



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

JUDICIAL REVIEW NO. 9 OF 2020

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

AND

IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES CAP 21 LAWS OF KENYA

AND

IN THE MATTER OF ARTICLES 47, 201 (D) AND 221 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT

AND

IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT

AND

IN THE MATTER OF COURT CONTEMPT ACT

AND

IN THE MATTER OF UNSATISFIED JUDGEMENT DEBTS AGAINST THE ATTORNEY GENERAL AND ANOTHER

IN THE SUM OF KSHS. 508,130/= TOGETHER WITH INTERESTS ON THE DECRETAL SUM AT 12% PER ANNUM

ARISING FROM THE JUDGEMENT OF CHIEF MAGISTRATE’S COURT AT MIGORI IN CIVIL SUIT NO. 2251 OF

2015 DELIVERED ON 1ST AUGUST 2017

REPUBLIC.....APPLICANT

-VERSUS-

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF INTERIOR, MINISTRY OF INTERIOR

& COORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

AND

NELSON KEROKO MARWA (alias NELSON KEROKO)EX PARTE APPLICANT

JUDGMENT

By a Notice of Motion Application dated 7/7/2020 filed on 10/7/2020 evenly, the ex-parte applicant through the firm of M/S Nyagesoa & Co. Advocates seeks the following orders: -

i) That the Honourable Court be pleased to grant an order of judicial review in the nature of mandamus do issue against the respondents herein jointly and severally compelling the respondents jointly and severally to pay ex-parte applicant the judgement debt herein in the sum of Kshs. 508,130/= being the general damages, costs together with all accrued interest on the decretal sum of damages at Kshs. 12% per annum arising from the judgement of the Migori Chief Magistrate's Court in Civil Suit Number 2251 of 2015 (Nelson Keroko Marwa (alias Nelson Keroko vs The Honourable Attorney General & Another delivered on 1/8/2017) and continues to attract interest at court rates.

ii) That the Honourable Court be pleased to set a timeline and/or duration which the respondents do settle the decretal sum with interest accruing until date of payment.

iii) In default of compliance with the orders of Mandamus and failure to pay the judgement in the sum of Kshs. 508,130/= together with all accrued interests amounts at 12% per annum the orders Mandamus be deemed as sufficient notice under Section 30(1) of the Contempt of Court Act, 2016 to the persons holding offices of the 1st, 2nd and 3rd respondents requiring them to show cause why contempt proceedings should not be commenced against the respondents.

iv) That in default of compliance with the orders of Mandamus and failure to pay the judgement debt in the sum of Kshs. 508,130/= together with all the accrued interests amounts at 12% per annum 30 days after service and failing to show sufficient cause for non-contempt proceedings against the persons holding the offices the 1st, 2nd and 3rd respondents for them to personally be summoned to court proceedings against the committed to civil jail for contempt.

v) The respondents be condemned to bear costs of this application.

The application is based on grounds (a) - (q) appearing on the face thereof and is supported by the Supporting Affidavit of Nelson Keroko Marwa, the ex-parte applicant sworn on 7/7/2020.

According to the ex-parte applicant, he obtained judgment in his favour vide **Migori CMCCC No. 2251 of 2015 Nelson Keroko Marwa - vs- The Honourable Attorney General & Another** for an amount of Kshs. 508,130/= together with accruing interest.

Consequently, the ex-parte applicant's advocates extracted a certificate of order of costs against the 1st respondent dated 18/4/2018 which was served upon the 1st respondent on even date. Further, the 1st respondent was served with a notice of entry of judgment on 4/7/2018. Despite that, the respondents have not made any efforts to make good the ex-parte applicant's claim against them hence he is not able to enjoy the fruits of his judgement.

The application is not opposed. Despite numerous service, the 1st respondents chose not to participate in these proceedings.

I have duly considered the submissions by the ex-parte applicant. Briefly, he reiterates that he sued in Migori CMCC No. 2251 of 2018 claiming general and special damages arising from unlawful and malicious prosecution by the 2nd respondent.

On 1/8/2017 the trial court delivered a judgement in his favour for a sum of Kshs. 400,000/= as general damages and Kshs. 12,130/= as special damages together with costs of the suit and interest. The ex-parte applicant served the 1st respondent with a decree, certificate of costs and a notice of entry of judgement which it has failed to satisfy.

Further to the foregoing, the ex-parte applicant submitted that at the time of filing this application, the decretal sum stands at Kshs. 508,130/= which remains unpaid together with accruing interest of 12% per annum.

I have considered the application and submissions of the ex-parte applicant. It is not in dispute that a judgement was delivered in his favour on 1/8/2017 and the outstanding amount stands at Kshs. 508,130/=. To support his application, the ex-parte applicant annexed a decree and certificate of costs order against the 1st respondent.

The ex-parte applicant is simply seeking an order of mandamus to compel the respondents to do their public duty and satisfy the decree which they have failed to do to the detriment of the ex-parte applicant.

In the case of **REPUBLIC VS. ATTORNEY GENERAL & ANOTHER EX-PARTE ONGATA WORKS LIMITED [2016] eKLR** Odunga J referred to the case of **R (REGINA) VS. DUDSHEATH, EX PARTE, MEREDITH [1950] 2 ALL E.R. 741, AT 743**, where Lord Goddard C. J. held as follows:

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy... "

Before an order of Mandamus can issue, the ex-parte applicant must comply with Section 21 of the Government Proceedings Act. In **Kisya Investments Ltd vs The A. G. (2005) 1KLR 74**, the Court explained why the strict and elaborate procedure under that section has to be followed, that is to allow the Government time to enable it to make arrangements to satisfy the decree.

In this case, what the ex-parte applicant is referring to a certificate of order of costs (**annexed and marked as NKM3**) is in fact a certificate of stated costs extracted and issued on 18/4/2018. There is no evidence that there is a Certificate of Order of costs that was issued pursuant to Section 21 of the Government Proceedings Act.

Order 29 Rule 3 of the Civil Procedure Rules provides as follows: -

3. Any application for a certificate under section 21 of the Government Proceedings Act (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and such certificate shall be in one of Form Nos. 22 and 23 of Appendix A with such variations as circumstances may require. (emphasis mine).

What the ex-parte applicant has annexed is a decree and a certificate of costs. There is a specific procedure on how the Certificate of Order of costs is obtained under **Order 29 Rule 3 of the Civil Procedure Rules** and the samples thereof are found in **Appendix A** of the Civil Procedure Act being **Forms 22 and 23**. Upon obtaining the Certificate of Order of costs there has to be proof of service upon the respondents thereof.

Whether the ex-parte applicant is deserving of the order of Mandamus: Having found that the ex-parte applicant has not fully complied with the legal requirements before the issuance of the order of mandamus, the court finds that the instant application is premature. The application dated 7/7/2020 is therefore struck out with no orders as to costs.

To sum up, I should comment on the issue of contempt raised by the ex-parte applicant. The ex-parte applicant has asked this court to find that in the absence of payment of the decretal sum, the persons holding office at the 1st, 2nd and 3rd respondents be personally summoned to court and committed to civil jail for contempt. The ex-parte applicant has invoked the provisions under Section 30(1) of the Contempt of Court Act, 2016.

The Contempt of Court Act, 2016 has been declared unconstitutional in **Kenya Human Rights Commission vs Hon Attorney General & Another (2018) eKLR** for among others, lack of public participation as required under **Articles 10 and 118(b) of the Constitution of Kenya 2010**. As far as I am concerned, there is no appeal against the said judgement.

In the absence of substantive legal provisions to guide litigants in bringing contempt proceedings, relief lies with Section 5(1) of the Judicature Act to avoid a lacuna in enforcement of court orders. See the Court of Appeal decision in **Christine Wangari Gachege vs Elizabeth Wanjiru & 11 Others (2014) eKLR** where it was held in the absence of statutory provisions on contempt proceedings, **Rule 81.4 of the English Civil Procedure Rules** which deals with the breach of judgement, order or undertakings was applicable by virtue of **Section 5(1) of the Judicature Act Cap 8 which provided that:**

"The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts."

Further, contempt proceedings can only be commenced after it has been satisfied that there is wilful and deliberate disobedience of court orders by the contemnor. To ask for contempt orders at this stage, is in my view premature.

The upshot is that the application dated 7/7/2020 is therefore struck out with no orders as to costs.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 30TH DAY OF SEPTEMBER, 2021

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Omwoyo holding brief Mr. Nyagesoa for the Ex-Parte Applicant.

No appearance for the Respondents.

Nyauke Court Assistant.