) of the *Government Proceedings Act* prohibits attachment of Government property and therefore the only order that commends itself against the Government for failure to settle decree is mandamus Is to compel such payment. In addition, Section 70 of the *Public Finance Management Act* mandates the 1<sup>st</sup> respondent as the accounting officer of the concerned Ministry to satisfy the decretal sum. Copies of the judgment in the civil suit, decree, certificate of costs, Certificate of Order against the



Government and several reminders for settlement were annexed as exhibits. Under 21. Section 21(4) of the *Government Proceedings Act*

“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 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. In *Kisya Investments Ltd v Attorney General & Another* [2005] 1 KLR 74 the High Court comprising Ibrahim and Visram JJ(as they were then) held:

“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 three fold 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 decree or judgments 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 monies provide 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 authorized by statute, and any unauthorized payment may be recovered. 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 judgments- 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. The second situation, which arises from the above, is that once a decree or judgment is obtained against the government, it would require some reasonable time to have it forwarded to the Ministry of Finance, Treasury, Controller 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 judgments and will be inundated with executions and attachments of its assets day in day out. Its buildings will be attached and its plans and equipment will be attached, its vehicles , aircraft, ships and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneers 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 its 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.”



15. In view of the above position which I agree with, the Civil Procedure Rules do not permit execution against the Government including County Governments and therefore the only remedy available to the decree holders against the Government is the remedy of Judicial Review by way of an order of mandamus to compel the Government and more particularly the Accounting Officer of the relevant State Department to settle the decree of the court.
16. In Republic v Attorney General Exparte James Alfred Koroso JR 44/2012 Odunga J (as he then was in the High Court) stated:

“...in the present case, the exparte applicant has no other option of realizing the fruits of this judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that he has been awarded is realized. Unless something is done he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current constitutional dispensation in light of provisions of Article 48 of *the Constitution* which enjoins the state to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered, are held in trust for the people of Kenya and public officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his or her lawful rights which have been decreed by a court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of *the Constitution*, Executive authority derives from the people of Kenya and is to be exercised in accordance with *the Constitution* in a manner compatible with the principle of service to the people of Kenya, and for their well being and benefit...The institution of Judicial Review proceedings in the nature of mandamus cannot be equated with execution proceedings. In seeking an order of mandamus the applicant is seeking, not relief against the Government, but to compel a government official to do what the government, through Parliament, has directed him to do. The relief sought is not execution or attachment or process in the nature thereof. It is not sought to make any person “individually liable for any order for any payment,” but merely to oblige a government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty case upon him by Parliament. The fact that an Accounting Officer is not distinct from the state of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In mandamus cases it is recognized that when statutory duty is case upon a public officer in his official capacity and the duty is owed not to the state but to the public, any person having a sufficient legal interest in the performance of the duty may apply to the courts for an order of mandamus to enforce it.

In other words, mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the state, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of the order of mandamus, his/her action amounts to insubordination and contempt of court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the court’s displeasure at the failure by a servant of the state to comply with the directive of the



court given at the instance of the Republic employer of the concerned public officer and to uphold the dignity and authority of the court.”

17. From the above statutory and judicial pronouncements which restate the law, it is clear that the only remedy available to such a decree holder as the *exparte* applicant herein against the Government is judicial review remedy of mandamus to compel the Accounting Officer of the relevant Ministry or State Department to settle the material decree.
18. In the instant case, the respondents do not dispute the decree. They acknowledge the indebtedness in terms of the decree and counsel for the respondents intimated that advisory for settlement had been given to the accounting officer. It therefore follows that the *exparte* applicant who is the decree holder has rights which have crystallized, to enjoy the fruits of his lawful judgment and those rights must not be curtailed. That right must be safeguarded and enforced by the court as espoused in Article 159(2) (a) and (b) of *the Constitution* that justice shall be administered without delay, and the applicant’s right to access Justice under Article 48 of *the Constitution* protected.
19. It is not in doubt that the 1<sup>st</sup> respondent is under a public duty to settle decree of the court made in favour of the *exparte* applicant, in order that justice may eventually be served because there is no other remedy available to the *exparte* applicant.
20. Since 2019 when the decree in Milimani CMCC 4360/2017 was made, the *exparte* applicant’s counsel has made several correspondences to the respondents asking for payment but all have fallen on deaf ears. The decretal sums due to the *exparte* applicant was barely one million Kenya shillings in 2029 and now, because of accruing interest and costs, the figure is skyrocketing at the expense of the Kenyan citizen and tax payer. The decree remains unsettled.
21. In view of the foregoing, the respondents cannot be heard to say that they have no money to settle the decree together with certificate of stated costs since 5<sup>th</sup> November 2019 and which decree was drawn and submitted to them nearly six years ago.
22. That being the case, the order that commends itself in these Judicial Review proceedings is a Judicial Review order of mandamus compelling the 1<sup>st</sup> respondent Principal Secretary, Ministry of Agriculture, Livestock and Fisheries who is also the accounting officer to settle decree in Milimani CMCC 4360/2017 between the *exparte* applicant herein and the Attorney General who was sued on behalf of the State Department.
23. In the end, I find this application for Judicial Review merited and I proceed to grant and issue the order of Mandamus compelling the accounting officer, Principal Secretary, Agriculture, Livestock and Fisheries or its successor in title, since the names of Ministries change from time to time in the prerogative of the president, to settle decree in Milimani CMCC 4360/2017 now totaling Kshs 1,313,096.47 together with interest.
24. Decree to issue for mandamus.
25. Should the decretal sum herein be settled in the next ninety (90) days of this judgment, this court directs that interest shall not accrue. This is meant to CUSHION the Kenyan tax payer from paying accruing interest which is punitive to the tax payer in perpetuity and not the government department that has defaulted. However, should the decree herein not be settled within 120 days of today, interest will continue to accrue. Additionally, as the Kenyan tax payer is the one suffering the default by the government department, I order that each party bear their own costs of this application for mandamus and for leave.



26. In default of settlement as decreed herein, the exparte applicant shall be at liberty to apply citing the accounting officer for contempt of court.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF MARCH, 2025**

**R.E. ABURILI**

**JUDGE**

