



Republic v Secretary Public Service Commission & 2 others; Ibrahim (Exparte) (Judicial Review Miscellaneous Application E037 of 2021) [2023] KEHC 3700 (KLR) (Judicial Review) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3700 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E037 OF 2021
JM CHIGITI, J
APRIL 27, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

THE SECRETARY PUBLIC SERVICE COMMISSION 1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY FOR INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

OMAR MOHAMED IBRAHIM EXPARTE

RULING

1. The application before this Court is the Ex parte Applicant’s Notice of Motion application dated 8th August, 2022 brought under Order 53 Rules 3 and 2 of the [Civil Procedure Rules](#) and the [Law Reform Act](#) Cap 26 of the Laws of Kenya.
2. The application seeks the following prayers;
 - i. That an order of mandamus be issued to compel the 1st, 2nd and 3rd Respondents to pay to the Applicant the sum of Kshs. 225,854 /- being the taxed amount owed to her in Nairobi Employment and Labour Relations Court Case No. 2071 of 2011 together with interest accruing thereon and costs.
 - ii. That the cost of this application be awarded to the Applicant.



3. The Application is supported by a Statement of facts dated 9th March,2021 and the Verifying Affidavit of Omar Mohamed Ibrahim sworn on even date.
4. The gist of the application before this court is that in its Judgment dated 8th September,2017 the Employment and Labour Relations Court directed the 1st Respondent to reinstate the Applicant as the Assistant Chief of Hororesa Sub location without loss of salary or benefits from the date of termination of his employment on 1st July,2007 and also pay his salary arrears together with interest at court rates from the date of filing of the said suit until payment in full.
5. A Decree was issued on 18th October,2017 and costs assessed by the Honourable Deputy Registrar at Kshs.225,854/=.The Ex parte Applicant urges that a Decree, Certificate of Taxation and Certificate of Order against the Government were served upon the Respondents who have declined to pay the said sum.
6. The Ex parte applicant contends that the Respondents have refused or neglected to pay the taxed amount as awarded by the Court.
7. The Court takes note that there is no response by the Respondents on record despite there being evidence of service being effected.
8. The Ex parte Applicant filed written submissions dated 21st March,2023. In the submissions it is submitted that Section 21(3) of the Government Proceedings Act imposes on an accounting officer a statutory duty to pay the sums in an Order to the person entitled or his advocate, and does not condition payment on budget allocation. Further that by not filing any response the Respondents have not demonstrated what steps if any were taken to ensure the paying of the taxed costs to the Ex parte Applicant.
9. The Ex parte Applicant in support of his case has placed reliance on the cases of Republic vs. Attorney General & Another Ex parte James Alfred Koroso JR Misc. Application No.44 o 2012 [2013] eKLR, Republic vs. Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza [2012] eKLR and Commission on Administrative Justice vs. Kenya Vision 2030 Delivery Board & 2 Others [2019]eKLR.
10. I have considered the argument advanced by the Ex parte Applicant herein and the issue for determination is whether the Respondents have a legal duty to satisfy the decree subject of these proceedings and whether the Applicant has satisfied the conditions precedent to warrant the orders of this court.
11. It is established law that an Applicant must follow the steps outlined in Section 21 of the Government Proceedings Act before receiving an Order of Mandamus. Section 21 of the Act states:

“

- “(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.”

12. The Act under Section 21 (3) continues to state as follows;

“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.”

13. The Court in the case of *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza* [2012] eKLR held 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.”

14. These regulations have the effect of requiring the accounting officer for the appropriate government department to fulfill any judgments obtained against that agency even though the government is not subject to the typical legal mechanisms of enforcing judgments.



15. The Court (Odunga, J as he then was) in the case of *Republic v The Attorney General & Another ex parte James Alfred Koroso* (2013) eKLR, where it cited with approval the case of *Shah v Attorney General* (No. 3) Kampala HCCM No. 31 of 1969 [1970] EA 543 extensively addressed the nature of mandamus and instances when the Court will grant the said Order of Mandamus. The Court also makes it clear that it is the accounting officer of the relevant government department that is obliged to satisfy the decree notwithstanding the fact that the said officer was not a party to the trial proceedings.
16. The Court in *Republic v The Attorney General & Another ex parte James Alfred Koroso* (*supra*) in part states as follows:

“...in 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 babysitting 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.”

17. Similarly, the Court of Appeal in *Republic v Kenya National Examinations Council ex parte Gathenji & 8 Others* Civil Appeal No 234 of 1996, set out the circumstances under which a judicial review order of mandamus will issue thus:

“The order of mandamus is of 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.”...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.”

18. In the instant case, the Applicant herein has moved this Court to compel the satisfaction of a judgment already decreed in his favour by a competent Court of law. The Respondents have not filed any response to the Applicant’s motion and as such no satisfactory reason has been given why the said decree is yet to be fulfilled almost six (6) years down the line.
19. I note that the Applicant has complied with the requisite procedure under Section 21 of the [Government Proceedings Act](#) and no objection has been raised of the said compliance and therefore, if the Court were to decline to grant mandamus, the Applicant would be left without an effective remedy despite holding a decree.
20. In the circumstances, I am convinced that the Applicant has established a claim to be granted a mandamus order. I hereby grant Order 1 of the motion notice dated 8th August, 2022. The costs of this application will also be borne by the Respondents.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2023

J. CHIGITI (SC)

JUDGE

