



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW NO. 6 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO**

**APPLY FOR THE JUDICIAL REVIEW ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM CAP, 26**

**AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF A DECREE MADE ON 26<sup>TH</sup> APRIL 2007**

**IN ROBERT NGANGA MWANGI VS P.C. ABONDO & 2 OTHERS**

**MAKURU CMCC NO. 5050 OF 2004**

**AND**

**IN THE MATTER OF AN APPLICATION BY:**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND**

**CO-ORDINATION OF NATIONAL GOVERNMENT.....RESPONDENT**

**EX PARTE: ROBERT NG'ANG'A MWANGI**

**JUDGMENT**

1. The *Ex Parte* Applicant herein (Applicant) sued, in the Chief Magistrates' Court, two Police Officers and the Attorney General claiming damages for personal injuries he claimed he sustained when he was assaulted by the two Police Officers. The suit was ***Nakuru CMCC No. 505 of 2004***.

2. The suit in the Chief Magistrates' Court was undefended. After the *ex parte* hearing, the Trial Magistrate awarded the Applicant Kshs. 101,500/- in damages plus costs and interests.

3. The decretal sum was never paid. This prompted the Applicant, through his lawyers, after reconstruction of the file following the certified loss of the original file, to take steps towards execution. He applied for a decree and *Certificate of Costs Against the Government*. A decree for Kshs. 227,360/- for damages plus interest and Kshs. 52,509/- Party and Party Costs was issued on 11/09/2017. Thereafter, a *Certificate of Costs Against the Government* was issued on 27/03/2018 for those amounts.

4. The Applicant's advocates proceeded to serve the documents on the Honourable Attorney General and made a demand for payment. Both that demand and follow up letters were ignored by the Honourable Attorney General. All these letters are exhibited in the Applicant's instant Application.

5. Having failed to elicit any action from the Honourable Attorney General, the Applicant filed the instant Application after duly obtaining the leave of this Court. The Application is dated 05/03/2019. It has a singular substantive prayer thus:

*That an order of mandamus do issue compelling the Principal Secretary, Ministry of Interior and Co-ordination of National Government to pay to the ex parte Applicant the judgment debt in the sum of Ksh 227,360/= together with interest from 11<sup>th</sup> September, 2017 until the date of payment costs which have been assessed and certified by the Magistrate at Ksh 52,509/= together with all accrued on the costs at 14% per annum from the 11<sup>th</sup> day of September, 2017 until the date of payment arising from the decree made on 26<sup>th</sup> April, 2007 in Nakuru CMCC No. 505 of 2004: Robert Nganga Mwangi Vs P. C Abongo & 2 others.*

6. The Application was duly served on the Honourable Attorney General. On at least six occasions, Counsel from the Attorney General's Chambers appeared in Court in the matter. On all those occasions, the Counsel informed the Court that they were seeking instructions from the relevant ministry in order to file a response. Eventually, the Honourable Attorney General did not file any response despite having been given at least five opportunities and extensions to do so between 03/03/2020 and 14/10/2021. The Court, therefore, directed the Applicant's Counsel to file Written Submissions – which he promptly did on 27/10/2021. The Application is, therefore, undefended.

7. The only issue for determination is whether the Applicant has satisfied the conditions for the grant of the order of mandamus against the Principal Secretary in the Ministry of Interior and Coordination of the National Government compelling him to settle the decretal amount.

8. It is not in doubt that section 21(4) of the Government Proceedings Act prohibits execution against the Government. The said provision states:

*Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, 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.*

9. However section 21 (1) of the Act provides:

*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.*

10. 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.*

11. As many decisions in our jurisdiction have pointed out, the effect of these provisions is that whereas execution proceedings as are known to law are not available against the Government, the Accounting Officer for the Government department concerned is nevertheless under a statutory duty to satisfy a judgement made by the Court against that department. That Accounting Officer can be compelled by an order for mandamus to do so. This is what the Applicant seeks here.

12. As the Court of Appeal said in **Republic vs. Kenya National Examinations Council Ex Parte Gathengi & 8 Others Civil Appeal No 234 of 1996** while citing with approval **Halsbury's Law of England, 4<sup>th</sup> Edn. Vol. 7 p. 111 para 89:**

*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.*

13. In the present case, the Applicant has obtained a Certificate of Costs against the Government as required by the Statute. He has served it

on the Attorney General and the appropriate Principal Secretary as required by the Statute. The Principal Secretary has failed to make the payments. The Principal Secretary is under a duty to make the payment and no lawful justification for non-payment has been proffered.

**14. In the circumstances, the order of mandamus prayed for by the Applicant is merited. It is hereby granted as prayed in the Notice of Motion dated 05/03/2019. In addition, the Applicant shall have the costs of this Application.**

15. Orders accordingly.

**DATED AT NAKURU THIS 24TH DAY OF FEBRUARY, 2022**

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**JOEL NGUGI**

**JUDGE**

**NOTE: THIS JUDGMENT WAS DELIVERED BY VIDEO-CONFERENCE PURSUANT TO VARIOUS PRACTICE DIRECTIVES BY THE HONOURABLE CHIEF JUSTICE AUTHORIZING THE APPROPRIATE USE OF TECHNOLOGY TO CONDUCT PROCEEDINGS AND DELIVER JUDGMENTS IN RESPONSE TO THE COVID-19 PANDEMIC.**