



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 113 OF 2018**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE CABINET SECRETARY FOR MINISTRY OF DEFENCE....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**EX PARTE APPLICANT: JOHN CHERUIYOT RONO**

**JUDGMENT**

**The Application**

1. The application before this Court for judgment is a Notice of Motion dated 5<sup>th</sup> July 2018 by John Cheruiyot Rono, the *ex parte* Applicant herein. The said application seeks orders for judicial review by way of mandamus to compel the Principal Secretary in the Ministry of Interior and Coordination of National Government, Kenya Defence Forces, to make payment of the sum of Kshs 1,500,000/= plus interest at the rate of 12% per annum from 8<sup>th</sup> March 2017 until payment in full.
2. The *ex parte* Applicant's application is supported by a statutory statement dated 12<sup>th</sup> April 2018 and a verifying affidavit he swore on the same date. The grounds for the application are that on 8<sup>th</sup> March 2017, the Court ordered the Respondent to compensate the *ex parte* Applicant for violating his fundamental rights and freedoms, and the *ex parte* was in this regard to be paid Kshs. 1,500,000/= as general damages. However, that the Respondent has failed neglected or refused to make the payment as directed.
3. The *ex parte* Applicant annexed copies of the judgment dated 8<sup>th</sup> March 2017 delivered in his favour in **John Cheruiyot Rono vs The Attorney General, Nairobi H.C Petition No. 536 of 2015**, the decree and Certificate of Order against Government dated 7<sup>th</sup> September 2017 and 27<sup>th</sup> September 2017 issued therein, and a letter dated 12<sup>th</sup> September 2017 and 4<sup>th</sup> October forwarding the said judgment, decree and Certificate of Order against Government to the Attorney General for purposes of payment.
4. The Respondent did not file any response to the Notice of Motion application dated 5<sup>th</sup> July 2018.

**The Determination**

5. This Court directed that the *ex parte* Applicant's application dated 5<sup>th</sup> July 2018 would be heard and determined by way of written submissions. The advocates on record for the *ex parte* Applicant, Osoro Juma & Company Advocates, filed submissions dated 9<sup>th</sup> August 2018, wherein they contended that as the Respondent was represented and participated fully in the hearing of the case before the said judgement was delivered.
6. In addition, that the Respondent was served with the judgment, decree and Certificate of Order against Government after its delivery. Furthermore, that their failure to respond to the application or make any payment is contemptuous and in contravention of the duty to execute their mandate and to provide fair administration of justice under Article 47 of the Constitution.
7. I have considered the pleadings and submissions by the *ex parte* Applicant, as well as the discussion by 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, wherein it was held as follows:

“...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..... .”

8. It is not disputed in the present application that judgment was entered on 8<sup>th</sup> March 2017 in **John Cheruiyot Rono vs The Attorney General, Nairobi H.C Petition No. 536 of 2015** in favour of the *ex parte* Applicant for damages and interest thereon, as against the Government. In addition, the *ex parte* Applicant did provide evidence of the said judgment, and a Certificate of Order against the Government for the sum of Kshs 1,592,712.30, in respect of the awarded general damages of Kshs 1,500,000/= and interest until 12<sup>th</sup> September 2017. The outstanding issues therefore that require to be determined are firstly, whether the Respondent is under a legal duty and obligation to satisfy the judgment issued in favour of the *ex parte* Applicant, and secondly, if so, whether the *ex parte* Applicant is entitled to the relief he seeks.

9. The applicable statutory provisions and judicial authorities support the position that liability for Government debts lies with the Accounting officers of the Ministries or public bodies concerned, while the procedure to be followed is that the Attorney General must be served with the Certificate of Costs against Government, in his capacity as the principal legal adviser and representative of the national government.

10. Section 21 of the Government Proceedings Act in this regard provides as follows on 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.”

11. It is evident from section 21(3) above that the person who is responsible for the payment of any damages or costs awarded against the Government is the accounting officer of the Ministry or public body concerned, who is the one under a statutory duty to satisfy a judgment made by the Court against that Ministry or body. This position was explained in **Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) e KLR** by Githua J. 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.”**

12. In the present application it appears that two persons are disclosed and pleaded as being liable for the decretal sum due to the *ex parte* Applicant, namely the Principal Secretary in the Ministry of Interior and Coordination of National Government, and Principal Secretary in charge of the Kenya Defence Forces. I have perused the judgment delivered in favour of the *ex parte* Applicant in **John Cheruiyot Rono vs The Attorney General, Nairobi H.C Petition No. 536 of 2015**, and note that the Court found that the violation of his rights occurred as a result of his unlawful arrest, imprisonment and torture by the Kenya Air Force.

13. The Principal Secretary in charge of the Kenya Defence Forces is thus the person who is liable for, and has the legal duty to pay the said decretal sum, and is therefore properly sued. Conversely, there is also a misjoinder of the Principal Secretary in the Ministry of Interior and Coordination of National Government in the pleadings.

14. The procedure required to be followed for payment of damages or costs due from the Government is provided in section 21 (1) and (2) of the Government Proceedings Act. The decree holder is in this regard only required to serve the Certificate of Costs on the Attorney General, as the legal representative of the accounting officer, who then advises and arranges for the accounting officer to make the payment. This position was reiterated in **Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza (2012) eKLR**. The *ex parte* Applicant did in this regard bring evidence of service of the Certificate of Costs against the Government on the Attorney General, which were enclosed in the letters of demand for payment dated 12<sup>th</sup> September 2017 and 4<sup>th</sup> October 2017.

14. This Court therefore finds that since the *ex parte* Applicant has judgment in his favour with respect to the demanded decretal amount as against the Government, and the Principal Secretary in charge of the Defence Forces as the Accounting Officer in the said Ministry is liable to pay the said decretal sum, the said Principal Secretary has a duty to effect the said payment. In addition, the Attorney General was also properly served with the Certificate of Order against the Government in accordance with the procedure stated in section 21 of the Government Proceedings Act, which has been detailed in the foregoing.

16. In the premises, I find that the *ex parte* Applicant's Notice of Motion dated 5<sup>th</sup> July 2018 is merited, and succeeds to the extent of the following orders:

**I. An order of mandamus be and is hereby issued directed to the Principal Secretary, Ministry of Defence, compelling him to pay the *ex parte* Applicant herein the sum of Kshs. 1,500,000/= and interest thereon at court rates with effect from 8<sup>th</sup> March 2017, being the decretal sum awarded in John Cheruiyot Rono vs The Attorney General, Nairobi H.C Petition No. 536 of 2015.**

**II. The *ex parte* Applicant shall have the costs of the Notice of Motion dated 5<sup>th</sup> July 2018 of Kshs 30,000/=.**

17. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF SEPTEMBER 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 *ex parte* Applicant's and Respondent's Advocates on record.

P. NYAMWEYA

JUDGE