



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JUDICIAL REVIEW CASE NO. E019 OF 2021**

REPUBLIC.....APPLICANT

-VERSUS-

1. THE ATTORNEY GENERAL

2. THE PRINCIPAL SECRETARY, MINISTER OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....RESPONDENTS

-AND-

1. WILSON KIAMA NGIBUINI

2. EVANS MWANGI

3. JOSPHAT KIMANI KAIGIE.....EX-PARTE APPLICANTS

**RULING**

1. The Notice of Motion application before the court is dated 25 May 2021. The application seeks the following orders: -

*a) That an order of Mandamus be issued to compel the Respondents to forthwith pay the sum of Kshs. 1,940,740/= to the Applicants as ordered by the Court on 3<sup>rd</sup> August 2020 in Mombasa Resident Magistrate Civil Case No. 26 of 2012; Wilson Kiama Ngibuini & 2 others -vs- Attorney General & Another together with interest to date, within thirty (30) days of this Honorable Court's order.*

*b) That the costs of this application be provided for.*

2. The said application is supported by a statutory statement dated 14<sup>th</sup> April 2021, and a verifying affidavit sworn on the same date by Wilson Kiama Ngibuini, the 1<sup>st</sup> *ex-parte* applicant. The ground for the application is that the *ex-parte* Applicants were charged in **Criminal Case No. 72 of 2010** by the state, and the case went through a full trial where they were acquitted vide a judgment dated 10 August 2011. The *ex-parte* Applicants further aver that they went ahead and filed **Mombasa Resident Magistrate Civil Case No. 26 of 2012** against the 1<sup>st</sup> Respondent for malicious prosecution where judgment was delivered on 28 November 2018, and the *ex-parte* Applicants were each awarded Kshs. 500,000/= in general damages together with costs and interest from the date of the judgment till payment is made in full. From the said judgment, a decree and certificate of order was issued on 3 August 2020 against the government, and the *ex-parte* Applicants effected service of the same upon the Respondents. According to the *ex-parte* Applicants, even though the Respondents were served with the decree and the certificate of orders against the government, the Respondents have failed and/or refused to settle the decretal sum thus necessitating the action herein. They further claim that vide a letter dated 18 September 2020, they wrote to the Cabinet Secretary for Interior & Coordination of National Government informing of the said amount of money owed to them by the government. The Cabinet Secretary replied to the letter vide a letter dated 30 September 2020 stating that they have no information on the judgment and the resultant decree. According to the *ex-parte* Applicants, the 2<sup>nd</sup> Respondent is in-charge of the revenue/finance management and is obliged in law to satisfy such amounts as may be awarded by a judgment of the court against the 1<sup>st</sup> Respondent to the person entitled thereto. The *ex-parte* Applicants claim that the failure by the Respondents to discharge their duty to settle the decretal sum as required by law is gravely lackadaisical and prejudicing the Applicants as they are unable to enjoy the fruits of their judgment after their successful litigation in the aforesaid matter.

3. The *ex-parte* Applicants annexed copies of the judgment, decree, and certificate of orders from the Civil Suit No. 26 of 2012 and the letter

from the Cabinet Secretary.

4. The application was opposed by the 1<sup>st</sup> Respondent vide grounds of opposition dated 27 July 2021. The 1<sup>st</sup> Respondent claimed that the application is misconceived, frivolous, vexatious and an abuse of the court process. The 1<sup>st</sup> Respondent claimed that the court entered judgment on 28 November 2018 in CMCC No. 26 of 2012 in the absence of the Respondents and despite the original file having not been traced to date. According to the 1<sup>st</sup> Respondent, judgment was entered despite there being no proceedings in the skeleton file, and this rendered the entire judgment erroneous as the Respondents would not be able to have typed proceedings in their record of appeal were they to appeal or enable them to apply for stay of execution of the judgment or leave to file an appeal in time. The 1<sup>st</sup> Respondent contended that the *ex-parte* Applicants deliberately by-passed the 1<sup>st</sup> Respondent regarding service of the certificate of orders for costs, decree and judgment and is now looking for a scape goat in the 2<sup>nd</sup> Respondent two years after judgment was entered in their favor. The 1<sup>st</sup> Respondent stated that the *ex-parte* Applicants have inordinately delayed in service of the requisite documents for payment upon the Respondents and thus, they should not benefit from their indolence, and further to this, the *ex-parte* Applicants deliberately delayed the execution so as to ensure that they acquire as much interest on the decretal sum as possible to their advantage.

5. The application was canvassed by way of written submissions from counsel of the parties.

6. Mr. Gikandi counsel for the *ex-parte* Applicants submitted that the order of mandamus is sought to enforce the government's duty to pay under Section 21 (3) of the Government Proceedings Act as well as common law duty to satisfy a decree. Counsel referred the court to the case of **Republic v Permanent Secretary, Minister of State for Provincial Administration, and Internal Security Ex parte Fredrick Manoah Egunza [2012] eKLR**, where the court held that payment will be based on a certificate of costs obtained by a successful litigant from the court issuing the decree which should be served to the Attorney General.

7. Counsel also cited the case of **Republic v Kenya National Examination Council ex-parte Gathenji & 8 others Civil Appeal No. 234 of 1999** where the Court of Appeal cited with approval, the Halsbury's Law of England, 4<sup>th</sup> Edition Vol. 7 p. 111 para 89. In this case the court dealt with the circumstances under which an order of mandamus is issued.

8. Counsel submitted that the *ex-parte* Applicants herein have moved the court to compel the satisfaction of a judgment already decreed in their favor by a competent court and the Respondents have not given any reason why the decree has not been satisfied more than one year down the line. Mr. Gikandi submitted that if the court was to decline to grant mandamus, the *ex-parte* Applicants would be left without an effective remedy despite holding a decree.

9. Counsel submitted that the subject of this application is a case filed in 2012, and the *ex-parte* Applicants tirelessly litigated for eight years before the delivery of the judgment and decree, therefore, the Applicants have a right to enjoy the fruits of their successful litigation. To buttress his claim, counsel cited the case of **Republic v Town Clerk of Webuye County Council & another [2014] eKLR** where Majanja J. stated that a decree holder's right to enjoy fruits of his judgment must not be thwarted. His reasons were underpinned by the values of the constitution.

10. Mr. Gikandi submitted that the Kenyan courts enforce the government's obligation to satisfy a decree through partly an order of mandamus and partly an order for committal to jail of the relevant accounting officer. He submitted that the current application is therefore the only remedy available to the *ex-parte* Applicants to ensure that the decree issued is complied with.

11. Mr. Mkok counsel for the Respondents filed his submissions. He submitted that the *ex-parte* Applicants are seeking orders that are untenable and is abusing the court process notwithstanding the fact that he obtained a judgment in their favor in an opaque manner thus denying the Respondents an opportunity to appeal the decision within the prescribed time at the lower court. With regards to the issue that it is the accounting officer that is legally bound to satisfy a decree, counsel cited the case of **Shah v Attorney General (No.3) Kampala HMC No. 31 of 1969 [1970] EA 543**.

### **Determination**

12. I have considered the pleadings and submissions by the parties, as well as the discussion by the Court of Appeal on the nature of the remedy of mandamus in its decision in **Republic v Kenya National Examinations Council ex parte Gathenji and 9 Others, [1997] eKLR**, wherein it was held as follows:

*“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. It is not disputed in the present application that judgment was entered in favor of the *ex parte* Applicant in **Mombasa Resident Magistrate Civil Case No. 26 of 2012**. However, the Respondents have claimed that the judgment was erroneous for lack of proceedings in the reconstructed file. From the judgment, the defendants who included the Attorney General, the 1<sup>st</sup> Respondent herein, entered appearance, filed their defence but failed to attend the hearing despite being duly served. If the Respondents had an issue with the proceedings and/or the records, they would have laid their claim at that time. Therefore, the Respondents’ averments that the judgment is erroneous is unfounded and without basis.

14. The issues therefore that require to be determined are firstly, whether the Respondent is under a legal duty and obligation to satisfy the decree and orders issued in favor of the *ex parte* applicant in the said judgment, and secondly, if so, whether the *ex parte* Applicant is entitled to the relief he seeks.

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

*“(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. In addition, execution proceedings against a government or public authority can 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 the holding in **Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security [2012] eKLR** 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. In the present application, the decretal sum due from the Respondent as per the annexed Certificate of Order issued on 3 August 2020 is Kshs 1,500,000/= together with costs of the suit paid by the Attorney General. Particulars of costs are advocates fees at Kshs. 44,500/=, advocate attendance fees at Kshs. 70,350/= and interest of the decretal sum at 12% per annum as from 28 November 2018.

18. This Court, therefore, finds that since the *ex parte* Applicants have judgment in their favor with respect to the demanded decretal amount and costs they have a right to enjoy the fruits of their win. However, the *ex parte* Applicants have not followed the procedure as laid down in Section 21 of the Act aforementioned. The Attorney General was not served with the certificate of orders instead, the *ex-parte* Applicants served the Ministry of Interior coordination. Despite this procedural overlap, there is a duty upon the Respondents to pay a debt already decreed by a competent Court of law to be due and payable by them.

19. In the premises, I find that the *ex parte* applicant's Notice of Motion dated 25<sup>th</sup> May 2021 is merited and succeeds as prayed with costs herewith assessed at Kshs. 30,000/=.

Orders accordingly.

**Dated, Signed and Delivered at Mombasa this 29<sup>th</sup> day of September, 2021.**

**E. K. OGOLA**

**JUDGE**

Ruling delivered via MS Teams in the presence of:

Ms. Randa for Applicant

Mr. Mkok for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Ms. Peris Court Assistant