



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. E052 OF 2020

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

EX-PARTE APPLICANT: JACQUELINE WANGUI NDIRANGU

JUDGMENT

The Application

1. On 16th June 2017, judgement was entered in favour of Jacqueline Wangui Ndirangu, the *ex parte* Applicant herein, in **CMCC No. 5510 of 2010 - Jacqueline Wangui Ndirangu vs. The Honourable Attorney General** wherein the sum of Kshs.183, 278/= together with costs and interest thereon at the rate of 12% p.a. from the date of filing suit until payment in full was awarded to the *ex parte* Applicant.

2. The *ex parte* Applicant has now filed the instant judicial review proceedings by way of an Notice of Motion application dated 23rd November, 2020 in which she is seeking the following orders:-

i) That an Order of Mandamus be directed to the Solicitor General as the Accounting Officer of the office of The Honourable Attorney General(Respondent) to pay to the *ex parte* Applicant the sum of Kenya Shillings Three Hundred and Seventy-Two Thousand Two hundred and Seventy and Fifty-Four Cents (Kshs.372,270.54/=) plus costs of the suit and interest at the rate of 12% p.a. from the date of judgement, 16th June 2017, until payment in full, being the decretal sum awarded to the *ex parte* Applicant in CMCC No. 5510 of 2010 - *Jacqueline Wangui Ndirangu vs. The Honourable Attorney General*.

ii) That the Court be at liberty to make such further and other orders as it deems fit to meet the ends of justice.

iii) That the costs of this Application be provided for.

3. The application is supported by the grounds on its face, a Statutory Statement dated on 22nd October, 2020 and a verifying affidavit sworn on the same date by the *ex parte* Applicant. It was deponed therein that a decree and Certificate of Order against the Government were extracted and served upon the Respondent on 24th January 2018, and that despite several requests by the *ex parte* Applicant to settle the decretal sum, the Respondent has failed, refused or neglected to pay. The *ex parte* Applicant averred that owing to the fact that the Respondent is a government body the appropriate mode of execution against it is by an order of Mandamus.

4. In conclusion, it was deponed that unless the Court intervenes the *ex parte* Applicant will be deprived of the fruits of her Judgement. Further, that no prejudice shall be suffered by the Respondent or any other person should the orders herein be granted.

5. There Respondent did not file a response to the Applicant's Notice of Motion.

The Determination

6. This Court directed the parties to canvass the instant application through written submissions. The *ex parte* Applicant through her Advocate, Mumbi Mwangi, filed written submissions dated 23rd November, 2020. The Respondent did not file any submissions.

7. The *ex parte* Applicant submitted that section 21 of the Government Proceedings Act provides for the procedures to be used in satisfying orders against the Government, and that successful litigants are enjoined to follow the procedure laid out therein, after which the relevant government department must settle the sums owed. Therefore, that after judgement was entered in favour of the Applicant on 16th June, 2017, a certificate of Order against the Government was issued on 9th November, 2017 certifying that the amount payable as at 6th November 2017 was the sum of Kenya Shillings Three Hundred and Eighty Thousand Eight Hundred and Seven (Kshs. 380,887.11/=).

8. Counsel further submitted that vide a letter dated 23rd January 2018, the *ex parte* Applicant demanded for settlement of the decretal sum and also forwarded copies of the judgement and Certificate of Order against the Government. It was submitted that through letters dated 6th March 2018, 11th May 2018, 26th June 2018, 30th August 2018, 22nd October 2018 and 7th August 2019 the *ex parte* Applicant continued to demand for settlement which was not forthcoming. Accordingly, that the *ex parte* Applicant had followed all statutory procedures laid out in section 21(1) of the Government Proceedings Act, and yet the Respondent had failed to settle the decretal sum owed.

9. It was thus submitted that the recourse available for the *ex parte* Applicant is an order of Mandamus, and reliance was placed on the case of **Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza [2012] eKLR** where the Court while reiterating the contents of section 21 of the Government Proceedings Act, held that a decree against the Government can only be enforced by way of an order of Mandamus compelling the accounting officer to pay the decretal amount.

10. Also cited were the cases of **Republic vs Attorney General & Another Ex parte James Alfred Koroso [2013] eKLR** and **Republic vs Attorney General & Another Ex parte Mike Maina Kamau [2020] eKLR** where both Courts emphasized the importance of access to justice as envisioned under Article 48 of the Constitution. It was further held that execution of judgements is part and parcel of the right to a fair hearing and that it is therefore an essential element of this right. In addition, that the failure to settle the decretal sum has meant that for three (3) years the *ex parte* Applicant has been denied the fruits of her judgement and her right to access justice in accordance with Article 48 of the Constitution.

11. In conclusion, it was submitted that upon service of the Certificate of Order against the Government, a duty was placed upon the accounting officer that is the Solicitor General as provided under Section 9 of the Office of the Attorney General Act, to pay the decretal sum. Therefore, that the *ex parte* Applicant had complied with the provisions of section 21 of the Government Proceedings Act, and that no appeal was filed against the Judgement entered and neither has the Respondent filed any application to stay its execution.

12. I have considered the *ex parte* Applicant's pleadings and submissions, and in arriving at a determination, I have also considered the holding by the Court of Appeal on the nature of the remedy of mandamus in its decision in **Republic vs Kenya National Examinations Council exparte Gathenji and 9 Others, [1997] e KLR**. The said Court held as follows in this regard:

“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....”

13. The requirements for an order of mandamus to issue were further explained by Mativo J. in **Republic vs Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another [2018] eKLR** as follows:

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in Apotex Inc. vs. Canada (Attorney General), [23] and, was also discussed in Dragan vs. Canada (Minister of Citizenship and Immigration).[24] The eight factors that must be present for the writ to issue are:-

- (i) There must be a public legal duty to act;
- (ii) The duty must be owed to the Applicants;
- (iii) There must be a clear right to the performance of that duty, meaning that:
 - a. The Applicants have satisfied all conditions precedent; and
 - b. There must have been:
 - i. A prior demand for performance;
 - ii. A reasonable time to comply with the demand, unless there was outright refusal; and
 - iii. An express refusal, or an implied refusal through unreasonable delay;
 - iv. No other adequate remedy is available to the Applicants;
 - v. The Order sought must be of some practical value or effect;
 - vi. There is no equitable bar to the relief sought;
 - vii. On a balance of convenience, mandamus should lie

14. It is not disputed in the present application that judgment was entered in favour of the *ex parte* Applicant in **CMCC No. 5510 of 2010 - Jacqueline Wangui Ndirangu vs. The Honourable Attorney General**. The issues therefore that require to be determined are firstly, whether the Respondent is under a public duty and obligation to satisfy the orders issued in favour of the *ex parte* Applicant in the said judgment, and secondly, if so, whether the *ex parte* Applicant is entitled to the relief she seeks.

15. Section 21 of the Government Proceedings Act in this regard provides as follows as regards the requirements to be met in the enforcement of orders as against Government organs in civil proceedings:

“(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.”

16. Execution proceedings against a government or public authority can thus only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body. This was also the holding in **Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012)** where J. Githua held 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.”

17. It is notable in this respect that the subject judgment herein was issued against the Attorney General as the Respondent. Section 9(5) of the Office of the Attorney General Act provides as follows in this regard:

(5) The Solicitor- General shall carry out any function, discharge any duty and exercise any power as may be directed by the Attorney-General and shall—

(a) organise, co-ordinate and manage the administrative and the legal functions of the Office; (b) assist the Attorney-General in the performance of his duties as the principal legal advisor to the Government;

(c) conduct, or assign and supervise all court cases, including appeals or petitions on behalf of the Attorney-General; and

(d) subject to Article 234 of the Constitution, be responsible for the discipline of State Counsel and other members of staff of the Office.

The Solicitor General is also the designated accounting officer for the Office of the Attorney General under the Public Finance Management Act.

18. This Court therefore finds that arising from these provisions, the Solicitor General is responsible for the satisfaction of Court orders and decrees on payment of money owed by Attorney General by virtue of his role and functions.

19. While still on the duty of the Respondent to pay the decretal sum, the *ex parte* Applicant has brought evidence to show that it has made several demands and requests for payment which have not been heeded to by the Respondent, and in this respect annexed copies of letters dated 23rd January 2018, 6th March 2018, 26th June 2018, 30th August 2018, 22nd October 2018, and 7th August 2019 sent to the Office of the Attorney General, and enclosing the decree, judgment, and Certificate of order against Government issued in **CMCC No. 5510 of 2010 - Jacqueline Wangui Ndirangu vs. The Honourable Attorney General**. There is thus an implied refusal on the part of the Respondent to pay the demanded sums.

20. Lastly, as to the actual amount of costs due from the Respondent, I have perused the judgment delivered on 16th June 2017 in **CMCC No. 5510 of 2010 - Jacqueline Wangui Ndirangu vs. The Honourable Attorney General** and note that the *ex parte* Applicant was awarded Kshs 183,278/=, costs of the suit and interest thereon. The Certificate of Order against the Government issued on 9th November, 2017 was inclusive of the costs and interest upto 6th November 2017, and certified the amount payable as Kshs 380,887.11 with interest at the rate of 12% until payment in full. This sum has not been contested by the Respondent.

The Disposition

21. In the premises, I find that the *ex parte* Applicant’s Notice of Motion dated 23rd November, 2020 is merited.

22. I accordingly grant the following orders:

I. An order of mandamus directed to the Solicitor General as the Accounting Officer at the Office of the Attorney General, compelling him to pay to the *ex parte* Applicant the sum of Kenya Shillings Three Hundred and Eighty Thousand, Eight Hundred and Eighty-Seven and Eleven Cents (Kshs.380,887.11/=) and interest thereon at the rate of 12% p.a. from 7th November 2017 until payment in full, being the decretal sum awarded to the *ex parte* Applicant in CMCC No. 5510 of 2010 - Jacqueline Wangui Ndirangu vs. The Honourable Attorney General.

II. The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 23rd November, 2020 of Kshs 30,000/=.

23. Orders accordingly.

DATED, AND SIGNED AT NAIROBI THIS 19TH DAY OF APRIL 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondent's Advocates on record.

P. NYAMWEYA

JUDGE