



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

JUDICIAL REVIEW NO. 11 OF 2018 (Judicial Review)

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS

REPUBLIC.....APPLICANT

VERSUS

THE HON. THE ATTORNEY GENERAL.....RESPONDENT

SAMUEL MUNGEMWE.....EXPARTE APPLICANT

JUDGEMENT

1. The undisputed background to the motion dated 2nd August 2018 is that **Samuel Mburu Mungemwe** (hereafter the *exparte* Applicant) sued the Attorney General (hereafter the Respondent) in **Thika CM's Civil Case No. 340 of 2009**. In the judgment delivered on 28th October 2017, the court found in the *exparte* Applicant's favour, awarding him damages in the sum of Kshs. 1,015,000/= and costs taxed at Kshs. 386,984/= with interest at court rates. The decree and certificate of costs issued on 27th November, 2017. A certificate of order against the Government was issued on 7th December 2017 for the total sum, inclusive of costs, of Kshs. 1,413,825.66.

2. Despite service of the copy of judgment, decree and certificate of order against the government upon the Attorney General, on 25th January, 2018 the decree was not satisfied and hence the *exparte* Applicant's motion to this court on 8th August, 2018, expressed to be brought under Order 53 Rule 2 of the Civil Procedure Rules seeking that:

“...[T]he respondent be directed by an order of mandamus, to pay the *exparte* Applicant, the decretal sum of Kshs. 1,413,825.66 and interest accruing till payment in full.” (sic)

3. The Attorney General did not oppose the motion by his affidavit filed on 20/11/2018 save to seek time to apply in the lower court for a review of the costs which they view as inordinately high. Despite being granted time to pursue the undecided review application, the Attorney General, does not appear to have prosecuted the intended review application in the lower court. Subsequently, the Attorney General's representative intimated to this court his willingness to settle the matter, but it appears, that too failed.

4. The court therefore directed that parties file their respective submissions. Only the *exparte* Applicant complied. The said submissions restate the grounds in support of the motion and urge that it be allowed.

5. The court has considered the material before it. Prior to bringing the instant motion, the *exparte* Applicant had duly complied with Section 21(1) & (2) of the Government Proceedings Act which provide that:

(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.”

6. By virtue of the provisions of Section 21(3) of the Government Proceedings Act the Accounting Officer of the Government Department concerned is under a statutory duty to make payment of damages or costs once the applicant complies with the procedure in Section 21(1) and (2) of the Government Proceedings Act. As stated by **Githua J.** concerning the foregoing provisions in **Republic V. Permanent Secretary Ministry of State for Provincial Administration and internal Security *exparte* Fredrick Manoah Egunza (2012)eKLR** .:

“Similarly, when a judgment has been entered against the government and a monetary decree issued against it, it does not enjoy any special privilege with regard to its liability to pay except when it comes to the mode of execution of decree. Unlike in other civil proceedings, where decrees for the payment of money or costs has 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.”

7. This holding is consistent with the findings of the Court in **Shah V. Attorney General (no. 3) [1970] EA 543** where **Goudie J** granted an order of mandamus to enforce the payment of decretal sum to the applicant, and also with other subsequent decisions by superior Courts. Outlining in detail the origins, definition, application, and purpose of the order of *mandamus*, court in **Shah’s** case stated inter alia that:

“Mandamus is essentially English in its origin and development, and it is therefore 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 by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual.

Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a 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 being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...

The foregoing may also be thought to be much in point in relation to the applicant’s unsatisfied judgement 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. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty...

Since *mandamus* originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda, they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law, but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law...

English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting “simply in his capacity of servant”.Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of *mandamus* will lie for the enforcement of the duties...With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile...

It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government....

Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go... In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant’s decree. It is sufficient for the duty to be owed to the public at large.

In the court’s view the granting of *mandamus* against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a government official to do what the Government, through Parliament, has directed him to do. Likewise, there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso “save as is provided in this section”. The relief sought arises out of subsection (3) and is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of

which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity, and the duty is owed not to the Crown but to the public, any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it.”

8. The *ex parte* Applicant herein is entitled to enjoy the fruits of his judgment. He cannot execute against the government as that is prohibited by statute. The decree remains unsatisfied by the public servant responsible therefor under statute despite service on the Attorney General. The decree could well be reduced to a mere piece of paper if the Applicant cannot enforce it, which eventuality would be a travesty of justice. There is no other legal option for enforcement available to the Applicant except an order of *mandamus* to compel the officer concerned to perform the statutory duty imposed by the provisions of Section 21(3) of the Government Proceedings Act.

9. In the circumstances, the court is persuaded that this is a proper case for the issuance of an order of *mandamus* directed not at the Attorney General as prayed, but at the Accounting Officer of the Ministry concerned in this case, to compel him to pay to the *ex parte* Applicant the sum of Kshs. 1,413,825.66 with interest thereon as stated in the certificate of order against government dated 7th December 2017. The Applicant is also awarded the costs of this motion.

DATE, SIGNED AND DELIVERED ELECTRONICALLY ON THIS 29TH DAY OF JULY 2021.

C. MEOLI

JUDGE

In the Presence of:

Mr Gitonga for the *ex parte* Applicant

N/A for the Respondent

Kevin: Court Assistant