



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 128 OF 2017

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY, MINISTRY OF

PUBLIC SERVICE, YOUTH & GENDER AFFAIRS.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

EX PARTE :

HENRY MUSEMATE MURWA

JUDGMENT

The Application

1. The *ex parte* Applicant herein is Henry Musemate Murwa, and he filed a suit in the High Court on 17th March 2008 being H.C.C.C. No. 94 of 2008, wherein he sued the Attorney General, the 2nd Respondent herein, claiming damages for unlawful dismissal from employment. The said suit was later transferred to the Industrial Court of Kenya as Cause No. 564 of 2011. Judgment was delivered in the said cause in favour of the Applicant on 17th January 2012, for damages in the sum of Kshs 6,000,000/= .

2. The Applicant stated that after the Respondents herein failed and/or neglected to satisfy the Court decree, he filed the present application after being granted leave. The application is by way of a Notice of Motion dated 4th April 2017, wherein he is seeking the following orders:

(a) **The Court be pleased to grant the Applicant an Order of Mandamus directing the Principal Secretary, Ministry Of Public Service Youth & Gender Affairs and the Attorney General to comply with and satisfy the Court Decree and /or Judgement in Cause No.564 of 2011 in the sum of ksh 8,483 338/= compromising a Principal sum of Kshs 6,000,000/= with costs taxed at Kshs 1,033,338/= and interest to March 2017 in the sums of Kshs 1,450,000**

(b) **The costs of the application be borne by the Respondents.**

3. The 1st Respondent is the Principal Secretary and Accounting Officer in the Ministry of State for Public Service and is one of the Respondents the orders of mandamus are directed to, in addition to the Attorney General, to comply and satisfy the court decree in Cause No. 564 of 2011.

4. The application is supported by a statement of facts and verifying affidavit dated 6th March 2017, which Ms. Guserwa, the counsel for the Applicant, wholly relied upon at the hearing of the application on 9th July 2018. The Respondents did not file any response to the application, and the Respondents' counsel, Mr. Munene, informed the court that they were willing to pay the money and that they had requested the funds from the Ministry for Public Service and Youth Affairs. After being indulged by the court on several occasions, and with no payment forthcoming, Ms. Guserwa consequently sought the order of mandamus, and indicated that the said order would facilitate the payment.

The Determination

5. The Court of Appeal discussed the nature of the remedy of mandamus that is sought by the Applicant at length in its decision in **Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others, [1997] eKLR** as follows:

““The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“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..... .”

6. The issues that require to be determined therefore are firstly, whether the Respondents are under a public duty and obligation to satisfy the decree and orders issued in favour of the Applicant, and secondly, if so, whether the Applicant is entitled to the relief he seeks.

7. The Respondents are departments of Government. Section 21 of the Government Proceedings Act provides as follows as regards the requirements to be met in the enforcement of orders as against Government in civil proceedings:

“(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:

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.

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, 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.”

8. Execution proceedings against a government or public authority can thus only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body. This was also the holding in Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) where J. Githua held 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.”

9. In the present application, the 1st Respondent is the accounting officer in the Government ministry that is in charge of Public Service, while the Attorney General was the Respondent in Cause 564 of 2011, and was the party against whom judgment was entered. The amount due from the Respondents has not been disputed, and the Applicant in this respect annexed copies of the judgment and decree awarded in Cause No. 564 of 2011.

10. The Applicant also contended that he had made demands for payment of the costs, and annexed a copy of a letter dated 9th November 2015 forwarding the said judgment and decree to the Attorney General, with a stamp of the State Law Office acknowledging receipt. A certificate of taxation issued on 2nd March 2017 for the sum of Kshs 1,003,338/= was also annexed.

11. It is notable in this regard that the procedure in section 21 of the Government Proceedings Act is not meant to relieve the Respondents from meeting their legal and statutory obligation to satisfy decrees and orders of the Court, and its main purpose is to notify the Respondents that the debt is due to facilitate payment. In this regard, the Applicant's letter dated 9th November 2015 indicated that the Attorney General would be served with the Applicant's Bill of Costs at a later date. Under section 21, service of a certificate of costs on the Attorney General is discretionary and upon directions of the Court. The key document that is required to be served on the Attorney General is the order and decree certifying the amount payable, which was done in this case.

12. This Court therefore finds that as judgment was already entered in favour of the Applicant with respect to the demanded decretal amount and costs, and the procedure stated in section 21 of the Government Proceedings Act has largely been followed, there is a duty upon the Respondents to pay a debt already decreed by a competent Court of law to be due and payable by them. The only amount due that needs to be clarified is of the interest that is to be paid by the Respondents, which the Court in Cause No. 564 of 2011 indicated in its judgment would be “interest due from the date of judgment. Thus, the interest payable is simple interest at the court rate of 12%, and from the date of judgment in Cause No. 564 of 2011.

13. In the premises, I find that the Applicant's Notice of Motion dated 4th April 2017 is merited. I accordingly grant the following orders:

(a) An order of mandamus directed to the Principal Secretary, Ministry of Public Service Youth & Gender Affairs and the Attorney General, to comply and pay the Applicant herein, Henry Musemate Murwa, the sum of Kshs 7,033 338/=-, comprising of the principal sum of Kshs 6,000,000/= and costs taxed at Kshs 1,033,338/= which were awarded in Cause No.564 of 2011, and interest at the rate of 12% per annum from the date of judgment in Cause No.564 of 2011 until payment in full.

(b) The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 4th April 2017 of Kshs 50,000/=.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF JULY 2018

P. NYAMWEYA

JUDGE