



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISCELLANEOUS CIVIL APPLICATION NO. 7 OF 2019**

**IN THE MATTER OF: AN APPLICATION BY BEATRICE KAMBUA MUTHAMI**

**(Suing Administratrix of the Estate of the Late MAPENZI MUTHAMI (Deceased))**

**AND**

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

**AND**

**IN THE MATTER OF: LAW REFORM ACT CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: MARIAKANI PRINCIPAL MAGISTRATES COURT CIVIL CASE NO. 1 OF 2014**

**BEATRICE KAMBUA MUTHAMI (Suing as Administratrix of the Estate of the Late MAPENZI MUTHAMI (Deceased))**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**SAMMY MUNGAI MUNENE.....1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL (Sued on**

**behalf of the Ministry of Agriculture,**

**Livestock, Fisheries and Irrigation,**

**Formerly of Agriculture).....2<sup>ND</sup> DEFENDANT**

**AND**

**BEATRICE KAMBUA MUTHAMI**

**(Suing as Administratrix of the Estate of the**

**MAPENZI MUTHAMI (Deceased).....EX-PARTE APPLICANT**

**Coram: Hon. Justice R. Nyakundi**

**Apollo Muinde & Partners Advocates for the applicant**

## Attorney General for the 2<sup>nd</sup> Defendant & Respondent

### JUDGMENT

The ex-parte applicant **Beatrice Kambua Muthami** respectfully petitions for a writ of mandamus do issue directed at the permanent secretary state department of Agriculture, Livestock, Fisheries and Irrigation being the accounting officer in charge of the said Department compelling him/her to effect payment of the damages awarded to the ex-parte applicant in **PMCC NO. 1 OF 2014** as indicated in the Decree and Certificate of Costs.

The jurisdiction of this court has been invoked under Order 53 Rule 3 of the Civil Procedure Rules and Section 89 of the Law Reform Act.

#### **Statement of the claim**

In the petition, the ex-parte applicant alleges that her daughter **Mapenzi Muthami** was lawfully working as a pedestrian off the Mombasa – Nairobi Road at Mariakani when she was knocked down by motor vehicle Registration No. GK A 860Q belonging to the Ministry of Agriculture, Livestock, Fisheries and Irrigation. As a result of the accident, **Mapenzi Muthami** succumbed to the fatal injuries.

The ex-parte applicant moved the court at Mariakani, seeking general damages under the Law Reform and Fatal Accidents Act in which an award of Kshs.637,250 plus costs and interest became due as compensation for a breach of duty of care in negligence.

Further, the ex-parte applicant allege, that the aforesaid decree has been severally brought to the attention of the respondent who has neglected, to have it settled, leaving, the estate of the deceased to suffer loss and damage.

The respondent allege that the ex-parte applicant aggregate claims have been forwarded to the responsible permanent secretary to have the substantive decree alleged to have remained unsettled paid, which they contend requires reasonable time to follow up and report the progress.

The application therefore remains unopposed to the extent of it's liability against the Judgment debtor – the Ministry of Agriculture, Fisheries and Livestock.

#### **Analysis and determination**

This constitutional remedy of mandamus is understood to be the main avenue as providing for execution and enforcement of monetary Judgment against the government. Unfortunately, by its actions and operations, the government does find itself in debt to her own citizens and persons. The government debt is usually charged to the consolidated fund under Section 21(1) and (3) of the Government Proceedings Act provides for a specific procedure over the years for money decrees against the government to be enforced based on the guidelines in the Act.

The court considers a petition for the writ of mandamus as the only other means available to obtain the relief as no direct execution or warrant of attachment can be issued against the government. The time for intervention by way of mandamus arises when the government remains in defiance of a court decree.

As currently formulated the Judgment of the court subject matter of these proceedings was delivered on 16.3.2017 soon thereafter all circumscribed procedures were also finalized expressly casting the Judgment as enforceable against the Judgment debtor.

The paramount and necessity of the writ of mandamus is for the ex-parte applicant to discharge the burden of proof on the alleged breach of legitimate expectation by the government, where the court has found that the government is in violation of the legitimate expectation, this approach of the writ of mandamus is consistent with constitution, a lison and Government Proceedings Act.

The issue on the burden of proof under Section 107 (1) of the Evidence Act lies with the ex-parte applicant. In reference to the persuasive case of the **Privy Council** decision **Francis Paponette and others v The Attorney General of Trinidad and Tobago {2011} 3 WLR 219**. The court addressed this issue of burden of proof and legitimate expectation as follows:

***“If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence it's conduct is for unfair as to amount to an abuse of power. The Board agrees with the observation of Lords L. J. in R (Nadarajah) v Secretary of State for the Home Department {2005} EWCA CIV 1363 at 68) The principle that good administration requires public authorities to be held to their promises would be undermined if the Law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances. It is for the authority to prove its failure or refusal to honour its promises was justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was not justified.”***

The state counsel **Martin Mwandjenje** deponed that there are measures taken to press the need for the respondent to settle the claim as required by Law. That functionally the payment process within the government involves engagement of various stakeholders, otherwise the communication on the same is being awaited.

The protection afforded by the constitution is against arbitrary or less favourable treatment under the same Law. The consideration whether the frustration of ex-parte applicant legitimate expectation to have her money decree settled by the government must be on the basis other than what is averred in the replying affidavit.

In support of this legal position again the court in **Keroche Industries Ltd v Kenya Revenue Authority and others Misc. Application No. 1285 of 2007** emphasized that:

***“..... legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all .... Which is, the value of the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation ..... legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way ..... public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised.”***

In applying the above principles, the ex-parte applicant contention is that since the death of her daughter and subsequent Judgment and the respondent liability and finality award of damages in 2017, there has been no substantive communication or reason when the decree would be settled.

The reason for not satisfying the Judgment of the court and withholding the administrative act as gleaned from the notice of motion weighs against the respondent’s argument of justification for non-payment of the Judgment debt.

As it relates to the justification for the breach of legitimate expectation, the very banality of the principle is whether by merely stating that the payment process within the government provides an answer to the kind of issues that arises in this judicial review petition.

I find the point made by the respondent fails to address the breach and or frustration of her legitimate expectation that she would be paid her outstanding decretal sum as realized from a valid Judgment of the court.

The court can only intervene by way of judicial review. In the cases of the **Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security ex-parte Fredrick Manoah Egunza {2012} EKLK, Shah v Attorney General No. 3 Kampala HCMC NO. 31 OF 1969 {1970} EA 543**, the threshold of the writ of mandamus and several key factors to consider in granting the relief as an appropriate remedy is reinforced in the principles illuminated and discussed in the above authorities.

Further mandamus as postulated in the above cases is a judicial remedy in the form of an order to the respondent to forebear from withholding the decretal sum being Judgment debt in a regularly obtained Judgment by the ex-parte applicant.

In **PMCC NO. 1 OF 2014**. The command sought to be enforced is consistent with Section 21(1) and (3) of the Government Proceedings Act. Unfortunately, the ex-parte applicant has no other adequate means to obtain the relief against the respondent except that of the writ of mandamus.

There is nonetheless at hand evidence that the respondent refusal to act is in contravention of a statutory duty imposed in terms of Section 21 of the aforesaid statute. Just before the application was made the ex-parte applicant has demonstrated that all relevant information on the unpaid Judgment debt was sent to the respondent.

In my view the ex-parte applicant has satisfied the court that in pursuing judicial remedy she has done so in good faith and not for collateral purposes.

A careful examination of the affidavit evidence which remains uncontroverted demonstrates that such as a legitimate claim against the respondent which is enforceable as of right under the provisions of the Government Proceedings Act.

This court therefor undertakes to exercise applicable jurisdiction as expressed by **Bankes L. J. in R v Port of London Authority ex-parte Kynock Ltd {1918} 1KB 176** that

***“a writ of mandamus is in essence a prerogative writ to command a tribunal, authority, person and Government to do something which it has omitted or refused to do in pursuant or execution or intended execution as stipulated in the Act.”***

In view of what I have said, the facts of the case, and the authorities cited I am satisfied that the continued refusal or withholding to honor the statutory obligations to settle the decree in favor of the ex-parte applicant is disproportionate to her legitimate expectation to be treated fairly. For the foregoing reasons an order for the writ of mandamus do issue against the respondent in terms of the notice of motion dated 26.9.2019 with orders as to costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2020**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Atyang for the Attorney General