



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 501 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY, MINISTRY OF LANDS

AND PHYSICAL PLANNING.....RESPONDENT

EX PARTE : SCENERIES LTD

JUDGMENT

The Application

1. The *ex parte* Applicant herein, Sceneries Ltd, was the Applicant in **Sceneries Limited v National Land Commission & 2 Others, Nairobi Constitutional and Human Rights Miscellaneous Constitutional Application No. 1 of 2016**, wherein judgment was delivered in its favour on 19th April 2018, and the National Land Commission was ordered to pay the costs of the suit to the *ex parte* Applicant. The *ex parte* Applicant subsequently filed the instant judicial review proceedings by way of a Notice of Motion dated 5th March 2019, seeking orders of mandamus compelling the Principal Secretary, Ministry of Lands and Physical Planning to pay the *ex parte* Applicant Kshs. 7, 240, 682/- and that the costs of this application be provided for. The Principal Secretary, Ministry of Lands and Physical Planning is the Respondent herein, and is sued in his capacity as the Accounting Officer in the said Ministry.

2. The instant application is supported by a statutory statement dated 21st December 2018, and a verifying affidavit of Samuel Kamau Macharia of even date. The crux of the Applicant's case is that on 23rd February 2017, and after judgment had been entered in his favour in **Sceneries Limited v National Land Commission & 2 Others**, it filed its Bill of Costs, which was taxed and allowed in the sum of Kshs. 7,240, 682/- on 4th December, 2017, and thereafter a Certificate of Taxation was issued on 25th January 2018. The *ex parte* Applicant subsequently applied for and obtained a Certificate of Order against the Government for the said sum on 13th March 2018. It is the *ex parte* Applicant's contention that the Respondent has neglected to pay the said amount despite demand for the same. It is contended that the Respondent is the Chief Accounting Officer for the Ministry of Lands & Physical Planning, and therefore has a duty to pay all claims against the Government as ordered by the Court.

3. In response to the application, the Respondent filed Grounds of Opposition dated 27th March 2019, stating that:

- a. The instant application is incurably defective, incompetent and an abuse of the court process, and should be dismissed forthwith with costs to the Respondent;
- b. The Attorney General has no statutory mandate or responsibility to settle decretal sums on behalf of other Government offices;
- c. The National Land Commission is an independent body established under Article 67 of the Constitution of Kenya, 2010 and has its own budget therefore able to pay their claims;
- d. The Attorney General is not the accounting officer of the National Land Commission and as such an order of mandamus cannot

issue against him;

e. The Attorney General does not receive funds from the National Treasury to settle claims on behalf of the National Land Commission; and

f. The Attorney General was not a party and neither did he participate in **Sceneries Ltd vs National Land Commission and 2 Others**.

4. The Court directed that the application would be canvassed by way of submissions. The *ex parte* Applicant's Advocates on record, Kamau Kuria & Company Advocates, filed submissions dated 20th May 2019, while Annette Nyakora, a Litigation Counsel in the Attorney General's chambers filed submissions dated 15th July 2019 on behalf of the Respondent.

The Submissions

5. The *ex parte* Applicant submitted on the question of this Court's jurisdiction to entertain the instant application, and cited its right to access to justice as espoused under Article 48 of the Constitution of Kenya. In this regard, reference was made to the decision in the case of **Dry Associates Limited v Capital Markets Authority and Another Interested Party Crown Berger (K) Ltd [2012] eKLR**, and the Court of Appeal case of **Joseph Nyamamba and 4 Others v Kenya Railways Corporation [2015] eKLR**. The Applicant further cited the case of **Republic vs. Town Clerk of Webuye County Council & Another [2014] eKLR**, wherein the Court urged an interpretation of Article 48 of the Constitution that favours enforcement and secures accrued rights for decree holders to ensure that they enjoy the fruits of their judgment.

6. The *ex parte* Applicant further relied on Section 21(1) and (3) of the Government Proceedings Act, which provides for enforcement of money decrees issued against the Government. The Applicant cited the cases of **Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza [2012] eKLR**; **Republic v Attorney General and Another ex-parte James Alfred Koroso [2013] eKLR**; and **Republic v Kenya Broadcasting Corporation ex – parte Dorcas Florence Kombo [2018] eKLR** in which the Courts set out the procedure for enforcing a decree or order issued against the government, and for the position that if the court were to decline to grant mandamus in such circumstances, applicants would be left without an effective remedy despite holding a decree.

7. Lastly, that the costs of this suit are to be awarded at the Court's discretion. The *ex parte* Applicant however cautioned that the Court's discretion, while absolute and unfettered, must be exercised judicially. The *ex parte* Applicant relied on the case of **Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others [2014] eKLR**, where the Supreme Court held that the awarding of costs is not to penalize the losing party but is a means for the successful litigant to be recouped for the expenses to which he has been put in fighting an action. Reference was also made to Odunga J.'s decision in **Republic v Communication Authority of Kenya and another ex – parte Legal Advice Centre aka Kituo Cha Sheria [2015] eKLR**.

8. The Respondent on its part submitted that the National Land Commission is an independent Commission established under Article 67(1) of the Constitution, and operationalized by the *National Land Commission Act* No. 5 of 2012. It is the Respondent's submission that the *National Land Commission Act* provides under section 30(b) that any function or transaction, civil proceedings or any other legal or other process in respect of any matter carried out in relation to the administration of public land administration by or on behalf of the Ministry of Lands before the commencement of the Act shall be deemed to have been carried out under the Act. That therefore, any functions previously performed by the Commissioner of Lands are now done by the National Land Commission.

9. The Respondent faulted the *ex parte* Applicant for the joinder of the Principal Secretary Ministry of Lands and Physical Planning to the instant proceedings, since the said Principal Secretary is not the accounting officer of the National Land Commission. The Respondent submits that the said Permanent Secretary does not receive any budgetary allocation from the National Treasury to settle claims on behalf of the Commission, therefore an order of mandamus cannot issue against him. The Respondent further submitted that the instant application arises from the judgment in **Sceneries Limited –Vs- The National Land Commission & 2 Others**, in which it was ordered that the National Land Commission do pay the costs of that suit to the Applicant. Therefore, that the Accounting Officer of the Commission ought to be sued, not the Principal Secretary Further, that the Attorney General and the Ministry of Lands were not a party in **Sceneries Limited vs The National Land Commission & 2 Others**, and cannot therefore be sued for Orders emanating from a suit that they did not take part in.

10. According to the Respondent, under section 21 of the Government Proceedings Act, the party to whom an order of mandamus is to be directed is the Accounting Officer of the respective party. Stating that the *ex parte* Applicant has attached only one demand letter to his application which was served on the Office of the Attorney General and not the National Land Commission, the Respondent submits that it is possible that the National Land Commission does not know that the *ex parte* Applicant has been demanding for payment. That in the absence of a demand letter to the National Land Commission, the *ex parte* Applicant has not met the threshold for an order of mandamus to issue.

11. The Respondent relied on the decisions in **Republic vs County Secretary, Nairobi City County & another Ex Parte Wachira Nderitu Ngugi & Co. Advocates [2016] eKLR**, and **Republic vs Attorney General & 2 Others Ex-parte Assocaied Architects and 3 Others [2018] eKLR**, where it was held that mandamus issues to compel performance of a public or statutory obligation or duty, and that the duty to pay the outstanding sum is bestowed upon the Accounting Officer of the Government State Department.

The Determination

12. I have considered the pleadings and submissions by the *ex parte* Applicant, 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) e KLR**, 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..... .”

13. It is not disputed in the present application that costs were awarded in the *ex parte* Applicant’s favour in **Sceneries Limited vs National Land Commission & 2 Others**. The nature of the orders granted therein as regards costs were that the Respondent and the First Interested Party therein were to pay the costs of the proceedings to the Applicant and Second Interested Party therein. The Respondent in the said suit was the National Land Commission, while the first Interested party was one Ngengi Muigai. The *ex parte* Applicant herein was the Applicant in the said suit, while the second interested party was Kenya Reinsurance Corporation Limited.

14. A perusal of the judgment shows that the main claim in the said suit was in relation to investigations that the National Land Commission was seeking to undertake on certain parcels of land, which would have adversely affected the *ex parte* Applicant, and on which the Court gave various orders. There was no record that the Principal Secretary, Ministry of Lands and Physical Planning and Attorney General were parties to the said suit, nor that they participated in the suit. There was also no order in the said judgment requiring the Principal Secretary, Ministry of Lands and Physical Planning and Attorney General to pay costs.

15. The main issues that therefore require to be determined are firstly, whether the Principal Secretary, Ministry of Lands and Physical Planning is under a public duty and obligation to satisfy the decree and orders on payment of costs issued against the National Land Commission in the judgment in **Sceneries Limited vs National Land Commission & 2 Others**, and secondly, if so, whether the *ex parte* Applicant is entitled to the relief he seeks.

16. As regards the issue of who as between the National Land Commission and the Principal Secretary, Ministry of Lands and Physical Planning are under a duty to pay the costs awarded to it, the *ex parte* Applicant made reference to the Supreme Court’s advisory opinion in **In the Matter of the National Land Commission [2015] eKLR** on the role of the National Land Commission and the Ministry of Lands and Physical Planning. It was submitted that the Commission and the Ministry are interdependent and work in consultation and cooperation, and further, while citing Rule 7 of the Sixth Schedule of the Constitution, the *ex parte* Applicant submitted that the existing laws need to be interpreted in a manner that conforms with the Constitution of Kenya.

17. The *ex parte* Applicant therefore put forward the following arguments for its case that it is the Respondent’s duty to pay the said costs. Firstly, that according to the Supreme Court’s interpretation of the provisions governing the National Land Commission, the latter performs its tasks hand in hand with the Ministry of Lands and Physical Planning. Therefore, that considering that the opposition to the application is based on a separation of the respective functions of the Commission and the Ministry, the same cannot hold since the Supreme Court has held otherwise.

18. Secondly, the *ex parte* Applicant submitted that the only requirement under Section 21 (1) and (2) of the Government Proceedings Act is that decree holder serves a Certificate of Costs on the Attorney General, who then arranges for the accounting officer to make the payment. According to the *ex parte* Applicant, the Attorney General is responsible for identifying the relevant accounting officer where there are shared functions like those of the Commission and the Ministry of Lands and Physical Planning. In support of this argument, the *ex parte* Applicant cited the case of **Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza (supra)**.

19. Thirdly, the *ex parte* Applicant submitted that in any case it is not disputed that the Certificate of Costs was served on the Attorney General, hence the Applicant cannot be held liable for any action which resulted in the Certificate not reaching the Secretary of the National Land Commission. The *ex parte* Applicant disagreed with the narrow view of the functions of the Attorney General as set out in Article 156 of the Constitution and the Government Proceedings Act. According to the *ex parte* Applicant, the word “Government” includes both departments and statutory departments. That, the conferment of independence on a body like the National Land Commission does not take away from the fact that it is a part of Government within the meaning of Section 21 of the Government Proceedings Act. The *ex parte* Applicant urged a broad interpretation of that section.

20. Lastly, the Applicant submits that notwithstanding that the National Land Commission is an independent body governed by the Constitution and the National Land Commission Act, and whose Accounting Officer is the Secretary of the Commission; misjoinder or non-joinder of parties to a judicial review application does not make the application fatally incompetent. The Applicant cited the case of **Republic v Charles Lutta Kasamani and Another ex parte Minister for Finance & Commissioner of Insurance as Licensing and Regulating Officers** [2006] eKLR where the Court of Appeal held that a defect in the form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal, and are curable by amendment.

21. It is therefore the Applicant's submission that as found by the Courts, misjoinder or non-joinder alone does not warrant the dismissal of an application, where the substance of the reliefs sought can still be realised despite the irregularity. The Applicant in this respect faulted the Respondent for not challenging at any point the issuance of Certificate of Order against it as well as the receipt for demand for payment, up until the instant suit was filed against it. In this respect the Applicant was guided by the Court of Appeal's decision in **Nabro Properties Ltd v Sky Structures Ltd and 2 Others** [2002] 2 KLR 299 where it was held that a person cannot base his claim on his own wrong.

22. The applicable law on enforcement of orders against Government entities in civil proceedings is section 21 of the Government Proceedings Act, which provides as follows as regards the requirements to be met:

“(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.”

23. 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.”

24. Statutory underpinning is also now given to the concept of accountability for expenditure of public funds under the Public Finance Management Act, which provide for and allocate responsibility in public expenditure to Accounting Officers. The said accounting officers are appointed by the Cabinet Secretary in charge of Finance under section 67 of the Public Finance Management Act, which also provides for the accounting officers for Constitutional Commissions or Independent Offices. The said section provides as follows:

(1) The Cabinet Secretary, except as otherwise provided by law, shall in writing designate accounting officers to be responsible for the proper management of the finances of the different national government entities as may be specified in the different designations.

(2) Except as otherwise stated in other legislation, the person responsible for the administration of a Constitutional Commission or institution or Independent Office shall be the accounting officer responsible for managing the finances of that Commission, institution or Independent Office.

(3) The Cabinet Secretary shall ensure that at any time there is an accounting officer in each national government entity.

25. In the present application, Article 253 of the Constitution is explicit as regards the legal status of Constitutional Commissions such as the National Land Commission, and states that each Constitutional Commission is a body corporate with perpetual succession and a seal; and is capable of suing and being sued in its corporate name. In addition, while it is desirable that the National Land Commission and the Ministry of the Lands work in harmony, it is notable in this respect that the reference on which the Supreme Court of Kenya's Advisory Opinion was sought in **In the Matter of the National Land Commission [2015] e KLR** was on the National Land Commission's functions and powers, on the one hand, and the functions and powers of the Ministry of Land, Housing and Urban Development (the Ministry), on the other hand in eight (8) specific areas namely:

- (a) On land administration and management functions
- (b) On land taxation and revenues
- (c) On human resources and staff issues
- (d) On land registration and issuance of titles
- (e) On the National Land Information Management System (NLIMS)
- (f) On transfer of assets
- (g) On private land
- (h) On land settlement.

26. There was no issue raised in the said Advisory Opinion as regards who the accounting officer of the National Land Commission was, which on the contrary is an issue clearly spelt out in the National Land Commission Act section 20 (4) as follows:

“(4) The secretary, shall be the accounting officer of the Commission and shall be responsible to the Commission for— “

- (a) all income and expenditure of the Commission;**
- (b) all assets and the discharge of all liabilities of the Commission; and**
- (c) the proper and diligent implementation of Part IV of this Act.”**

It is also notable that the Secretary to the National Land Commission is a constitutional office established by Article 250(12) of the Constitution which provides that each Constitutional Commission shall have a secretary who shall be the chief executive officer of the Commission.

27. Therefore, it is the finding of this Court that under the National Land Commission Act, the Government Proceedings Act and the Public Finance Management Act, it is the Secretary of the National Land Commission who is the accounting officer for any expenditure and accountable for any money decrees due from the said Commission, and on whom the statutory duty to pay falls. As the order of mandamus is sought to enforce the performance of a statutory duty, the non-joinder of the Secretary and Chief Executive Officer of the National Land Commission in this suit is thus fatal to the Applicant's claim.

28. The provisions of section 21 of the Government Proceedings Act must also be read with the necessary changes in relation to the National Land Commission. In this regard, the National Land Commission is a corporate body, and the service of the certificate of costs that is required by the said section on the Attorney General must read as requiring service on the appropriate officer in the National Land Commission. It is notable in this respect that section 20(3) of the National Land Commission Act provides that the Secretary to the Commission shall also be the head of the secretariat.

29. This Court therefore finds that since it is the Secretary of the National Land Commission that is under a statutory duty as the accounting officer to pay the *ex parte* Applicant the costs awarded in its favour in **Sceneries Limited v National Land Commission & 2 Others**, there is no duty upon the Principal Secretary in the Ministry of Lands and Physical Planning to pay the said costs.

30. In the premises, I find that the *ex parte* Applicant's Notice of Motion dated 5th March 2019 is incompetently filed, and the same is hereby struck out with no order as to costs.

31. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2019

P. NYAMWEYA

JUDGE