



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW NO. 689 OF 2017**

**IN THE MATTER OF: THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA, THE CIVIL PROCEDURE ACT CHAPTER 21 LAWS OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

**AND**

**IN THE MATTER OF: JUDGMENT AND DECREE DATED 16<sup>TH</sup> JUNE, 2017 IN CMCC NO. 1724 OF 2009, MILIMANI NAIROBI IN SUSAN WAYUA VS. THE ATTORNEY GENERAL**

**AND**

**IN THE MATTER OF: AN APPLICATION BY SUSAN WAYUA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AGAINST THE ATTORNEY GENERAL**

**BETWEEN**

**SUSAN WAYUA.....APPLICANT**

**VERSUS**

**1. ATTORNEY GENERAL**

**2. PRINCIPAL SECRETARY, MINISTRY OF INTERIOR &**

**COORDINATION OF NATIONAL GOVERNMENT.....RESPONDENTS**

**RULING**

**The Application**

1. The Notice of Motion before the court is dated 20<sup>th</sup> December, 2017. The application seeks the following orders:

**(a) That an order of mandamus be issued directed at the Principal Secretary of Interior and Co-ordination of National Government in the Republic of Kenya compelling him to satisfy the decree issued by the Chief Magistrate's Court at Nairobi being CMCC No. 1724 of 2009, Susan Wayua vs. The Attorney General being payment of Kenya Shillings Four Million Ninety Two Thousand Two Hundred and Nineteen and Twenty One cents (Kshs. 4,092,219.21) and costs of Kenya Shillings Two Hundred and Twenty Two Thousand Six Hundred and Forty Eight and Sixty cents (Kshs. 222,648.60).**

**(b) That the costs be awarded to the Applicant**

2. The application is premised on statutory statement of facts filed herein and is based on the grounds set out in the application and on the Verifying Affidavit of **Susan Wayua** sworn on 20<sup>th</sup> December, 2017.

3. The Applicant's case is that she is conversant with the facts of this case and that she filed a suit against the State through the Attorney General. The State filed a defence on 22<sup>nd</sup> July, 2009 denying her claims, and the matter proceeded for hearing on 17<sup>th</sup> September, 2015 and Judgment was subsequently delivered on 23<sup>rd</sup> March, 2016 in her favour in the following terms:

(i) Liability 100% against the Defendant.

(ii) General damages for pain, suffering and loss of amenities Kshs 3,500,000/=.

(iii) Special damages Kshs. 67,945/=.

(iv) Costs and interest. (Annexed is the Judgment marked "SW 1")

4. The Applicant later proceeded to look for funds to pay the further court fees which was duly paid and a decree was issued by the court on 16<sup>th</sup> June, 2017. She then applied through her counsel for a certificate of Judgment against the Attorney General which was issued on 7<sup>th</sup> July, 2017 and that she instructed her counsel to finally issue a formal demand for the payment of the sums duly awarded to her.

#### Response

5. The application is not opposed. The Attorney General has not filed a response. Neither did the Attorney General file submissions.

#### Submissions

6. The Ex parte Applicant filed submissions which I have considered. The issue I raise for determination is whether or not the orders sought can be granted.

#### Determination

7. I have considered the application and the submissions of the Ex parte Applicant. The suit giving rise to the application was filed, was prosecuted and Judgment delivered on 23<sup>rd</sup> March, 2016 for Kshs. 3,500,000/= general damages and Kshs. 67,945/= special damages. Interest and costs were also given. A copy of the said Judgment is annexed to the affidavit of the Applicant as Exhibit No. SW1. Also annexed are:

(i) The certificate of stated costs and

(ii) Certificate of order against the Government for a sum of Kshs. 4,397,792.84/=.

(iii) A copy of letter of demand addressed to the Office of the Attorney General dated 20<sup>th</sup> November, 2017. The said decree remain unpaid to date.

8. In my view the Applicant seeks the order of mandamus to compel the Respondents to perform a public duty which has been imposed on them due to their negligence. They have failed to satisfy the decree to the detriment of the Applicant who has a legal right. Justice J. V. Odunga in the case of **REPUBLIC VS. ATTORNEY GENERAL & ANOTHER EX-PARTE ONGATA WORKS LIMITED [2016] EKLK** referred to the case of **R (REGINA) VS. DUDSHEATH, EX PARTE, MEREDITH [1950] 2 ALL E.R. 741, AT 743**, where Lord Goddard C. J. held as follows:

**"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy... "**

9. The Applicant suffered loss and injury and judgment was entered in their favour. The Respondents failure to comply will be an injustice occasioned to the Applicant. Judge G. V. Odunga in the case of **REPUBLIC VS. ATTORNEY GENERAL & ANOTHER EX-PARTE ONGATA WORKS LIMITED [2016] eKLR** referred to the case of **REPUBLIC VS. PERMANENT SECRETARY, MINISTRY OF STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY EXPARTE FREDRICK MANOAH EGUNZA [2012] eKLR** where Githua J stated 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. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues."**

10. This Court notes from the court record that counsel for the Respondents appeared before court and intimated that the Respondents were awaiting the supplementary budget from treasury to enable them plan and allocate funds to settle this claim but no communication or update has been forthcoming from the Respondents. The Respondents have not opposed the current application which in my view is merited.

11. For the foregoing reasons the application before the court is allowed as prayed.

**Dated, Signed and Delivered in Nairobi this 11<sup>th</sup> day of April, 2019.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Mr. Onyango for Applicant

No Appearance for Respondents

Mr. Ibrahim Court Assistant