



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

JUDICIAL REVIEW APPLICATION NO. 3 OF 2013

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF ORDER 53 RULE 3 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

AND

THE ATTORNEY GENERAL.....RESPONDENT

AND

WILSON KIPTOO BIRECH.....EX PARTE

JUDGMENT

[1] The Notice of Motion dated 17 July 2015 was filed herein on 19 August 2015 by the *Ex-Parte* applicant, **Wilson Kiptoo Birech**, pursuant to **Sections 8 and 9** of the **Law Reform Act, Chapter 22** of the **Laws of Kenya** and **Order 53 Rule 3** of the **Civil Procedure Rules**. He thereby prayed for the following orders:

[a] That an Order of Mandamus be granted to compel the respondent to pay to the applicant the sum of **Kshs. 663,000/=** being the decretal amount in **Eldoret Chief Magistrate's Civil Case No. 105 of 2011** together with **Kshs. 62,250/=** being the certified costs with interest thereon at 12% per annum from **5 December 2011** until payment in full.

[b] That the costs of the application be awarded to the applicant against the respondent.

[2] The application was based on the grounds that the *Ex-Parte* applicant instituted a civil suit against the respondent, being **Eldoret CMCC No. 105 of 2011**; and that the trial court adjudicated over the same and delivered its Judgment in favour of the *Ex-Parte* applicant on **5 December 2011** for **Kshs. 663,000/=** together with costs and interest; which costs were taxed on **30 July 2012** at **Kshs. 65,250/=**. The *Ex-parte* applicant complained that by the time the instant application was filed on **19 August 2015**, the respondent was yet to honour the decree, despite demand and reminders.

[3] The *Ex-parte* applicant set out the facts in support of the application for leave and explained that, on or about **5 June 2009**, his motor vehicle **Registration No. KAS 495S**, Nissan Matatu, was lawfully carrying on business along Eldoret-Webuye road when, upon reaching Mwamba area, motor vehicle **Registration No. GK A496F** collided with it. He contended that the said accident was caused by the negligent manner in which the driver of motor vehicle **Registration No. GK A496F** was being driven. Thus, he filed **Eldoret High Court Civil Case No. 184 of 2009**, claiming **Kshs. 663,000/=**, being the amount of the damage as quantified by **Wareng Auto Insurance Loss Assessors**. It was further the averment of the *Ex-Parte* applicant that the Attorney General did not file a defence until **24 February 2010**.

[4] The *Ex-parte* applicant further averred that, the case was thereafter transferred from the High Court to the Chief Magistrate's Court as **Eldoret CMCC No. 105 of 2011**; and that on **5 December 2011**, Judgment was entered in his favour as against the respondent as prayed for in the Plaint. The costs were then assessed on **14 February 2011** at **Kshs. 65,250/=**; and that since then, and despite numerous reminders to the Office of the Attorney General, the decretal sum and costs remain unpaid. A copy of the Decree and the Certificate of Costs were annexed to the *Ex-Parte* applicant's Verifying Affidavit.

[5] Whereas the respondent filed Grounds of Opposition to the application for leave dated **25 March 2013**, no response appears to have been made to the substantive application; which application was canvassed by way of written submissions. As to the nature of the remedy of Mandamus, counsel for the *Ex-Parte* applicant cited the case of **Shah vs. Attorney General** [1970] EA 543. He submitted that Mandamus is the most appropriate remedy in the circumstances as the *Ex-Parte* applicant is not in a position to otherwise pursue execution proceedings against the Government of Kenya for the recovery of the judgment debt. In this regard, he relied on **Section 21** of the **Government Proceedings Act, Chapter 40** of the **Laws of Kenya**, and urged the Court to allow the application and grant the orders sought.

[6] Counsel for the respondent, on his part, proposed two issues for determination; namely, whether the Notice of Motion dated **17 July 2015** is competently before the Court; and whether the order of Mandamus can be granted in the circumstances. Counsel relied on **Section 21(3)** of the **Government Proceedings Act** and **Republic vs. Permanent Secretary Office of the President, Ministry of Internal Security & Another, Ex-parte Nassir Mwandih** [2014] eKLR to support his argument that it was imperative for the *Ex-Parte* applicant to enjoin the accounting officer of the relevant Ministry. According to him, the Attorney General is not the accounting officer in this regard; and that his role throughout the subject proceedings was merely to provide legal representation to the national government pursuant to **Article 156** of the **Constitution of Kenya**.

[7] Needless to say that Mandamus is a relief available to litigants under **Article 23(3)(f)** of the Constitution and **Order 53** of the **Civil Procedure Rules**. Its scope was well explicated in **Halsbury's Laws of England, 4th Edition, Volume 1** thus:

"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..."

[8] Thus, the first issue for determination is whether the application dated **17 July 2015** is competently before the Court. The said application was brought pursuant to Sections **8 and 9** of the **Law Reform Act**, and in respect of which **Order 53 Rule 1** of the **Civil Procedure Rules** provides thus in sub-rules (1), (2) and (3):

(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

[9] A perusal of the record confirms that the *Ex-parte* applicant applied for leave vide his application dated **25 March 2013**; and that the said application was accompanied by a Statement of Facts as well as a Verifying Affidavit as required; and that on the basis thereof, leave was granted by the Court (Hon. Githua, J.) on **30 June 2015**. It is therefore my finding that the application is competent from the standpoint of **Order 53 Rule 1** of the **Civil Procedure Rules**.

[10] It is however a requirement of **Section 21** of the **Government Proceedings Act**, that:

"(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."

[11] Subsections (3) and (4) of **Section 21** of the **Government Proceedings Act**, on the other hand, stipulate that:

“(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] It is plain therefore that the *Ex-Parte* applicant was under obligation to cause a certificate to issue in the prescribed form for service on the Attorney General as provided for in **Section 21** aforementioned for purposes of payment after the expiration of 21 days of the issuance of the order in issue. There is no indication that **Section 21(1)** of the **Government Proceedings Act** aforesaid was complied with as no copy of such certificate, if any, was annexed to the Applicant’s affidavit for the Court’s consideration. In the premises, and granted the peremptory nature of **Section 21(4)** of the **Government Proceedings Act**, it would follow that the instant application is premature; and therefore that the second issue would not arise.

[13] In *Newton Gikaru Githiomi & Another vs. Attorney General* [2015] eKLR, Hon. Odunga J. had the following to say, which I entirely agree with:

“It must be remembered that judicial review orders are discretionary. Since they are not guaranteed, a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. Further, as the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative and public inconvenience or where the object for which the application is made has already been realized.”

[14] In the same vein, it was held in *Republic vs. Attorney General & Another, Ex Parte Stephen Wanyee Roki* [2016] eKLR;

“...the Court only compels the satisfaction of a duty that has become due. In other words, where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass...”

[15] In the premises, it is my finding that, in the absence of a Certificate of Order as provided for in **Section 21** of the **Government Proceedings Act**, this application for Mandamus is premature, and is hereby struck out with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 29TH DAY OF OCTOBER, 2020

OLGA SEWE

JUDGE