



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 374 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY SECRETARY,**

**MACHAKOS COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**CHIEF OFFICER FINANCE/COUNTY TREASURER,**

**MACHAKOS COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**EX PARTE:**

**VETERAN PHARMACEUTICALS LIMITED**

**JUDGMENT**

**The Application**

1. The *ex parte* Applicant herein, Veteran Pharmaceuticals Limited, filed these judicial review proceedings by way of a Notice of Motion dated 5<sup>th</sup> November 2018, seeking orders of mandamus against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein, who respectively hold office of County Secretary and County Chief Finance Officer in the Machakos County Government.
2. The Applicant sought orders to compel the Respondents to satisfy the decretal amount of Kshs 1,601,705/= plus costs of Kshs 217,426/= obtained in the Applicant's favour in **Nairobi High Court, Commercial and Admiralty Division Civil Case No. 565 of 2015 - Veteran Pharmaceuticals Limited vs Kangundo Level 4 Hospital & Another**. The said Applicant also sought payment of the accrued interest on the decretal amount at the court rate of 12% per annum from 7.4.2016 until payment in full. Further, that the costs of the application be provided for.
3. The Applicant relied on a statutory statement by his Advocates dated 22<sup>nd</sup> May 2018, and a verifying affidavit and a supporting affidavit sworn on the same date by Robert Kamau Willie Ngigi, a director of the Applicant company. In summary, its case was that after judgment was entered in its favour in **Nairobi High Court, Commercial and Admiralty Division Civil Case No. 565 of 2015 - Veteran Pharmaceuticals Limited vs Kangundo Level 4 Hospital & Another**, its costs were taxed, and that it obtained the Decree, Certificate of Taxation, and Certificate of Order against the Government, which were duly served on the Respondents, together with several demands for the payment of the sums due.
4. However, that the Respondents have neglected and/or refused to settle the Applicant's claim, and these proceedings are the only means through which a Government can be compelled to pay the Applicant. Therefore, that the refusal to pay the amount is irrational, unreasonable and without any unjustifiable cause.
5. The Respondents filed a Grounds of Objection dated 15<sup>th</sup> November 2018 in response to the application, wherein it was stated that the application was incurably defective, as it does not comply with the provisions of Order 53 of the Civil Procedure Rules. Further, that the application was premature and the Applicant has not followed the laid down procedure.

## The Determination

6. The application was canvassed by way of written submissions. The Applicant's advocates, J. M. Mugo & Company Advocates, filed submissions dated 30<sup>th</sup> November 2018, while J. Muoki & Company Advocates filed submissions dated 1<sup>st</sup> February 2019 for the Respondents.

7. Both the Applicant and Respondent relied on the decision in **Shah vs Attorney General (No3) (1970) EA 543** as to the nature of the remedy of mandamus, and the Applicant further relied on section 11 of the Fair Administrative Action Act and Order 53 of the Civil Procedure Rules for the grant of the remedy. The Applicant further submitted that it had fully complied with Order 53, as leave to institute these proceedings was granted by this Court on 22<sup>nd</sup> October 2018, and all the required pleadings were filed and served on the Respondents. Furthermore, that having complied with section 21 of the Government Proceedings Act and Order 29 of the Civil Procedure Rules, there is no reason why it should be denied the fruits of its judgments. The Applicant cited the decisions in **Republic vs County Secretary Migori County Government & Another, (2018) e KLR** and **Jaribu Credit Traders Limited vs Nairobi County Government, (2018) e KLR** for this position.

8. The Respondent on the other hand submitted that the Applicant could seek other remedies other than mandamus as he did not comply with Order 53 of the Civil Procedure Rules, and did not follow due process in obtaining the decretal sum owed to him by the Respondent. According to the Respondent, while the Applicant obtained all the relevant documents in order to get paid, he overlooked a mandatory step provided by the county governments in the provision of goods and services, which is that it must have an IFMIS account. The Respondent explained that IFMIS is an e-procurement system, and proceeded to give reasons for the said system and how it operates.

9. I have considered the pleadings and submissions by the Applicant and Respondent, as well as 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 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, 4<sup>th</sup> 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..... .”**

10. It is not disputed in the present application that judgment was entered in favour of the Applicant in **Nairobi High Court, Commercial and Admiralty Division Civil Case No 565 of 2015 - Veteran Pharmaceuticals Limited vs Kangundo Level 4 Hospital & Another**. 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.

11. 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.”

12. Machakos County is one of the Counties established by Article 6 of the Constitution and the First Schedule to the Constitution, and is constitutionally recognized as a distinct government level of government by the said Article. The definition of “Government” in the Government Proceedings Act refers to the “Government of Kenya”, and J. Odunga held as follows in **Republic v Attorney General & another ex-parte Stephen Wanyee Roki [2016] eKLR** as regard the application of the Government Proceedings Act to County Governments:

“20 Although the provisions of the Government Proceedings Act do not expressly refer to County Governments, section 7 of the Sixth Schedule to the Constitution (Transitional And Consequential Provisions) provides that:

*All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.*

21. It follows that the provisions of the Government Proceedings Act, a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. One such construction would be the reality that Government is now at two levels and Article 189(1)(a) of the Constitution requires that the Constitutional status and institutions of government at both the National and County levels be respected. In my view such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to execution proceedings.”

13. 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)** 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.”

14. As regards who the accounting officers of the Machakos County are, section 44 of the County Government Act establishes the office of the County Secretary who is secretary to the County executive Committee, and is answerable for the operations of the County Executive, and whose functions include being head of the county public service. Section 103 of the Public Finance Management Act also establishes the County Treasury comprising of the County Executive member of Finance, the Chief Officer and the departments of the County Treasury responsible for finance and fiscal matters.

15. Under section 103(3) of the Public Finance Management Act, the County Executive Committee Member for Finance is the head of Treasury and is thus the responsible for finance matters in the County. Therefore, both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are jointly responsible for the satisfaction of Court orders and decrees on payment of money owed by the Machakos County by virtue of their roles and functions.

16. In the present application, the amount due from the Respondents has not been disputed, and the Applicant in this respect annexed copies

of the decree awarded in **Nairobi High Court, Commercial and Admiralty Division Civil Case No 565 of 2015 - Veteran Pharmaceuticals Limited vs Kangundo Level 4 Hospital & Another**, whereby it is stated that judgment was entered for the Applicant against the Respondent for the sum of Kshs 1,601,705/= plus interest at the rate of 18% per annum from 7.4.2015 until payment in full and taxed costs of the suit.

17. The Applicant also annexed a Certificate of Order against Government that was issued in the said suit on 12<sup>th</sup> May 2017, and a certificate of costs of Kshs 217,426/= dated 28<sup>th</sup> February 2018 in the Applicant's favour after taxation of its Bill of Costs in the suit. All these documents bore stamps acknowledging receipt by the Respondent.

18. The Respondent did not indicate in what manner the Applicant had not complied with Order 53 of the Civil Procedure Rules, which Order provides for the procedure to be followed when instituting judicial review applications. Order 53 Rule 1 provides as follows as regards the procedure for applying for judicial review orders:

**(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.**

**(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.**

**(3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.**

**(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:**

**Provided that where the circumstances so require, the judge may direct that the application be served for hearing *inter partes* before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.**

19. Order 53 Rule 3 further provides as follows:

**(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.**

**(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.**

**(3) An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the High Court on the hearing of the motion.**

**(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.**

20. In this respect the Applicant did file an application for leave to commence judicial review proceedings by way of a Chamber Summons dated 22<sup>nd</sup> May 2018 and filed in Court on 10<sup>th</sup> September 2018. The said leave was granted by this Court on 22<sup>nd</sup> October 2018, and the Applicant subsequently filed its Notice of Motion on 5<sup>th</sup> November 2018 of the same date, which application is the subject of this judgment. The Respondent does not dispute that they were served with the pleadings filed herein, and they have participated in the hearing of the application. This Court therefore finds that the procedure in Order 53 of the Civil Procedure Rules was complied with.

21. In addition, the Respondents did not cite any law required to be followed by the Applicant as regards the opening of an IFMIS account or on the application of the said IFMIS procedure before payment of a decretal sum is made. In any event from the submissions made by the Respondents, it appears that the said IFMIS procedure was to be followed at the time of procurement of the services provided by the Applicant, which services are not disputed and on which judgment has already been delivered in the Applicant's favour.

22. This Court therefore finds that as the Applicant has judgment in its favour with respect to the demanded 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 1<sup>st</sup> Respondent to pay a debt already decreed by a competent Court of law to be due and payable by them.

23. The only clarification that needs to be made is that of the interest payable on the decretal sum, in that while the judgment and decree in **Nairobi High Court, Commercial and Admiralty Division Civil Case No 565 of 2015 - Veteran Pharmaceuticals Limited vs**

**Kangundo Level 4 Hospital & Another** indicated that the interest awarded on the decretal sum was be at 18% per annum, the Applicant in the instant application sought orders that interest be paid on the decretal sum at court rates of 12%.

24. In the premises, I find that the Applicant's Notice of Motion dated 5<sup>th</sup> November 2018 is merited. I accordingly grant the following orders:

(a) An order of mandamus directed to the Respondents herein to comply and pay the *ex parte* Applicant herein the decretal amount of Kshs 1,601,705/= with interest thereon at the rate of 12% per annum from 7.4.2015 until payment in full, and the taxed costs of Kshs 217,426/= 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 5<sup>th</sup> November 2018 of Kshs 50,000/=.

25. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MARCH 2019**

**P. NYAMWEYA**

**JUDGE**