



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 289 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY,

MINISTRY OF DEFENCE.....RESPONDENT

THE ATTORNEY GENERAL.....INTERESTED PARTY

EX PARTE:

1. GERALD JUMA GICHOHI

2. HUMPREY KALAMA SHUME

3. PETER MWANGI KARIUKI

4. JAMES GITAU THANDI

5. DAVID GIKUNJU MWANGI

6. FRANCIS NGURE KUWONA

7. OBADIAH MAZA MWAMBONU

8. PLACIDE MWAKISACHI EDWARD

9. JOHN PHINEHAZ THAIRU

10. LAWRENCE KEARIE WARUKIRA

JUDGMENT

The Application

1. The *ex parte* Applicants herein were the Petitioners in **High Court (Nairobi) Petition No.587 of 2012 - Gerald Juma Gichohi & 9 Others vs The Attorney General**, wherein they sued the Attorney General, who is the Interested Party herein, for various violations of their rights under the Constitution,. The Respondent on the other hand is the Principal Secretary in the Ministry of Defence, appointed pursuant to Article 155 of the Constitution, while the Interested Party is an office established by Article 156, and is the legal representative of the of the Government in civil litigation.

2. The Applicants subsequently filed an application in this Court by way of a Notice of Motion dated 2nd August 2018 seeking the following orders:

1. An order of Mandamus against the Respondent compelling the Respondent to pay the Applicants the judgement debt in the sum of Kshs 28,639,469/= together with all accrued interest on the decretal sum of damages at the court rate of 12% per annum arising from the judgement of this Court delivered on 29.05.2015 in High Court (Nairobi) Petition No.587 of 2012 (Gerald Juma Gichohi & 9 Others vs The Hon. Attorney General).

2. THAT the Respondent be condemned to bear costs of the proceedings herein

3. The application was supported by a statement dated 17th July 2018 and a verifying and further affidavit sworn on 17th July 2018 and 26th July 2018 respectively by Peter Mwangi Kariuki, the 3rd *ex parte* Applicant, which were sworn on his own behalf and on behalf of the other *ex parte* Applicants. The Applicants stated that they were victims of arbitrary arrest, unlawful and incommunicado detention without trial, torture, cruel, inhuman and degrading treatment and/or punishment between 1st August 1982 and March 1983.

4. That they consequently sued the Interested Party herein for violations of their rights in **High Court (Nairobi) Petition No. 587 of 2012 – Gerald Juma Gichohi & 9 Others vs The Attorney General**, and after a full hearing, they were awarded damages of Kshs 20,200,000/= together with the costs of the Petition, with interests at court rates from the date of judgement on 29th May 2016. Further, that a duly certified decree was issued by the Court in the said Petition on 6th May 2016. Thereafter, that party and party costs were taxed in the total sum of Kshs 848,695/= and a certificate of taxation was duly issued by the Deputy Registrar of the court on the 30th March 2017. In addition, that the Certificate of Order against the Government in the said Petition was issued on the same date for the amount of Kshs 25,484,947/= being the decretal sum, interests and costs.

5. It is the Applicants' case that the certified decree, the Certificate of Taxation and the Certificate Of Order against the Government, and a request to settle the same were served on the Respondent and the Interested Party, and duly acknowledged by both. That a reminder was written to the Interested Party on 3rd April 2018 and copied to the Respondent and the Principal Secretary, the National Treasury urging them to settle the subject judgement debt and gave notice for the instant proceedings but to no avail. However, that no response has been forth coming from the parties, that no appeal has been filed against the judgement in the High Court and there are no orders of stay of execution.

6. The Applicants averred that both the Respondent and the Interested Party have neglected to keep them informed of any step if any that they have taken, neither that to date the Respondent has neglected to factor the sums of the subject judgement debt in any of the ministry's proposed budget for inclusion in the National budget estimates presented to the National Assembly including the current 2018/2019 budget. This, they contended, is a dereliction of duty bestowed on the Respondent by section 21 (3) of the Government Proceedings Act to pay the Judgement debt, and the Public Finance Management Act to prepare and present financial estimates that faithfully factor in the indebtedness of the Ministry, and a violation of Article 201 of the Constitution that enjoins responsible and prudent management and use of public finance.

The Response

7. The Application was opposed through the replying affidavit sworn on 16th August 2018 by Saitoti Torome, the Principal Secretary at the Ministry of Defence. He deponed that he is the accounting officer in the Ministry of Defence as provided for in the Public Finance Management Act and averred that any liability or expenditure incurred against the Government can only be defrayed from moneys provided for by Parliament, since satisfaction of decree and judgements is deemed to be expenditure by Parliament and as a result it must be justified in law and provided for in Government expenditure.

8. However, that despite making the necessary budget proposals, Parliament has not provided any monies to settle any claims including the Applicants'. He further proffered that the Ministry currently has many pending decrees amounting to Kshs 4 billion, and has been unable to settle due to financial constraints, and settlement of the monies at once would completely paralyse the Ministry. Lastly, that the Ministry of Defence can only be accountable for what it has received, and it has not received any allocation to settle the current claim. That it would therefore be manifestly be unjust for the Applicants to hold the Ministry liable yet it's not in control of the fund.

The Determination

9. The parties were directed by this Court to canvass the application by way of written submissions. The Applicant's Advocate, Mbugua & Mureithi Company Advocates, filed submissions dated 12th November 2018, while F.M. Kioko, a State Counsel, filed submissions for the Respondent dated 1st November 2018.

10. The Applicant urged that only contention in the Respondent's Replying Affidavit is the allegation that despite making budgetary proposals for settlement of claims, Parliament has neither allocated nor approved funds for such settlement and it would be unfair for the court to hold them responsible. However, that this contention is not supported by any evidence at all, and points out the Respondent's dereliction of statutory duty by the Respondent as the ministry's accounting officer.

11. The Applicants further submitted that under section 21(3) of the Government Proceeding Act, the legal obligation to pay a judgement debt appearing on the Certificate of Order against Government is immediate unless an appeal has been lodged, or there is a suspension order of the said Certificate, and is not pegged on the budget making process or on annual budgets. Furthermore, that the failure to make funds available to pay judgment debts is itself a failure to carry out a statutory obligation, and incompatible with Article 201 of the Constitution on responsible and prudent management of public finance on account of escalation of the debt arising from the interest payable. The Applicants relied on the provisions of section 21(3) and the case of **Republic vs Principal Secretary, Ministry of Defence & Another ex parte David Gitau Njau & 9 Others, (2018) eKLR** for these propositions.

12. They relied on the Court of appeal case of **Mahaja vs Khatwalo & Another, 1983 eKLR** for the proposition that where deserved an order of mandamus will issue regardless of interference. Placing reliance on the case of **Republic vs the Attorney General & Another ex-parte James Alfred Koroso, 2013 eKLR** that there being no other mode of execution against the Government the order of mandamus sought is the only remedy available to the Applicants.

13. The Respondent on its part submitted that the orders of mandamus are meant to compel performance of a public duty. He pointed out that he has not refused or neglected to obey or comply with the judgement of the Court but rather, that the failure to pay has been occasioned by circumstances that are beyond his control. This is for the reason that payment by Government departments rely on yearly budgetary allocations which are normally approved by the National Assembly, which is an independent arm of Government which has the ultimate control and oversight over public expenditure. According to the Respondent, the decretal amount was in its budgetary proposals, but the same was not approved by the National Assembly and this is the reason why the ministry has been unable to satisfy the judgement.

14. The Respondent further submitted that since he has shown willingness to settle the decretal sum by factoring it in the budgetary proposal, there is nothing to be compelled to do, and that at most what the Applicants are facing is merely a delay in settlement and that delay does not warrant for orders of mandamus to issue.

The Determination

15. I have considered the arguments by the Applicant and Respondent. The main issue for determination is whether the Applicants are entitled to the order of mandamus they seeks. The Court of Appeal discussed the nature of the remedy of mandamus in its decision in **Republic vs Kenya National Examinations Council ex-parte 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..... .”

16. It is not disputed in the present application that judgment was entered in favour of the Applicants in **High Court (Nairobi) Petition No.587 of 2012 - Gerald Juma Gichohi & 9 Others vs The Attorney General**. The issues therefore that require to be determined are firstly, whether the Principal Secretary of the Ministry of Defence is under a public duty and obligation to satisfy the decree and orders issued in favour of the Applicants in the said judgment, and secondly, if so, whether the Applicant is entitled to the relief he seeks.

17. Section 21 of the Government Proceedings Act 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.”

18. 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 (2012) e KLR** where J. Githua held 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.”

19. In the present application, the amount due from the Respondent has not been disputed, and the Applicants in this respect annexed copies of the judgment delivered by Lenaola J. (as he then was) on 29th May 2015 in **High Court (Nairobi) Petition No.587 of 2012 - Gerald Juma Gichohi & 9 Others vs The Attorney General**, and the decree and certificate of Taxation issued therein on 6th May 2016 and 30th March 2017 respectively. Judgment was in this respect entered for the Applicants against the Respondent and various awards of damages made for each Applicant for violations of their constitutional rights, and the Certificate of Taxation was for an amount of party and party costs against the Respondent for the sum of Kshs 848,695/=.

20. The Applicants also annexed a Certificate of Order against Government that was issued in the said suit on 30th March 2017, for the decretal amount of Kshs 20,200,000/=, interest thereon at 12% per annum from 29th May 2015 until 27th March 2017 of Kshs 4,436,252/=, and the taxed costs of Kshs 848,695/=. A letter dated 6th April 2017 by their Advocate to the Interested Party, attaching the aforesaid judgment, decree and Certificate of Order against Government, and a follow up letter dated 3rd April 2018, were also attached by the Applicants. All these letters bore stamps acknowledging receipt by the Interested Party. The Applicants have to this extent established and satisfied the Court that they have a legal right to the decretal sums that requires enforcement by way of mandamus.

21. As to whether the Respondent is under a duty to pay the said decretal sums, an order of mandamus is normally issued when an officer or an authority by compulsion of law or statute is required to perform a duty, and that duty, despite demand in writing, has not been performed. The Applicants have brought evidence to show that they did make demands for payments of the decretal sum from the Respondent. This Court also notes that while the Respondent does not deny the Applicants’ claims, it averred that it has made the necessary budgetary proposals to facilitate payment, but did not provide evidence of the said proposals.

22. In addition, the Applicants’ legal rights arise from Court orders given in their favour, and unless and until the said Court orders are set aside or varied, the Respondent is under a constitutional and legal duty to obey the same in upholding the rule of law. The Government Proceedings Act also imposes a statutory duty on the Respondent to satisfy the decretal sums due to the Applicants upon compliance with the procedure set out therein. To allow the performance of these duties dependent on the availability and/or provision of funding would in effect make the duties discretionary, and allow the Respondent to decide if and when to undertake duties which are in their nature mandatory. It is also notable that no such exemption is provided by law. In any event the lack of funding to pay the decretal sum does not extinguish the existence and nature of the Respondent’s duties, and only affects the mode of performance of that duties.

23. The issue whether the lack of budgetary allocation can absolve the Respondent of its duty to pay the decretal sum was discussed in the case of **Republic vs Principal Secretary, Ministry of Defence & Another ex parte David Gitau Njau & 9 Others, (supra)**, and I am in this regard in agreement with the holding by Odunga J. when the learned Judge stated as follows:

“19....it is therefore my view that settlement of decretal sum by the Government and its agencies does not necessarily depend on the availability of funds. This position was appreciated by this Court in **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012** in which this Court pronounced itself as

follows:

“I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein.”

20. In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations. In other words financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle a sum decreed by the Court to be due from it.

21. In my view it is the obligation of the government department concerned in conjunction with the Treasury to ensure that funds are allocated towards the settlement of the liabilities owed by the Government. The failure to do so amounts to failure to perform a statutory obligation hence warrants the grant of an order of *mandamus*. Whereas difficulties in the settlement of decretal sum may be a basis for seeking accommodation with respect to settlement, such difficulties cannot be a basis for seeking that an otherwise merited application for *mandamus* ought not to be granted.”

24. This Court therefore finds that as judgment was already entered in favour of the Applicant with respect to the demanded decretal amount and costs, the procedure stated in section 21 of the Government Proceedings Act has largely been followed, and there has been a demand for payment made, there is a duty upon the Respondent, who is the relevant accounting officer, to pay a debt already decreed by a competent Court of law to be due and payable by them.

25. The only clarification that needs to be made is that of the interest payable on the decretal sum, in that the Certificate of Order against the Government annexed by the Applicants indicated that the demanded amount of Kshs 25,484,947/= was of the decree amount and interest thereon at 12% per annum until 27th March 2017, as well as the taxed costs. It is not clear to the Court in this respect how the figure of Kshs 28,639,469/= sought by the Applicants in the Notice of Motion dated 2nd August 2018 has been arrived at, and this Court will therefore only grant orders with respect to the amounts decreed by the Court, including making provision for the allowed interest.

26. In the premises, I find that the Applicant’s Notice of Motion dated 2nd August 2018 is merited. I accordingly grant the following orders:

a) An order of *mandamus* is hereby issued compelling the Principal Secretary of the Ministry of Defence to effect payment of the decretal sum of Kshs. 20,200,000/= with interest thereon at the rate of 12% per annum from 29th May 2015 until payment in full, and of taxed costs of Kshs 848,695/= with interest thereon at the rate of 12% per annum from the date of this judgment until payment in full, in satisfaction of the decree issued in Nairobi High Court Petition No.587 of 2012 - Gerald Juma Gichohi & 9 Others vs The Hon. Attorney General.

b) The *ex Parte* Applicants shall have the costs of the Notice of Motion dated 2nd August 2019 of Kshs 100,000/=.

27. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF MARCH 2019

P. NYAMWEYA

JUDGE