



Ismail Rahimtullah Registered Trustees & another v Judiciary (Judicial Review Application E280 of 2024) [2025] KEHC 8941 (KLR) (Judicial Review) (24 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8941 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E280 OF 2024**

RE ABURILI, J

JUNE 24, 2025

BETWEEN

ISMAIL RAHIMTULLAH REGISTERED TRUSTEES 1ST APPLICANT

SONY HOLDINGS LIMITED 2ND APPLICANT

AND

THE JUDICIARY RESPONDENT

JUDGMENT

1. Pursuant to the leave of court granted on 13th December, 2024, the *ex parte* Applicants filed the Notice of Motion dated 17th December, 2024 seeking an order of mandamus to compel the Chief Registrar of the Judiciary to satisfy a decree of the High Court dated 6th November, 2023 and issued on 19th December, 2023 in HCCCOM Case No. E014 of 2023 adopting the final award dated 9th April 2019 and published on 22nd March, 2022 issued by Fred O.O.N^oC Ojiambo, MBS,SC relating to the matter of Arbitration between the *ex parte* applicants herein and the Judiciary, settling the dispute in favour of the *ex parte* applicants in the sum of Kshs 111,707,914.46 being outstanding rent plus accrued rent, costs incurred in the preparation and registration of the Deed of Surrender of the lease, Kshs 36,300 legal fees and stamp Duty, reinstatement, repairs and re letting premises Kshs 20,182,918.83 and interest together with costs of the reference to the Arbitrator.
2. The above award was made by consent of both parties to the Arbitration.
3. The substantive Notice of Motion was expressly brought under Order 53 of the Civil Procedure Rules, Sections 8 and 9 of the *Law reform Act* and sections 7, 10 and 11 of the *Fair Administrative Action Act*. The applicants also cited Articles 21,22,23, 27(1), 47 and 165 (6) and (7) of *the Constitution*.



4. The Notice of Motion is supported by a statutory statement and a verifying affidavit sworn on 13th December, 2024 by Alex Trachtenberg the Director of Sony Holdings Limited, the 2nd Applicant hereto, annexing the following documents, among others:
 - a. Pleadings in the civil suit, including a request for judgment in default of appearance and defence
 - b. Documentary evidence adduced in the civil suit wherein judgment was entered against the defendants/respondents herein in default of appearance and defence for a liquidated sum
 - c. Certified copy of the decree and certificate of costs
 - d. A valid certificate of order against the Government, and
 - e. Evidence of service and demands for settlement of the decree.
4. The Respondent, though represented by counsel who entered appearance dated 18th November, 2024, by filing a notice of appointment of advocates, did not file any replying affidavit, statement of grounds of opposition or submissions. The application is thus unchallenged on the facts.
5. The application was canvassed orally on 5/5/2025. Counsel for the applicant reiterated the prayers sought and the facts giving rise to the claim while the respondents' counsel Ms Kimanthi submitted that the respondents do not dispute the fact that court orders have to be complied with but that they sought another opportunity to settle the decretal amount.

Analysis and Issue for Determination

5. Having considered the application as filed and argued and the fact of there being no dispute on the facts pleaded and as deposed by the applicant, the issue for determination is whether the Applicant is entitled to an order of mandamus to compel the Respondent to pay the decretal sum under Section 21 of the [Government Proceedings Act](#).
6. Sections 21 and 25 of the [Government Proceedings Act](#) bars any execution against the Government property by way of attachment and sale. This provision is replicated in Order 29 of the Civil procedure Rules, as well as section 25 of the [Government Proceedings Act](#).
7. The rationale for barring execution against the Government was stated in *Kisya Investments Ltd (supra)* wherein the High Court comprising Ibrahim and Visram, JJ. (as they were then) held 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 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 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 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 plants 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 auctioneer’s hammer.

No government can possibly survive such an onslaught. The government and therefore the state operations will ground to a halt and paralysed 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”.

8. Equally, section 21 (4) of the *Government Proceedings Act* prohibits execution against the Government. The section provides that: -

“Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, 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.”

9. In *Republic vs. County Secretary, Nairobi City County & Another ex parte Wachira Nderitu Ngugi & Co. Advocates* [2016] eKLR, the court held thus:

“...the law as it stands presently is that no execution can be levied against the property of a Government in settlement of a decree in a civil case and hence the only recourse available to a decree holder is to apply for mandamus against the Chief Officer of the Government, and upon obtaining such orders, the decree holder will be at liberty to apply for committal of the Chief Officer if the order of mandamus is not complied with.”

10. The scope of an order of mandamus was discussed by the Court of Appeal in the case of *Kenya National Examination Council vs. Republic ex parte Geoffrey Gathenji Njoroge & 9 Others* [1997] eKLR thus:

“What is the scope and efficacy of an order of Mandamus? Once again, we turn to Halsbury’s Law of England, 4th Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says:

“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.”

11. At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

12. In *Republic v Attorney General & Another ex parte James Alfred Koroso* [2013] eKLR, it was held that where a judgment creditor has complied with Section 21 of the *Government Proceedings Act* and the Government fails to honour its obligation, an order of mandamus lies to compel the performance of that statutory duty.

13. What the principles in the above cited cases espouse is that an order of mandamus will compel 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.

14. Has the applicant complied with the elaborate procedure for applying for mandamus under section 21 of the *Government Proceedings Act*?

15. Before the court issues a mandamus order, there must be proof that the provisions of section 21 of the *Government Proceedings Act* have been complied with. In the case of *Republic vs. Permanent Secretary Office of The President Ministry of Internal Security & Another ex-parte Nassir Mwandishi* [2014] eKLR, Odunga, J. (as he then was), held as follows:

“...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] with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule...

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.”



16. Similarly, in *Republic vs. Permanent Secretary Ministry of State for Provincial Administration and Internal Security* [2012] eKLR, the Court held thus:

“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.”

16. I adopt the reasoning of the court in both *Republic vs. Permanent Secretary Office of The President Ministry of Internal Security & Another ex-parte Nassir Mwandishi* and *Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security* (supra).
17. Thus, only after the procedure as laid down under section 21 of the *Government Proceedings Act* has to be complied with and a demand for payment made that a cause of action accrues for the purposes of an application for an order of mandamus against the Government.
18. In this case, it is uncontroverted that the applicant has fully complied with the provisions of Section 21 by obtaining a valid decree, obtaining a certificate of order against the Government and effecting service of the same on the respondent.
19. The Respondent has not alleged any procedural default or legal impediment to payment. There is no evidence of any appeal, stay of execution or judicial review against the original judgment adopting the Arbitral award, which adoption was by consent.
20. The respondent’s counsel acknowledged that the decree has not been settled and simply asked for more time to settle. The decree has been pending since it was issued on 19th December, 2023 vide HCCOM MISC E014 of 2023 and the certificate of order against the government is dated 5th March, 2024. There are demand letters send to the respondent accounting officer forwarding the said documents including the certificate of order against the government on 6th March 2024. Another demand was issued on 22nd April 2024 and in October 2024.
21. As was held by the Court of Appeal in *Five Star Agencies Limited & another v National Land Commission* [2024] KECA (12 April 2024)(Judgment), the applicant having complied with section 21 of the *Government Proceedings Act* and made a demand for payment, the cause of action accrued for purposes of an application for mandamus against the government.



22. It is settled law that mere failure by a government department to pay a lawful debt does not excuse performance of a statutory duty. Budgetary constraints or administrative delays are equally not a defence against a legal obligation established by a court. See *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza* [2012] eKLR.
23. In the circumstances, this Court is satisfied that the Applicant has met the threshold for the grant of the orders sought.
24. Accordingly, the following orders are hereby issued:
 - a. An Order of Mandamus is hereby issued, compelling the accounting officer Chief Registrar of The Judiciary to settle decree in HCCOM MISC E014 of 2023 as per certificate of order against the government dated 5th March 2024.
 - b. Mention on 30th September 2025 to confirm settlement.
 - c. The applicant will have costs of this mandamus application assessed at kshs 50,000.
 - d. Decree to issue.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF JUNE, 2025

R.E. ABURILI

JUDGE

