



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW NO. 4 OF 2017**

**SK (Minor suing through father and next friend)**

**JA.....APPLICANT**

**VERSUS**

**PRINCIPAL SECRETARY**

**MINISTRY OF EDUCAT..... RESPONDENT**

**RULING**

**1.** The applicant herein filed this application under a notice of motion seeking for orders that: -

i. An order of mandamus be and is hereby issued to command and compel the respondent to pay to the applicant the decretal dues, costs and interest in ELDORET CMCC NO. 516 of 2015, SK minor suing through father and next friend JA vs Hon. ATTORNEY GENERAL and EZEKIEL KIBIWOTT. The decretal sum of Kshs. 436,021/= and certificate of costs of Kshs. 101,405/= with interest at the rate of 14% per annum from 11/11/2015 till payment in full.

**2.** The application is based on the grounds that the applicant is the decree holder against the respondent in the above suit and that the respondent has willfully neglected, ignored and/or refused to pay to the applicant the decretal sum, costs and interest thereon inspite of being notified of the judgment accordingly.

**3.** The neglect and refusal by the respondent to pay has been inordinate and prejudicial to the applicant's rights to realize the fruits of his judgment as against the respondent.

**4.** The refusal also amounts to abuse of discretionary powers vested on the respondent and in blatant contravention of the tenets of natural justice. The respondent has not given any explanation, reason or justification for the refusal to pay the applicant.

**5.** The respondent opposed the application through grounds of opposition dated 4<sup>th</sup> February, 2019 that the application is defective, premature and offends the provisions of *Section 21* of the *Government Proceedings Act Cap 40* laws of Kenya.

**6.** The applicant in support of their application submitted that the judgment of the lower court was delivered on 11/2/2016. The respondents have failed, ignored and/or refused to pay the judgment sum of Kshs. 426,405 without any reason and no appeal has been preferred to date.

**7.** That this application be allowed to enable the ex-parte applicant enjoy the fruit of his judgment.

**8.** Further, that *Section 21(4)* of the *Government Proceedings Act* prohibits execution against the Government. *Section 21(1) and 21(3)* of the same *Act* provides an avenue wherein the decree holder can get compensated for damages and costs.

**9.** The ex-parte applicants have complied with all legal provisions and therefore the respondents have no legal or factual basis whatsoever to deny the applicant what is legally his by refusing to satisfy the decree, costs and interests.

**10.** The respondent submitted that the application is immature since at the time of filing, the applicant had not yet supplied the respondent with copies of certified decree, certificate of costs and certificate of order against the government.

**11.** The provisions of *Section 21* of the *Government Proceedings Act* require that the above documents be supplied by the claimant to the Attorney General or the relevant Accounting Officer for payment to take place.

12. Further, that before issuance and service of the statutory certificates, cause of action for the purpose of seeking a judicial review relief in the nature of mandamus had not accrued in this matter.

13. The respondent has as of now been informed of the pending payment and is working with the treasury to ensure that it is done.

#### ISSUES FOR DETERMINATION.

a) The main issue for determination is whether the application offends the provisions of Section 21 of the Government Proceedings Act Cap 40 Laws of Kenya.

b) Whether the applicant is entitled to the reliefs sought.

14. By virtue of Section 21(4) of the Government Proceedings Act, Cap 40 Laws of Kenya, the applicant has no other appropriate remedy except *mandamus*. That was the position held in the English case of R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J. said:

*"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. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. "*

15. It is trite law that judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In Shah vs. Attorney General (No. 3) Kampala HCCM No. 31 of 1969 [1970] EA 543 Goudie J, expressed himself, *inter alia*, as follows:

*"Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment...The foregoing may also be thought to be much in point in relation to the applicant's unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty...Since mandamus originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law...English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting "simply in his capacity of servant". There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a mandamus would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of mandamus will lie for the enforcement of the duties...With regard to the question whether mandamus will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, mandamus will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile... It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government...Whereas mandamus may be refused where there is another appropriate remedy, there is no discretion to withhold mandamus if no other remedy remains. When there is no specific remedy, the court will grant a mandamus that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a mandamus is to go, then mandamus will go...In the present case it is conceded that if mandamus was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of mandamus must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament...In the court's view the granting of mandamus against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and 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. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In mandamus cases it is recognised that when statutory duty is cast upon a Crown servant in his official*

capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata*, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for mandamus by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by mandamus on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which mandamus will not lie for this reason alone are comparatively few...Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designata* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of mandamus will issue as prayed with costs."

16. On this same issue, Githua, J in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR expressed herself as follows:

"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."

17. In this case we are dealing with the duty to pay a debt already decreed by a competent Court of law as due and payable. Section 21(1) and (2) clearly sets out the procedure to be undertaken in enforcing a judgment against a public body.

18. In this case, there is no evidence that the applicant complied with the provisions. The applicant should furnish the respondent with requisite documents to facilitate the fulfilment of the decree. The respondent have indicated that they are aware of the claim and are working on it. They need not be compelled to do so when they have demonstrated the will to pay.

19. The application lacks merit and is dismissed with no order as to costs.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 18<sup>th</sup> day of December, 2019

In the absence of:

Ms.Karanja for the for the Appellant

Ms Tigoi for the Respondent

Ms Abigael – Court Assistant