Republic v Salaries and Remuneration Commission, Judicial Service Commission & Attorney General Ex Parte Sollo Nzuki (Judicial Review Miscellaneous Application 58 of 2020) [2020] KEHC 1074 (KLR) (15 December 2020) (Judgment)

Republic v Salaries and Remuneration Commission & 2 others Ex Parte Sollo Nzuki [2020] eKLR

Neutral citation: [2020] KEHC 1074 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

JUDICIAL REVIEW MISCELLANEOUS APPLICATION 58 OF 2020

GV ODUNGA, J

DECEMBER 15, 2020

BETWEEN

REPUBLIC ..... APPLICANT

AND

SALARIES AND REMUNERATION COMMISSION ..... 1ST RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

SOLLO NZUKI ..... EXPARTE APPLICANT

JUDGMENT

1. By a judgement dated 18th December, 2019, this court in Constitutional Petition No. 18 of 2018 issued the following orders:

    a. A Declaration that paying Judges of the High Court of Kenya and judges of equal status a starting rate that is lower than the starting Remuneration of other Judges of the High Court of Kenya and courts of equal status appointed to the same office on the same day is a violation of the affected Judge's rights not to be discriminated against as guaranteed by Article 27 of the Constitution of Kenya, 2010 and a violation of their rights as guaranteed by Articles 41 (2) of the Constitution.

    b. A declaration that the Appointment to the office of Judge of the High Court of Kenya and or a judge of courts of equal status is a substantive appointment and not a promotion from

a position of Magistrate or any other office and as such all persons appointed to office of Judge of the High Court of Kenya and courts of equal status are entitled to similar starting remuneration and benefits.

d. A declaration that the purported categorization by the 1st and 2nd Respondents of the High Court Judges and Judges of courts of equal status based on whether they were appointed from outside or within the judiciary is unconstitutional.

e. A declaration that the 1st Respondent's communication on the remuneration of Judges and Magistrates contained in its letter Ref No. SRC/TS/HRCOH/3/25 dated 10th June 2013 is discriminatory to the extent that it subjects judges appointed in 2014, 2015 and 2016 to a lesser starting salary than the starting salary of those appointed prior to the said period.

i. A declaration compelling the 1st and 2nd Respondents to pay (unless already paid) all the affected judges the starting salary equal to the starting salary paid to the judges appointed with them on their respective dates of appointment (whichever is higher), and, that the said amount(s) plus benefits be backdated to their respective dates of appointment and paid promptly.

2. By Notice of Motion Notice of Motion Application dated 12th day of August 2020 seeks for an order of mandamus to compel the 1st and 2nd Respondents herein to enforce, implement and effect the decree dated 13th March 2020 relating to the judgement of this Honourable Court dated the 18th day of December 2019.

3. According to the Applicant, upon the delivery of the judgement the court granted the Respondents 30 days stay of execution which period has since lapsed but the Respondents have, despite being duly served with the decree, failed to honour, implement and/or enforce the said orders and pay all the affected judges in the Petition the starting salary equal to the starting salary paid to the judges appointed with them on their respective dates of appointment (whichever is higher), and that the said amount(s) plus benefits be backdated to their respective dates of appointment and paid promptly. It was disclosed that whereas the 2nd Respondent being dissatisfied with the judgement of this Honourable Court delivered on the 18th day of December 2019 filed a Notice of Appeal on the 8th day of January 2020, no appeal has been filed.

4. Since the application was not opposed, the applicant urged the court to grant the orders sought based on the decisions in Kenya National Examination Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR and Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543, Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006, Republic vs. Cabinet Secretary for Internal Security ex parte Gragory Oriaro Nyauchi & 4 others [2017] eKLR referred with approval to the holding in Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707.

5. According to the Ex Parte Applicant, Article 230(4) of the Constitution confers upon the 1st Respondent the function of setting and regularly reviewing the remuneration of all State officers (including Judges of the High Court of Kenya and courts of equal status). In carrying out its functions the 1st Respondent is required by the Constitution to take into account inter alia transparency and fairness.

6. In view of the foregoing, it was submitted that the Ex Parte Applicant has ably demonstrated before this Court that there exists a Statutory duty borne on the Respondents which duty the Respondents have illegally and unlawfully failed and/or refused to perform and that as a result of the non-performance of the said duty by the respondents, the said judges have suffered prejudice and loss. The affected judicial

officers have a direct and substantial interest in securing the performance of the duty and as such this Court is enjoined to grant the orders of mandamus to compel the Respondents to perform the said duty being the enforcement of the judgement of this Honourable Court dated the 18th December 2019 and the Decree thereof dated 13th March 2020.

7. The application was however opposed by the 2nd Respondent, the Judicial Service Commission. According to the 2nd Respondent, the Motion is fatally defective, bad in law and an abuse of the process of this Court.

8. It was contended that under the provisions of Articles 172 and 173 of the Constitution, the Judicial Service Commission has no powers to review and set the remuneration of Judges as well as Judicial Officers. To the contrary, it is the duty of the 1st Respondent to set and review salaries and remuneration of the judges and judicial officers and that is why the court in its judgement of 18th December, 2019 declared the 2nd Respondent's circular Ref. No. SRC/TS/HRCO3/25 as unconstitutional.

9. The 2nd Respondent therefore submitted that it is unable to comply with the court's judgement unless and until the 1st Respondent issues a circular giving effect to the said judgement. However, as a sign of good faith, it has initiated the process of establishing the number and names of the judges who are affected with the decision and have already finalized the figures awaiting a meeting with the representatives of the judges with a view to confirming the correctness of the information. The delay, in finalizing its part, it submitted has been occasioned by the COVID-19 pandemic and the need to factor in the figures in the Judiciary budget.

10. The 2nd Respondents therefore sought the court's indulgence to discharge its obligations under the judgement and decree.

11. In support of its position the 2nd Respondent relied on Article 172(1) (b) (i) of the Constitution of Kenya 2010 provides that the functions of the Judicial Service Commission include review and making recommendations on the conditions of service of judges and judicial officers while Article 230(4) of the Constitution provides that the powers and functions of the Salaries and Remuneration Commission shall include setting and regularly reviewing the remuneration and benefits of all State Officers, a term which under Article 260 of the Constitution of Kenya, 2010 mean inter alia Judges and Magistrates.

12. In view of the foregoing, it was submitted that it is the duty of the 1st Respondent to set and review the Salaries and remuneration of Judges and Magistrates and therefore the orders sought herein should be directed at the 1st Respondent since the 2nd Respondent's duty is only limited to identifying the judges who are affected by the judgement subject matter herein and determining the sums due to each of them.

13. The 1st Respondent did not respond to the application while the 3rd Respondent was granted leave to withdraw from the proceedings as the orders sought did not concern him.

Determination

14. I have considered the issues raised in this application.

15. Section 21(1) of the Government Proceedings Act provides:

> 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.

16. Section 21 (3) of the said Act on the other hand provides:

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.

17. Dealing with the said provisions Githua, J in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR expressed herself 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. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues." [Emphasis mine].

18. This Court in Republic vs. Cabinet Secretary for Internal Security ex parte Gragory Oriaro Nyauchi & 4 others [2017] eKLR referred with approval to the holding in Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707 as follows:

> " A mandamus issues to enforce a duty the performance of which is imperative and not optional or discretionary…The order of mandamus is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon 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 remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet the mode of redress is less convenient, beneficial and effectual."

19. The effect of grant of an order of mandamus was considered in extenso in in Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 where Goudie, J expressed himself, inter alia, as follows:

> " Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature… In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment…The foregoing may also be thought to be much in point in relation to the applicant's unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty…Since mandamus originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law…English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting "simply in his capacity of servant". There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a mandamus would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in

relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of mandamus will lie for the enforcement of the duties...With regard to the question whether mandamus will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, mandamus will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile... It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government....Whereas mandamus may be refused where there is another appropriate remedy, there is no discretion to withhold mandamus if no other remedy remains. When there is no specific remedy, the court will grant a mandamus that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a mandamus is to go, then mandamus will go... In the present case it is conceded that if mandamus was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of mandamus must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament... In the court's view the granting of mandamus against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In mandamus cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as persona designata, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for mandamus by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by mandamus on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which mandamus will not lie for

this reason alone are comparatively few...Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as persona designate to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of mandamus will issue as prayed with costs." [Emphasis added].

20. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the Republic vs. The Attorney General & Another ex parte James Alfred Koroso, this Court expressed itself as hereunder:

> "...in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit...The institution of judicial review proceedings in the nature of mandamus cannot be equated with execution proceedings. In seeking an order for mandamus the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which

he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In mandamus cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it. In other words, mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of mandamus, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are nolonger execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."

21. The circumstances under which judicial review order of mandamus are issued were set out by the Court of Appeal in Republic vs. Kenya National Examinations Councilex parte Gathenji & 8 Others Civil Appeal No 234 of 1996, the Court of Appeal cited, with approval, Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89 thus:

> " The order of mandamus is of 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."...These principles mean that an order of mandamus compels 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."

22. What comes out clearly from the foregoing is that 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. Secondly, an order of mandamus only issues to a person who is under a legal obligation to act. Therefore, for an order of mandamus to issue, an applicant must bring himself within the holding in the case of Prabhulal Gulabchand Shah vs. Attorney General & Erastus Gathoni Miano; Civil Appeal No.24 of 1985 where the Court of Appeal stated:-

> " The person seeking mandamus must show that there resides in him a legal right to performance of a legal duty by a party against whom the mandamus is sought or alternatively that he has a substantial personal interest and the duty must not be permissive but imperative and must be of public rather than private nature."

23. In this case, the Ex Parte Applicant herein have moved this Court to compel the satisfaction of a judgement already decreed in his favour by a competent Court of law. The 2nd Respondent has in its

submissions shown that the mandate of determining remuneration of Judges falls within the docket of the 1st Respondent. According to it, it has already taken steps towards the satisfaction of the decree in so far as its mandate is concerned. The 1st Respondent whose mandate is to determine the remuneration has however not responded to this motion. It has not given any reason why the decree has not been satisfied. If the Court were to decline to grant mandamus, Ex Parte Applicants would be left without an effective remedy despite holding a decree.

24. I associate myself with the position adopted by Majanja, J in Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006 that:

> " ...a decree holder's right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant's right of access to justice protected under Article 48 of the Constitution."

Order

25. In the premises I hereby issue an order of mandamus compelling the 1st Respondent herein to implement and effect the Decree dated 13th March, 2020 regarding the judgement of this Court dated the 18th day of December, 2019. The 2nd Respondent is similarly directed to take the necessary steps within its mandate to facilitate the satisfaction of the said decree

26. The costs of these proceedings are awarded to the Ex Parte Applicant and the said accosts are to be borne by the 1st Respondent.

27. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 15TH DAY OF DECEMBER, 2020

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Mare for the ex parte applicant

CA Geoffrey