



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

JUDICIAL REVIEW NO. 1 OF 2021

IN THE MATTER OF: AN APPLICATION BY SIMON NJAGI KAREKE, JOSEPH MACHARIA WANYOIKE AND PAUL MBURU NJIHIA

FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF: SPM CIVIL SUIT NO. 36 OF 2010 IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT LAMU

AND

IN THE MATTER OF: GOVERNMENT PROCEEDINGS ACT, CAP 40, LAWS OF KENYA

BETWEEN

REPUBLICAPPLICANT

-VERSUS-

THE PRINCIPAL SECRETARY, STATE DEPARTMENT FOR INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL..... 2ND RESPONDENT

AND

1. SIMON NJAGI KAREKE

2. JOSEPH MACHARIA WANYOIKE AND

3. PAUL MBURU NJIHIAEX PARTE APPLICANTS

Coram: Hon. Justice R. Nyakundi

George Wakahiu & Njenga Advocates for ex parte applicants

The Director of Public Prosecution

The Attorney General

J U D G M E N T

This is a petition by the petitioner invoking the Court's supervisory jurisdiction pursuant to Article 165 (8) and (9) of Article 23 of the Constitution and Order 53 of the Civil Procedure Act for the purposes of granting a writ of mandamus.

The genesis of the issue starts with the Civil proceedings in Civil Suit No. 36 of 2010 before the Senior Resident Magistrate at Lamu subsequently on the merits of the claim a Judgment ensued with the following orders with:

(a). A decree extract of 10.12.2013.

In the aforesaid decree the petitioner was awarded a sum of Kshs.1,000,000/= against the respondents being compensation for general damages plus costs and interest. That the Judgment and decree upon being extracted, was served upon the Attorney General as representative of the Government of Kenya and its attendant ministries. That the decretal sum has never been paid to Ministry of Interior and Coordination of National Government which is a breach of the Law on execution and enforcement of Judgments.

It is for those reasons the petitioner has applied for the writ of mandamus for the respondents to satisfy the decree in **SPM No. 36 of 2010 at Lamu Court**. When the matter was listed before this Court, the respondent had filed a replying affidavit stating that all necessary efforts have been made towards the settlement of the decree but finds remain to be a major hindrance. As far as the writ petition is concerned, the respondent averred that some of the delays have been occasioned by the failure of the petitioners' advocates to submit the necessary supplying documents. That the Government keeping in mind and endeavoured to satisfy the decree nonetheless.

At the hearing of the petition, Learned counsel for the petitioner filed written submissions to the effect that the conduct of the Government is wanting in delaying to settle the decretal sum. Learned counsel submitted that the decree of the trial Magistrate has not been appealed against and cannot be ignored by the Government in giving excuses for non-settlement. The Learned counsel submitted and urged the Court to grant the writ of mandamus as of necessity in line with Article 165 (7) (8) of the Constitution and Order 53 of the Civil Procedure Rules.

Learned counsel emphasized on the principles in **Shah v AG No. Kampala HCCM 31 of 1969; R v Attorney General ex parte Alfred Koroso; R v Kenya National Examinations Council ex parte Gathengi & 8 others Civil Appeal No. 234 of 1996; R v Town Clerk of Webuye County Council & Another HCCC 448 of 2006; R v Principal Secretary, Ministry of Internal Security & Another ex-parte Schon Noorani & Another {2018} eKLR; R v Principal Secretary, Ministry of Internal Security & Another ex-parte Schon Noorani & Another {2018} eKLR.**

The Learned counsel pointed out that all the necessary documents have been served upon the respondent contrary to the averments in the affidavit.

Determination

The issue to be answered is whether a writ of mandamus is appropriate because of the denial to settle the decree in **SPMCC No. 36 of 2010**. The petitioner presents novel questions as to which there is at the very minimum provisions for a remedy of mandamus against an inferior Court to be compelled to do what the Law requires of them as a sustenance of the rule of Law in a constitutional democracy. Mandamus is appropriate to correct the respondent's undisputable error in declining to honour the decree of the trial Court. As a threshold matter, there is no basis in Law or equity why the respondents continues to disobey enforcement of the decree by way of settlement of terms. This prerogative writ is discretionary and operates in the area of public Law what the Court is being asked to investigate is whether non-compliance with the decree of the Court, the respondent are in breach of the Law. Mandamus literally means we command requiring the respondents to refrain from continuing to neglect the settlement of a valid Judgment of the Court.

Blackshire commentaries explained:

“Mandamus issues to the body of an inferior jurisdiction, commending it to do justice according to the powers of their office, whenever the same is delayed, for it's a peculiar business of the Court of Kenya's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers, with which the crown or legislative have invested them, and this not only by restraining their excesses, but also quickening their negligence.”

In several other cases, **R v Principal Secretary State Dept of Interior, Ministry of Interior & Coordination of National Government exparte Salim Awadhi & 12 others {2018} eKLR; R v Permanent Secretary Ministry of State Provincial Administration and Interior, Security exparte Manoah Egunza {2012} eKLR; Shah v Attorney General {1970} EA 543; R v The Attorney General & Another exparte; James Koro HCCC No. 44 of 2012.** The writ of mandamus provides a key opportunity for the exparte applicant to access justice on execution and enforcement of decrees against a public body. The rule of Law sets a fundamental criteria that the constitution is supreme over the acts of government and private citizens or the subjects for that matter. Any exercise of power by the government is founded in the ultimate source of the Law. The word of mandamus under Article 23 of the Constitution is one such model an individual citizen can challenge his or her government to account, otherwise there is a presumption that the Government is above the Law.

In the case of **Record Association v Union of India (AIR) 1994 SC 268 at 298** the Supreme Court of India had this to say:

“For the rule of Law to be realistic, there has to be room for discretionary authority within the operations of rule of Law even though it has to be reduced to the minimum extent necessary for proper, governance, and within the area of discretionary authority, the existence of proper guidelines or norms of general application excludes arbitrary exercise of discretionary authority. In such a situation, the exercise of discretionary authority in its application to individuals, according to proper guidelines and norms, further reduces the area of discretion but to that extent discretionary authority has to be given to make the system workable.”

I remain convinced as did **Abraham Lincoln** the former U.S president. In his address to the **young men's Lyceum of Springfield Illinois 27.1.1818:**

“Let every man remember that to violate the Law is to trample on the blood of his father, and to tear the charter of his own and his children’s liberty....” Let reverence for the Laws by every American mother to the LISPUNG babe, that prattles on her lap”

This is where our constitution under Article 23 fashioned the remedies on judicial review to secure the rule of Law. In principle **Brennan J** in the **Church of Scientology v Woodward {1982} 154 CLR 25, 70** held thus:

“Judicial review is neither more nor less than the enforcement of the rule of Law of executive actions. It is the means by which executive power is prevented from exceeding the powers and the functions assigned to the executive by Law and the interests of the individual as protected accordingly.”

From the issues raised in the petition, I am persuaded that all material evidence relied upon by the petitioner result in the claim bring justiciable against the respondents for an order of mandamus. Disobedience of Court orders by the Government is, however hard wired into their culture which has permeated every institution, class, public bodies alike. Sometimes the two sides bring the judiciary and the Government to face each other as symbolic swords targeted at each other with the lines of might drawn and none is willing to submit. One wonders in a Constitutional democracy, how come Government power, whether exercised by the county, regulatory bodies, public authorities is never exercised in accordance with the Law. It is evident that a government official/public body can rather die than act in ensuring the executive powers are exercised in accordance with the Law and in furtherance to obedience to Court orders as the beacon of the rule of Law.

In the instant case the failure by the Ministry of Interior and National Coordination to honor, the settlement of the decree in **SPMCC NO. 36 OF 2013** is a matter reviewable by this Court. The writ of mandamus is available to cure the theoretical possibility of payment of the compensation which has been outstanding since extraction of the decree of the Court. The petitioner in this case has a legitimate expectation of enjoying the fruits of his Judgment sourced from a valid Judgment of the Court. On the whole, I find merit in the petition notwithstanding the averments in the replying affidavit of the respondent.

I hold that it fails to entitle them of any remedy of rejecting the petition. In the result a writ of mandamus be and is hereby issued against the respondent to settle the decree in **SPMCC NO. 36 OF 2013**.

It is so ordered.

DATED SIGNED AND DISPATCHED via email AT MALINDI THIS 22ND DAY OF DECEMBER, 2021

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R NYAKUNDI

JUDGE