



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VIHIGA**

**JUDICIAL REVIEW NO. 1 OF 2021**

**EVANS JAMES MISATI T/A HEALTH AND WATER FOUNDATION.....APPLICANT**

**VERSUS**

**COUNTY SECRETARY CHIEF OFFICER MINISTRY OF HEALTH**

**COUNTY GOVERNMENT OF VIHIGA.....RESPONDENT**

***EX PARTE*: EVANS KAMES MISATI t/a HEALTH AND WATER FOUNDATION**

**JUDGMENT**

1. The *ex parte* applicant herein holds a decree against the respondent made in Kakamega CMCCC No. 264 of 2019 on 22<sup>nd</sup> November 2019. Leave to commence these proceedings was obtained on 8<sup>th</sup> February 2021. The substantive Motion, dated 19<sup>th</sup> February 2021, for a *Mandamus* order to compel payments of the amounts in the decree of 26<sup>th</sup> November 2019, for a declaration and costs, was filed herein on 2<sup>nd</sup> March 2021.

2. When the matter came up on 16<sup>th</sup> March 2021, the court pointed out that there had been no full compliance with the Government Proceedings Act, Cap 40, Laws of Kenya, with respect to obtaining a certificate of order or decree against Government and serving it on the respondent. The respondent took out the matter and asked for time to obtain the certificate of order or decree against Government. The *ex parte* applicant then obtained the certificate against Government, dated 21<sup>st</sup> June 2021. It was placed on record on 14<sup>th</sup> July 2021.

3. The statutory duty on Government to settle a decree against it accrues when it is served with a certificate of decree against Government, as required by section 21 of the Government Proceedings Act. The certificate of order against Government is the accounting document that triggers payment. Without the said certificate not being served there

would no duty to pay. A *Mandamus* order can only be sought and granted after the statutory duty has arisen. The primary document when it comes to grant of *Mandamus* orders against the Government with respect to enforcement of money decrees against the Government is the certificate of order against the government. Section 21 of the Government Proceedings Act provides as follows:

*“21. Satisfaction of orders against the Government*

*(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.

(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.”

4. The courts have severally pronounced themselves on the importance of the certificate of order against Government before any decree can be satisfied in favour of the person holding the same. In *Permanent Secretary Office of the President Ministry of Internal Security & Another ex parte Nassir Mwachhihi* (2014) eKLR (Odunga J), the court said:

“33. ... the rules applicable to normal execution proceedings by way of committal to civil jail are not necessarily applicable to enforcement of an order of the Court arising from an order of mandamus by way of committal. It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the Government Proceedings Act have been complied with respect to issuance of certificate of costs and certificate of order against the Government ...

34. The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court...”

5. In *Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoh Egunza Nairobi HC Misc. App. 31 of 2012* (Githua J) (unreported), the court stated:

“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.”

6. The statutory duty on the part of Government to settle a judgment or decree of a court arises only after the Government has been served with the certificate of order against it. Without being served with the said certificate, the Government does not incur the duty to pay or satisfy the judgment or decree, and, as a consequence, a *Mandamus* order would not be available, since *Mandamus* is meant to compel performance of a statutory or legal duty. That is the purport and effect of section 21(3)(4) of the Government Proceedings Act.

7. It was said, in *Republic vs. County Secretary Migori County Government & another* [2019] eKLR (Mrima J), that:

“12. Once a party obtains the Certificate of Order and the Certificate of Costs, in the event the Certificate of Costs is obtained separately, together with the Decree, then such a party must satisfy the Court of service of those documents upon the party named in the Certificates. In this case there is neither evidence of issuance of the Certificates nor service thereof on the Respondents or their Advocates.

13. I therefore have no difficulty in finding that the Ex parte Applicant has not fully complied with the legal requirements for an order of mandamus to be availed. The application is premature and cannot stand.”

8. In the instant case, the certificate of order or decree against Government was issued on 21<sup>st</sup> June 2021. There is no evidence as to when it was served on the respondent, for there is no affidavit of service to effect that it was served. The copy of certificate of order or decree against Government was also not placed on record by way of an affidavit. It is a piece of evidence that the *ex parte* applicant wishes this court to look at as it determines the application, so it should not have just filed in court. It should have been properly placed on record, on oath, through an affidavit, as affidavit evidence, properly attached as an annexure to the affidavit. In that affidavit, he should have deposed as to whether the certificate of order or decree against Government was served on the respondent, for the duty on the part of the respondent could only arise upon service of that certificate on the respondent. I see from the record that the certificate of order or decree against Government was not served on the respondent, although I do see that the certificate of order on costs, dated 22<sup>nd</sup> November 2019, was served on the respondent on 22<sup>nd</sup> June 2021.

9. The certificate of order or decree against Government was also obtained after the Motion herein had been filed. The Motion was filed herein on 19<sup>th</sup> February 2021, while the certificate was obtained on 21<sup>st</sup> June 2021. That would mean that the statutory duty on the part of the respondent to pay had not accrued as at the time the Motion was filed. The Motion is premature. It cannot be a basis for grant of the *Mandamus* order in respect of a certificate of decree obtained during its pendency. The certificate of decree was obtained belatedly to cure an

incurable anomaly.

10. The last point I would like to make is with respect to declarations. The Motion is founded on the procedural law governing Judicial Review in Kenya, the Law Reform Act, Cap 26, Laws of Kenya, and the Civil Procedure Rules. There are only three orders of Judicial Review that can be made under those provisions, namely, *Certiorari*, *Mandamus* and Prohibition. A declaration is not available under Judicial Review, unless it is sought through a constitutional petition. The declaration that the non-payment of the decree was a violation of the law and an infringement of the rights of the *ex parte* applicant is, therefore, not available for me to make in these proceedings.

11. The Motion, dated 19<sup>th</sup> February 2021, is, therefore, incompetent, for the reasons given above, and it is hereby struck out. The respondent shall have the costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF NOVEMBER, 2021**

**W. MUSYOKA**

**JUDGE**