



Kay Construction Company Limited v Chief Accounting Officer, Kenya Rural Roads Authority & another (Judicial Review Application E086 of 2024) [2025] KEHC 8956 (KLR) (Judicial Review) (24 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8956 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E086 OF 2024
RE ABURILI, J
JUNE 24, 2025

BETWEEN

KAY CONSTRUCTION COMPANY LIMITED APPLICANT

AND

**CHIEF ACCOUNTING OFFICER, KENYA RURAL ROADS
AUTHORITY 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The application dated seeks an order of mandamus compelling the 1st and 2nd Respondents to settle the decree arising from the Arbitration Award as adopted in HCC Com. Arb E005/2023, which amounts to Kshs. 40,943,088.45. The Applicant asserts that the decree remains unsatisfied despite service of the Certificate of Order against the Government dated 18th October 2023 and a demand for settlement.

Background

2. The Applicant obtained an Arbitration Award on 30th December, 2021 and filed suit for adoption of the said award vide HCC Com. Arb E005/2023, which award was duly adopted by the court. The resultant decree was for Kshs. 41,210,454 and to be paid in 30 days of the date of the award in default, the said amount to attract interest at commercial rates. There was also the costs of the award Kshs 6, 052, 000 to be shared equally between the parties plus costs of kshs 30,000. The Certificate of Order against the government gives commercial rate interest to be 13%. The total sum plus interest accrued owing to the default was kshs 50,913,055. However, Kshs 10,000,000 is admittedly paid leaving a



balance of Kshs 40,913,055. The certificate of order against the government has interest calculated as at 18th October, 2023 to be Kshs 9,702,634.45.

3. A Certificate of Order against the Government was issued on 18th October 2023 and served upon the 1st Respondent. Despite this, only Kshs. 10 million was paid in 2022, and no further efforts have been made to settle the outstanding balance.

The Respondents' Contention

4. The Respondents filed a replying affidavit sworn on 26th July 2024 by Matilda Ita the 2nd Respondent's Deputy Director, Finance, opposing the motion and deposing that the application is premature and misconceived. It is the 1st Respondent's position that the original amount payable was Kshs. 41 million, and a sum of Kshs. 10 million has already been paid, leaving an outstanding balance of approximately Kshs. 31 million. They do not dispute that interest has accrued, following the default and that the amount cited in the Notice of Motion reflects the award in the certificate of order against the government.
5. The Respondents contend that efforts have been made toward settling the balance. These include formal engagement with the National Treasury for the release of funds and submission of the Applicant's claim to the Government Pending Bills Verification Committee as shown by the annexed letters dated 22nd December 2023 and 26th January, 2024. It is the Respondents' position that the payment process is subject to the Government's internal procedures and budgetary cycles.
6. They argue further that the efforts to settle the claim are ongoing, and as such, the application is premature and should be dismissed.

Issues for Determination

7. I have considered the application and the response by the respondents. The issues for determination are:
 - a. whether the Applicant has met the threshold for issuance of an order of mandamus, particularly: whether there is a clear legal duty on the part of the Respondents to settle the decree; and whether the said duty has been breached;
 - b. Whether the application is premature given the Respondents' alleged ongoing efforts to settle the decree;
 - c. Whether mandamus can be issued where payment is dependent on budgetary allocation by the National Treasury and verification by the pending Bills Verification Committee.

Analysis and Determination

8. The principles governing mandamus are settled. In *Republic v Kenya National Examination Council Ex Parte Gathenji* [1997] eKLR, the Court held that for an order of mandamus to issue, the applicant must demonstrate a clear legal right and that the respondent has failed to perform a public duty. It is worth reproducing here part of the judgment that has stood the test of time that on the efficacy of mandamus:

“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... The order must



command no more than the party against whom the application 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... These principles mean that an order of mandamus 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. “

9. In the Indian case of *Dr. Rai Shivendra Bahadur v Governing Body of the Nalunda College*, A.I.R. 1962 S.C. 1210), it was held:

“In order that mandamus may issue to compel the respondents to do something, it must be shown that statute impose a legal duty and the appellants has a legal right under the statute to enforce its performance.”

10. Mandamus will not issue where to do or not to do an act is left to the discretion of the authority. In *Union of India v Shree Gajanan Mahanaj Sansthan* [2002] 5 SCC 44, the Indian Supreme Court expressed:

“When enforcement of a provision in a statute is left to the discretion of the Government without laying down any objective standards, no writ of mandamus could be issued directing the Government to consider the question whether the provision should be brought into force and when it can do so.”

11. Section 21(1) of the *Government Proceedings Act* provides that once a judgment is entered against the Government, a Certificate of Order must be issued and served. Section 21(4) of the same Act as read with section 25 and Order 29 of the Civil Procedure Rules prohibits execution against government property, making judicial review the only available remedy to decree holders.
12. It is not in dispute that a valid Award and Certificate of Order against the Government were obtained and served upon the respondents on 30th October 2023. As was held by the Court of Appeal in *Five Star Agencies Ltd & Another v National Land Commission & 2 Others (Civil Appeal E290 & 328 of 2023)* [2024] KECA 439 (KLR), a decree holder is entitled to mandamus where the government has failed to pay a lawful judgment debt after service of the certificate of order against the government.
13. In that case, the Court affirmed that funding constraints do not absolve accounting officers of their statutory duty to initiate payment procedures, especially after proper service of a Certificate of Order.
14. Similarly, in *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County ex parte Stanley Muturi* [2016] eKLR, the High Court held that government entities cannot evade obligations to satisfy court decrees. The Court emphasized that public financial processes, while complex, cannot override legal obligations.
15. This Court acknowledges that the Respondents have made certain efforts, including: payment of Kshs. 10 million; initiation of correspondence with the National Treasury; and submission to the Pending Bills Committee.
16. However, these efforts, while noted, do not satisfy the threshold of discharging a public duty. The balance remains unpaid long after the Certificate of Order was served and there is no evidence of a concrete payment plan or timeline. The delay is substantial and unjustified.



17. It is well established that mandamus will issue even if the government contends that budgetary constraints exist, so long as the decree remains undisputed and unpaid. See *Five Star Agencies Ltd*, (supra).
18. 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. In other words, 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 *Judicial Review E014 OF 2021, Republic v County Secretary, County Government of Kisumu & 2 others; Otieno Ragot & Co. Advocates (Exparte) at Kisumu High Court*.
19. In *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County Ex Parte Stanley Muturi [2016] eKLR - Miscellaneous Civil Application 221 of 2016 Odunga J* (as he then was) citing other decisions had this to say:

“ 15. The first issue for determination is whether this Court ought not to grant the orders sought herein on the basis of the unavailability of funds. *Githua, J in Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR* 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].

16. I associate with the said decision and it is therefore my view that settlement of decretal sum by the Government whether National or County does not necessarily depend on the availability of funds. This position was appreciated by this Court in *Wachira Nderitu, Ngugi & Co. Advocates v The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012* in which this Court pronounced itself as follows:

"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."

17. In my view 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. In other words 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. That objection therefore fails.

20. In the end and based on the above analysis supported by judicial precedents, this Court is satisfied that a lawful decree exists; a Certificate of Order against the Government was served; the Respondents have failed to discharge their legal duty to satisfy the decree; and that the Applicant has no other recourse under the law due to the bar on execution under Section 21(4) of the *Government Proceedings Act*.

21. Accordingly, this Court proceeds to issue the following orders:

- a. An order of mandamus is hereby issued compelling the 1st and 2nd Respondents to settle the outstanding balance of Kshs. Kshs. 40,943,088.45, exclusive of further accrued interest at commercial rates of 13% per annum as per Order 5 of the Decree issued on 14th April, 2023 in HCC Com. Arb E005/2023.
- b. The Respondents shall file with the Court, within 60 days of this judgment, a progress report indicating steps taken to comply.
- c. The Applicant shall have the costs of this application assessed at Kshs 50,000.

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

R.E. ABURILI

JUDGE

