



Republic v Attorney General & another; Nyaguthie (Exparte Applicant) (Suing as the Administrator of the Estate of Joan Nyambura Wambugu (Deceased)) (Judicial Review 3 of 2019) [2023] KEHC 21805 (KLR) (9 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21805 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
JUDICIAL REVIEW 3 OF 2019
GL NZIOKA, J
AUGUST 9, 2023
IN THE MATTER OF EXECUTION AGAINST THE GOVERNMENT
AND
IN THE MATTER OF SATISFACTION OF CERTIFICATE OF COSTS
UNDER ORDER 21 RULE 9 OF THE CIVIL PROCEDURE RULES 2010
AND
IN THE MATTER OF SECTION 20 OF THE GOVERNMENT
PROCEEDINGS ACT, CAP 40 LAWS OF KENYA
AND
IN THE MATTER OF AN ORDERS OF MANDAMUS

BETWEEN

REPUBLIC APPLICANT

AND

HON. ATTORNEY GENERAL 1ST RESPONDENT

**THE PRINCIPAL SECRETARY STATE DEPARTMENT OF
 DEFENCE 2ND RESPONDENT**

AND

ESTHER NYAGUTHIE EXPARTE APPLICANT
SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOAN NYAMBURA
WAMBUGU (DECEASED)



JUDGMENT

1. By a Notice of Motion application dated February 1, 2022, brought under the provisions of; Order 51 Rule 1, 2 & 4, Order 53 Rule 3 of the Civil Procedure Rules, section 8 and 9 of the Law Reform Act (cap 26) Laws of Kenya and section 3A of the Civil Procedure Act (cap 21) Laws of Kenya and all other enabling provisions, the *ex-parte* applicant is seeking for the following orders:
 - a. That his Honourable court be pleased to issue an order of compelling the 1st respondent to pay the *ex parte* applicant herein the decretal sum of; Kshs 2,009,700 and costs of the suit amounting to; Kshs 191,865.40 together with interest thereon of Kshs. 237,575 in satisfaction of the judgment delivered on; April 9, 2019 in Naivasha Civil Case No. 662 of 2015: *Esther Nyaguthie (Suing as the administrator of the Estate of Joan Nyambura Wambugu (Deceased) vs Department of Defence and the Hon. Attorney General*
 - b. That the costs of the application be provided for.
2. The application is based on the ground thereto, the statutory statement and the verifying affidavit dated; September 16, 2019. The *ex-parte* applicant's case is that, she is the legal representative and Administrator of the Estate of the late; Joan Nyambura Wambugu
3. Further, she instituted a suit No. 662 of 2015 at the Chief Magistrate's Court at Naivasha seeking for general and special damages against the 1st respondent under the Fatal Accidents Act and the Law Reform Act.
4. That on April 9, 2019, Hon. Esther K. Kimilu entered judgment in in her favour wherein the 1st respondent was ordered to pay a sum of; Kshs 2,009,700 as damages plus cost and interest at court rates.
5. Subsequently, she made an application under the provisions of Order 29 (3) of the Civil Procedure Rules, 2010 and section 21 of the Government Proceedings Act, requesting for a Certificate of Order against the 1st respondent, and on August 7, 2019, the trial court issued an order that the Certificate of Costs against the Government be issued and the same and decree were issued accordingly.
6. That, the Certificate of Order was served upon the 1st respondent, however, the respondents have failed to pay the decretal sum of Kshs 2,009,700 plus costs of the sum of Kshs 191,865.40 together with interest at the rate of 12% per annum from April 9, 2009 to May 27, 2019 despite the twenty-one (21) days have passed since being served with the same.
7. Further, the suit is very old and the applicant is in urgent need of the money as she was dependent on the income of the deceased. That, as the successful litigant she is entitled to enjoy the fruits off the judgment.
8. The respondents did not file any response to the application despite being afforded an opportunity to do and therefore the application is unopposed.
9. The application was disposed of by way of written submissions, the applicant file two sets of submissions dated; April 3, 2023 and May 17, 2023 and submitted that under Order 29 Rule 3 of the Civil Procedure Rules, provides for satisfaction of orders against the Government and states that an application for a certificate under section 21 of the Government Proceedings Act shall be made in the subordinate courts and the certificate issued therein shall be used in a claim against the Government.



10. That, the applicant herein obtained a Certificate of Order dated August 7, 2019, however the respondents had failed to pay the decretal sum. That in the case of; *Republic vs Jomo Kenyatta University of Agriculture and technology ex parte Elijah Kamau Mwangi* [2021] eKLR the court held it the Government can only be compelled by an order of *mandamus* for the satisfaction of a public duty if its due and where the condition precedent necessary for duty to accrue has come to pass.
11. The applicant relied on the case of; *Kenya National Examination Council vs Republic ex parte Geoffrey Gathenji Njoroge & 9 others* (1997) eKLR where the Court of Appeal made specific reference to the prerogative writ of *mandamus* stating that, it compels performance of a public duty imposed on a person or a body of persons by a statute.
12. The applicant submitted that an order of *mandamus* is premised on an existing public duty where the fulfilment of the same is yet to be achieved due to delay or ignorance of orders.
13. That in the case of; *Republic vs County Government of Kiambu ex parte Laban J Macharia Muiruri* [2021] eKLR, the court cited with approval the case of; *Republic vs Town Clerk of Webuye County Council & Another* 448 of 2006 where the court discussed the importance of a decree holder enjoying the fruits of judgment.
14. The applicant urged the court should adopt an interpretation that favours enforcement and secure the accrued rights underpinned by the values of Article 10 of the *Constitution*, the obligation of the court to do justice under Article 159 (2) (a) and (b) of the *Constitution* of Kenya, 2010 and the applicant’s right to access justice under Article 48 of the *Constitution*.
15. That she has fulfilled the pre-requisite necessary for an order of *mandamus* to issue against the respondents and that any further breach of duty owed to her is an abuse of the court process and a total disregard for the rule of law.
16. Lastly, she submitted that section 27 of the *Civil Procedure Act* provides that costs follow the event and prayed that the court make order for costs of the application to be borne by the respondents.
17. Having considered the materials and arguments advanced by *ex parte* applicant and I find that, the main issue to determine is whether the applicant has met the threshold for grant of the orders sought. In that regard, section 21(4) of the *Government Proceedings Act* provides as follows:

“ 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”.
18. Pursuant to the aforesaid, it follows that a decree holder can only enforce a judgment in its favour against the Government, by seeking for an order of *mandamus* to compel the Government to pay make the payment.
19. The order of *mandamus* is derived from the Latin word “*Mandare*” meaning to command. It is a judicial remedy in the form of an order from a court to any government, subordinate court, corporation, or public authority, to do some specific act which that body is obliged under law to do, and which is in the nature of public duty, and in certain cases one of a statutory duty, where a public body or official has unlawfully refused, declined or otherwise failed to undertake the duty.



20. In that regard the Court of Appeal in the case of; *Kenya National Examination Council v Republic, Ex-Parte Geoffrey Gathenji Njoroge & 9 Others* [1997] eKLR stated as follows:

“The next issue we must deal with is this: 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.”

21. To revert back to the matter herein, the *ex parte* applicant has produced a copy of the judgment dated; April 9, 2019, the decree and certificate of costs dated; May 28, 2019, and the Certificate of Order dated; August 7, 2019 in support of the application for orders sought. It suffices to note that, judgment herein was entered in the year 2019 and the notice thereof was issued in the same year. The question is; for how long can the *ex parte* applicant wait to enjoy the fruit of justice.

22. It is noteworthy that, the 1st respondent is a litigant like any other litigant under the law. The fact that section 21(4) of the *Government Proceedings Act* shields it does not mean it exonerates it from liability. Indeed, the old adage states that “justice delayed is justice denied”. Further Article 159 of *the Constitution* of Kenya, 2010 implores the courts to dispense justice expeditiously. Finally, Article 48 of *the Constitution* gives the *ex parte* applicant the right to access justice.

23. The upshot of the aforesaid is that the applicant has met the threshold of grant of the orders sought and therefore, I allow the application as prayed

24. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 9TH DAY OF AUGUST 2023

GRACE L NZIOKA

JUDGE

In the presence of:

Mr. Mwangi for the Applicant

N/A for the Respondent

Ms. Ogutu Court Assistant

