REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 163 OF 2015

IN THE MATTER OF AN APPLICATION FOR LEAVE TO

APPLY FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE SPOTS ACT (ACT NO. 25 OF 2013)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

SPORTS KENYA.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

EX-PARTE

CAROLINE MUNGAI

KIMANI MAKAU

JOEL ATUTI

JARED NAMBAKA

ELIZABETH YATICH

PASCAL MWANZIA

STEPHEN KAMAU

GABRIEL MWASYA

GEORGE OBUMBA

RACHEAL NGIGI

CAXTON MWITI

ROBERT WEPUKHULU

MARY MITOEK

BONFACE KIRIMI

IKUUAH ELIAS

CHARLES THUMBI

CHARLES NGERECHI

ZACHARY ONKOBA

THOMAS KISAKA

HENRY MUKOLWE

CHRISTOPHER NYASAKA

SAMUEL WANYAMA

MICHENI BURURIA

DORRIS MTINYARI

PASCCALINE MUSAU

VANE MBOGO

RULING

Introduction

1. On 10th May, 2016, the parties to these proceedings recorded a consent which substantially settled the dispute herein. It would however seem that the said consent was never honoured by the Respondent.

2. Consequently by the a Notice of Motion dated 4th July, 2017, the applicants herein seek the following orders:

> **1) That this honourable court be pleased to issue a notice to show cause to the Director General of the 1st respondent to show cause why contempt of court proceedings should not be commenced against him.**
>
> **2) That the costs of this application be borne by the respondent.**

Applicants' Case

3. According to the applicants, sometime in the year 2015, they filed this judicial review application against the respondents seeking orders of *mandamus* to compel the respondents to comply with the requirements of the section 9(2) to the 4th Schedule of the ***Sports Act*** as per prayers 2 and 3 of their chamber summons application dated 21st May 2015 to which the 1st Respondent replied by its replying affidavit filed on 26th October 2015.

4. Subsequently, the parties agreed to negotiate and settle the matter and pursuant thereto on 10th May 2016 parties recorded a consent in court and the same was duly adopted as an order of this Court on 22nd June 2016. It was averred that it was a term of the said consent that the 1st respondent carry out suitability tests for the ex parte applicants by 31st May 2016 and indeed the suitability tests were carried out albeit belatedly. It was also a term of the consent that the 1st respondents communicate to the respective applicants the results of the suitability tests latest by 15th June 2016 and concurrently with such communication, all successful ex parte applicants be issued with appointment letters. However, when the applicants' advocates on record attended court on 11th July 2016 to confirm compliance with the consent order, the 1st respondent had not communicated the results of the suitability test to the ex parte applicants and neither had any of the ex parte applicants been issued with an appointment letter. Instead, on the said date the 1st respondent's advocate on recorded intimated to the Court that appointment letters for the 26 ex parte applicants herein were ready and all they were waiting for was funds from treasury to pay salaries. Notwithstanding the foregoing, to date, the 1st respondent has not communicated the results of the suitability test to any of the ex parte applicants and neither has any of the ex parte applicants been issued with an appointment letter over a year after the 1st respondent undertook

by way if a consent recorded in court to do so.

5. It was averred that the 1st respondent through its advocates on record have made repeated promises to the court to comply with the terms of the consent but on all occasions they have come back to Court having not done so. As a result of the 1st respondent's default above, the Court's order of 22nd June 2016 has been rendered of no effect and the 1st respondent is thus in contempt of court.

6. The applicants therefore averred that it is in the interest of justice to protect the dignity of this Court by issuing a notice to show cause to the accounting officer of the 1st respondent, the director general, to come to court and show cause why contempt of court proceedings should not be instituted against him.

1st Respondent's Case

7. In opposition to the application the Respondent filed a sworn replying affidavit by which it was averred that although it is their wish to take in the employees as contemplated in the consent order of 10th May 2016, the 1st respondent has not received any funding from the government for a very long time. In its view, there has not been satisfactory funding from the National Treasury to cater for the anticipated recruitment of regional Sports Officers and this is evident in the Government of Kenya printed estimates for Financial year 2016/2017 and 2017/2018.

8. The 1st Respondent lamented that on several occasions, it had written to the Principal Secretary seeking support from the Ministry so as to enable them comply with the consent order to which the national Treasury responded on 11th December 2017.

9. It was further disclosed that there has been reduced income generation resulting from prolonged closure of facilities for repair, maintenance and replacement to achieve fit-for-purpose condition hence the 1st respondent has not been able to generate any income from the stadia as a result thereof.

10. The 1st Respondent's position was that even if the said employees were to be taken in by the 1st respondent, there will be no money to pay their salaries, which may lead to filling of Employment Cases in the Employment and Labour Relations Courts; another liability to the 1st respondent. It was revealed currently there is lack of an organizational structure within the 1st respondent which means that the 1st respondent is operating with an old structure inherited from Sports Stadia Management Board, whose jurisdiction was confined to the management of Moi International Sports Centre, Kasarani and Nyayo Stadiums. To the 1st Respondent, finalization of the organizational structure will play a major role in giving an indication of what numbers are required to handle its projects and programmes at the grassroots and that the 1st respondent has made efforts to implement the consent order but there are other external forces that are making it difficult for the same hence its inability to comply therewith.

Determination

11. Section 30 of the ***Contempt of Court Act*** (hereinafter referred to as "the Act") provides that:

> ***(1) Where a State organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.***
>
> ***(2) No contempt of court proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation, unless the court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.***
>
> ***(3) A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General.***
>
> ***(4) If the accounting officer does not respond to the notice to show cause issued under subsection (1) within thirty days of the receipt of the notice, the court shall proceed and commence contempt of court proceedings against the accounting officer.***
>
> ***(5) Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.***
>
> ***(6) No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith.***

12. It is therefore clear that before any civil contempt of court proceedings are instituted in disobedience of a judgement, decree or order, the applicant must first move the Court to issue a notice to show cause against the accounting officer of the State organ, government department, ministry or corporation concerned. Such notice is to be served on both the accounting officer and the Attorney General. If no response to the notice is received, the Court may then at the expiry of the said thirty days' notice period proceed to commence contempt of court proceedings against the concerned accounting officer. In my view the thirty days' period is meant to enable the Attorney General to give legal advice to the entity concerned and thus avoid the necessity of contempt proceedings. Where however the entity believes that contempt of court proceedings ought not to be commenced, the entity is required to within the said period show cause, in my view preferably by way of an affidavit why the said proceedings ought not to be commenced. The Court will then determine whether cause has been shown or not based on

the material before it. Without the rules of procedure having been promulgated it is therefore my view that an application for notice ought to be accompanied by an affidavit and that application may be heard ex parte since the merits thereon may be dealt with when the cause is shown by the entity or public officer concerned.

13. Where no cause is shown and the contempt of court proceedings are commenced, the Court can however only find that officer guilty of contempt upon satisfactory proof that the said contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of the accounting officer. Such officer will then be liable to a fine not exceeding two hundred thousand shillings.

14. With respect to the contempt of court proceedings subsequent to the issuance of the notice to show cause, section 7(3) of the said Act provides that:

> ***"…any proceedings to try an offence of contempt of court provided for under any other written law shall not take away the right of any person to a fair trial and fair administrative action in accordance with Articles 47 and 50 of the Constitution."***

15. It follows that the rules of natural justice ought to be adhered to in respect of the proceedings subsequent to the notice to show cause. In this respect it is expected that the application seeking orders to commit for contempt ought to be served personally upon the person sought to be committed.

16. In this case, the only reason advanced by the 1st Respondent for failing to comply with the Court order is lack of funds. It is however not indicated when, if at all, such funds will be available. That the accounting officer is legally bound to satisfy a decree or an order of a Court of competent jurisdiction was clearly appreciated by **Goudie, J**, in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where he 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 designate* 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."**

17. In this case there is no doubt that the person who is legally bound to ensure that the Court order is complied with is the Director General of the 1st Respondent.

18. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**, this Court expressed itself as hereunder:

"…the present case the ex parte applicant has no other option of realising 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 realised. Unless something is done he will forever be left baby sitting 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. The fact that the Accounting Officer 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 Public Officer in his official capacity and the duty is owed not to the State 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. 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. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus,* his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are nolonger execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."

19. As regards lack of funds, **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:

"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*." [Emphasis mine].

20. I associate with the said decision and it is therefore my view that settlement of decretal sum by the Government whether National or County does not necessarily depend on the availability of funds. This position was appreciated by this Court in **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012** in which this Court pronounced itself as follows:

"I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein."

21. In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations. In other words financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle the same. In this case, the 1st Respondent may only be indulged if it presents a comprehensive reasonable plan of action on how it intends to comply with the Court order since compliance therewith is a must and there is no other option.

22. In this case no such plan has been placed before this Court and this Court cannot simply ignore its order on the basis that due to lack of finances earmarked towards the implementation of the order, the same cannot be implemented. It is the duty of the Government to allocate funds in every financial year in order to meet its obligations which obligations include compliance with Court orders.

23. In the premises I hereby direct that a Notice to Show Cause do issue to the 1st Respondent's Director General to show cause why contempt of court proceedings cannot be commenced against them. The said Notice is to be served on the Attorney General as well.

24. The costs of this application are awarded to the ex parte applicant to be borne by the 1st Respondent.

25. Orders accordingly.

Dated at Nairobi this 16th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kimaru for Mr Thangei for the 1st Respondent

CA Ooko