



Republic v Principal Secretary, Ministry of Interior And Coordination of National Government & another; Musa (Exparte) (Judicial Review Miscellaneous Civil Application E006 of 2024) [2025] KEHC 7444 (KLR) (Judicial Review) (27 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7444 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS CIVIL APPLICATION E006 OF 2024
RE ABURILI, J
MAY 27, 2025

BETWEEN

REPUBLIC APPLICANT

AND

THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

AND

MUSTAFA MWALIM MUSA EXPARTE

JUDGMENT

1. The applicant in the Notice of Motion application dated 29th January, 2024 moved this Court seeking an order of mandamus compelling the respondents to settle the costs in the sum of Kshs 719,741.70 being the costs awarded to the exparte applicant in Nairobi Judicial Review Application No. E178 of 2021 Republic versus Inspector General of Police & 2 others exparte Mustafa Mwalim Musa and certified in the Certificate of Order for costs against the Government dated 1st December, 2023. The applicant also prays for costs of this application.
2. The application is predicated on the grounds contained in the statutory statement and verifying affidavit sworn by the applicant in the chamber summons for leave dated 22nd January, 2024 and the annexures thereto.
3. Leave to apply was granted on 25th January 2024 upon which the substantive motion was filed on 29th January 2024. However, the court fees filed was not in accordance with the schedule of court fees for



judicial review application. The applicant only paid Kshs 1500 as opposed to Kshs 10,000. I would have struck out the motion. I however invoke the provisions of section 96 of the *Civil Procedure Act* and direct the applicant to pay into court the full court fees before taking any other step in this matter.

4. Having said as much, the applicant's case is straight forward. Following the quashing of criminal proceedings mounted by the ODPP against the applicant in Nairobi Judicial Review Application No, E178 of 2021, the Court awarded the applicant costs of that matter, which costs were taxed by the Deputy Registrar of this Court on 3rd October, 2023 and a certificate of costs dated 4th October, 2023 was issued.
5. In compliance with section 21 of the *Government Proceedings Act*, the applicant obtained a certificate of order of costs against the Government dated 1st December, 2023 and from the annexures to the verifying affidavit, the Attorney General was served on 7th December 2023 with the said documents and a demand for settlement and in default, execution proceedings against the accounting officer of the relevant Ministry would ensue.
6. The respondents have not responded to the said demand. They have also not challenged the certificate of costs by way of a reference. They however filed grounds of opposition to the Notice of Motion. The grounds of opposition are dated 3rd April 2025 wherein the respondents deny that they have willfully neglected to settle the costs. that they rely on the National Treasury for allocation of funds, and that Treasury's approval was sought and approved subject to availability of funds which funds are taxpayers' money hence, once the same is available, the costs shall be settled.
7. The application was argued orally with the applicant's counsel reiterating the contents of the statutory statement and verifying affidavit while the respondent's counsel too, reiterated the grounds of opposition. I need not reproduce it here as I have already restated the same above.

Determination

8. Having considered the application and the response thereto, the question is whether the prayer for mandamus is merited.
9. Section 21(1) of the *Government Proceedings Act* provides:

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.

10. Section 21 (3) of the said Act on the other hand provides:

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.

11. In this case, the only reason advanced for not settling the costs as assessed and as per the certificate of order for costs against the government is that there are budgetary constraints and that despite the Treasury approving payment, it is subject to availability of funds which are not available.
12. The respondents contend that they have not deliberately refused to settle the costs as awarded and that therefore the application for mandamus should be dismissed.
13. This court observes that the costs were awarded way back in October 2023 and that by now, if the respondents did not want the applicant to apply for mandamus to increase on costs, they would have settled the costs even if by instalments and on a quarterly or annual basis. They also claim that they sought and obtained Treasury's permission to pay but that they are waiting for the exchequer to settle the same.
14. In *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza* [2012] eKLR Githua J expressed herself as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. 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. 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.” [Emphasis mine].



15. I associate with the above holding and it is therefore my view mandamus for settlement of decree of the court cannot be tied to the availability of funds. This position was appreciated by the High Court in Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012 in which this Court pronounced itself as that:

“I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly, I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein.”

16. In my view, as has been severally stated by this court, a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations. Thus, financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle a sum decreed by the Court to be due from it. See Odunga J (as he then was in Republic v Principal Secretary, Ministry of Defence & another Ex Parte David Gitau Njau & 9 others [2018] eKLR)
17. It therefore follows that it is the obligation of the government department concerned in conjunction with the Treasury to ensure that funds are allocated towards the settlement of the liabilities owed by the Government. The failure to do so amounts to failure to perform a statutory obligation hence warrants the grant of an order of mandamus.
18. Needless to say, whereas difficulties in the settlement of decretal sum may be a basis for seeking accommodation with respect to settlement, such difficulties cannot be a basis for seeking that an otherwise merited application for mandamus ought not to be granted.
19. The other question is whether the orders sought herein can issue against both the Respondents herein. As was rightly held in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza (supra):

“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. In *Shah vs. Attorney General* (No. 3) Kampala HCCM No. 31 of 1969 [1970] EA 543 where Goudie, J expressed himself, inter alia, as follows:

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. 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. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment... The foregoing may also be thought to be much in point in relation to the applicant’s unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the *Government Proceedings Act*. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty... Since mandamus originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law... English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting “simply in his capacity of servant”. There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a mandamus would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of mandamus will lie for the enforcement of the duties... 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. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile... It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the *Government Proceedings Act* shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government... Whereas mandamus may be refused where there is another appropriate remedy, there is no discretion to withhold mandamus if no other remedy remains. When there is no specific remedy, the court will grant a mandamus that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a mandamus is to go, then



mandamus will go... In the present case it is conceded that if mandamus was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of mandamus must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament... In the court's view the granting of mandamus against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the *Government Proceedings Act*. 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. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and 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 cast upon him by Parliament. The fact that the Treasury Officer of Accounts 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 recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown 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. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata*, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for mandamus by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by mandamus on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which mandamus will not lie for this reason alone are comparatively few...Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designata* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of



the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore, an order of mandamus will issue as prayed with costs.”

24. In Judicial Review Miscellaneous Application No. 44 of 2012 between the Republic vs. The Attorney General & Another ex parte James Alfred Koroso, Odunga J (as he then was) expressed himself as follows:

“...the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the 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 judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks 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/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 for 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 cast upon him by Parliament. The fact that the 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 recognised that when statutory duty is cast 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 an 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, the employer of the concerned public officer and to uphold the dignity and authority of the court.”

21. It is thus clear that orders of mandamus can only issue against the accounting officer of the ministry or the government department concerned. In this , it is clear that the concerned accounting officer is the 1st Respondent, against whom the prayer for mandamus is directed.
22. It is however important to remember that the failure to settle decretal debts promptly and expeditiously invariably leads to escalation of costs and in other instances, costs payable thereon. This position means that the public is subjected to pay more money than it ought to have paid. In my view, to fail to take adequate steps in order to minimise the amount of public expenditures cannot be termed as prudent and responsible way of using public funds in order to meet the requirements of Article 201 of *the Constitution*.
23. The circumstances under which judicial review order of mandamus are issued were set out by the Court of Appeal in Republic vs. *Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996* inter alia:

“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 or 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...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of 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.”
24. This position is now buttressed in section 7(2)(j) of the *Fair Administrative Action Act* under which the Court is empowered to issue orders of judicial review where there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law. In those circumstances, section 11(1) of the said Act empowers the Court to issue an order compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right.
25. As stated hereinabove, once the certificate of order against the Government is served on the Hon. Attorney General, the consequences of section 21(3) of the *Government Proceedings Act* kick in and a statutory duty is thereby imposed on the relevant accounting officer to pay the sums specified in the said order to the person entitled to or to his advocate together with any interest lawfully accruing thereon.
26. In this case, the said certificate was duly issued and served. Therefore, as was appreciated in Republic vs. Kenya National Examinations Council ex parte Gathenji & Others (supra), there is a specific legal right but no specific legal remedy available for enforcing that right as execution cannot issue against the Government in the ordinary way. In such circumstances it is clear that an order of mandamus may go forth in order to remedy the defects of justice.
27. To disallow this application would mean that that the applicantt will forever be locked out from realising his fruits of judgement.



28. Therefore there being a duty imposed on the accounting officer in the Ministry of Interior and Coordination of National Government who was the predecessor office holder, the Principal Secretary therein to settle the costs as awarded and certified in favour of the applicant herein, I find merit in the Notice of Motion dated 29th January, 2024 and I issue an order of mandamus compelling the 1st respondent to pay the applicant the costs of Kshs 719,741.70 arising from the judgement delivered in Judicial Review Application No. E178 of 2021 at Nairobi on 3rd October, 2023 as no efforts have been made to settle the said costs.
29. Mention on 16th July 2025 before the Deputy Registrar to confirm settlement and in default, the applicant is at liberty to apply.
30. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF MAY, 2025

R.E. ABURILI

JUDGE

