



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 150 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF EXECUTIVE OFFICER, INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....RESPONDENT

EX PARTE:

DR.PATRICK MWEU MUSIMBA

JUDGMENT

The Application

1. The Ex Parte Applicant herein, **Dr Patrick Mweu Musimba, (hereinafter “the Applicant”)**, was a Respondent in **Machakos Election Petition Numbers 1 & 7 of 2013 - Richard Kalembe Ndile & Caroline Mwelu Mwandiku vs Patrick Mweu Musimba & Two Others**, in which judgment was delivered on 13th August 2013. The Respondent on the other hand is the Chief Executive Officer of the Independent Electoral and Boundaries Commission, which is a Constitutional Commission established under Article 88 of the Constitution.
2. The Applicant filed a Notice of Motion dated 12th June 2018, in which he seeks that an order of mandamus do issue compelling the Chief Executive Officer of the independent Electoral and Boundaries Commission to pay to him Kshs 1,500,000/= as costs ordered and taxed in Machakos High Court Election Petitions number 1 and 7 of 2013. Further, that the Respondent do pay the costs of this application.
3. The Application is supported by the grounds on its face and the Supporting Affidavit of Patrick Mweu Musimba sworn on the 22nd June 2018, and a Further Affidavit sworn by his Advocate, Kennedy Wachira Mari, on 8th August 2018. The Applicant also relied on the statutory statement dated 3rd April 2018 and verifying affidavit he swore on 10th April 2018, that accompanied his Chamber Summons application for leave to commence judicial review proceedings.
4. It is the Applicant’s case that the Court in **Machakos Election Petition Numbers 1 & 7 of 2013** ordered the Respondent to pay him costs which were taxed at Kshs 1,500,000/=, but which the Respondent has failed to pay. That it would therefore be just in the circumstances for the court to issue in the order of mandamus against the Respondent to compel payment of the monies due to him.
5. The Applicant also averred that after the costs were certified after taxation, his Advocates wrote to the Respondent’s Advocates by a letter received by the said Advocates on 10th June 2016, forwarding the certificate of costs and the taxing master’s ruling, and that the Respondent’s Advocates responded by a letter dated 8th July 2014 enclosing a letter dated 25th June 2014 from the Respondent, in which it was seeking time to source for funds to pay the costs.
6. The Applicant’s Advocate, Wachira Ndungu & Co. Advocates, filed submissions on the application dated 8th August 2018, wherein he urged that after the taxation of their costs, the certificate of costs was issued on 17/05/2014, and that no reference was preferred against the award. Further, that the certificate of costs was served upon the Respondent, and acknowledged through its letter dated 25/6/2014, and that the Respondent sought time to source funds to settle the costs but did not make the payments.
7. The Applicant submitted that Article 88 of the Constitution establishes the Respondent’s Commission, while section 13(1) of the

Independent Electoral and Boundaries Commission Act establishes it as a body corporate with perpetual succession and common seal, with the capacity to sue and be sued. Further, that section 13(2) of the Act subjects execution proceedings against the Respondent's Commission to the Government Proceedings Act. Therefore it's trite that execution proceedings against the Government are by way mandamus against the accounting officer of the Government department liable.

8. According to the Applicant, the corporate nature of the Respondent Commission means that execution against the Respondent is not akin to execution against a Government department, which would involve issuance of a certificate of order against the Government to the office of the Attorney General, or require it to be sued through the Attorney General. Further, that section 10(7) of the Independent Electoral and Boundaries Commission Act makes the Secretary the Chief Executive Officer to the Respondent's Commission, and paragraph (c) thereof makes him the accounting officer of the commission, and therefore all execution process should be targeted against him and not the Attorney General.

9. Based on the foregoing the Applicant submitted that there was no need to issue the Attorney General or obtain any certificate of order against Government, hence his application is not fatal. He also alleged that the Respondent's replying affidavit is defective as it does not depose authority of the Respondent to swear the affidavit.

The Response

10. The Application was opposed by Ann M Kiusya, the Respondent's advocate in **Machakos Election Petition Numbers 1 of 2013**, through a replying affidavit she swore on 2nd July 2018. The deponent described the application as unmeritorious and time barred, as it should have been filed within six months after the decision was made, and therefore should be dismissed as it has been brought after inordinate delay.

11. Further, that the application is not sustainable, as it has been filed four and half years later, and the Applicant did not take steps to realise the costs in time and therefore the same cannot stand. She further emphasised that the same cannot stand as the Respondent was not served with the decree and certificate of costs immediately after judgement was delivered in 2013. She termed as fatal the Applicant's failure to attach decree, certificate of costs, demand notice to the Attorney General and the copy of certificate of order against the Government. Therefore, that the application should be dismissed with costs to the Respondent.

12. Anne Kiusya & Company Advocates filed submissions for the Respondent dated 24th August 2018, wherein they reiterated that the orders sought in application cannot be granted as the application was filed belatedly. They pointed out that the bill of costs was taxed and the certificate of costs issued on the 17/05/2014, and that the application has been filed five years down the line.

13. The Respondent relied on the case of **Kenya National Examinations Council Vs Republic Ex-parte Geoffrey Gathenji Njoroge & Others, (1997) eKLR** for the scope of judicial review orders, and submitted that the Applicant did not serve the notice of intention to institute this judicial review application on the Respondent as required by the law. They relied on the case of **Mike J.C Mills vs The Posts & Telecommunication, Nairobi HCMA No 1013 Of 1996** for the holding that judicial review matters are commenced by a notice to the registrar under Order 53 rule 1(3).

14. Further, that in an application for mandamus there must be demand for payment made by or on behalf of the decree holder to the relevant department. For this proposition they relied on the decision in **The District Commissioner Kiambu vs R And Others ex-parte Ethan Njau (1960) EA 109 that** adequate notice must be given to the government before legal action is taken against it by way of judicial review.

15. It was urged that the Respondent should not be compelled to pay a particular amount which has not been ascertained, as the certificate of costs was not served on the Respondent as required by law. Reliance was placed on the case of **Arthur Kinuthia Albert vs Permanent Secretary, Ministry of Health (2008) e KLR** and **Republic vs Attorney General & Another ex-Parte Ongata Works Limited (2016) e KLR** that the quantum payable must be ascertained, for an order of mandamus to issue compelling a Respondent to pay the sum.

The Determination

16. The parties at the hearing of the application relied on the written submissions they had filed in Court. I have considered the arguments by the Applicant and Respondent. Two issues arise for determination. The first is whether the Applicant's application is properly before this Court on account of being filed in time and the applicable procedure having been followed. The second is whether the Applicant is entitled to the order of mandamus he seeks.

17. On the first issue, Order 53 Rules 1 and 2 of the Civil Procedure Rules of 2010 provides as follows in this regard as regards the procedure for commencing judicial review proceedings:

1.(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so

directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing *inter partes* before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.

2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

18. It is evident from the said provisions that there is no requirement to notify the Government of the intention to bring legal action or commence judicial review proceedings against it. In addition, the above -cited provisions were the applicable provisions at the time of the filing of the current judicial proceedings.

19. In the present application, the Applicant filed the application for leave to commence judicial review proceedings by way of a Chamber Summons dated 3rd April 2018 that was filed in Court on 10th April 2018, and was supported by a statement of facts and verifying affidavit. Furthermore, the Applicant did annex various letters of demand to the Respondent including a final demand dated 20th March 2018, as “Annexure PM 5” to his verifying affidavit sworn on 10th April 2018

20. In addition, the time limit of 6 months within which to bring an application for judicial review orders only applies where the order sought is one of certiorari, which is not the case in the present application which is seeking an order of mandamus. The limitation period with respect to an order of mandamus to enforce a sum due on a judgment is provided for by section 4(4) of the Limitation of Actions Act, which provides as follows:

(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

21. It is not disputed that the judgment sought to be enforced in this application was delivered on 13th August 2013, and the Certificate of Costs was issued on 17th April 2014 which are both within the twelve year limitation period. The Applicant’s application is thus properly before this Court, having complied with the applicable procedure and having been filed within time.

22. On the second issue, the Court of Appeal discussed the nature of the remedy of mandamus in great length in its decision in **Republic vs Kenya National Examinations Council exparte 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..... .”

23. It is not disputed in the present application that judgment was entered in favour of the Applicant in **Machakos Election Petition Numbers 1 & 7 of 2013 - Richard Kalembé Ndile & Caroline Mwelu Mwandiku vs Patrick Mweu Musimba & Two Others** by Majanja J. on 15th August 2013, in which the learned Judge awarded the Applicant full costs of the suit which were capped at Kshs 1,500,000/=. The Applicant annexed a copy of the said judgment and also annexed a certificate of costs issued therein on 17th April 2014 for the amount of Kshs 1,500,000/=.

24. The question to be answered therefore, is whether the Respondent is under a public duty and obligation to satisfy the decree and orders issued in favour of the Applicant in the said judgment. Section 13 of the Independent Electoral and Boundaries Commission Act provides as follows in this respect:

1) The Commission shall be a body corporate with perpetual succession and a common seal and shall be capable, in its own name, of—

(a) acquiring, holding and disposing of movable and immovable property;

(b) suing and being sued; and

(c) doing or performing all such acts and things as a body corporate may by law do or perform.

(2) Any legal proceedings for execution of judgments against the Commission shall be subject to the Government Proceedings Act.

25. 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.”

26. 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.”

27. The provisions of section 21 of the Government Proceedings Act must be read with the necessary changes in relation to the Respondent's Commission. In this regard, the Respondent's Commission being a corporate body, the service of the certificate of costs that is required by the said section on the Attorney General must read as requiring service on the appropriate officer in the Respondent Commission.

28. Section 10 of the Independent Electoral and Boundaries Commission Act provides for a Secretary to the Respondent's Commission, and section 10(7) of the Act provides for the following functions of the Secretary to the Commission:

(7) The secretary shall be—

(a) the chief executive officer of the Commission;

(b) head of the secretariat;

(c) the accounting officer of the Commission;

(d) custodian of all commission's records;

(e) responsible for—

(i) executing decisions of the Commission;

(ii) assignment of duties and supervision of all employees of the Commission;

(iii) facilitating, co-ordinating and ensuring execution of Commission's mandate;

(iv) ensuring staff compliance with public ethics and values; and

(v) the performance of such other duties as may be assigned by the law and Commission.

29. The Respondent is therefore both the executive officer and accounting officer for purposes of section 21 of the Government Proceedings Act, and the proper party to be served with any legal documents and process involving the Respondent's Commission. The Applicant annexed as Annexure "KW1" to its Further Affidavit sworn on 8th August 2018 the letter received by the Respondent's Advocate on 10th June 2014, which enclosed the Certificate of Costs. In addition, the Applicant also annexed a copy of a letter dated 28th February 2018 addressed to the Respondent as "Annexure PM 5" to his verifying affidavit sworn on 10th April 2018, in which the certificate of costs dated 7th April 2014, as well as the letter received by the Respondent's Advocate on 10th June 2014, and the responses thereto by the Respondent and its Advocate dated 8th July 2014 and 27th June 2017 were annexed.

30. This Court therefore finds that as judgment was already entered in favour of the Applicant with respect to the demanded amount of costs, and the procedure stated in section 21 of the Government Proceedings Act has largely been followed, there is a duty upon the Respondent to pay a debt already decreed by a competent Court of law to be due and payable by them.

31. Lastly, it is clear from the judgment and certificate of costs that the amount of costs of Kshs 1,500,000/= was all inclusive, and to this extent the amount payable is certain and the said certificate of costs is thus enforceable.

32. In the premises, I find that the Applicant's Notice of Motion dated 12th June 2018 is merited. I accordingly grant the following orders:

I. An order of mandamus directed to the Chief Executive Officer of the Independent Electoral and Boundaries Commission compelling him or her to pay to the *ex Parte* Applicant Kshs 1,500,000/=, being the costs awarded and taxed in Machakos High Court Election Petitions Numbers 1 and 7 of 2013.

II. The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 12th June 2018 of Kshs 50,000/=.

33. Orders accordingly.

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

P. NYAMWEYA

JUDGE