



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
JUDICIAL REVIEW NO. 24 OF 2016
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS
BETWEEN
REPUBLIC.....APPLICANT
VERSUS
THE DIRECTOR OF PUBLIC
PROSECUTIONS.....1ST RESPONDENT
INSPECTOR GENERAL OF
POLICE.....2ND RESPONDENT
CABINET SECRETARY MINISTRY
OF INTERIOR & COORDINATION OF
NATIONAL GOVERNMENT.....3RD RESPONDENT
ERNEST AMUGUNI SIVA.....SUBJECT

RULING

1. By notice of motion dated 31st August 2016 the *ex parte* applicant sought and obtained leave of the court to institute judicial review proceedings in the nature of *mandamus* to compel the respondents to settle the decree in Nakuru Constitutional Miscellaneous No. 31 of 2013. Pursuant to the leave granted by the court **Ndung'u J** the applicants filed the present chamber summons dated 15/9/2016.
2. The background to the application is contained in the statement of facts and the verifying affidavit sworn by the applicant dated 31/8/2016. The applicant had vide **Constitutional Petition Misc. No. 31 of 2013** sought orders requiring the Provincial Criminal Investigation Officer (PCIO) to produce the subject one Moses Ndeda in court, and; requiring the PCIO and the Officer Commanding Station (OCS) Bondeni and Central Police Stations to provide the court all documents and warrants which authorized the arrest and detention of the subject. In the alternative, the applicant sought a declaration that the arrest and detention of the subject was unconstitutional. He sought orders that the State does compensate the subject and his family general damages for wrongful confinement, mental torture, and suffering and injury.
3. The *habeas corpus* application was allowed by the court **Emukule J** (as he then was) vide a ruling dated 26/11/2013 when the court also allowed the applicant to pursue compensation in default. In a judgment dated 10/10/2014, the court awarded damages of Kshs. 1,800,000 to the petitioner and the estate of the subject. It is this compensation that the *ex parte* applicant seeks to enforce by an order of mandamus.
4. In the present application the Director of Public Prosecution (DPP), the Inspector General of Police, and Cabinet Secretary in the Ministry of Interior Co-ordination of National Government are named as the 1st, 2nd and 3rd respondents respectively. It is only the 1st respondent who entered appearance upon being served the application. The 2nd and 3rd Respondents participated only after being given time extension and even then they did not file any sworn affidavits. Their counsel filed written submissions which they subsequently highlighted.

5. I have carefully considered the application and submissions dated 17/3/2017 filed by the applicant; submissions dated 3/4/2017 by the 1st Respondent (DPP) and submissions dated 28/6/2017 filed on behalf of the 2nd and 3rd Respondents being the Inspector General of Police and Cabinet Secretary, Ministry of Interior and Co-ordination of National Government respectively.

6. It is not in doubt that the *ex parte* applicant holds judgment and decree against the Government or a State Agency. It is not clear however which agency should meet the obligation. As earlier stated this matter originated from a *habeas corpus* application by the *ex parte* applicant and a Constitutional petition seeking damages against the Government for the loss of his son who was believed to have disappeared in the hands of the police. DPP was named in the petition as the respondent. The resultant decree and certificate thereof was drawn against the DPP. In subsequent proceedings the DPP sought a review of the judgment and decree vide an *ex parte* application dated 24/8/2015 in Constitutional Misc. Petition No.31 of 2013 seeking to set aside the award.

7. It was the DPP's argument in the said application that the correct party that ought to have been sued on behalf of the Kenya Police was the Attorney General who was vested with the duty to act for the Government in civil claims. The court (**Odero J**) dismissed the review application on the reasoning that the issues raised in the application were in the purview of appeal not review.

8. The applicant submits in the present application that the DPP was the right party to satisfy the decree. According to the applicant, the Government agency with power of criminal prosecution is the DPP and that the Attorney General does not represent the state in criminal proceedings. He contends that the powers granted to the DPP by Article 157 (4) of the Constitution to direct the Inspector General of Police would in the instant case afford him power to direct the Inspector General to pay the compensation in question.

9. The 2nd and 3rd respondents, Attorney General and Cabinet Secretary Interior argue that they cannot satisfy a decree arising from proceedings that they were not party to and that an order of *mandamus* cannot be directed at them.

10. The only issue in this application is whether the order of *mandamus* is merited and to whom it should be directed.

11. In **Republic vs Kenya National Examination Council ex parte Gathengi and 8 others Civil Appeal No. 234 of 1996** the Court of Appeal stated (citing Halsbury's Law of England 4th Edition Vol. 7 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 is enforcing that right and that it may issue in cases where although there is an alternative legal remedy yet the mode of redress is less, convenient, beneficial and effectual.”

12. It is not in doubt that the *ex parte* applicant holds a valid decree which has neither been appealed nor set aside. While the decree as drawn names the DPP as the respondent, I observe as did **Odero J** in the review application that the order for payment of damages was directed to the Kenya Police and not the DPP. The judgment states at paragraph 27 that,

“There shall therefore issue a declaration that—

(a)...

(b) The state, through the Kenya Police do compensate the subject's estate and family members in damages for wrongful confinement, mental torture...”

13. I take judicial notice that in the current organization of Government, the Kenya Police Service headed by the Inspector General of Police is domiciled in the Ministry of Interior and Co-ordination of National Government. It is true as submitted by the State Counsel representing the 2nd and 3rd respondents that both the Inspector General of Police and the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government were not parties to the original Petition No. 31 of 2013. However as is clear from the judgment it is the officers of the Kenya Police Service who were found culpable. I must however correct the notion by the applicant that the DPP has power under the Constitution to direct the Inspector General of Police to pay damages. The power under Article 157 (4) of the Constitution is limited to investigating any information and allegation of criminal conduct.

14. The Attorney General has correctly submitted that it was not a party to the petition. It has also gone further to state that it has no duty to satisfy the decree. Article 156 (4) of the Constitution makes the AG the legal advisor to the Government and clearly states that it shall represent the National Government in court in legal proceedings other than criminal proceedings.

15. In my view the issue of joinder or non-joinder of the Attorney General in Petition No. 31 of 2013 cannot be used at the present stage to deny the Applicant relief that has already been granted by the court. The National Government must be seen as one executing its functions through different state agencies and departments. The justice of this case demands that the Applicant is not tossed from one government department to another seeking satisfaction of an award against government that has already been awarded by the court. Indeed the Respondents are not denying that the Applicant holds a valid decree and certificate and that the government ought to pay.

16. The procedure for getting a decree satisfied by Government is found in **Section 21** of the **Government Proceedings Act**. It provides that a successful party should obtain a certificate from the proper officer of the court. Under Section 21 (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 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...

17. In **Republic Vs. Permanent Secretary, Ministry for State for Provincial Administration and Internal Security (2012) eKLR** cited in **Seventeenth Enterprises Limited –Vs- Cabinet Secretary for Ministry of Interior and Co-ordination of National Government & 2 others Ex parte Fredrick Manoah Egunza(2016) eKLR, Githua J** expressed herself on enforcement of money decrees against the government thus:-

“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 to pay the sum specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”

18. I am fully persuaded on the relevant procedure by the authority above. From the foregoing, I am satisfied that the order of mandamus is merited. Owing to the peculiar circumstances of this case, the order of mandamus be and is hereby issued directing the Attorney General and the Accounting Officer, Ministry of Interior and Coordination of National Government to satisfy the decree in this case.

Orders accordingly.

Judgement signed

R. LAGAT KORIR

JUDGE

Judgment delivered, dated and counter signed at Nakuru this 26th day of September 2018

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JANET MULWA

JUDGE

In the presence of:

..... Court clerk

..... For the Applicant

..... For the Respondents