



**Republic v Principal Secretary, Ministry of Agriculture
Livestock and Fisheries & 2 others (Application E144 of 2022)
[2023] KEHC 22531 (KLR) (Judicial Review) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22531 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E144 OF 2022
J NGAAH, J
SEPTEMBER 27, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**PRINCIPAL SECRETARY, MINISTRY OF AGRICULTURE LIVESTOCK AND
FISHERIES 1ST RESPONDENT**

**MINISTRY OF AGRICULTURE LIVESTOCK AND FISHERIES 2ND
RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The application before court is the applicant's motion dated 22 September 2022 expressed to be brought under order 53 rule 3 (1) of the [Civil Procedure Rules](#). It seeks for the orders that:

An order of mandamus directed to the Principal Secretary, Ministry of Agriculture, Livestock and Fisheries; Ministry of Agriculture, Livestock and Fisheries to comply by paying to the applicant within 21 days of the order of the court the sum of Kshs. 199,064,023.83 as at 31st January 2022 together with interest as ordered by the court in Misc. No. E 1143 of 2020-Export Trading Company Limited -versus-The Ministry of Agriculture, Livestock and Fisheries and Another and in default a Notice to Show Cause do (sic) issue against the Principal Secretary, Ministry of Agriculture, Livestock and Fisheries; Ministry of Agriculture Livestock and Fisheries why they should not be cited for contempt of court”.



2. The applicant also asked for costs of the application.
3. The application is based on a statutory statement dated 20 September 2022 and an affidavit sworn on even date by Mr. Biren H. Jasani in verification of the facts relied upon. Mr. Jasani has introduced himself in the affidavit as the country head of the applicant.
4. According to Mr. Jasani, an arbitral award made in favour of the applicant was adopted as a judgment of this Honourable Court in Miscellaneous Application No. E1143 of 2020 on 2 February 2021.
5. On 8 June 2021 the deputy registrar in the commercial and tax division of the Court issued a certificate of order against the government. The certificate was forwarded to the 3rd respondent by a letter dated 19 November 2021 requiring the government to settle the amount specified in the certificate within 21 days from the date of the letter. By another letter dated 9 December 2021 the applicant forwarded the tabulation of the outstanding amount at the request of the 2nd respondent. However, no response has been forthcoming. In the absence of any other option to enforce payment the applicant has filed the instant application and prays that the application be allowed.
6. The respondents opposed the motion and filed grounds of objection to that end. They contend that the applicant is guilty of material non-disclosure for failing to disclose that it has previously initiated similar proceedings in High Court Judicial Review Application No. E060 of 2022 seeking the same prayers sought in this application.
7. It is also contended that the application is vexatious and an abuse of the process of this Honourable Court and that it offends the provisions of order 53 rule 3 of the *Civil Procedure Rules* and sections 8 and 9 of the *Law Reform Act*.
8. Based on the same grounds, the respondents filed a motion dated 2 March 2023 seeking to have leave granted to the applicant to file the instant motion set aside.
9. Even then, Mr. Philip Kello Harsama the Principal Secretary, State Department for Crop Development and Agricultural Research in the Ministry of Agriculture, Livestock and Fisheries, swore a replying affidavit admitting that he is aware that the instant proceedings are predicated upon an arbitral award issued in favour of the applicant on 4 September 2020 in the sum of Kshs. 518,541,329.50/= together with interest and costs.
10. This amount, according to him, was paid on 9 March 2021.
11. By a letter dated 18 March 2021 his ministry made a request to the national Treasury for an additional budgetary allocation of Kshs. 153,695,650/= to cater for the outstanding sum made up of interest on the decretal amount. However, no allocation has been made and, therefore, the ministry has been unable to settle the interest on the decretal sum.
12. It is the 1st respondent's case that the ministry has not willfully and deliberately failed to settle the sum due but the delay in payment has been occasioned by what he has described as "budgeting cycle and financial constraints."
13. Mr. Harsama has also sworn that the amount claimed is not consistent with the decree issued on 8 June 2021 and a certificate of order against the government issued on even date.
14. I have considered the respective applications by both parties and the submissions filed in support of their respective positions.
15. The preliminary point of law raised by the respondents on the applicant having filed an earlier suit can easily be disposed of.



16. The applicant has not denied that indeed it had filed an earlier suit seeking the same reliefs sought in this application in judicial review application no. 60 of 2020. I gather from applicant's and respondent's counsel that the suit was abandoned for the reason that the main motion was filed outside the time prescribed by the court after leave was granted.
17. If withdrawal of a previous suit was material in determination of the viability of any subsequent suit filed over the same subject matter and between the same parties, I would agree with the applicant that disclosure would be material and failure to disclose in such circumstances would certainly qualify as a material non-disclosure. But nothing barred the applicant from withdrawing the suit and filing a fresh one; at least, no authority has been brought to my attention where an applicant for judicial review reliefs would have been barred from instituting a fresh suit after its previous suit has been withdrawn. In these circumstances, I would not consider the revelation in the subsequent suit of the applicant's previous suit as necessary. It would not make any difference whether to grant or decline leave.
18. In any event, the respondents agree that the applicant is a holder of a decree that has not been satisfied or fully satisfied. And as will become apparent in due course, the only means available to the applicant to enforce the decree is through the order of mandamus. There would be no reason why an application for this order should not be considered in these circumstances.
19. For these reasons I do not find any substance in the respondents' preliminary objection and the application to set aside leave. The preliminary objection is overruled and the application dismissed.
20. Turning back to the applicant's application, the certificate of order served upon the respondents speaks of Kshs. 732,121,050.04 as the amount due and owing to the applicant. But in the motion before court, the applicant has asked for Kshs. 199,064,023.83.
21. Going by the 1st respondent's depositions I have to proceed on the assumption that this is the accrued interest. It is noted that the 1st respondent admitted that the accruing interest has not been paid but since he did not provide any figure of the amount due as interest and neither has he contested the figure provided by the applicant I am entitled to assume that the amount due is Kshs. 199,064,023.83.
22. I am not satisfied with the reasons proffered by the 1st respondent for non-payment of this sum. Lack of budgetary allocation is not a sufficient reason why a decree from a court of law cannot be settled. If anything, the tax payer is exposed to more loss without the "budgetary allocation" because, as a result of the delay in settlement of the decree, the outstanding amount has ballooned to hundreds of millions.
23. It is inevitable, in these circumstances that a mandatory or mandamus order should ensue, if not for anything else, to mitigate the loss that the tax payer has been subjected to.

Why a mandatory order?

24. One of the ways through which decrees or orders are enforced is, of course, execution or attachment. However, the Government is protected from such process of execution or other similar process in enforcement of decrees or orders by section 21 of the [Government Proceedings Act](#), in particular, section 21(3) thereof. That section reads as follows:

21. Satisfaction of orders against the Government

- (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.

- (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.
- (3) 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.

- (4) 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.
- (5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.

25. The Ministry of Agriculture, Livestock and Fisheries or State Department for Crop Development and Agricultural Research in that ministry are protected from execution under section 21(4) of the *Government Proceedings Act*. In the face of this protection from execution or attachment, the only available route open to the applicant is to compel the 1st respondent to perform his statutory duty under section 21(3) of the Act and pay what has been decreed as due and owing to the applicant. In other words, only the order of mandamus would be the appropriate order under the circumstances.

26. According to *Halsbury's Laws of England*/Judicial Review (volume 61 (2010) 5th Edition)/5. Judicial Remedies/ (1) Introduction paragraph 689:

A mandatory order is, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal requiring him, or them, to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty (See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL). The breach of duty may be a failure to exercise a discretion, or a failure to exercise it according to proper legal principles.”



27. This is reiterated in paragraph 703 which states:

A mandatory order is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or it to do some particular thing specified in the order which appertains to his or its office and is in the nature of a public duty... the purpose of a mandatory order is to compel the performance of a public duty, whether of an inferior court or tribunal to exercise its jurisdiction, or that of an administrative body to fulfil its public law obligations. It is a discretionary remedy.”

28. And with particular reference to public officers who, like in the instant case, fail to perform their duty, paragraph 706 is clear that a mandamus order may be issued to compel them to carry out the duty. It reads as follows:

706. Public duties by government officials.

If public officials or public bodies fail to perform any public duty with which they have been charged, a mandatory (mandamus) order may be made to compel them to carry out the duty (See R v Metropolitan Police Comr, ex p Blackburn (No 3) [1973] QB 241, [1973] 1 All ER 324, CA; R v London Transport Executive, ex p GLC [1983] QB 484, [1983] 2 All ER 262, DC.)”

29. The applicant has demonstrated that it extracted a certificate of order against government and that the same was duly served upon the respondents. It has not been suggested that it defaulted in any step prescribed under section 21 of the Act as to disentitle it to the order of mandamus. In any event, the accounting officer on whose shoulder the burden to pay lies has acknowledged that he is aware that the decree or the amount specified in the certificate of order against Government has not been settled.

30. A demand for payment having been made and the 1st respondent having failed to pay, no other evidence is required to demonstrate that the 1st respondent has failed to perform a public duty with which he is charged under section 21(3) of the *Government Proceedings Act*. A mandamus order would properly issue in such circumstances.

31. Accordingly, I hereby allow the applicant’s motion dated 22 September 2022 to the extent that an order of mandamus is hereby issued compelling the 1st respondent to pay the applicant the accruing and unpaid interest on the decretal sum calculated in accordance with the decree given and issued by this Honourable Court on February 2, 2021. I will not make any order for costs to spare tax payer who would ultimately bear the burden of costs if the respondents were to be condemned to pay them. It is so ordered.

SIGNED, DATED AND DELIVERED ON 27 SEPTEMBER 2023

NGAAH JAIRUS

JUDGE

