



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC JUDICIAL REVIEW APPLICATION NO. 51 OF 2017

IN THE MATTER FOR APPLICATION FOR JUDICIAL REVIEW

REPULIC..... APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL... RESPONDENT

SAMSON LUMADEDE SHIVAJI.....EX-PARTE

RULING

(Application made by ex-parte chamber summons)

1. The applicant filed an ex-parte motion seeking leave to apply for an order of mandamus to compel the respondent to release a sum of Ksh 391,698/= which leave was granted (on.....). The decretal amount was pursuant to judgment delivered in Eldoret CMCC No. 951 of 2009. Leave was granted and the applicant filed a substantive motion on 18.6.2019 seeking for the following order:

- a. The court be pleased to issue an order of mandamus to compel the respondent to release to the applicant a sum of Ksh 391,698/= being the decretal sum in Eldoret CMCC NO. 951 OF 2209, which sum is being withheld by the respondent.
- b. Costs of the application be in the cause.

2. The application is premised on grounds carried in the motion and a statement by the applicant and supported by a verifying affidavit sworn on 16.5.2017. The applicant averred that he had sued the A.G and judgment was entered in his favor on 12.2.2014 for a sum of Ksh 391,698/= plus interest, but the respondent has failed to pay the sum, yet he could not execute the decree. However, the court could compel by an order of mandamus for payment of the said sum. He deposed in his affidavit that what he averred was true and correct to his knowledge.

3. The respondent was served with the said application and filed grounds of opposition dated 9.11.2018 and filed on 14.11.2018. It was averred that the application was misconceived, untenable and bad in law and an abuse of the court process. The applicant had failed to comply with the provisions of *Section 21 of the Government Proceedings Act Cap 40 Laws of Kenya*.

4. In addition to the grounds of opposition it is alleged the applicant had failed to join the accounting officer in the Ministry as a party to the application and to indicate whether he had failed to facilitate payment. It was urged that the application be dismissed with costs.

5. In a further affidavit sworn by counsel for the applicant it was averred that a certificate of order was issued against the government and the same was attached for the court's reference.

Submissions

6. The applicant urged that he had filed a suit against the respondent at the Chief Magistrate's court vide a plaint dated 13.11.2009 seeking orders for damages and costs following an accident occasioned by their driver. Judgment was delivered on 12.2.2014 for a sum of Ksh 391,698 plus interest. The application was premised on section 21 of the government proceedings whereby the certificate of costs has to be drawn showing the amount payable. A certificate of order for costs was served upon the Attorney General on 15.9.2015 in compliance with *Section 26(2) of the Government Proceedings Act*.

7. In addition, the Attorney General was the appropriate party in the proceedings to be sued as opposed to the respondent's allegation. This is

pursuant to *Article 256(4)(b)* of the *Constitution* as read with *Section 4(2)* of the *Attorney General Act, 2012*, which provides that it can be sued against the national government. Further only the A.G can be compelled to pay pursuant to *Section 26* of the *Government Proceedings Act*, and that the accounting officer is the administrative responsible of the respondent pursuant to *Section 26(3)* of the *Government Proceedings Act* to pay after receiving the certificate of costs under *Section 26(2)*.

8. The respondent has failed to pay the decretal sum which was awarded by the lower court. In *R v. A.G & Anor ex-parte James Alfred Koroso* NRB HC JR Misc. Appl. No. 44 of 2012 the court held:

“ In the present case the ex parte applicant has no other option of realizing the fruits of his judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that has been awarded is realized. Unless something is done he will forever be left babysitting his barren decree.”

9. It was humbly urged that the respondent be compelled to pay the amount in the certificate of order for costs.

10. The respondent did not file its submissions.

Issue for determination.

11. The issues that arise are:-

- a. Whether the applicant has satisfied the conditions for issuance of a mandamus order.
- b. Whether the respondent is entitled to pay the applicant the claimed sum.

12. The importance of judicial review was emphasized in *Commissioner of Land v. Kunste Hotel Ltd [1995-1998] 1EA 1 (CAK)* which laid the principle on Judicial review, the Court of Appeal said that:-

“Judicial Review is concerned not with the private rights or the merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he has been subjected’,” as was held in Republic v. Secretary of State for Education and Science ex-parte Avon County Council [1991] 1 ALL ER 282.

13. In this case the applicant is seeking for a fair treatment. He only seeks to have the respondent pay out the said sums so that he can enjoy the fruits of his judgment, failure to which it amounts to an injustice. The only way the applicant could obtain his money is by filing such an application since execution cannot issue against the government as provided for by *Section 21(4)* of the *Government Proceedings Act* which states:-

“save as provided in this section, no execution, or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, 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.”

14. The respondent argued that it was not the right party to be sued and that the accounting officer ought to have been a party. The application herein is properly brought as provided under *Section 21(4)* of the *Government Proceedings Act*. The Attorney General is the legal representative of the government. The issue on misjoinder of parties was illustrated in *Republic Ex-parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocates & Anor (Civil Applic no. Nai 281 of 2005)* in which the Court of Appeal stated that:

“suffice it to say that a defect in 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. Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? we think not, as we find that it substantially complies with the guidelines set out by this court.”

In view of the above, the applicant is not guilty of misjoinder as alleged by the respondent.

15. The respondent also opined that the applicant did not comply with the requirement to facilitate payment of the said decree. By a further affidavit by applicant’s counsel, a certificate of order for costs was annexed. It shows the same was prepared on the 4.9.2015 and it indicated the decretal sum of Ksh 315.695/= plus accrued interest from the judgment date and costs payable of Ksh 76,003/=. The applicant complied with *Section 21* of the said *Act* which states as follows:

(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.”

16. The applicant seeks for an order of mandamus against the respondent. The respondent has a public duty to satisfy the decree, and in case of failure the court has power to compel them to do so. In *R v. Kenya National Examination Council ex-parte Gathengi & 8 Ors [1997] eKLR* the three judge bench of the Court of Appeal stated from the Halsbury’s Law of England, 4th Edn Vol. 7 pg 111 para 89 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 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...”

It is therefore outright that the Attorney General is the right body to be compelled to pay out the said sums, the applicant having complied with the procedure as stated above.

17. In addition to the above, the same sentiments were adopted in *R v. Permanent Secretary Ministry of State for Provincial Ministry of State for Provincial Administration and Internal Security & Anor ex parte Fredrick Manoah Egungza [2012] eKLR* 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.”

18. Given the foregoing, the application is merited and is hereby granted. The court also wishes that the Government where the right procedure has been complied with by a successful litigant should be paying as a matter of course and without inordinate delay to serve as a good example in meeting court orders and to save the court precious time wasted in hearing this kind of undeserved applications.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 18th day of December, 2019

In the presence of:

Mr. Kandie holding brief for Mr. Maina for the exparte Appellant

Attorney General for the Respondent absent

