



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E1092 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....RESPONDENT

EX PARTE APPLICANT:

REGINA NDUKU MUTUA, The administrator

of the estate of MULWA NZIOKA (Deceased)

JUDGMENT

The Application

1. On 19th December 2017, the court gave judgement in favour of the *ex parte* Applicant herein in **Milimani CMCC NO. 7775 of 2014 - Regina Nduku Mutua, Suing as Personal Representative of the Estate of Mulwa Nzioka (Deceased) vs The Attorney General**, wherein the sum of Kshs. 1,619,400/= together with costs and interest thereon at court rates 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 12th January 2021 in which she is seeking the following orders:-

i) THAT, the Honourable Court be pleased to grant the applicant an order of mandamus directed to the principal secretary, Ministry of Interior & Coordination of National Government to pay forthwith the decretal amount in Milimani CMCC No.7775 of 2014 of Kshs. 2,035,241.27/= plus interest thereon at 12% from the said date of 22nd September,2019 until payment in full.

ii) Costs of this application be provided for.

3. The said application is supported by a statutory statement dated 17th January 2020, and a supporting affidavit sworn on the same date by the *ex parte* Applicant. It is averred that the *ex parte* Applicant instituted proceedings in **Milimani CMCC NO. 7775 of 2014** claiming general and special damages after an electrocution incident at the Kamiti Maximum Prison which led to the death of Aloise Mulwa Nzioka. It was deponed that the court awarded the *ex parte* Applicant the sum of Kshs. 1,619,400.00 as damages on 19th December 2017 plus costs and interest until payment in full.

4. The deponent deposed that the amount owing as at 22nd February,2019 when the decree was drawn was Kshs. 2,035,241.27 and as such this amount continues to attract interest at the rate of 12% p.a. until payment in full. It is averred that on 16th August 2019 the Attorney General and the Principal Secretary, Ministry of Interior and Coordination of National Government were duly served with copies of the Judgement, Decree and Certificate of Order against the Government.

5. In conclusion, the deponent urged the court to issue an order of mandamus compelling the Principal Secretary, Ministry of Interior and Coordination of National Government to pay Kshs. 2,035,247.27 which is the amount owed plus interest from 19th December 2019 until payment in full. The *ex parte* Applicant annexed copies of the judgment dated 19th December 2017, decree and certificate of stated costs

dated 6th November 2018, and Certificate of Order against the Government issued on 31st May 2017 in in **Milimani CMCC NO. 7775 of 2014 - Regina Nduku Mutua, Suing as Personal Representative of the Estate of Mulwa Nzioka (Deceased) vs The Attorney General**

6. The Respondent did not file a response to the *ex parte* Applicant's Notice of Motion.

The Determination

7. This Court directed the parties to canvass the instant application through written submissions. The *ex parte* Applicant through her Advocate, Mutunga and Muindi Advocates, filed written submissions dated 15th January 2021. The Respondent did not file any submissions.

8. The *ex parte* Applicant submitted that despite the Principal Secretary, Ministry of Coordination of National Government and the Attorney General being aware of the decree by a competent court of law, they have refused to pay the decretal sum and hence the need for this court to issue an Order of Mandamus directing them to pay forthwith.

9. 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....”

10. 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

11. It is not disputed in the present application that judgment was entered in favour of the *ex parte* Applicant in **Milimani CMCC NO. 7775 of 2014 - Regina Nduku Mutua, Suing as Personal Representative of the Estate of Mulwa Nzioka (Deceased) vs The 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.

12. 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.”

13. 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.”

14. It is notable in this respect that the suit and judgment in **Milimani CMCC NO. 7775 of 2014 - Regina Nduku Mutua, Suing as Personal Representative of the Estate of Mulwa Nzioka (Deceased) vs The Attorney General** was brought and issued against the Attorney General as the legal representative of the relevant Government Ministry, and it has not been disputed that the relevant Ministry is that of Interior and Coordination of National Government in which Ministry the deceased worked and was found to have contributed to his

death. This Court therefore finds that the Principal Secretary of the Ministry of Interior and Coordination of National Government is responsible for the satisfaction of the said Court decree.

15. While still on the duty of the Respondent to pay the decretal sum, the *ex parte* Applicant has brought evidence to show that she has made a demand and request for payment which have not been heeded to by the Respondent, and in this respect annexed copies of a letter dated 28th June 2019, sent to the Office of the Attorney General, and enclosing the decree, judgment, and Certificate of order against Government issued in **Milimani CMCC NO. 7775 of 2014 - Regina Nduku Mutua, Suing as Personal Representative of the Estate of Mulwa Nzioka (Deceased) vs The Attorney General**. There is thus an implied refusal on the part of the Respondent to pay the demanded sums.

16. Lastly, as to the actual amount of costs due from the Respondent, I have perused the judgment delivered on 19th December 2017 in **Milimani CMCC NO. 7775 of 2014 - Regina Nduku Mutua, Suing as Personal Representative of the Estate of Mulwa Nzioka (Deceased) vs The Attorney General**, and note that the *ex parte* Applicant was awarded Kshs 1, 619,400/=, costs of the suit and interest thereon. The Certificate of Order against the Government issued on 31st May 2017 was inclusive of the costs and interest upto 22nd February 2019, and certified the amount payable as Kshs 2,035,241.27 with. This sum has not been contested by the Respondent.

The Disposition

17. In the premises, I find that the *ex parte* Applicant's Notice of Motion dated 12th January 2021 is merited.

18. I accordingly grant the following orders:

I. An order of mandamus directed to the Principal Secretary, Ministry of Interior & Coordination of National Government compelling him to pay to the *ex parte* Applicant the sum of Kshs. 2,035,241.27/= and interest thereon at 12% from 22nd February 2019 until payment in full, being the decretal sum awarded to the *ex parte* Applicant in Milimani CMCC NO. 7775 of 2014 - Regina Nduku Mutua, Suing as Personal Representative of the Estate of Mulwa Nzioka (Deceased) vs The Attorney General

II. The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 12th January 2021 of Kshs 30,000/=.

19. Orders accordingly.

DATED, AND SIGNED AT NAIROBI THIS 27TH DAY OF MAY 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