



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E1129 OF 2020

BETWEEN

NYABARO ONDITI.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....RESPONDENT

JUDGMENT

The Application

1. Nyabaro Onditi, the *ex parte* Applicant herein, has moved this Court in an application brought by way of a Notice of Motion application dated 4th February, 2021 and is seeking the following orders:

a) THAT an order of mandamus be issued compelling the Respondent to pay and settle the taxed party and party costs of Kshs. 2,120,046/- together with interest at court rates at 12% from 26/1/2016 being the date of taxation till payment in full as awarded to (Nyabaro Onditi) the Applicant by the Court of Appeal in Kisumu Civil Appeal No. 44 of 2013.

b) THAT in the event the Respondent fails to pay and settle the Kshs. 2,120,046 together with the interest at court rates at 12% from 26/1/2016 being the date of taxation till payment in full within 14 days from the date of the grant of prayer 1 above, the court do issue warrants of attachment and sale to a licenced Auctioneer to attach the moveable properties of the Respondent to recover the amount of Kshs. 2,120,046 together with interest at 12% from 26/1/2016 till payment in full.

c) THAT the cost of this application be awarded to the Applicant.

2. The application is supported by the grounds set out in the application together with the is supported by a statutory statement dated 10th November 2020, and a verifying affidavit sworn on the same date by the Applicant, and a supplementary affidavit sworn on 24th November 2020 by Jackson Omwenga, the *ex parte* Applicant's Advocate. The *ex parte* Applicant averred that on 21st February, 2014, the Court of Appeal determined the appeal in **Kisumu Civil Appeal No. 44 of 2013** and awarded costs. Thereafter, the costs were taxed by the Deputy Registrar in the sum of Kshs. 2,120,046 inclusive of the court fees, and a certificate of taxation issued on 29th January, 2016. It was also his averment that the Respondent herein was well represented by an advocate who duly participated in all the proceedings but despite being aware of the taxed costs, has totally failed, refused and/or neglected to pay the same.

3. The *ex parte* Applicant advocates on record, Jackson Omwenga & Co Advocates also filed written submissions dated 14th April, 2021 in support of the application. In sum, counsel argued that despite having served the Respondent with the substantive motion and the firm of Chepkuto Advocates filing a notice of appointment, they have neither filed a response nor submissions in opposition of the application meaning the application is unopposed. In addition, that the Respondent have not shown by way of any document that they settled the taxed party and party costs of Kshs 2,120,046/= arising from **Kisumu Civil Appeal No. 44 of 2013**.

The Response

4. The Respondent however did file Grounds of Opposition dated 16th July 2021, and opposed the application on the grounds that it is incompetent and fatally defective having failed to comply with the mandatory provisions of Section 21 of the Government Proceedings Act, of Kenya as read with Order 29 Rule 3 of the Civil Procedure Rules by failure to obtain a Certificate of Order of Costs against the Government; and that the Applicant's prayer for attachment of the Respondent's property is bad in law and against the provisions of Section 21(4) of the Government Proceedings Act. Therefore, that the application should be struck out with costs.

5. Chepkuto Advocates, who are on record for the Respondent, also filed submissions dated 16th July 2021, wherein it was urged that the procedure for enforcement of orders as against the government is laid down in Section 21(1) of the Government Proceedings Act, under

which an applicant must first provide a certificate of order against the government which may include the costs awarded thereto, or a separate certificate of order of costs against the government has to be issued. Further, that the same is to be served upon the government for the duty to pay to arise, and enforcement proceedings, by way of mandamus can only be undertaken thereafter.

6. However, that from a perusal of the *ex parte* Applicant's pleadings and attachments, no certificate of order of costs has been annexed by the Applicant, and what was annexed is the certificate of costs that was issued upon taxation of the costs by the Registrar, which was what was served upon the Respondent. Reliance was placed on the decisions in **Republic vs Attorney General & Another ex parte The Standard Limited & Baraza Limited [2018] eKLR**, and **Republic vs. County Secretary Migori County Government & Another [2019] eKLR**, where the courts struck out the applications that had not complied with the provisions of Section 21 of the Government Proceedings Act.

7. On whether the Respondent's movable properties may be attached, the Respondent cited section 21(4) of the Government Proceedings Act, and the cases of **County Government of Isiolo vs Shariff Ibrahim Farah, (2019) eKLR** and **Jamleck Waweru Karanja vs County Government of Nakuru, (2020) eKLR**, wherein it was held that a party is barred from executing against the government, and that the only available remedy for satisfaction of orders as against the government is through institution of judicial review proceedings for an order of mandamus. Consequently, that execution against the government via warrants of attachment is not allowed under law.

The Determination

8. I have considered the *ex parte* Applicant's and Respondent's pleadings, and submissions, and I am guided by the holding of the Court of Appeal on the nature of the remedy of mandamus in its decision in **Republic vs Kenya National Examinations Council ex parte 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....”

9. 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

10. 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, and secondly, if so, whether the *ex parte* Applicant is entitled to the relief sought.

11. 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.”

12. Execution proceedings against a government or public authority under the Government Proceedings Act 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 also the holding in *Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security* (2012) where Githua J. 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.”

13. The provisions of section 21 of the Government Proceedings Act must be read with the necessary changes in relation to the Respondent Commission. In this regard, the Respondent is a corporate body, and the service of the certificate of costs that is required by the said section

on the Attorney General must read as requiring service on the appropriate officer in the Respondent. Section 10 of the Independent Electoral and Boundaries Commission Act in this regard provides for a Secretary to the Respondent's Commission, and section 10(7) of the Act provides for the following functions of the Secretary to the Commission:

(7) The secretary shall be—

- (a) the chief executive officer of the Commission;**
- (b) head of the secretariat;**
- (c) the accounting officer of the Commission;**
- (d) custodian of all commission's records;**
- (e) responsible for—**
 - (i) executing decisions of the Commission;**
 - (ii) assignment of duties and supervision of all employees of the Commission;**
 - (iii) facilitating, co-ordinating and ensuring execution of Commission's mandate;**
 - (iv) ensuring staff compliance with public ethics and values; and**
 - (v) the performance of such other duties as may be assigned by the law and Commission.**

14. In the present application, the *ex parte* Applicant annexed copies of the judgment delivered on 21st February 2014 and certificate of costs dated 29th January 2016 issued in **Kisumu Civil Appeal No. 44 of 2013**. The *ex parte* Applicant also annexed copies of letters dated 5th February 2016, 5th December 2017, 20th March 2019 and 23rd October 2020 sent to the Respondent, seeking payment of the costs and annexing a copy of the judgment and certificate of costs. The *ex parte* Applicant however did not annex any evidence of a Certificate of Order against Government issued in respect of the taxed costs, nor evidence of the service of the same on the Respondent, which is the Respondent's main objection.

15. While it may be desirable to have all the particulars included in a Certificate of Order against the Government, it is my view that a decree and Certificate of Costs issued by a Deputy Registrar of the Court of Appeal is adequate certification of what the particulars of an order are in this respect, and suffices for purposes of section 21 of the Government Proceedings Act. The *ex parte* Applicant did provide evidence that the Certificate of Costs was served on the Respondent, and also provided evidence of a letter from the Respondent's Secretary dated 17th February 2016, in which he acknowledged receipt of the said Certificate and indicated that the Respondent was in the process of sourcing funds. In addition, the procedure in section 21 of the Government Proceedings Act is not meant to relieve the Respondent from meeting its legal and statutory obligation to satisfy decrees and orders of the Court, and its main purpose is to notify the Respondent that the debt is due to facilitate payment.

16. The Respondent is therefore under a duty to pay the total costs taxed at Kshs 2,120,046/=-, given that the *ex parte* Applicant has brought evidence to show that he made demands and requests for payment which have not been heeded to by the Respondent, and an order of mandamus is in the circumstances merited. As regards the actual amount of costs due from the Respondent, I have perused the judgment delivered on 21st February 2014 in **Kisumu Civil Appeal No. 44 of 2013** and Certificate of Taxation dated 29th January 2016, and I note that there was no award of interest made therein. Section 26(2) of the Civil Procedure Act in this respect provides that where a decree for the payment of money is silent with respect to the payment of interest on the aggregate sum from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

17. Lastly, on the prayers for issue of warrants of attachments, section 21 (4) of the Government Proceedings Act provides as follows:

"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. "

The only method of enforcement therefore available to the *ex parte* Applicant is to pursue contempt of court proceedings, once he has been granted and served the Respondent with an order of mandamus which is not complied with.

The Disposition

18. In the premises, I find that the *ex parte* Applicant's Notice of Motion dated 4th February 2021 is merited to the extent of the following orders:

I. An order of mandamus be and is hereby issued to compel the Respondent to pay the *ex parte* Applicant the sum of Kshs 2,120,046/-, being the taxed party and party costs of awarded to the *ex parte* Applicant by the Court of Appeal in Kisumu

Civil Appeal No. 44 of 2013, together with interest thereon at 6% per annum from 26th January 2016, being the date of taxation, until payment in full.

II. The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 4th February 2021 of Kshs 30,000/=.

19. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF NOVEMBER 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2021

A. NDUNG'U

JUDGE