



Republic v Attorney General & another; Muturi (Exparte Applicant) (Miscellaneous Civil Application 01 of 2020) [2022] KEHC 14320 (KLR) (25 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14320 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION 01 OF 2020**

JN KAMAU, J

OCTOBER 25, 2022

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE

RULES 2010

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW**

AND

**IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT KISUMU
CIVIL SUIT NO 525 OF 2012**

AND

**JULIUS CHOOGO MUTURI VS JAMES ADHIAMBO JERA & THE
ATTORNEY GENERAL**

BETWEEN

REPUBLIC PLAINTIFF

AND

**PRINCIPAL SECRETARY MINISTRY OF PUBLIC WORKS 1ST
RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

AND

JULIUS CHOOGO MUTURI EXPARTE APPLICANT



JUDGMENT

Introduction

1. In his Notice of Motion dated 7th August 2020 and filed on 18th August 2020, the Ex parte Applicant sought for orders that an order of mandamus be directed to the Respondents to compel them to pay him the sum of Kshs 975,303/= being the decretal amount owed to him in CMCC No 525 of 2012 together with interest accruing thereon at the rate of fourteen (14%) per annum from 7th February 2018 until payment in full and the taxed costs of the suit that were assessed at Kshs 222,097/=.
2. He swore an affidavit in support of his said application on 7th August 2020. He averred that he instituted CMCC No 525 of 2012 at Kisumu Law Courts against the Respondents claiming compensation for injuries he sustained as a result of the accident in which the Respondents' motor vehicle was involved.
3. He contended that the matter proceeded to full hearing and the Trial Court delivered a Judgment on 7th February 2018 in his favour. He added that thereafter his advocates notified the Respondents of the said Judgment and also served them with a Notice to Institute Judicial Review proceedings but that the Respondents had not settled the decretal sum together with the taxed costs and/or advanced a plausible reason to explain the failure to pay the aforesaid Judgment sum.
4. He was emphatic that he had been denied the fruits of his judgment hence the need for an order of mandamus to compel the Respondents to settle the decretal sum as no appeal had been preferred to stop them from complying with the Trial Court's decree.
5. The Respondents did not file any response to the Ex parte Applicant's application and/or Written Submissions. The Ex parte Applicant's Written Submissions were dated 28th March 2022 and filed on 7th April 2022.
6. This Judgment is therefore based on the said Ex parte Applicant's Written Submissions.

Legal Analysis

7. The Ex parte Applicant submitted that his application was premised on Order 53 of the Civil Procedure Rules 2010. He also invoked Article 159 of the Constitution of Kenya 2010 and Section 8 of the Law Reform Act Cap 26 Laws of Kenya.
8. He urged the court to exercise its discretionary power and grant the orders sought. He drew the court's attention to *Halsbury's Laws of England 4th Edition Volume 1 (1) paragraph 12 page 270* which states that:-

“The remedies of quashing orders, prohibiting orders, mandatory reliefs are all discretionary. The court has a wide discretion whether or not to grant, courts will take into account the conduct of the party applying and consider whether it has not been as such as to disentitle him to relief.”
9. He pointed out that he had demonstrated that he followed up on his Judgment and made the demand of the same from the Respondents who never settled the decretal amount and the taxed costs.



10. He further contended that the institution of judicial review proceedings was in the nature of mandamus and that seeking such an order was not essentially relief against the government but to compel a government official to do what the government through parliament has directed him to do.
11. He placed reliance on the cases of *Republic vs Kenya National Examination Council Ex parte Gathengi & Others Civil Appeal No 234 of 1996* (eKLR citation not given) and *Shah vs Attorney General (1970) EA 543* where the common thread was that mandamus was a prerogative order used to compel public officers to perform duties imposed upon them.
12. He also relied on the case of *Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Mancah Egunza* [2012] eKLR where it was held that when a judgment was entered against the government and a monetary decree was issued against it, it did not enjoy any special privileges with regards to its liability.
13. He asserted that since execution could not issue upon the Respondents, the only avenue for him to obtain the amount owed to him was for the court to issue orders of mandamus to compel the Respondents to settle the decretal amount together with the taxed costs.
14. In this regard, he relied on the case of *R U County Secretary Nairobi City and Another vs Ex-parte Wachira Nderitu Ngugi and Co. Advocates* [2015] eKLR where it was held that an Ex parte applicant had no other option of realizing the fruits of his judgment apart from mandamus and unless something is done he would forever be left babysitting his barren decree.
15. Section 21(1) of the *Government Proceedings Act* Cap 40 (Laws of Kenya) provides that:-

“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.”

16. Section 21 (3) of the said *Government Proceedings Act* further stipulates that:-

“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.”



17. As Githua J held in the case of *Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* [2012] eKLR, once a government was sued in a civil matter, it became a party just like any other person and did not enjoy any special privileges.
18. In the present case, the court noted that the Ex parte Applicant served the Respondents with certified copies of typed proceedings, certified copy of the Judgment dated 7th February 2018, Decree and Certificate of Costs dated 7th February 2018 and a Notice to Institute Judicial Review Proceedings dated 29th April 2019.
19. Indeed, copies of the said Judgment, Decree and Certificate of Costs against the Government were duly acknowledged by the Provincial Litigation Counsel at the Attorney General's Office in Kisumu as was evidenced by its official stamp on all documents.
20. The Respondents did not give any cogent reason why the decree had not been satisfied more than four (4) years since it was issued. Notably entity that fails to carry out its constitutional and statutory mandate does so at its detriment and cannot defeat a lawful claim that has been made against the government.
21. As the Ex parte Applicant was barred from executing against the government to recover its monies without first complying with the law, it had no option but to apply for an order for mandamus. Indeed, unless the order herein was granted, he would be left with an unexecuted decree.

Disposition

22. For the foregoing reasons, the upshot of this court's decision was that the Ex parte Applicant's Notice of Motion application that was dated 7th August 2020 and filed on 18th August 2020 was merited and the same be and is hereby allowed in terms of Prayer No (1) therein.
23. The Trial Court did not expressly pronounce itself from when interest would accrue, for the avoidance of doubt, interest on the general damages of Kshs 800,000/= and costs awarded in CMCC No 525 of 2012 Julius Choogo Muturi vs James Odhiambo Jera & Another will accrue from the date of judgment of the lower court of suit until payment in full while interest on special damages in the sum of Kshs 30,045/= that was awarded therein will accrue from the date of filing suit until payment in full.
24. The Respondents will bear the Ex parte Applicant's costs of the proceedings herein.
25. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER 2022

J. KAMAU

JUDGE

