



REPUBLIC OF KENYA



Ndichu (Suing as the legal representative of John Ngugi Ndichu (Deceased)) v Permanent Secretary Ministry of Defence (Miscellaneous Civil Application E011 of 2021 & Miscellaneous Application E013 of 2021 (Consolidated)) [2022] KEHC 15502 (KLR) (18 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15502 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CIVIL APPLICATION E011 OF 2021 &
MISCELLANEOUS APPLICATION E013 OF 2021 (CONSOLIDATED)**

CM KARIUKI, J

NOVEMBER 18, 2022

BETWEEN

PETER NGUGI NDICHU APPLICANT

**SUING AS THE LEGAL REPRESENTATIVE OF JOHN NGUGI NDICHU
(DECEASED)**

AND

PERMANENT SECRETARY MINISTRY OF DEFENCE RESPONDENT

RULING

1. The applicant has filed the notice of motion dated June 8, 2021 and has sought for an order of *mandamus* to be issued to compel the Permanent Secretary, Ministry of Defence, to pay the applicant the judgment debt in Nyahururu CMCC No 95 of 2011 for the sum of Kshs 1,168,232/= together with all accrued interest at the rate of 14% per annum from November 19, 2019 till payment in full.
2. The application is supported by the grounds contained in the application and the statement of fact and verifying affidavit filed at the leave stage. Accordingly, the respondent has filed the replying affidavit sworn by Dr Ibrahim M Mohammed, the principal secretary Ministry of Defence.

Applicant case and submissions

3. It is the applicant's case that it is evident from the parties' respective pleadings that it is not in dispute that the applicant is entitled to payment of the decretal sum in Nyahururu CMCC No 95 of 2011. It is also not in dispute that the respondent was on the public duty to ensure that the said amount is paid to the applicant. Lastly, it is not disputed that the respondent has been aware of the obligation of paying the said decretal sum but failed to perform.



4. The applicant has contended that by a letter dated July 19, 2019, his advocate forwarded to the Attorney General a copy of the judgment, the decree, and certificate of costs, and the certificate of order against the government. However, the respondent failed to act on the said documents, prompting the applicant to institute execution proceedings in Nyahururu CMCC No 95 of 2011.
5. In Nyahururu CMCC No 95 of 2011, the court had entered judgment jointly and severally against the Attorney General on behalf of the Ministry of Defence and one Muthini Kiptoo Katavi. On July 7, 2017, the Chief Magistrate's Court issued a notice to show cause against one Muthini Kiptoo Katavi, and on November 19, 2019, a warrant of arrest was issued against him. The arrest warrant is marked as annexure PNN "4" (b).
6. The amount that was certified by the court as due and owing from the defendants in Nyahururu CMCC No 95 of 2011 as per the said warrant of arrest was Kshs 1,168,232/= as of November 19, 2019. Therefore, it is this amount that the respondent was obligated to pay as of that date.
7. In the current application, the applicant is seeking payment of the said Kshs 1,168,232/= together with accrued interest from November 19, 2019 till payment in full. The interest is usually calculated at a court rate of 14%. Therefore, the Chief Magistrate Court decision to certify the amount due as of November 19, 2019 as Kshs 1,168,232/= has yet to be set aside and should be the working figure.
8. The respondent has stated that it has made provision for payment of Kshs 904,683.80/=. Accordingly, that provision will reduce the amount due and owing at the execution stage.
9. In the current application, the court is being called upon to direct the applicant to be paid his dues by the respondent. The present application does not call upon the court to determine the amount to be paid but rather to direct the respondent to pay what has been certified as due and owing in Nyahururu CMCC No 95 of 2021.
10. The applicant submits that the respondent's deposition on the provision it has made of Kshs 904,683.80 is relevant in the current application. Accordingly, the respondent expects to state how he intends to settle the amount in full, Kshs 1,168,232/=, together with accrued interest from November 19, 2019.

Respondent's case and Submissions

11. The Ministry of Defence filed a replying affidavit sworn by its principal secretary on November 17, 2022. It was explained that this matter is intertwined with Nyahururu HCC No 13 of 2021 in respect of the execution of Nyahururu SPMCC Case No 184 of 2011. Both cases arose from the same accident and were filed by the same plaintiff, except that in SPMCC Case No 184 of 2011, the plaintiff acted on the estate of John Ndichu Ngugi (deceased).
12. The Ministry of Defence forwarded a settlement for Kshs 904,683.90 to the office of the attorney general for settlement of Nyahururu SPMCC Case No 184 of 2011, where a decree and certificate of order against the government had been served against the ministry. However, the ministry erroneously marked this payment as a settlement in respect of Nyahururu SPMCC Case No 95 of 2011.
13. As averred in the replying affidavit of the account officer, the ministry is yet to be served with the requisite documents to enable its budget for the decretal amount in respect of Nyahururu SPMCC Case No 95 of 2011. It is worth noting that the plaintiff has not demonstrated service of the decree and certificate of costs against the government upon the respondent.
14. The respondent urges the court to take judicial notice of public finances' detailed budgeting and appropriation process, which parliament must approve through the annual finance bill. Public money



cannot be appropriated without an expenditure being sanctioned by parliament. It, therefore, benefits the applicant herein to serve the appropriate documents for the ministry to factor the same in its budget and make payment.

15. Respondent further submits that alternative forms of dispute are to be promoted as per article 159 (1) (c) of the *Constitution*. Our interpretation of this article is that the courts should exercise restraint where the parties are amenable to settlement through reconciliation, mediation, or arbitration. In this particular case, the respondents have invited the advocates for the applicant to resolve the administrative issues herein to no avail. See the letter dated October 7, 2021.
16. In the circumstances, the failure to have the matter herein factored and budgeted has to a greater extent, been occasioned by neglect by the applicants to serve the requisite documents. Further, since the current applicant was lodged, there needs to be more cooperation by the applicant's advocate to enable a speedy settlement of the matter.
17. Noting respondent submissions in paragraph 6 above, it is submitted that the prayers sought cannot be granted. Further, it is submitted that in the circumstances, the current application is immature and has not been brought in good faith. Discretionary orders cannot be issued to a party who failed to act in good faith.

Issues, Analysis, and Determination

18. After going through the pleadings and parties' submissions, I find the issues are; whether the issuance of the orders of the *mandamus* is justifiable and what is In *Shah v Attorney General (No 3) Kampala HMC No 31 of 1969 [1970] EA 543* where the court expressed itself, among other things, as follows:

“Mandamus is essentially English in its origin and development, and it is logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court, where the injured party has a right to have anything done and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or statute and is also applicable in certain cases when an act of parliament imposes a duty for the benefit of an individual. Mandamus is neither a writ of course nor of right. Still, it will be granted if the duty is in the nature of public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself is imperative. In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfillment of which some other person has an interest, the court has jurisdiction to grant *mandamus* to compel the fulfillment foregoing may also be thought to be much in point in relation to the applicant's unsatisfied judgment which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the *Government Proceedings Act*.”

19. In the case of *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza [2012] eKLR*, the court expressed itself as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favor 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 concerning 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 favor 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 court should issue the certificate of order against the government after the 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 after which government liability accrues."

20. 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.
21. The court should issue the certificate of order against the government after the 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.
22. In my view, the only way in which the respondent can avoid payment where there is a valid judgment of a court of competent jurisdiction is to show that the judgment has been set aside on appeal or review or that an order of stay has been issued suspending the execution of the said judgment. Order 42 rule 6(1) of the [Civil Procedure Rules](#) is clear that even the pendency of an appeal does not ipso facto operate as a stay of the decree or order appealed against.
23. Having disposed of the impediments placed on the path of the applicants, there is no reason why this otherwise merited notice of motion cannot be granted.

Order

- i. As a result, I allow the notice of motion dated June 8, 2021 and issue an order of mandamus compelling the respondents to pay the applicants sum of Kshs 1,168,232/= and the costs of these proceedings.
- ii. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 18TH DAY OF NOVEMBER, 2022.



CHARLES KARIUKI
JUDGE

