



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW MISC. APPLICATION NO. 273 OF 2019**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PRINCIPAL SECRETARY,**

**MINISTRY OF INTERIOR AND**

**CO-ORDINATION OF NATIONAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**POLICE CONSTABLE SIMON KINUTHIA GITAU.....2<sup>ND</sup> RESPONDENT**

**DIVISIONAL TRAFFIC OFFICE KILIMANI.....3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**EX PARTE:**

**TITUS BARASA MAKHANU**

**JUDGMENT**

**The Application**

1. The *ex parte* Applicant herein, Titus Barasa Makhanu, is the decree holder in **Nairobi High Court Constitutional Petition Number 463 of 2015**, wherein he obtained judgment in his favour against the 2<sup>nd</sup> to 5<sup>th</sup> Respondents herein on 29<sup>th</sup> February 2016 for damages of Kshs 250,000/- and costs. His costs were subsequently taxed as Kshs 185,907/= on 22<sup>nd</sup> August 2016, and he was issued with a Certificate of Taxation dated 30<sup>th</sup> January 2020, and a Certificate of Order against the Government dated 6<sup>th</sup> July 2017 for the decretal sum of Kshs 476,263/=. The *ex parte* Applicant has now sued the Principal Secretary in the Ministry of Interior and Coordination of National Government who is the 1<sup>st</sup> Respondent herein, as the person who is under a statutory duty to pay the said decretal sum.

2. The *ex parte* Applicant filed the instant judicial review proceedings by way of a Notice of Motion dated 9<sup>th</sup> March 2020, seeking orders of mandamus compelling the 1<sup>st</sup> Respondent to pay the him through his duly appointed Messrs Titus Makhanu & Associates Advocates the sum of Kshs 476,263/=-, specified in the Certificate of Order against the Government issued on 6<sup>th</sup> July 2017, together with interest on the same from 29<sup>th</sup> February 2016 until the date of payment. The *ex parte* Applicant also prayed that the costs of the application be provided for.

3. The above-stated facts are detailed in a statutory statement dated 5<sup>th</sup> September 2019, and a verifying affidavit and supplementary affidavit deponed to by the *ex parte* Applicant on 5<sup>th</sup> September 2019 and 4<sup>th</sup> February 2020 respectively. He annexed thereto the judgment, decree, Certificate of Taxation and Certificate of Order against Government issued to him in **Nairobi High Court Constitutional Petition Number 463 of 2015**. He also annexed demand letters seeking payment of the decretal sum that he sent to the Attorney General's office dated 28<sup>th</sup> July 2017 and 31<sup>st</sup> August 2017.

4. In summary, the *ex parte* Applicant's case is that the Respondents have an obligation in law to pay the decretal sum pursuant to court

orders as part of their duty to observe the rule of law . Further, that the 1<sup>st</sup> Respondent as the accounting officer of the Ministry of Interior and Coordination of National Government has the obligation and duty to ensure the settlement of the decree and has wrongfully neglected and/or refused to do so.

5. The 1<sup>st</sup> to 5<sup>th</sup> Respondents did not file any response to the application, despite being given the opportunity to do so.

### **The Determination**

6. The application was canvassed by way of the *ex parte* Applicant's written submissions dated 9<sup>th</sup> March 2020, wherein he reiterated the facts and grounds for his application. The *ex parte* Applicant submitted that his right to enjoy the fruits of his judgment must be realised, and cited the decision to this effect in **Republic vs Town Clerk of Webuye County Council & Another, HCCC 448 of 2006.**

7. Further, that once a Certificate of Order against the Government is issued and served upon the Attorney General, section 21 (3) of the Government Proceedings Act imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order. Reliance was placed on the decision in **Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza, (2012) e KLR** for this position.

8. The *ex parte* Applicant also cited the decision in **Shah vs Attorney General (No.3) (1970) E.A. 543** on the nature of an order of mandamus, and the decision in **Republic vs Attorney General & Another Exparte James Alfred Koroso (2013) eKLR**, for the submission that the *ex parte* Applicant has no other option to compel the 1<sup>st</sup> Respondent to perform his obligations.

9. I have considered the *ex parte* Applicant's pleadings and submissions, and I am guided by the decision and discussions by the Court of Appeal on the nature of the remedy of mandamus in **Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others, (1997) e KLR**, 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, 4<sup>th</sup> 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.....”**

10. It is not disputed in the present application that judgment was entered in favour of the *ex parte* Applicant in **Nairobi High Court Constitutional Petition Number 463 of 2015.** The issues therefore that require to be determined are firstly, whether the 1<sup>st</sup> Respondent is under a legal duty and obligation to satisfy the decree and orders issued in favour 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.

11. Section 21 of the Government Proceedings Act provides as follows as regards the requirements to be met in the enforcement of orders as against Government 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. 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 vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) e KLR** 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.”

13. In the present application, the decretal sum due from the 2<sup>nd</sup> to 5<sup>th</sup> Respondents has not been disputed, and the *ex parte* Applicant in this respect annexed copies of the judgment, decree and Certificate of Costs awarded in **Nairobi High Court Constitutional Petition Number 463 of 2015**. The *ex parte* Applicant also annexed a copies of the demand letters sent to the Attorney General, and which enclosed the decree and Certificate of Order against Government. Lastly, the 1<sup>st</sup> Respondent has not disputed the finding in the judgment in **Nairobi High Court Constitutional Petition Number 463 of 2015** that officers in his Ministry were responsible for the acts leading to the *ex parte* Applicant being awarded damages.

14. This Court therefore finds that since the *ex parte* Applicant has judgment in her favour with respect to the demanded decretal amount and costs, and the procedure stated in section 21 of the Government Proceedings Act has largely been followed, there is a duty upon the 1<sup>st</sup> Respondent to pay a debt already decreed by a competent Court of law to be due and payable by them.

15. The only clarification that needs to be made is as regards the interest payable on the decretal sum. It is notable that the Trial Court in its judgment in **Nairobi High Court Constitutional Petition Number 463 of 2015** did not indicate the applicable rate of interest, and in the circumstances the general rule is that court rates will apply. In addition, the Certificate of Order against Government for Kshs 467,263.00 issued on 6<sup>th</sup> July 2017 that was annexed by the *ex parte* Applicant was inclusive of the damages and taxed costs, as well as interest of Kshs 40,356/= from 29<sup>th</sup> February 2016 to 5<sup>th</sup> July 2017 at the rate of 12% per annum. Any interest due is therefore only payable from 6<sup>th</sup> July 2017.

16. In the premises, I find that the *ex parte* Applicant’s Notice of Motion dated 9<sup>th</sup> March 2020 is merited, and succeeds to the extent of the following orders:

**I. An order of mandamus be and is hereby issued directed to the 1<sup>st</sup> Respondent herein to comply and pay the *ex parte* Applicant the sum of Kshs 476,263/=, being the decretal sum awarded in Nairobi High Court Constitutional Petition Number 463 of 2015, as certified in the in the Certificate of Order against the Government issued therein on 6<sup>th</sup> July 2017, with interest thereon at court rates from 6<sup>th</sup> July 2017 until the date of payment in full.**

**II. The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 9<sup>th</sup> March 2020 of Kshs 30,000/=.**

17. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF AUGUST 2020

P. NYAMWEYA

JUDGE

**FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT**

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the Applicant's and Respondents' Advocates on record.

P. NYAMWEYA

JUDGE