



**Republic v Principal Secretary Ministry of Public Service and Gender & another;
Mativo (Exparte) (Judicial Review Miscellaneous Application E119 of 2022)
[2023] KEHC 25953 (KLR) (Judicial Review) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25953 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E119 OF 2022
JM CHIGITI, J
NOVEMBER 30, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**THE PRINCIPAL SECRETARY MINISTRY OF PUBLIC SERVICE AND
GENDER 1ST RESPONDENT**

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

JUSTUS KIATINE MATIVO EXPARTE

JUDGMENT

1. The Ex parte Applicant is before this Court seeking an Order of Mandamus directed to the 2nd Respondent to pay the Applicant the sum of Kshs. 2,156,322.24/= as awarded by the Honourable Court in Nairobi CMCC No.6185 of 2017. The application in which this order is sought is the Ex parte Applicant’s motion dated 19th October,2022.
2. It is supported by a Statutory Statement dated 28th September,2022 and a Supporting Affidavit sworn on 29th September, 2022 by the Applicant.
3. The Applicant’s case is that although a certificate of order against the government was served together with a decree and demand letter requesting for payment of the sum of Kshs. 2,156,322.24/= upon the Attorney General the same is yet to be satisfied leading to filing of the application before this court.



4. In response to the application the 1st and 2nd Respondents filed Grounds of Opposition in which four (4) grounds are raised as follows;
 1. That the Attorney General, the 2nd Respondent herein has no statutory mandate or responsibility to settle decretal sums on behalf of other Government entities.
 2. That the Attorney General is not the accounting officer of the Ministry of Public Service and Gender and as such an order of mandamus cannot issue against him.
 3. That the Attorney General does not receive budgetary allocation from the National Treasury to pay claims on behalf of other Government ministries and entities, Departments and agencies.
 4. That the application is incurably defective, incompetent and an abuse of the court process and should be dismissed with costs to the Respondents herein.”
5. The Ex parte Applicant also filed a Further Affidavit sworn on 11th April, 2023 in which he furnishes the Court with a certified copy of the Judgment of the trial court dated 24th May, 2019 as directed by this Court on 27th March, 2023.
6. The Application was canvassed by way of written submissions however as can be seen from the record M/s Gathoga acting for the 1st and 2nd Respondent indicated that she would not be filing any submissions.
7. The Ex parte Applicant in his submissions aside from reiterating what is stated in the Statutory Statement and the Supporting Affidavit contends that the Judgment of the Lower Court was delivered on 24th May, 2019 which is close to four (4) years but no payment has ever been made. The Ex parte Applicant also contends that he continues to suffer and is in constant medication for the injuries sustained.
8. It is also the Ex parte Applicant’s submission that no appeal has been preferred against the said decision and that the 1st Respondent who is the Accounting Officer of the Ministry of Public and Service and Gender should be compelled by an order of mandamus to compel him to pay the accruing decretal sum of Kshs. 2,156,3322/=.
9. The Court has duly considered the application, further affidavit, response by the Respondents and submissions by the Ex parte Applicant and one issue crystallizes for determination and this is whether the Ex parte Applicant is entitled to an order of Mandamus as sought.
10. It is settled law that before an order of mandamus is issued, an Applicant must abide by the procedure in Section 21 of *Government Proceedings Act* which provides:
 - “(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.”

11. Section 21 (3) of the said Act on the other hand provides:

“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.”

12. The Court will issue an order of Mandamus under certain circumstances as was held in the case of Republic v Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996, where the Court of Appeal cited with approval, Halsbury’s Law of England, 4th Edition. Vol. 7 p. 111 para 89 thus:

“The order of mandamus is of most extensive remedial nature and is in form, of 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.”

13. It is not in contention as is evidence by the record and the Respondent’s grounds of opposition that indeed there is a subsisting order of the Court that is yet to satisfied four (4) years after it was issued. Further that the Respondents are aware that the said order exists.

14. It has also not been contended that service of the Certificate of order Against Government dated 14th June,2021 and the Decree dated 26th August,2019 was effected upon the 2nd Respondent as evidenced by the Affidavit sworn by Diffinah Moithaga on 21st March,2023. This Court however takes judicial notice that while before the Court on 2nd March,2023 M/s Gathoga advocate for the Respondents indicated that she did not have a copy of the certified judgment of the lower court which prompted the court to direct the Ex parte Applicant on the said date to furnish the Respondent with the same however when the matter came before court on 27th March,2023 the Ex parte Applicant had not complied and the Court directed that he furnish the same to the Respondent and the Court failure to which the Court would still proceed to deliver its judgment.



15. The Court takes judicial notice that as is evidenced by the Affidavit sworn by Diffinah Moithaga on 19th April, 2023 the certified Judgment was furnished to the court and served upon the Respondents. The Respondents knowledge of the subsisting order is however not contended.
16. The Respondents in their response contend that the Ex parte has no statutory mandate or responsibility to settle decretal sums on behalf of other Government entities and further that it is not the accounting officer of the Ministry of Public Service and Gender and as such an order of mandamus cannot issue against the 2nd Respondent.
17. It is also the Respondents case the Attorney General does not receive budgetary allocation from the National Treasury to pay claims on behalf of other Government ministries and entities, Departments and agencies.
18. The office of the Attorney General is established under Article 156. The specific duties of the Attorney General are set out as follows in Article 156 (4) to (7) of the Constitution:

- “(4) The Attorney-General—
- (a) is the principal legal adviser to the Government;
 - (b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and
 - (c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.
- (5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.
- (6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.
- (7) The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.”

19. Section 5 of the Office of the Attorney General Act provides for additional functions of the Attorney General as follows:

- “(1) In addition to the functions of the Attorney-General under Article 156 of the Constitution, the Attorney-General shall be responsible for—
- (a) advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters;
 - (b) advising the Government on all matters relating to the Constitution, international law, human rights, consumer protection and legal aid;
 - (c) negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of the Government and its agencies;



- (d) coordinating reporting obligations to international human rights treaty bodies to which Kenya is a member or on any matter which member States are required to report;
- (e) drafting legislative proposals for the Government and advising the Government and its agencies on legislative and other legal matters;
- (f) reviewing and overseeing legal matters pertaining to the registration of companies, partnerships, business names, societies, adoptions, marriages, charities, chattels, hire purchase and coat of arms;
- (g) reviewing and overseeing legal matters pertaining to the administration of estates and trusts;
- (h) in consultation with the Law Society of Kenya, advising the Government on the regulation of the legal profession;
- (i) representing the national Government in all civil and constitutional matters in accordance with the *Government Proceedings Act* (Cap. 40);
- (j) representing the Government in matters before foreign courts and tribunals; and
- (k) performing any function as may be necessary for the effective discharge of the duties and the exercise of the powers of the Attorney- General.”

20. The 2nd Respondent contrary to the assertions of the Respondents is before this Court pursuant to the provisions of Article 156 which 4 (a) which states that the 2nd Respondent is principal legal adviser to the Government and Section 5(1)(a) of the *Office of the Attorney-General Act*, 2012 which states that the Attorney General shall be responsible for advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters. In this case it is upon the 2nd Respondent to advise the 1st Respondent on the importance of complying with court orders.
21. It is obvious from the Ex parte Applicant’s submission that he is aware that it is the 1st Respondent who is the Accounting Officer of the said Ministry and as such the issue of upon whom the order of mandamus should issue against does not hold water.
22. The Court in the case of *Republic v The Attorney General & Another ex parte James Alfred Koroso* (2013) eKLR held 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 baby-sitting 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.”

Disposition

23. In light of the above, I am satisfied that the Ex Parte Applicant has made a case for the grant of an order of mandamus and I hereby grant the same in terms of prayer (1) of the notice of motion dated 19th October, 2022. The Ex parte Applicant will also have costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2023

J. CHIGITI (SC)

JUDGE

