



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 518 OF 2016

IN THE MATTER OF AN APPLICATION BY NANCY WAIRIMU KIRUNDI AND KAMUNYU KIRUNDI FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AGAINST THE HONOURABLE ATTORNEY GENERAL

AND

IN THE MATTER OF AN APPLICATION BY NANCY WAIRIMU KIRUNDI AND KAMUNYU KIRUNDI FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AGAINST THE PRINCIPAL SECRETARY DEPARTMENT OF PUBLIC WORKS, MINISTRY OF LAND, HOUSING AND URBAN DEVELOPMENT

AND

IN THE MATTER OF THE GOVERNMENT PROCEEDINGS ACT, CAP 40 LAWS OF KENYA

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT NAIROBI, MILIMANI COMMERCIAL COURTS, CIVIL SUIT NO. 1619 OF 2003

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT AND ARTICLE 23 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES [2010] AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES OF THE LAW.

REPUBLIC..... APPLICANT

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY

DEPARTMENT OF PUBLIC WORKS2ND RESPONDENT

EX PARTE

NANCY WAIRIMU KIRUNDI (suing as the legal administrator

Of the Estate of Emmanuel Kirundi Kamunyu (deceased)

JUDGMENT

1. The ex parte applicant Nancy Wairimu Kirundi (suing as the legal administrator of the Estate of Emmanuel Kirundi Kamunyu (deceased) seeks from this court, vide a notice of motion dated 22nd February 2017 as amended, orders of mandamus directed at the respondent Accounting Officer Department of Public Works in the Ministry of Lands Housing and Urban Development, to pay to her the sum of kshs 947,980 being the decretal sum in Chief Magistrate CC No. 1619 of 2003 at Nairobi together with kshs 111,035 being certified costs, interest of 12% per annum from 24th January, 2012 until payment in full.
2. Further, that the Accounting Officer of the said Department do comply and certify the decree in 14 days from date of service of the order and that in default, notice to show cause do issue against the said respondent why they should not be cited for contempt of court.
3. The applicant also sought for costs of these proceedings and any other further reliefs that the court may deem just and expedient to grant.
4. The application is supported by the affidavit sworn by Nancy Wairimu Kirundi and the statutory statement filed all accompanying the chamber summons for leave dated 7th October 2016.
5. The respondents appeared in this matter represented by the Honourable Attorney General and even conceded to the application for leave to apply for mandamus being granted on 13th December 2016 but they never filed any response in opposition to the substantive notice of motion subject of this judgment.
6. The ex parte applicant's case is that she is in possession of a valid decree of the court vide Milimani Nairobi CM CC 1619/2003 wherein she sued the 1st respondent for damages arising from a traffic accident which occurred on 30th March 1999 involving the deceased Emanuel Kirundi Kamunyu who was lawfully travelling as a fare paying passenger aboard motor vehicle registration No. KAE 674 W when the said motor vehicle collided with Motor vehicle GK W920 occasioning to the deceased fatal injuries.
7. That the driver of the GK motor vehicle was convicted and fined for causing death by dangerous driving and the applicant with another, instituted civil suit CMCC 1619/2003 vide plaint dated 21st February 2003 and after the full hearing before Honourable B.K. Ndungu (SPM) at Milimani Commercial Courts, Nairobi, the 1st defendant on behalf of the Ministry of Public Works (as it was then) was found vicariously 100% liable in negligence, with the driver of the aforesaid vehicle.
8. The trial court then on 18th May 2012 delivered its judgment in favour of the plaintiffs awarding kshs 2,025,394 plus costs of shs 111,035 which were assessed and on 30th April 2013 the certificate of order against the government was issued in accordance with the law and a decree drawn. That despite numerous requests to the respondents to satisfy decree, there has been no response hence these proceedings.
9. In the submissions filed on 20th September 2017 by the applicant, it was submitted that mandamus issues pursuant to Section 21(4) of the Government Proceedings Act Cap 40 Laws of Kenya since the law prohibits execution against the Government.
10. Further, that it is the obligation of the Government to settle its liabilities as decreed by the court. Reliance was placed on **Halsbury's Laws of England 3rd Edition VOL 11 page 84 paragraph 159** on the elements of mandamus, and a submission made that the applicant, in view of Section 21(4) of the Government Proceedings Act, is left with no other remedy but to apply for mandamus to compel settlement of a decree issued by a court of competent jurisdiction.
11. Reliance was placed on **Shah vs Attorney General No. 3 Kampala HC Miscellaneous No. 31/1969** cited in **Republic vs Dunsheath ex parte Meredith [1950] 2 ALL ER 741 and Yusuf Mutinda v Zakariya Mugunyasoka[1957] EA 393** where it was held that mandamus is not a writ of right but will be granted if the duty is in the nature of a public duty and especially if it affects the rights of an individual, provided there is no more appropriate remedy. Further that the person or authority to whom it is issued must be either under a statutory or legal duty to do something or not to do something; and the duty must of an imperative nature.
12. The applicant urged the court to exercise its discretion to grant the order sought and relied on Section 21 of the Government Proceedings Act.
13. I have carefully considered the ex parte applicant's motion as supported by the verifying affidavit and statutory statement.
14. I have also considered the elaborate submissions and the documents annexed to the chamber summons for leave which include decree and certificate of order against the Government and the numerous requests for settlement of this matter and decree in the Chief Magistrate's Court where damages were awarded to the ex parte applicant herein in a fatal accident claim.
15. I have also considered the fact that Mr Munene counsel for the respondents did intimate to court that they had a letter written to the Attorney General by the 2nd respondent confirming that money was being factored in the 2017/2018 budget to settle the subject decree and he even asked for a mention in November 2017. This was on 20th September 2017 and come 13th November 2017 when this matter was mentioned, it was stated by Miss Chimau for the respondents that they had addressed the Ministry on the settlement but that the budget had already been drawn and they sought more time in the new term to know the position of payment.
16. This judgment is being delivered in the new term as requested by the respondents. As correctly submitted by the applicant's counsel, the law under Section 21(4) of the Government Proceedings Act Cap 40 of Kenya prohibits execution against the Government. But the law does not leave the successful decree holder against the government empty handed with a barren decree. The applicant is given an opportunity to approach the court by way of Judicial Review to seek for a remedy of mandamus, to compel settlement of a decree, for as long as a certificate of Order Against the Government has been issued and served upon the Attorney General or the Accounting Officer of the relevant Ministry against whom the decree was issued. This is the spirit and letter of Section 21(1) (2) (3) of the Government

Proceedings Act.

17. In this case, there is sufficient evidence that there is a valid decree of the court in CMCC No.1619/2003 and certificate of Order Against the Government was duly issued and served upon the respondents and demands for settlement made.

18. The respondents admittedly, have budgeted for the said decree and so what remains is disbursement, as the accounting officer is under a statutory duty to settle decree of a court of competent jurisdiction.

19. Accordingly, I find that the applicant has demonstrated that she is entitled to the Judicial Review orders. I issue mandamus directed at the respondent Accounting Officer Department of Public Works in the Ministry of Lands Housing and Urban Development, to pay to the applicant the sum of kshs 947,980 being the decretal sum in Chief Magistrate CC No. 1619 of 2003 at Nairobi together with kshs 111,035 being certified costs, interest of 12% per annum from 24th January, 2012 until payment in full.

20. I also award her costs of these proceedings.

21. I decline prayers No. 2 and 3 as they are consequential orders which have a totally different procedure applicable, should the mandamus hereto issued be disobeyed and are subject to the provisions of Section 30 of the Contempt of Court Act. Prayer No. 5 is not specific. It is therefore declined. Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 8th day of March, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Mr Githuka h/b for Mr Ndirangu for the exparte applicant

N/A for the Respondents [served]

CA: Kombo