



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 612 OF 2017

GRACE AKINYI AMBAYO.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF HEALTH.....2ND RESPONDENT

JUDGMENT

1. Pursuant to leave granted by this court on 16th February, 2018, the ex-parte applicant filed an amended Notice of dated 18th April, 2018 seeking the following orders;

- a. An Order of Mandamus compelling the 1st and 2nd Respondents to facilitate and/or make payment of the decretal amount of Kshs. 1,008,459.30/= as general damages and costs of Kshs. 119, 977.30/= as awarded by the trial court.
- b. An Order of Manadamus to compel the 2nd Respondent to release to the 1st Respondent the decretal sum for onward transmission to the applicant.
- c. That costs of this application be in the cause.

The application is supported by the grounds set out in the application and those in the supporting affidavit of GRACE AKINYI AMBAYO sworn on 18th April, 2018.

2. The Applicant alleges that she filed a suit against the 1st Respondent in **CMCC No. 5372 of 2013** seeking compensation for loss and damages arising from an accident involving the ex-parte applicant and motor vehicle registration no. GK A161N attached to the Ministry of Health. The ex-parte applicant succeeded in the trial and obtained judgment against the 1st Respondent and a decree was issued on 13th December, 2016 to the tune of Kshs. 1,008,459.24/= plus interest and costs at Kshs. 119,977/=. Further, the ex-parte applicant claims to have paid a further Kshs. 44,090/= in court fee in November, 2016.

3. The ex-parte applicant contends that the Respondents have failed to remit the aforementioned amount to the applicant thus denying the ex-parte applicant the fruits of the judgment.

4. It is the ex-parte's case that justice will not be done unless the Respondents are compelled to pay the sum owed to the applicant.

5. The Respondents did not respond to the application.

Submissions

6. The application was canvassed by way of written submissions. The ex-parte applicant filed her submissions on 16th November, 2018. The Respondents did not file any submissions.

7. The ex-parte applicant submitted that a decree was issued on 29th November, 2016 for the sum of Kshs. 1,008,459.30/= being damages

and interest therein and Kshs. 119,977/= for costs by the lower court in **CMCC No. 5372 of 2013** against the 1st Respondent. Subsequently, the ex-parte applicant applied for a certificate of order against the government on 13th December, 2016 as required by Section 21 (3) of the Government Proceedings Act.

8. The ex-parte applicant contended that she served the Certificate of Order upon both Respondents but she did not receive any response from them. The ex-parte applicant lamented that she had made several attempts to reach the Respondents including sending her advocates to seek audience with the Respondents' advocates but to no avail. Having made several attempts and being exempted from the normal execution process, the ex-parte applicant opines that an order of mandamus would be the only effective way to force the Respondents to pay the sum owed to her. To support this assertion, the ex-parte applicant cited the case of **Republic v. Principal Secretary State Department of Interior, Ministry of Interior & Co-ordination of National Government & Principal Secretary, ex-parte Salim Awadh Salim & 12 others [2018] eKLR** where the court pronounced itself as follows:

“In this case, the Applicants herein have moved this court to compel the satisfaction of a judgment already decreed in their favour by a competent Court of law. The Respondents have not given any reason why the decree has not been satisfied more than three years down the line. If the Court were to decline to grant mandamus, applicants would be left without an effective remedy despite holding a decree.

In the premises I hereby issue an order of mandamus compelling the Principal Secretary, Ministry of Interior & Co-ordination of National Governance to pay to the applicants the judgment debt herein in the sum of Kshs. 51, 261, 031/= together with all accrued interest on the decretal sum of damages at 12% per annum arising from the judgment of this court in Petition No. 822 of 2008.”

Determination

9. The ex-parte applicant seeks to compel the Respondents to pay the sum of Kshs. 1, 128, 436.60/= being the principal sum (general and special damages), interest on special and general damages, and costs of the suit in CMCC No. 5372 of 2013 that was awarded to the Applicant. The ex-parte applicant alleges to have obtained a Certificate of Order against the Government and served it upon the Respondents but the Respondents have failed to honour the Order.

10. In **CMCC No. 5372 of 2013**, the ex-parte applicant brought a suit against the 1st Respondent claiming to have been hit by motor vehicle registration no. GK A161N attached to the National Spinal Injury Hospital, Ministry of Health. The said suit was brought against the 1st Respondent. However, in my view, the 1st Respondent was sued in its capacity as the principal legal advisor of the government. Section 5 (1) (i) of the Office of the Attorney General Act provides as one of the function of the Attorney General that the Attorney General will represent the National Government in all civil and constitutional matters in accordance with the Government Proceedings Act. In this case, the acts and omissions leading up to the institution of the suit were those of the Ministry of Health which is a state agency/institution. Therefore, the liability therein cannot be imputed on the 1st Respondent but rather on the 2nd Respondent. In the case of **James Samuel Mburu v. Attorney General & another [2017] eKLR** where the court stated as follows:

“I agree with the Respondent’s counsel’s submissions on this issue entirely for reasons that unless the Attorney General is sued for acts or omissions committed or omitted to be done by his office as established under Article 156 of the Constitution and as operationalized by the Office of the Attorney General Act, the Attorney General being the Principal Legal advisor to the Government remains just that in all representative legal proceedings where other Government or State Department are sued but in the name of the Attorney General.

It therefore follows that albeit the Attorney General is the primary party to the suit and the only party as such, he cannot carry the legal duty of settling the decree or enforce the order issued against the specific Government Ministry or State Government on whose behalf the Attorney General was sued.

And even assuming that the office of the Attorney General is sued in its own capacity, the Attorney General not being the Accounting Officer of the Office of the Attorney General cannot be compelled to settle decree or to enforce an order of the court. It is the Solicitor General, who is the Accounting Officer of the Office of the Attorney General and Department of Justice.”

11. Section 21 of the Government Proceedings Act states as follows with regard to satisfaction of orders against the government:

(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.

(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.

12. The ex-parte applicant obtained a Certificate of Order against the Government on 13th December, 2016. And vide an Affidavit of service filed in court on 4th October, 2016, there is evidence that the Judgment, Decree and Certificate of Order against government were served upon the 1st Respondent. There is however, no evidence that the same were served on the 2nd Respondent. Be that as it may, the 1st Respondent ought to have transmitted the said documents to the Ministry of Health on whose behalf the Hon. Attorney General was sued.

13. It is now trite law that an order of mandamus is issued as a last resort where there are no appropriate alternative remedies available to the applicant. The ex-parte applicant is prohibited from carrying any execution or attachment process enforcing payment by the Government. I see no other remedy available to the ex-parte applicant other than an order of mandamus. In **REPUBLIC V PERMANENT SECRETARY, MINISTRY OF STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY EXPARTE FREDRICK MANOAH EGUNZA[2012]eKLR**, cited by the ex-parte applicant, the court held as follows:

“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”.

14. In this case, the ex-parte applicant obtained the Certificate of Order against the Government and served it upon the 1st Respondent. No appeal against the judgment of the lower court was filed by the Respondents and neither did they seek a stay of execution of the decree. A duty therefore arose on the 2nd Respondent, who is the accounting officer of the Ministry of Health to pay the sum owed to the ex-parte applicant.

15. Therefore, the application is allowed. The order of mandamus will issue to compel the 2nd Respondent and not the 1st Respondent to pay the sum owed to the ex-parte applicant as the 1st Respondent was only sued in the lower proceedings on behalf of the 2nd Respondent. Orders are therefore issued as follows:

a. An Order of Mandamus be and is hereby issued compelling the 2nd Respondent to satisfy the order of the court issued on 29th November, 2016 by paying the ex-parte applicant Kshs. 1,008,459/= being the principal amount plus interest and Kshs. 119, 977.30/= being the costs plus interest at 12% p.a from 29th November, 2016 until this payment in full.

b. Costs of this application to be borne by the Respondents.

Dated, Signed and Delivered in Nairobi this 29th Day of March 2019.

D. CHEPKWONY

JUDGE.