



Bosire v Attorney General & another (Judicial Review Miscellaneous Application E001 of 2021) [2022] KEHC 11609 (KLR) (Judicial Review) (19 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E001 OF 2021**

AK NDUNG'U, J

MAY 19, 2022

BETWEEN

SAMUEL E. O. BOSIRE APPLICANT

AND

ATTORNEY GENERAL & ANOTHER RESPONDENT

JUDGMENT

1. Pursuant to leave of this court granted on January 7, 2021, Samuel E Bosire (hereinafter the applicant) moved this court by way of notice of motion dated January 20, 2021 seeking orders;
 - i) That an order of *mandamus* remove into this honourable court and compelling the Attorney General to pay to the applicant the sum of Kshs 836,557/- with interest at court rates from June 1, 2011 in terms of the certificate of order against the Government issued pursuant to the judgment delivered in Nairobi ELC Case No 491 of 2015 *Samuel EO Bosire v The Hon Attorney General* delivered on July 26, 2018.
 - ii) That the costs of this application be provided for.
2. The application is based on grounds that;
 - i) The applicant herein filed ELC Case No 491 of 2015 *Samuel EO Bosire v The Hon Attorney General* seeking special damages amounting to Kshs 816,157/- interest at treasury bills rates or such order as the court may deem fit and just to grant from the date that payment was made to the commissioner of lands until payment in full or in the alternative at the rate of interest offered by treasury bills.
 - ii) That on July 26, 2018, the Environment and Land Court delivered judgment in favour of the applicant and awarded him a sum of Kshs 836,557/- in damages together with interest on



the sum awarded calculated from June 1, 2011 until payment in full. The applicant was also awarded costs of the suit.

- iii) That on November 8, 2018, the Applicant filed party & party bili of cost dated October 19, 2018, against the Attorney General.
 - iv) That the applicant's party & party bill of costs was taxed against the respondent in the suit in the sum of Kshs 251,035/- *vide* a ruling dated May 23, 2019.
 - v) That the applicant was subsequently issued with the certificate of order against the Government in the sum of Kshs 836,5571- being the decretal amount together with interest on the sum awarded calculated from June 1, 2011 until payment in full.
 - vi) That the applicant has served the Attorney General with the certificate of order against the Government and demanded payment of the sum Kshs 836,557/- of the decretal amount together with interest on the sum awarded calculated from June 1, 2011 until payment in full within thirty (30) days thereof.
3. In addition, reliance is placed on the facts and reasons set out in the statutory statement dated December 14, 2020 and the affidavit verifying facts sworn by the applicant on even date.
 4. The gist of the application as can be gleaned from the facts is that the applicant obtained judgement against the Hon Attorney General for Kshs 836,557 in damages with interest from June 1, 2011 until payment in full. The applicant has since obtained a certificate of order against the Government and demanded payment of the sum of Kshs 836,557 together with interest on the sum calculated from June 1, 2011.
 5. The application is opposed and the respondents have raised grounds of opposition viz;
 - i) That the order of *mandamus* sought by the applicant against the Attorney General cannot issue. The *ex parte* applicant should know that the Attorney General has no statutory mandate or responsibility to settle decretal sums on behalf of other Government offices. The simple reason being that the Attorney general is "the between" the court and his client. As such, any demand for payment should be made to the relevant Ministry and not the Attorney General.
 - ii) That the *ex parte* applicant has not served the relevant Ministry with demand letters for payment of Kshs 836,557/=. Therefore, it cannot be said that there has been willful refusal by the Ministry to pay the decretal sum when the applicant has not shown or proved that indeed they have made demands for payment and that the same demands have not been met.
 - iii) That there is no proof on record that the *ex parte* applicant has been making demands for payment from the Ministry of Lands and Physical Planning after delivery of judgment on July 26, 2018. There is not a single letter attached to the application addressed to the Principal Secretary Ministry of Lands and Physical Planning seeking settlement of the decretal sum dated post July 20, 2018.
 - iv) That the Attorney General is not the accounting officer of the Ministry of Lands and Physical Planning. As such, the Attorney General cannot be compelled to settle claims on behalf of the Ministry of Lands and Settlement.
 - v) That the Honourable Attorney General does not receive budgetary allocation form the National Treasury for purposes of settling claims on behalf of other government agencies or Ministries.



- vi) That since there are no orders sought against the 2nd respondent the case against the 2nd respondent should be withdrawn and/ or dismissed with costs.
 - vii) That the instant application has not met the threshold required for the court to grant judicial review orders and as such, an order of *mandamus* should not issue.
 - viii) That the instant application is premature, incurably defective, incompetent and an abuse of the court process and should be dismissed forthwith with costs to the respondents.
6. The application was canvassed by way of written submissions.
7. I have had occasion to consider the application the grounds relied upon as seen on the face of the application and as particularised in the statutory statement filed and verifying affidavit. I have had due regard to the grounds of opposition by the respondents. I have considered the submissions by learned counsel. Of determination is whether the applicant has established a case for the grant of the judicial review remedy sought.

The Applicable Legal Principles

8. Execution of decrees against the Government takes a special procedure provided for under the [Government Proceedings Act](#) distinct from execution proceedings under the [Civil Procedure Act](#) and the [Rules](#) made thereunder. A prerogative writ of mandamus is the remedy available to decree holder against the Government to compel the accounting officer in the relevant ministry to pay the decretal amount due. Such an applicant is required to abide by the procedure in section 21 of the [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.”

9. 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. ”



10. Githua, J in *Republic v Permanent Secretary, Ministry of State for Provincial and Internal Security ex parte Fredrick Manoah Egunza* [2012] eKLR while dealing with the said provisions expressed herself 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. ”

11. In the instant suit, the applicant has satisfied the requirements of the *Government Proceedings Act*. There is a valid decree of court against the respondents. The applicant obtained a certificate of order against the Government. The order has been duly served on the Attorney General. Despite the service, the respondents have not honoured the decree. The respondents have thus failed to honour their statutory duty as required under the law. A ground in opposition has been raised that the Attorney General is not the accounting officer of the ministry of lands and physical planning and as such, he cannot be compelled to settle claims on behalf of the ministry. It is further urged that the applicant has not served the relevant ministry with demand letters and there is no proof that the applicant has been making demands to the ministry concerned. Whereas, in my view, counsel for the respondents states the law correctly that the Attorney General is not the Accounting Officer of the ministry concerned, she, again in my view, fails to nail it when she asserts that the applicant has not served the ministry with demand letter(s) as that is not a condition precedent to the satisfaction of a decree by an accounting officer. The court in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza* stated;

“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.” (Emphasis added)

12. There is no denial that the certificate of order against the Government was served on the Attorney General. The condition precedent for the satisfaction of the decree has thus been met. In my view the joinder of the Principal Secretary Ministry of Lands and Physical Planning rescues the applicant’s application from the jaws of defeat. This is so because this is the accounting officer on whom section 21(3) of the Act imposes a statutory duty to pay the sums specified in the certificate of order against the Government once the order is served on the Attorney General. To send the applicant away from the seat of justice empty handed holding a paper judgement whose fruits he cannot realise would not only lower the dignity of the court and be a blemish on the rule of law but would be a sure erosion of the faith the people have in the judicial system and the administration of justice through the courts.
13. In Republic v The Attorney General & Another ex parte James Alfred Koroso, the court stated;

“...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."

14. The circumstances under which judicial review order of *mandamus* are issued were set out in [*Republic v Kenya National Examinations Council ex parte Gatbenji & 8 others*](#) Civil Appeal No 234 of 1996, where the Court of Appeal cited with approval, [*Halsbury's Law of England*](#), 4th Edn Vol 7 p 111 para 89 thus:

"The order of *mandamus* is of most extensive remedial nature and is inform, 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."

15. The ministry of lands and physical planning has not given any reason why the decree herein has not been satisfied. The applicant has demonstrated full compliance with the law relating to execution of judgement against the Government and its agencies. Following the Court of Appeal's findings in [*Republic vs Kenya National Examinations Council ex parte Gatbenji and 8 others*](#), am of the view that the order of mandamus sought by the applicant is appropriate in this matter. It is not lost on me that the applicant sought the order against the Attorney General. Under the very wide latitude afforded this court by article 159 of the [*Constitution*](#) to do justice without undue regard to technicalities, and aware that the law only requires service of the certificate of order against the Government to be served on the Attorney General and once served a duty is imposed by section 21(3) of the [*Act*](#) on the Accounting officer of the ministry concerned to pay the sums specified in the order, I allow the application herein and make the following orders;

- a) An order of *mandamus* be and is hereby issued compelling the Principal Secretary, Ministry of Lands and Physical Planning to pay to the applicant the sum of Kshs 836,557 with interest at court rates from June 1, 2011 in terms of the certificate of order against the Government issued pursuant to the judgement delivered in Nairobi ELC Case No 491 of 2015, [*Samuel EO Bosire v The Attorney General*](#) delivered on July 28, 2018.
- b) Each party to bear its own costs



DATED SIGNED AND DELIVERED THIS 19TH DAY OF MAY 2022.

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AK NDUNGU

JUDGE

