



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 634 OF 2017

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT

AND

IN THE MATTER OF THE GOVERNMENT PROCEEDINGS ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....RESPONDENT

EX PARTE :

TRANSCEND MEDIA GROUP LIMITED

JUDGMENT

The Application

1. The *ex parte* Applicant herein, Transcend Media Group Limited, is a limited company incorporated in Kenya, while the Respondent is the Independent Electoral and Boundaries Commission, a corporate statutory body that is established under the Independent Electoral and Boundaries Commission Act. It is not in dispute between the parties that the *ex parte* Applicant filed **High Court Civil Case No. 304 of 2014** seeking payment of a specified sum of money for media services it rendered to the Respondent with respect to the General Elections held on 4th March 2013. Upon trial, judgment was rendered in the said suit on 20th July 2017 in favour of the *ex parte* Applicant for the sum of Kshs 150,067,892.00 with costs and interest at Court rates.

2. The *ex parte* Applicant subsequently filed the instant judicial review application by way of a Notice of Motion dated 13th November 2017 seeking the following orders:

a) An orders of mandamus to compel the Respondent to pay to the Applicant the decretal sum of Kshs 150,367,882.40, costs and interest thereon at court rates, as awarded in HCCC No. 304 of 2014 on 20th July 2014.

b) In default of payment, an order that the Respondent’s Chief Executive Officer , one Ezra Chiloba, or the person for the time being occupying the office of Chief Executive Officer of the Respondent do show cause why he should not be fined and or committed to civil jail for a period of six (6) months.

c) The costs of the application be awarded to the Applicant.

3. The Application was supported by a Statement of Facts dated 30th October 2017, and a verifying affidavit sworn on the same date by the *ex parte* Applicant's Director, one Lai Muthoka. The *ex parte* Applicant's main ground is that the Respondent was served with the decree and Certificate of Costs in HCCC No. 304 of 2014 in accordance with the provisions of the Government Proceedings Act, and that despite demand, it has refused to settle the decretal sum.

4. The *ex parte* Applicant annexed copies of the judgments, decree and certificate of costs issued in **High Court Civil Case No. 304 of 2014**, as well as a demand to, and various correspondence between the *ex parte* Applicant's Advocates on record, and Lubulellah and Associates Advocates on payment of the decretal sum.

5. In the course of hearing the application, the counsel for the Applicant informed the Court on 9th October 2018 that they were abandoning the prayer for committal of the Respondent's Chief Executive Officer to civil jail, and only pursuing the prayer for mandamus.

The Response

6. The Respondent in response filed Grounds of Opposition dated 2nd November 2017 and a Replying Affidavit sworn on 14th November 2017 by Moses Kipkogei, its Senior Legal Officer. The salient points of its response to the outstanding prayer for mandamus were that the application seeks to enforce a decree contrary to or without compliance with sections 13, 21 and 32 of the Government Proceedings Act.

7. It was averred in this respect that the *ex parte* Applicant had not annexed a Certificate of Order against the Government as required by the said Act, and that there is no demand for payment made by the *ex parte* Applicant on the Respondent. It was noted that a demand made against a law firm by the *ex parte* Applicant was not a demand against the Respondent for purposes of judicial review proceedings.

8. Further, that the Respondent is dependent upon Parliamentary allocation of funds for specified purposes, and that the judgment in HCCC No. 321 of 2013 was rendered on 20th July 2017 which was at the beginning of the financial year that ended on 30th June 2018. Therefore, that the decretal sum in would be budgeted for in the next financial year commencing from 1st July 2018 and could only be paid when the funds are availed for that specific purpose.

The Determination

9. The *ex parte* Applicant's application was canvassed by way of written submissions. Amolo & Kibanya Advocates filed two sets of submissions dated 16th November 2018 and 20th November 2018 on behalf of the *ex parte* Applicant, while Lubulellah & Associates filed submissions dated 3rd December 2018.

10. The *ex parte* Applicant submitted that it had filed the instant judicial review application pursuant to the provisions of section 13(2) of the Independent Electoral and Boundaries Commission Act which stipulates that any legal proceedings for execution of judgments against the Respondent shall be subject to the Government Proceedings Act, and that section 20(1) of the Government Proceedings Act approves the application of section 26 of the Civil Procedure Act which provides that a judgment debt shall attract interest.

11. It was submitted that upon filing of the proceedings the Respondent made a part payment of Kshs 213,269,503.00 on 15th December 2017, and that the Applicant was thus seeking enforcement of payment of outstanding interest of Kshs 26,261,880/= as at November 2018. Reliance was placed on the decisions in **Jotham Mulati Welamondi vs The Chairman, Electoral Commission of Kenya, (2002) e KLR** for the position that the Respondent should be compelled to perform its constitutional duty of paying the remaining portion of the decretal sum. Lastly, that the Respondent is relying on procedural technicalities to avoid or delay paying the said decretal sum.

12. The Respondent on its part submitted that there was no compliance by the *ex parte* Applicant with section 21 of the Government Proceedings Act as it had failed to annex a Certificate of Order against the Government and a Certificate of Costs. Reliance was also placed in this regard on the decision in **Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) e KLR** on the requirements of this section. Furthermore, that no demand for payment had been made by the *ex parte* Applicant on the Respondent.

13. I have considered the pleadings by the Applicant, and 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 exparte Gathenji and 9 Others, [1997] eKLR**, 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, 4th 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..... .”

14. It is not disputed in the present application that judgment was entered in favour of the Applicant in **HCCC No. 304 of 2014 – Transcend Media Group vs Independent Electoral & Boundaries Commission**. The issues therefore that require to be determined are firstly, whether the Respondents are under a public duty and obligation to satisfy the decree and orders issued in favour of the Applicant in the said judgment, and secondly, if so, whether the Applicant is entitled to the relief he seeks.

15. Section 13(2) of the Independent Electoral and Boundaries Commission Act provides in this respect that **any legal proceedings for execution of judgments against the Commission shall be subject to the Government Proceedings Act. The relevant provisions of the Government Proceedings Act** is section 21, which 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.”

16. 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 (supra)** where J. Githua held as follows:

“ 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.”

17. The provisions of section 21 of the Government Proceedings Act must be read with the necessary changes in relation to the Respondent Commission. In this regard, the Respondent is a corporate body, and the service of the certificate of costs that is required by the said section on the Attorney General must read as requiring service on the appropriate officer in the Respondent. Section 10 of the Independent Electoral and Boundaries Commission Act in this regard provides for a Secretary to the Respondent’s Commission, and section 10(7) of the Act provides for the following functions of the Secretary to the Commission:

(7) The secretary shall be—

(a) the chief executive officer of the Commission;

(b) head of the secretariat;

(c) the accounting officer of the Commission;

(d) custodian of all commission's records;

(e) responsible for—

(i) executing decisions of the Commission;

(ii) assignment of duties and supervision of all employees of the Commission;

(iii) facilitating, co-ordinating and ensuring execution of Commission's mandate;

(iv) ensuring staff compliance with public ethics and values; and

(v) the performance of such other duties as may be assigned by the law and Commission.

18. In the present application, the *ex parte* Applicant annexed as Annexure LM 10" to its verifying affidavit, a letter dated 14th August 2017 it's Advocates sent to Lubullellah & Associates, who are the Respondent's Advocates on record, which letter is stamped as received on 15th August 2017. The said letter enclosed the decree and Certificate of Costs issued in **HCCC No. 304 of 2014 – Transcend Media Group vs Independent Electoral & Boundaries Commission** , and also made a demand for payment of the decretal sum and costs totaling to Kshs 224,902,385.80. The said decree and Certificate of Costs for Kshs 7, 954,239.40 were both issued by the Registrar of the High Court on 1st August 2017, and were annexed as Annexures "LM9" and "LM 10" to the *ex parte* Applicant's Verifying Affidavit.

19. The said Respondent's Advocates responded in a letter to the *ex parte* Applicant's Advocates dated 21st August 2017, stating that they would take instructions and revert back. The Respondent does not dispute the submissions by the *ex parte* Applicant that after filing of this application, the Respondent then made a payment of Kshs 213, 269,503/= on 15th December 2017, and that what is outstanding as at November 2018 is accrued interest of Kshs 26,261,888.00. The amount due to the *ex parte* Applicant from the Respondent is thus ascertainable and is not disputed.

20. The Respondent's main objection is that no certificate of Costs against the Government was annexed by the *ex parte* Applicant, and that the said Certificate was also not sent to the Respondent as required by section 21 of the Government Proceedings Act. What section 21 stipulates is that the appropriate officer of the Court issues to the person who has obtained orders against the Government, a certificate in the prescribed form containing particulars of the order.

21. While it may be desirable to have all the particulars included in a Certificate of Order against the Government, it is my view that a decree and Certificate of Costs issued by a Deputy Registrar of the High Court is adequate certification of what the particulars of an order are in this respect and suffices for purposes of section 21 of the Government Proceedings Act. The *ex parte* Applicant did provide evidence that these two key documents were served on the Respondent's Advocates in this case.

22. In addition, the procedure in section 21 of the Government Proceedings Act is not meant to relieve the Respondent from meeting its legal and statutory obligation to satisfy decrees and orders of the Court, and its main purpose is to notify the Respondent that the debt is due to facilitate payment. In this regard, it is notable that upon receipt of the *ex parte* Applicant's demand, the Respondent's Advocate in its letter dated 21st August 2017 did indicate that it would notify the Respondent of the same and seek instructions.

23. The Respondent further argued in this respect that a demand made against the Respondent's Advocates is not a demand against the Respondent for purposes of judicial review proceedings. No provision of law was cited by the Respondent to support this position, and it has been severally held in this respect that an advocate has ostensible authority to act on behalf of a client – see the Court of Appeal decisions in **Kenya Commercial Bank Ltd. vs Specialized Engineering Company Ltd. [1982] KLR 485** and **Flora N. Wasike vs Destimo Wamboko, (1982 – 1988) KAR 625**.

24. Lastly, the Respondent also submitted that they were unable to settle the demanded sum because they have not received funds from Parliament. I fully adopt the reasons and findings made in **Republic v Chief Executive Officer, Independent Electoral and Boundaries Commission & another Ex-Parte M' Anyiri Hannington Gitaari [2016] eKLR** where similar arguments were raised by the Respondent, and where Gikonyo J. held as follows:

“ It is the duty of IEBC to make provision for payments of court decrees in their budgetary estimates, and failure to do so can only be their mistake. It is apparent that the decree herein was passed in 2013 and these proceedings were instituted in October, 2015. The 2nd Respondent has been aware of the decree all along. Therefore, whereas their funds are allocated through the financial systems provided under section 17 of the IEBC Act, it is their duty to provide for such budgetary provisions in their financial estimates, and so their argument that they have not refused to pay except that they have not received funds for payment of this decree is completely dishonest.”

25. In any event, in the present case the arguments made by the Respondent about lack of knowledge of the decretal sum, the lack of a demand by the Applicant, and the inability to pay the decretal sums have been discounted and overtaken by events, as it did not dispute that the said decretal sum has since been substantially paid, a fact that was conceded by its counsel during the hearing held on 2nd May 2018.

26. This Court therefore finds that as judgment was already entered in favour of the Applicant with respect to the demanded interest on the 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 Respondent to pay a debt already decreed by a competent Court of law to be due and payable by them.

27. In the premises, I find that the Applicant's Notice of Motion dated 13th November 2017 is merited. I accordingly grant the following orders:

a) An order of mandamus directed to the Chief Executive Officer of the Independent Electoral and Boundaries Commission compelling him or her to pay to the *ex Parte* Applicant Kshs 26,261,888.00, being the outstanding accrued interest on the decretal sum awarded in HCCC No. 304 of 2014 – Transcend Media Group vs Independent Electoral & Boundaries Commission, with interest thereon at the rate of 12% per annum from the date of this judgment until payment in full.

b) The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 13th November 2017 of Kshs 50,000/=.

28. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF JANUARY 2019

P. NYAMWEYA

JUDGE