



**Muchene v Attorney General (Judicial Review Application E172 of 2024)  
[2025] KEHC 5201 (KLR) (Judicial Review) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5201 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW APPLICATION E172 OF 2024**

**RE ABURILI, J  
APRIL 28, 2025**

**BETWEEN**

**SUSAN MUCHENE ..... APPLICANT**

**AND**

**THE ATTORNEY GENERAL ..... RESPONDENT**

**RULING**

1. The notice of motion application dated 6<sup>th</sup> August 2024 seeks leave to institute judicial review proceedings seeking orders of mandamus to compel the respondent to settle decree and certificate of costs in Milimani CMCC No 3538 of 2013. The application is brought pursuant to the provisions of sections 8 and 9 of the Law reform Act, Sections 21 and 22 of the Government Proceedings Act, Orders 29 and Order 53 Rule 3 of the Civil Procedure Rules and also Section 3A of the Civil Procedure Act.
2. The application is predicated on the grounds that judgment was pronounced against the respondent in CMCC No 3538 of 2013 on 29<sup>th</sup> October 2021 and a decree and certificate of costs were issued by the court on 14<sup>th</sup> March 2021 in the sum of Kshs 6,904,327/=.
3. It is the applicant's case that a previously filed suit Miscellaneous Application No E243 of 2022 was erroneously transferred to the Lower Court and subsequently upon closure of the said suit, the instant application was filed.
4. Opposing the Notice of Motion, the respondent filed grounds of opposition dated 23<sup>rd</sup> November 2024 contending that it (State law Office) is not the accounting officer to the Ministry of Defence and that as such, an order of Mandamus cannot issue. It is also urged that the application offends Section 21 of the Government Proceedings Act since there is no certificate of order against the government that has been served on the respondent nor has the same been attached to the instant application.



5. According to the respondent, the application also offends Order 53 rule 1(1) and (2) of the *Civil Procedure Rules 2010* which requires that such an application for leave be made by way of Chamber Summons. The respondent also urges that the notice of motion dated 6<sup>th</sup> August 2024 is founded on the wrong provisions of the law.
6. The application was heard orally on 2<sup>nd</sup> April 2025 but it was only the Applicant's counsel who was present in court despite a hearing notice having been served on the respondent. The Respondent has at all times been aware of the proceedings in this suit.

### **Analysis and Determination**

7. I have carefully considered the application dated 6<sup>th</sup> August 2024 and filed on 12<sup>th</sup> August 2024. The main issue for determination is whether the orders sought are available to the applicant.
8. The commencement point is the respondent's objection that the application offends Order 53 Rule 1(1) and (2) of the *Civil Procedure Rules, 2010*, which requires that applications for leave be made by way of a Chamber Summons. It is indeed true that the application before the Court is brought by way of Notice of Motion and cites, among others, Order 53 Rule 3, which applies only where leave has already been granted.
9. Order 53 Rule 3 governs the procedure for filing a substantive motion once leave has been granted. In contrast, the present application is one for leave and should therefore have been brought under Order 53 Rule 1, which provides:
  1. Applications for mandamus, prohibition and certiorari to be made only with leave [Order 53, rule 1]
    - (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
    - (2) An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —
      - (a) a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and
      - (b) affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.
10. However, this court notes that the application is supported by a statement and a verifying affidavit, in line with the requirements under Order 53 Rule 1. Further, prayer 1 of the notice of motion seeks leave to commence judicial review proceedings. The respondent has also raised the issue of misjoinder, asserting that she is not the proper party to be sued. However, the respondent was the party to the proceedings in the lower court and therefore cannot be said to be an improper party in these proceedings. The only issue would be whether mandamus would issue against the respondent, as opposed to the Accounting Officer of the relevant Ministry on whose behalf the respondent was sued as the principal legal Advisor to the National Government.
11. The *Government Proceedings Act* at sections 12 and 13 provide as follows,



12. Parties to proceedings

- (1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Office of the Attorney-General, as the case may be.
- (2) No proceedings instituted in accordance with this Part of this Act by or against the Office of the Attorney-General shall abate or be affected by any change in the person holding the Office of the Attorney-General.

13. Service of documents

All documents required to be served on the Government for the purpose of or in connection with any civil proceedings by or against the Government in accordance with the provisions of this Act shall be served on the Office of the Attorney-General.

12. Section 12 read in the 2010 Constitutional framework mandates that all civil proceedings against the National Government must be instituted in the name of the Attorney general. Documents in respect of civil proceedings too must be served upon the Attorney General.
13. Although Judicial Review Proceedings are neither civil nor criminal in nature, they are sui generis and the Attorney General having been the primary party in the civil proceedings, is a necessary party in this case for continuation of proceedings. This is so, taking into account the spirit and letter of section 21 of the *Government Proceedings Act* that mandate the service of the Certificate of Order Against the Government, upon the Attorney General, who would then advise the accounting officer of the relevant Government Ministry or Department to settle the decree in accordance with the Certificate of Order Against the Government.
14. Furthermore, this court is guided by Article 159(2)(d) of the *Constitution*, which mandates that justice shall be administered without undue regard to procedural technicalities. In *Raila Odinga & others v Independent Electoral and Boundaries Commission & others* [2013] eKLR the Supreme Court stated:

“Our attention has repeatedly been drawn to the provisions of article 159 (2) (d) of the *Constitution* which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice.”
15. Guided by the foregoing, I find that the procedural errors cited namely, the reliance on the wrong provision of the law and mode of bringing the application before this court and the alleged misjoinder do not go to the root of the application. They are curable defects and should not hinder the Court from considering the application on its merits.
16. I now turn to the substantive question; whether the applicant’s application satisfies the legal threshold for grant of leave to apply for an order of mandamus to enforce a decree against the Government, pursuant to Section 21 of the *Government Proceedings Act*.
17. The Respondent contended that the application is fatally defective for want of a Certificate of Order against the Government, and that no such certificate has been served upon the Respondent or attached to the application.
18. Courts have respectively pronounced themselves on the importance of the certificate of order against Government before any decree can be satisfied in favour of the person holding the same against the



Government both at the County and national level. In *Permanent Secretary Office of the President Ministry of Internal Security & another ex parte Nassir Mwachibi* [2014] eKLR (Odunga J as he then was) had this to say:

“ 33. ... the rules applicable to normal execution proceedings by way of committal to civil jail are not necessarily applicable to enforcement of an order of the Court arising from an order of mandamus by way of committal. It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the *Government Proceedings Act* have been complied with respect to issuance of certificate of costs and certificate of order against the Government ...

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 decrees and orders of the Court...”

19. 5. Earlier on in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* Nairobi HC Misc. App. 31 of 2012 (Githua J) stated as follows on the same issue:

“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.”

20. The statutory duty on the part of Government to settle a judgment or decree of a court arises only after the Government has been served with the certificate of order against it. Without being served with the said certificate, the duty to satisfy decree by the Government does not accrue or crystalize, and, as a consequence, a Mandamus order would not be available. This is so, because Mandamus is meant to compel performance of a statutory or legal duty. That is the purport and effect of section 21(3)(4) of the *Government Proceedings Act*.

21. This was emphasized in *Republic v County Secretary Migori County Government & another* [2019] eKLR where Mrima J stated that:

“ 12. Once a party obtains the Certificate of Order and the Certificate of Costs, in the event the Certificate of Costs is obtained separately, together with the Decree, then such a party must satisfy the Court of service of those documents upon the party named in the Certificates. In this case there is neither evidence of issuance of the Certificates nor service thereof on the Respondents or their Advocates.



13. I therefore have no difficulty in finding that the Ex parte Applicant has not fully complied with the legal requirements for an order of mandamus to be availed. The application is premature and cannot stand.”
22. Section 21(1) of the *Government Proceedings Act* provides as follows:
21. Satisfaction of orders against the Government
- (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.
- (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.”
23. Upon perusal of the documents filed in support of the Notice of motion seeking leave to apply for mandamus, I find that the applicant has not annexed the judgment, the decree, the certificate of order against the government, or any evidence of service of the said documents upon the Attorney General.
24. The absence of these essential documents renders the application bare and fatally defective and incapable of sustaining the relief of mandamus sought. Accordingly, the application for mandamus is found to be is prematurely filed and therefore incompetent.it is hereby struck out.
25. The application for leave dated 6<sup>th</sup> August 2024 is hereby struck out.



26. As there is a decree pending settlement by the accounting officer of the Ministry of Defence, I make no orders as to costs.
27. This file is closed.
28. I so order.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL, 2025**

**R. E. ABURILI**

**JUDGE**

