



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 113 OF 2018

IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 26, 27, 28, 32, 35, 47, 48, 49, 50 AND 51 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE BILL OF RIGHTS UNDER THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: UNLAWFUL TERMINATION OF EMPLOYMENT BY THE KENYA ARMED FORCES AND TORTURE BY THE GOVERNMENT AGENTS

BETWEEN

JOHN C. RONO SERVICE NO. 12321.....APPLICANT

VERSUS

1. PRINCIPAL SECRETARY, MINISTRY OF INTERIOR &

COORDINATION OF NATIONAL GOVERNMENT

2. THE ATTORNEY GENERAL.....RESPONDENTS

RULING

The Application

1. The Notice of Motion before the court dated 5th July, 2018 was filed pursuant to the leave granted to on 10th April, 2018. The application prays for:

(a) An order for Judicial Review by way of mandamus to compel the Principal Secretary in the Ministry of Interior and Coordination of National Government, Kenya Defence Forces as the Accounting Officer of the Ministry of Interior and Coordination Government, Kenya Defence Forces to make payment of the sum of Kshs. 1,500,000/= plus interest at the rate of 12% p.a. from the 8th day of March, 2017 until payment in full.

(b) An order for costs of these proceedings.

2. The application is premised on grounds set out thereon and is supported by Statutory Statement dated 12th April, 2018 and also by the Verifying Affidavit of **John Cheruiyot Rono** sworn on 12th April, 2018.

3. The Ex parte Applicant's case is that he is the beneficiary of the Judgment issued by this court on 8th day of March, 2017 by his Lordship the late Judge Onguto J. The said Judgment has not been stayed nor set aside by any other court therefore there is need to compel the Respondent to obey the decree and make payments to satisfy the decree herein dated 7th September, 2017 for Kshs. 1,500,000/=together with interest as 12% p.a. till payment in full is made. The Respondent has failed, neglected and/or refused to make payment to comply with the court's orders issued herein. The Respondent was well represented at the hearing hereof and all applications for execution have been make

procedurally and they have been secured with the orders of this court, that is,

- (a) The Judgment herein
- (b) The decree
- (c) Certificate of order against the Government has been served

4. The Applicant states that the Respondent has not only been in contempt of the court's orders, but that the Permanent Secretary to the Ministry of Defence has contravened the constitution by failing to obey Article 47 of the constitution for failing to do their part for fair administrative actions especially having been notified to make payment as per the court order and failing to prepare the cheque for such payments is failing to execute fair administrative actions which is against Article 47 of the constitution. The failure to either make payments and/or even file any response is not only contemptuous, it is failing to execute their mandate for fair administration as officers of the state under Article 47 of the constitution and therefore it is the Applicant's case that the Respondents having failed to obey the court orders and the several applications filed to propel them to prepare payments.

The Response

5. The application is not opposed. The Respondent has not filed any response to the application.

The Determination

6. I have considered the application. Mandamus as Judicial Review remedy is a discretionary remedy which the court can grant or reject even when it is merited. Mandamus as a remedy compels the Respondent to do a statutory duty which the Respondent is required to do, but has declined to do. By its very nature a grant of mandamus presupposes that the Respondent is aware of what it is required to do, but has failed or neglected to do the same. The Ex parte Applicant must therefore prove to the court that the Respondent is indeed aware of its duty. It is not enough that the Applicant attaches pleadings leading to the establishment of the Respondent's duty. It is not enough to attach, for example, a copy of a Judgment leading to the decree, or a copy of a decree and certificate of costs. These documents only prove the existence of duty of the Respondent. But they do not show whether or not the Respondent is aware of these documents. In the instant case, the suit leading to these proceedings was not defended by the Respondent. The Respondent did not participate in the preparation of the decree or the certificate of costs. It did not have to. But the Applicant is obliged to bring to the attention of the Respondent these documents by way of a demand to pay the sum due. There is a letter of demand addressed to the Respondent by the Applicant. The letter is dated 12th September, 2018. However, there is no evidence that the said letter was served upon the Respondent.

7. The certificate of order against the government is attached dated 27th September, 2018. It is drawn fifteen (15) days after alleged demand was made. There is no evidence that the said certificate of order was ever served on the Respondent. As it were, there is no evidence of demand. The Respondent could not be expected to satisfy a decree it has no knowledge of, and a mandamus cannot issue where the Applicant has not fulfilled an important element of demanding for payment and the same not being honoured. It is the finding of this court that the Respondent cannot be compelled to satisfy a decree which has not been brought to his notice by way of a demand. To that extent the application herein is premature for merit of procedure and is dismissed. Parties to bear own costs.

Dated, Signed and Delivered in Nairobi this 11th day of April, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Tuitoyek for Respondent

No Appearance for Applicant

Mr. Ibrahim Court Assistant