



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

JUDICIAL REVIEW NO. 7 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY SECRETARY,

THE COUNTY GOVERNMENT OF UASIN GISHU.....RESPONDENT

EXPARTE PAUL GICHERU t/a GICHERU & COMPANY ADVOCATES

RULING

1. What is pending before the court is the application dated 9th July 2019 which application seeks an order of mandamus compelling the respondent to settle the balance of the decretal amount interest and costs in **HC Misc. Application No. 160 of 2013** between the ex parte applicant and the respondent amounting to **kshs. 45,691,288/-**.

2. The application is based on the grounds that a consent agreement was entered into on 28th October 2014 between the ex parte applicant and the respondent settling the suit no. **Eldoret HC Misc. Application no. 160 of 2013**. The agreement was recorded as an order of the court and it related to 39 matters which the ex parte applicant has been handling on behalf of the respondent. The respondent has to date not paid **kshs. 45,691,288/-** being the balance of the fees for the 39 matters. It is 5 years since the court issued the orders but the respondent has never settled the amount.

RESPONDENT’S CASE

The respondent did not file any response. The respondent did not make any submissions in the application when it came up for hearing. The respondent’s advocate submitted that he did not have instructions that were sufficient for him to submit on the application.

WHETHER THE APPLICATION IS MERITED

The application seeks to compel the respondent to pay a decretal amount in compliance with a court order.

Section 21 of the Government Proceeding Act makes provision for satisfaction of orders against the government. Section 21 (1) of the Government Proceedings Act provides:

“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.”

The upshot of the foregoing is that a certificate is to be issued to the government officer or department containing the particulars of the order. The applicants have not provided evidence that they issued any such certificate in accordance with the act. However, it is not disputed that

the sums are owed to the applicants. It is also undisputed that the applicants have made efforts to notify the respondent of the pending balance.

The circumstances under which judicial review order of *mandamus* are issued were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council Exparte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

“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 or 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...These principles mean that an order of mandamus compels 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.”

In **Republic Vs. The Attorney General & Another Exparte James Alfred Kosoro** [Misc. Application JR No.44 of 2012] Judge G.V. Odunga stated:

“...in the present case the Exparte Applicant has no other option of realizing the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realized. Unless something is done he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.... The institution of judicial review proceedings in the nature of mandamus cannot be equated with execution proceedings. In seeking an order for mandamus the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. ...

In other words, mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform.

Whereas it is clear that the respondents have an obligation to the ex parte applicant to ensure he enjoys the fruits of his judgment by paying the sum owed, I do not think the remedy lies in judicial review, and to adopt such an approach to recover fees owed is in my view an abuse of judicial review process. The applicant ought to follow execution procedure under the Government Proceedings Act. I think the applicants ought to comply with the procedure of issuing a certificate in pursuit of the fruits of judgment. The application is dismissed as being an abuse of the court process

Delivered and dated this 19th day of December, 2019 at Eldoret

H. A. OMONDI

JUDGE

In the presence of:-

Mr. Kipkurui for the Applicant

No appearance for the Respondent