



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 194 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE HONOURABLE ATTORNEY GENERAL...1ST RESPONDENT

AUCTIONEERS LICENSING BOARD.....2ND RESPONDENT

EX-PARTE: DUNCAN MUGAMBI T/A WRIGHT AUCTIONEERS

RULING

1. Pursuant to leave granted on 15th May, 2018, the Ex-parte applicant filed a Notice of Motion dated 4th June, 2018 seeking the following orders:

a) An Order of Mandamus directed against the Hon. Attorney General to compel him to honour the Court Decree and certificate of costs in Miscellaneous Civil Application No. 362 of 2006, and pay the Ex-parte applicant a sum of Kshs. 166,909.00 together with interest at the rate of Kshs. 12% till payment in full with effect from 7th August, 2013.

b) THAT costs be borne by the Respondents

The application is supported by the grounds set out thereunder and those in the Verifying Affidavit of DUNCAN MUGAMBI sworn on 14th May, 2018.

2. The ex-parte applicant claims that he was the Applicant/Decree Holder in Miscellaneous Civil Application No. 362 of 2006 where it had sued both Defendants. After hearing of the matter, the ex-parte applicant contends that his claim was successful and judgment entered in his favour for the sum of Kshs. 166,909.00.

3. The ex-parte applicant states that the 1st Respondent was aware of the decree as his office participated in the trial and the Certificate of Costs was also served on the office. Despite this, the ex-parte applicant alleges that the 1st Respondent has failed to pay the aforementioned sum of money.

4. It is the ex-parte applicant's case that there is no stay of execution which was issued in the matter, neither is there an appeal lodged against the decision. Therefore, the ex-parte applicant urges the court to allow the application.

5. Neither of the Respondents filed any response to the application.

Submissions

6. Despite court's direction that the parties file written submissions, the ex-parte applicant did not file any submissions. The 1st and 2nd Respondents filed their submissions on 19th November, 2018.

7. Ms. Nyakora, learned Counsel for the 1st and 2nd Respondents submitted that the Attorney General has no statutory mandate to settle decretal sums on behalf of other government agencies such as the 2nd Respondent, as the Attorney General is not the accounting officer of the 2nd Respondent. Counsel argued that the Attorney General only represents government ministries in civil matters and acts as the Principal Legal Advisor of the government. Counsel cited the case of **James Samuel Mburu v. Attorney General & another [2017] eKLR** where

the court stated:

“I agree with the Respondent’s counsel’s submissions on this issue entirely for reasons that unless the Attorney General is used 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 Departments 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.”

8. Ms. Nyakora contended that the 2nd Respondent is a body corporate that has the capacity to sue and be sued and whose monies are allocated to it after approval by Parliament. Counsel pointed out that the 2nd Respondent has never been served with either a Certificate of Costs against the Government or a decree. Further, Counsel argued that the ex-parte applicant has never approached the 2nd Respondent requesting for payment, therefore an order cannot be issued compelling the 2nd Respondent to pay.

Determination

9. The issue that arises for determination is whether the 1st Respondent should be compelled to pay the ex-parte applicant a sum of Kshs. 166,909.00 together with interest at 12% accruing from the Court Decree and Certificate of Costs in Miscellaneous Civil Application No. 362 of 2006.

10. To begin with I must point out that when the ex-parte Applicant first sought leave from this court to apply for an order of mandamus, he indicated that the said order would be directed at both Respondents. However, upon grant of leave and filing the Notice of Motion dated 4th June, 2018 the ex-parte applicant sought to have the order directed at the 1st Respondent only.

11. The sum claimed by the ex-parte applicant arose from Miscellaneous Civil Application No. 362 of 2006 in which the ex-parte applicant was granted costs which were taxed at Kshs. 166, 909/=. The ex-parte applicant, subsequently vide a letter dated 16th December, 2014 wrote to the 1st Respondent seeking payment of Kshs. 166,909/=. The ex-parte applicant did not seek any payment from the 2nd Respondent.

12. The 1st Respondent contended that the said amount should be sought from the accounting officer of the 2nd Respondent and not itself. Is the 1st Respondent the appropriate party to be compelled to pay the aforementioned sum? An order of mandamus is issued compelling a public body, authority or tribunal to perform a public duty. In most cases it is issued where there is a legal right and there is no other alternative of enforcing that right. In this case it is not disputed that pursuant to **Miscellaneous Civil Application No. 362 of 2006**, the ex-parte applicant was awarded costs which were taxed at Kshs. 166,909/=. However, there is a dispute as to which respondent is legally bound to pay the said sum.

13. In my view, in **Miscellaneous Civil Application No. 362 of 2006**, the 1st Respondent was sued in his 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 “representing the National Government in all civil and constitutional matters in accordance with the Government Proceedings Act”. Therefore, in **Miscellaneous Civil Application No. 362 of 2006**, the Attorney General was not sued in its capacity as the office of the Attorney General of Kenya but rather as what would be termed as a representative of the 2nd Respondent which is a government entity. The 1st Respondent with the approval of this court cited the case of **James Samuel Mburu v Attorney General & another [2017] eKLR** where the court opined that:

“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”.

14. In my view, the right party to be compelled to pay the sum sought is the Accounting Officer of the 2nd Respondent as it is the actions or omissions of the 2nd Respondent that led to the institution of Miscellaneous Civil Application No. 362 of 2006.

15. Be that as it may, the ex-parte applicant has not shown any attempt at seeking the costs owed from the 2nd Respondent. The ex-parte applicant did not prove that the decree seeking the said sum was served upon the 2nd Respondent. It could therefore be presumed that the 2nd Respondent is not aware that it owes the ex-parte applicant monies being costs for Miscellaneous Civil Application No. 362 of 2006.

16. In this instance, I do not find the prerogative order of mandamus to be befitting in these circumstances. For these reasons, the application dated 4th June, 2018 is hereby dismissed.

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

D. CHEPKWONY

JUDGE.