



**Republic v County Government of Nairobi; Mwangi & another (Exparte Applicants) (Both Suing as the Personal Representatives of the Estate of Ephantus Ngari Waithira - Deceased) (Judicial Review Application E106 of 2023) [2025] KEHC 6962 (KLR) (Judicial Review) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6962 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW APPLICATION E106 OF 2023**

**RE ABURILI, J  
MAY 28, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF NAIROBI ..... RESPONDENT**

**AND**

**JANE WAITHIRA MWANGI ..... EXPARTE APPLICANT**

**JOSEPH MUIRURI MAINA ..... EXPARTE APPLICANT**

**BOTH SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF  
EPHANTUS NGARI WAITHIRA - DECEASED**

**JUDGMENT**

1. The two exparte applicants are legal representatives of the estate of the deceased Ephantus Ngari Waithira. Pursuant to leave of court granted on 21<sup>st</sup> August 2024, the exparte applicant filed Notice of motion dated 23<sup>rd</sup> August, 2024, seeking judicial review orders of mandamus to compel the respondents herein to settle decree and certificate of order against the Government issued in Milimani Chief Magistrates’ Court Civil Suit No. 2025 of 2019 amounting to Kshs 1,250,000 plus costs.
2. The suit arose out of a street lighting electric pole accident along River Road in Nairobi County wherein the deceased Ephantus Ngari Waithira lost his life.



3. Copy of decree and certificate of order against the government dated 22<sup>nd</sup> May 2020 and issued 23<sup>rd</sup> March, 2023 is annexed to the supporting affidavit. The applicants also annexed letter dated 24<sup>th</sup> March 2021 forwarding copy of decree and judgment to the respondents and asking for payment into the bank account of their advocates on record. That letter was received and stamped by the County Secretary on 24<sup>th</sup> March, 2021. Another letter dated 17<sup>th</sup> June 2021 was served upon the respondents on the same date referring to the earlier demands of 24<sup>th</sup> March 2021 and 24<sup>th</sup> May 2021. Further letters dated 10<sup>th</sup> August 2021 and 12<sup>th</sup> October 2021 demanding for settlement of decree and certificate of order against the government were received by the respondents on same dates that the letters were written. These were followed by letters dated 14<sup>th</sup> December 2021 and 19<sup>th</sup> January 2022 respectively and received by the respondents on the respective dates. Again, vide the letter dated 29<sup>th</sup> March 2023 accompanied by certificate of order against the government dated 23<sup>rd</sup> March 2023, the respondents received the said letter and certificate on 3<sup>rd</sup> April 2023.
4. There is no single response to any of the above letters demanding for settlement of decree and certificate of order against the government.
5. In the replying affidavit sworn by Martha Karungaru Wambugu the head of County Treasury, she deposes on 14<sup>th</sup> October 2024 that the application by the ex parte applicants is fatally defective, an abuse of court of process and was filed in total defiance of due process, smacks of impunity, trivializes the nature of application, causes delay and ought to be dismissed with costs to the respondents. That the application does not meet the threshold for judicial review orders sought and that neither had the respondents refused to settle decree in the cited case Milimani CMCC 2025 OF 2019 in favour of the applicants.
6. Further, that the applicants had not satisfied the requirements under section 21 of the Government Proceedings which mandate that certificate of order against the Government be served upon the Attorney General or the accounting officer of the concerned government department before applying for mandamus.
7. That the applicants had not effected service of the certificate of order against the government on the respondents hence the conditions precedent for mandamus had not been satisfied by the applicants.
8. The applicants filed a further affidavit sworn on 7<sup>th</sup> April 2025 annexing a certificate of order against the government and a letter of demand letter received by the respondents on 3<sup>rd</sup> April 2023.
9. The application was argued orally with each of the parties' counsel reiterating the positions stated above and which I need not reproduce here.

### **Analysis and Determination**

10. I have considered the application for judicial review orders of mandamus to compel settlement of decree and certificate of order against the government issued in the lower court in Milimani CMCC 2025 of 2019 and the various letters of demand sent to the respondents duly acknowledge including the contested certificate of order against the government which was served on 3<sup>rd</sup> April, 2023 upon the respondents.



11. The requirements for an order of mandamus to issue were explained by Mativo J. in *Republic vs Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another* [2018] eKLR as follows:

“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. 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”

12. On whether there is a public legal duty to the ex-parte applicants, the law does not permit execution against governments. Accordingly, it is only through judicial review orders that the decrees against governments can be enforced. As to whether the Respondent herein is under a duty to pay the subject decretal sums, an order of mandamus is normally issued when an officer or an authority by compulsion of law or statute is required to perform a duty, and that duty, despite demand in writing, has not been performed.

13. Section 21 of the Government Proceedings stipulates 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:

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.

14. The duty by the respondents is owed to the ex parte Applicants and this is not denied. Further, there is a valid judgment rendered by a court of competent jurisdiction against the respondents in favour of the applicants in Milimani CMCC 2025 of 2019. That judgment has not been settled to date.
15. On Whether there was a prior demand for performance, the respondents denied demand and service but the further affidavit filed clearly show that the respondents were served with the certificate of order against the government and the demand on 3<sup>rd</sup> April 2023.this is in compliance with section 21 (2) of the [Government Proceedings Act](#) reproduced above.
16. The ex parte Applicants have demonstrated by way of several demand letters written to the respondents and duly received by the respondents and requests for payment which have not been heeded to by the Respondents.
17. In the case of Republic v Kenya National Examinations Council Ex Parte Gathenji & 8 Others Civil Appeal No. 234 of 1996, where the Court of Appeal cited with approval, Halsbury's Law of England, 4th Edition. Vol. 7 p. 111 para 89 thus:

“The order of mandamus is of most extensive remedial nature and is in form, of 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 ineffectual."

...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

18. In *Kungu v County Government of Nairobi* (Judicial Review Miscellaneous Application E034 of 2023) [2024] KEHC 3265 (KLR) (Judicial Review) (3 April 2024) (Ruling), the Court dismissed a Judicial Review Application against the county government of Nairobi when the applicant failed to follow the mandated procedure. The Court stated;

"...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. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues."

19. On whether Respondents ought to be compelled to settle the sums due, this Court is guided by the case of *Republic v Attorney General & another Ex-parte James Alfred Koroso* [2013] eKLR where Odunga J with approval cited *Shah vs Attorney General (No.3) Kampala HCMC No. 31 of 1969* [1970] EA 543 where Goudie, J expressed himself, inter alia, as follows:

"Mandamus is a prerogative order issued in certain cases to compel the performance of a duty...Thus, it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy....

With regard to the question whether mandamus will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, mandamus will lie on the application of a person interested to compel them to do so...

What the Applicant is seeking is not relief against the Government but to compel a government official to do what the Government, through Parliament, has directed him to do."

20. In the instant case, I am satisfied that the applicants have complied with the requirements and or conditions precedent for mandamus to issue. Mandamus being the only remedy available to them in this age-old decree and certificate of order against the government, I hereby allow the application dated 23<sup>rd</sup> August 2024. I grant judicial review order of mandamus compelling the County Government of



Nairobi and in particular, the Chief Officer, finance who is the accounting officer to settle decree and certificate of order against the government issued on 22<sup>nd</sup> May 2020 and dated 23<sup>rd</sup> March, 2023 in the sum of Kshs 1,455, 955.00 inclusive of interest and costs of the suit in the trial court.

21. Each party shall bear their own costs of these proceedings noting that the judgment was delivered on 22<sup>nd</sup> May 2020 but the applicants took their time before filing the application subject of this judgment.
22. Decree for Mandamus to issue forthwith. Matter to be mentioned on 22<sup>nd</sup> July 2025 before the Deputy registrar.
23. I so order.

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

**R.E. ABURILI**

**JUDGE**

