



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 268 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

FOR ORDERS OF MANDAMUS UNDER ARTICLE 47 OF THE

CONSTITUTION, SECTIONS 8 & 9 OF THE LAW REFORM

ACT (CAP 26) AND ORDER 53 OF THE CIVIL

PROCEDURE RULES

AND

IN THE MATTER OF ARTICLES 201(D) AND 221 OF THE CONSTITUTION

AND

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT

AND

IN THE MATTER OF THE GOVERNMENT PROCEEDINGS ACT

AND

IN THE MATTER OF THE CONTEMPT OF COURT ACT, 2016

AND

IN THE MATTER OF UNSATISFIED JUDGMENT DEBT AGAINST

THE COMMISSIONER OF POLICE AND THE ATTORNEY GENERAL

IN THE SUM OF KSHS 51,261,031/= TOGETHER WITH INTEREST ON

THE DECRETAL SUM AT 12% p.a ARISING FROM THE JUDGMENT

OF THIS COURT IN PETITION NO 822 OF 2008 DELIVERED

ON 31ST JULY 2013 AND THE SUBSEQUENT FINAL DECREE

AND CERTIFICATE OR ORDER AGAINST THE

GOVERNMENT ISSUED THEREON

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

**THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF
INTERIOR, MINISTRY OF INTERIOR & COORDINATIO
OF NATIONAL GOVERNMENT.....1ST RESPONDENT**

**THE PRINCIPAL SECRETARY,
MINISTRY OF THE NATIONAL TREASURY....2ND RESPONDENT**

SALIM AWADH SALIM

SAIDI HAMISI MOHAMED

BASHIR HUSSEIN CHIRAQ

MOHAMED SADER

HASSAN SHABANI MWAZUME

SWALEH ALI TUNZA

ABDALLAH HALFAN TONDWE

KASIM MUSA MWARUSI

ALI MUSA MWARUSI

FATMA AHMED CHANDE

MUHIBITABO CLEMENT IBRAHIM

MOHAMED ABUSHIR SALIM.....EX PARTE

JUDGEMENT

1. By a Notice of Motion dated 16th June, 2017, the applicants herein seek the following orders:

1. That an order of mandamus do issue against the respondents jointly and severally compelling the respondents jointly and/or severally to pay to the applicants the judgment debt herein in the sum of Kshs. 51,261,031/= together with all accrued interest on the decretal sum of damages at 12% per annum arising from the judgment of this court in petition no 822 of 2008 (Salimg Awadh Salim & 10 Others –vrs The Commissioner of Police & 3 Others delivered on 21st July 2013;

2. That in default of compliance with the order of Mandamus and failure to pay the judgment debt in the sum of Kshs 51,261,031/- together with all accrued interest amounts at 12% per annum the order of mandamus be deemed as sufficient notice under Section 30(1) of the Contempt of Court Act, 2016 to the persons holding the offices of the 1st and the 2nd respondents requiring them to show cause why contempt of court proceedings should not be commenced against them thirty (30) days after service of the orders of mandamus;

3. That in default of compliance with the order of mandamus and failure to pay the judgment debt in the sum of Kshs 51,385,795/- together with all interest amounts accrued at 12% per annum thirty (30) days after service and failing to show sufficient cause for non-compliance with the orders of mandamus the ex parte applicants be a liberty yo commence contempt of court proceedings against the persons holding the offices of the 1st respondent and 2nd respondents for them to be personally summoned to court, proceeded against the committed to civil jail for contempt of this honourable court;

4. That the respondents be condemned to bear the costs of this application.

2. According to the applicants, the 1st to 8th applicants are citizens of Kenya while the 9th to 11th applicants are foreign nationals being Tanzanian (9th and 11th applicants) and Rwandese (10th applicant).

3. They averred that they were all victims of arbitrary arrest, unlawful and unconstitutional *incommunicado* detention without trial in Kenya, torture, cruel, inhuman and degrading treatment and/or punishment in Kenya and subsequent illegal, unlawful, extrajudicial and unconstitutional forcible removal and transfer from Kenya to Ethiopia via Somalia in *extra-ordinary rendition* and unlawful, illegal and unconstitutional *incommunicado* detention and torture, cruel, inhuman and degrading treatment and/or punishment in Somalia and Ethiopia, between January 2007 and October 2008.

4. Arising from the aforesaid actions, the applicants sued the Commissioner of Police, the Hon. Attorney General and two private airline companies for the violations of their rights vide the said High Court (Nairobi) Petition No. 822 of 2008 (Salim Awadh Salim & 10 Others vs. The Commissioner of Police & 3 Others) and following a full contested hearing they were successful against the Commissioner of Police and the Hon. Attorney General and were awarded, *inter alia*, compensation in damages in the total sum of Kshs 34,500,000/- together with interest at court rates from the date of judgment on 31st July 2013 and costs of the petition. As a result, on 24th October 2014 this court issued a duly certified decree of the judgment in the said petition.

5. It was further averred that on 18th December 2014 after a full hearing of the Bill of Costs party and party costs in the said petition were taxed in the total sum of 949,632/- in favour of the applicants and a certificate of taxation duly issued on 16th February 2015 and on 24th March 2014 this court issued a certificate of order against the government in the said petition in the total sum of Kshs 42,221,084/- inclusive of the decretal sum, interest on the decretal sum at the time and party and party costs.

6. According to the applicants, the said certified decree, certificate of taxation and certification of order against the government in the said petition and a request for settlement were subsequently duly served on the named respondents Principal Secretary, Department of Interior, Ministry of Interior and Coordination of the National Government and the Principal Secretary, Ministry of Finance and the National Treasury and, the Hon. Attorney General who all duly acknowledged receipt.

7. The applicants disclosed that their advocates on record have made numerous subsequent follow-ups for settlement of the judgment debt herein but have all been met with resolute muteness by the named respondents and the Hon. Attorney General, yet to date no appeal has been filed against the judgment in the said petition and there are no orders of stay of execution.

8. The applicants averred, based on legal advice, that under Section 21(3) of the **Government Proceedings Act** (Cap 40) it is the statutory duty of the named respondents to pay the judgment debt herein. However, as a direct consequence of the respondents' continued collective total disregard, neglect, disobedience and violation of the said judgment and final orders of this court in failing to settle the judgment debt the judgment debt has escalated on account of interest and it now stands in the sum of Kenya Shillings Fifty One Million Two Hundred and Sixty One Thousand and Thirty One (Kshs. 51,261,031/-) as at 26th May 2017 and continues to accrue interest until the date it will be paid.

9. The applicants averred that to date the 2nd respondent never included the sums of the judgment debt herein in any of the annual national budgets including the current national budget for the Financial Year 2017/2018 and that the said disregard, neglect, disobedience and violation of the said judgment and final orders of this court resulting in the escalation of the judgment debt on account of interest is a violation of the constitutional values of management of public finance under Article 201 of the constitution that enjoins responsible management and use of public finance. The same, according to them, is also a violation of the constitutional values of the rule of law, equality before the law and human dignity which are all foundational pillars of our constitutional democracy. It was asserted that the continued violation of the constitutional values of management of public finance, the rule of law, equality before the law and human dignity is a grave and present danger to the constitutional order of the Republic of Kenya.

10. The applicants' case was that unless this Court intervenes and compels the respondents to obey the said final orders of this Court by immediate settlement of the judgment debt herein the respondents will continue with the disobedience of the said orders and thus corrode and erode the dignity of this court and the confidence of the applicants and the general public in the efficiency of the judicial process of resolving disputes in Kenya.

11. The application was not opposed by the Respondents.

12. I have considered the issues raised in this application.

13. 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.

14. Section 21 (3) of the said Act on the other hand provides:

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.

15. Dealing with the said provisions Githua, J in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoh 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].

16. The effect of grant of an order of *mandamus* was considered *in extenso* in in Shah vs. Attorney General (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543 where 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.” [Emphasis added].

17. 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:

“...in 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 no longer 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.”

18. 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 ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996, the Court of Appeal cited, with approval, *Halsbury’s Law of England*, 4th Edn. Vol. 7 p. 111 para 89 thus:

“The order of *mandamus* is of 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."...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."

19. In this case, the Applicants herein have moved this Court to compel the satisfaction of a judgement already decreed in their favour by a competent Court of law. The Respondents have not given any reason why the decree has not been satisfied more than three years down the line. If the Court were to decline to grant *mandamus*, applicants would be left without an effective remedy despite holding a decree.

20. I associate myself with the position adopted by **Majanja, J** in **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006** that:

"...a decree holder's right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant's right of access to justice protected under Article 48 of the Constitution."

Order

21. In the premises I hereby issue an order of *mandamus* compelling the Principal Secretary, Ministry of Interior & Coordination of National Governance to pay to the applicants the judgment debt herein in the sum of Kshs. 51,261,031/= together with all accrued interest on the decretal sum of damages at 12% per annum arising from the judgment of this court in petition no 822 of 2008 (Salimg Awadh Salim & 10 Others –vrs The Commissioner of Police & 3 Others delivered on 21st July 2013.

22. The other prayers are however premature at this stage.

23. The applicants will have half the costs of these proceedings.

24. It is so ordered.

Dated at Nairobi this 9th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Gikonyo for Mr Mbugua Mureithi for the ex parte applicant

Mr Sekwe for the Respondent

CA Ooko