



Republic v Principal Secretaries Ministry of Interior & Coordination of National Government & another; Omukaga (Exparte) (Judicial Review E010 of 2021) [2022] KEHC 11472 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11472 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
JUDICIAL REVIEW E010 OF 2021
TM MATHEKA, J
JULY 28, 2022

N THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS
AND
IN THE MATTER OF ARTICLES 23 & 156 OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC APPLICANT

AND

PRINCIPAL SECRETARIES MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT

AND

PIUS IDEWA OMUKAGA EXPARTE

RULING

1. The Ex parte Applicant is before this court vide an application dated July 22, 2021 which seeks the following orders;
 - (i) That this honourable Court be pleased to issue an order of Mandamus compelling, commanding and or directing the respondents herein jointly and or severally to pay the Ex-Parte Applicant/Subject herein Pius Idewa Omukaga a sum of Kshs. 468,310/= in satisfaction of the judgement and or decree in *NAKURU CMCC NO.1115 OF 2014* plus interest accruing thereon at court rates from 29th November 2019 until payment in full PLUS costs of this application for leave and other subsequent proceedings herein.



- (ii) That the costs of these Application/Proceedings be borne by the Respondents herein jointly and or severally.
2. The application is supported by the grounds on its face and verified by the supporting affidavit of the Ex-parte Applicant Pius Idewa Omukaga dated July 22, 2021.
 3. In the affidavit, the Ex parte Applicant swears that he instituted *Nakuru CMCC No.1115 of 2014* against the respondents herein jointly and severally and or against their servants, subjects, agents, predecessors in title, designation and or job description and or employees claiming damages as a result of a road Traffic Accident that arose on or about June 14, 2014.
 4. That Judgment was delivered in his favour on or about 29th day of November, 2019 and the respondents herein jointly and severally and or through their servants ordered to pay the decretal sum therein which they have not done to date despite service of decree, certificate of order against the government and demand letters as per the affidavit of service.
 5. He deponed that he made this application as he has no other option in realizing the fruits of his judgement apart from seeking an order of mandamus to ensure that the judgment as awarded is realized.
 6. He deposed that the purpose of an order of mandamus is to remedy the defects of justice and accordingly it will ensure that justice may be done and urged this court to allow his application.

Responses

7. The Office of the Attorney General filed grounds of opposition dated October 15, 2021 on behalf of the Respondents and they are as follows:
 - a. That the Application as it is, does not meet the qualification for the prayers sought.
 - b. That the Applicant has not supplied the Respondents with the original decree , a precursor to payment being effected by the government
8. That the Application is therefore premature for failure to provide the aforementioned documents.

Written Submissions

9. The ex parte applicant filed his written submissions dated November 26, 2021. He reiterated the averments contained in his supporting affidavit. To buttress he relied on *Seventeenth Enterprises Limited vs Cabinet Secretary For Ministry of Interior & Coordination of National Government & 2 others* [2016] eKLR where the court quoted with approval the case of *Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* [2012] eKLR where court expressed itself as follows;

“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.....”

10. The applicant submitted that having obtained a certificate of order against the government and the same having been served upon the respondents and they having failed to honour the same by paying the sum due, amounts to failure by the respondent to carry out a public duty which entitles him to an order of mandamus as of right.
11. The applicant argued that the 1st respondent being the accounting officer of the relevant ministry is the right person to see to it that the sum due is paid and that it should not be heard to argue that they cannot settle this claim since there has been no budgetary allocation for the same. This is because firstly, existence of a budgetary allocation is not a condition precedent to pay and secondly it is the responsibility of the Government to settle claims against at all material times. For this proposition the applicant relied on the aforementioned case.
12. The Ex-parte applicant further urged this court to allow the Application in terms of prayer (1) and (2) as prayed. He relied on the case of Republic vs Principal Secretary & Another Ex-Parte Herman Marine Nderi [2014] eKLR where the applicant contended that a certificate of order against the Government had been served upon the Attorney General but no payment had been made hence the necessity to file Judicial Review Application. The court issued an order of on grounds that the respondent had a duty to pay a claim once a certificate of order was issued by the court under section 21 of the Government Proceedings Act, cap 40.
13. The Applicant also relied on the case of Republic vs Attorney General & Another Ex-Parte Simon Wainaina Mwaura [2013] eKLR where at the conclusion of the trial, the magistrate entered judgment in favour of the Applicant and subsequently a certificate of order against the government was issued in the sum of Kshs.244,245.40 together with interest at the rate of 12% per annum until payment in full. Thereafter the Applicant demanded for payment as per the certificate order from the Attorney General but no payment was forthcoming. The Applicant filed Judicial Review Application seeking for compensation and the court was satisfied that the Applicant had met the conditions for the grant of an order of mandamus and proceeded to issue it directing the respondents to pay the Applicant, together with the costs of the application.

Issues For Determination

14. Whether the application meets the threshold for the grant of the orders sought.

Analysis

15. There is no dispute that the Applicant instituted *Nakuru CMCC No.1115 of 2014* against the respondents on June 14, 2014 and a judgment delivered in his favour on 29th November 2019. As per the attached decree the applicant is entitled to be paid a total sum of Kshs. 463,310/- by the respondents.



16. The true scope of the order of Mandamus has been settled since *Kenya National Examination Council vs Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR 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.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel 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.

17. The applicant is in order to invite the remedy of Mandamus for the performance of public duty to settle the decretal sum as he has complied with the provisions of section 21 of the *Government Proceedings Act*. This section provides that:-

“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.”

18. The applicant in this matter duly obtained an order of this court to commence these proceedings; he served the respondents with decree and certificate of order against the government. He also served the respondents with demand letters and to date they have not settled the decretal amount due.
19. The respondent has only offered a mere denial in response. It is evident that the circumstances of this case warrant the order of mandamus as sought.
1. An order of mandamus be and is hereby issued compelling the respondents herein jointly and or severally to pay the Ex-Parte Applicant/Subject herein Pius Idewa Omukaga the sum of Kshs.468,310/= in satisfaction of the decree in *Nakuru CMCC No.1115 of 2014* plus interest accruing thereon at court rates from 29th November 2019 until payment in full.
 2. The applicant will have the costs of the application for leave and other subsequent proceedings herein.
 3. The costs be borne by the Respondents herein jointly and /or severally.
20. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 28TH JULY, 2022.

Mumbua T Matheka J

CA Edna

J. Ndung'u Njuguna & Company Advocates,

njugunakamotho@yahoo.co.uk

For the Respondents: Office of the Attorney General

cl.nakuru@ag.go.ke.

