



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 362 OF 2016**

**IN THE MATTER OF AN APPLICATION BY JAMES SAMUEL MBURU FOR LEAVE TO  
APPLY FOR AN ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF THE ATTORNEY GENERAL**

**AND**

**IN THE MATTER OF THE PRINCIPAL SECRETARY MINISTRY OF FINANCE AND  
NATIONAL TREASURY**

**AND**

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

**BETWEEN**

**JAMES SAMUEL MBURU.....APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY MINISTRY OF**

**FINANCE AND NATIONAL TREASURY.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. On 16<sup>th</sup> November 2016 this court granted to the exparte applicant leave to institute Judicial Review proceedings seeking for an order of mandamus to compel the settlement of the decree in Nairobi CMCC No. 73420/2003 in favour of the applicant James Samuel Mburu in the sum of shs 1,714,361 which remains due and owing to him vide judgment delivered on 21<sup>st</sup> April 2015.
2. Leave was in respect of the amended chamber summons amended on 11<sup>th</sup> October 2016 as per leave of court granted on 16th November 2016.

3. The substantive motion was dutifully filed on 24<sup>th</sup> November 2016 within the 21<sup>st</sup> days stipulated in Order 53 Rule 1 (4) of the Civil Procedure Rules.

4. The applicant's notice of motion seeks for the following Judicial Review order and other orders:

*a) Mandamus to issue jointly and severally directed to the respondent's the Attorney General and the Principal Secretary of the Ministry of Finance and National Treasury, compelling them jointly and severally to pay kshs 1,714,361 being the decretal sum owed to him in Nairobi CM CC 13420/2003 together with interest thereon at 12% per annum from 1<sup>st</sup> January 2001 to 1<sup>st</sup> January 2007 and taxed costs of the suit pursuant to the certificate of order issued on 18<sup>th</sup> December 2015.*

*b) That in the event of failure to pay the sum of shs 1,714,361 the persons occupying the position of the Attorney General and the Principal Secretary of Ministry of Finance and National Treasury, be committed to jail in contempt of the orders issued herein;*

*c) That costs of the application be paid by the respondents.*

*d) Such further or other relief as the Honourable court may deem fit and just to grant.*

5. The application which is expressly brought under the provisions of Order 53 Rules 3 and 4 of the Civil Procedure Rules and other enabling laws is predicated on the sole ground that since 21<sup>st</sup> April 2015 when judgment was entered for the applicant against the respondent for the sum of shs 1,714,362 and that despite several reminders, the Attorney General and the Principal Secretary of the Ministry of Finance have jointly and severally in breach of and despite being duly served with the said orders blatantly and completely failed to settle the decretal sum herein.

6. The said application is also based on the statutory statement of James Samuel Mburu filed on 13<sup>th</sup> October 2016, the affidavits sworn on 11<sup>th</sup> October 2016 and 8<sup>th</sup> November 2016 and such other to be adduced at the hearing.

7. According to the applicant, his case is that he is the decree holder in CM CC13420/2003 having successfully sued the Attorney General for his dues following his unlawful termination of his employment on 17<sup>th</sup> June 1997 by his then employer the Ministry of Finance as the Head of Ken Ren Liquidation unit as an arbitrator.

8. That the ministry admitted vide its letter dated 6<sup>th</sup> December 2000 that it owed him shs 918,225 and undertook to pay him by 11<sup>th</sup> December 2000 but defaulted necessitating institution of suit before the Magistrate's court hence Nairobi CM CC 13420/2003 against the Ministry of Finance as represented by the Attorney General.

9. That judgment was delivered on 21<sup>st</sup> April 2015 by the Chief Magistrate, Milimani Commercial Court Honourable R.A. Oganyo(Mrs). That vide decree issued on 17<sup>th</sup> August 2015 the respondent was ordered to settle shs 1,714,361 and Certificate of Order against the Government issued.

10. That todate, no appeal has been filed against that judgment/decreed yet the respondents have declined or refused to settle the decree which is prejudicial to the applicant who has send several reminders to the Attorney General.

11. That the Attorney General is under a public duty to pay the decretal sum due as Order 29 Rule 2 of the Civil Procedure Rules prohibits the execution against the Government hence these proceedings for an order or mandamus to compel payment.

12. On 21<sup>st</sup> December 2016 the respondents filed grounds of opposition signed by Mr Kepha

Onyiso Senior Principal State Counsel opposing the application for mandamus orders and contending that:

*a. The Attorney General has no statutory mandate/responsibility to settle decretal sums on behalf of the Government officers;*

*b. That the annexure JSM1 shows that the Attorney General was sued on behalf of the Ministry of Finance and Planning as it then was, and therefore cannot be liable for settling judgments decreed against the said office.*

*c. That the Attorney General is not the accounting officer for the National Treasury.*

*d. That prayer 2 of the motion is not available as it seeks to expand the jurisdiction of this court by craft.*

*e. That prayer 2 presupposes that the outcome of the applicant is predetermined and if this court were to grant prayer, it would be violating the respondent's rights under Article 50 of the Constitution and would be taking away the respondent's right to appeal as expressly conferred under Section 8(5) of the Law Reform Act.*

*f. That the application is defective and should be dismissed forthwith with costs to the respondents.*

13. The parties' advocates argued the motion orally before me in JR 489/2016 between the same parties and agreed that as the cause of action arose from the same facts, the judgment in JR 489/2016 be adopted as judgment in this case. However, upon considering JR 489/2016, I discovered that the main motion in the said matter was filed out of the 21 days period stipulated by Order 53 of the Civil Procedure Rules, unlike in this matter where the motion was dutifully filed within the stipulated statutory period. I therefore struck out JR 489/2016 for being incompetently filed and it would be prejudicial to apply that order of striking out to a cause that is competently before the court hence this separate judgment determining the merits of this matter.

14. The parties' advocates reiterated what is contained in their respective pleadings with Miss Ndungu urging the court to grant the orders sought to alleviate her client's suffering as he has been waiting for his dues for a long time and that the objection to the application is intended to delay and deny her client justice which is a constitutional right.

15. Miss Ndungu further submitted that as the law does not permit execution against the Government, only judicial review orders of mandamus can issue to accord her client an opportunity to realize his fruits of a lawful judgment.

16. On the claim by the respondent's counsel that the Attorney General not being an accounting officer for the National Treasury and merely being the principal legal advisor to Government hence no mandamus can issue against him, the applicant's counsel submitted that the judgment and decree was issued against the Attorney General hence he cannot escape the duty to settle a lawful decree of the court as no appeal was filed challenging the judgment. Reliance was placed on **KNEC vs Republic Exparte Goeffrey Gathenji Njoroge & 9 Others [1977] e KLR** and **Republic vs Attorney General & Another Exparte James Alfred Koroso [2013] e KLR** on the nature of mandamus and when this Judicial Review remedy will issue, where there is no specific remedy, citing with approval **Shah V Attorney General No. 3 Kampala HC Miscellaneous No. 31/69 [1970] EA 543**.

17. It was submitted that unless mandamus issues, the applicant decree holder will forever be left baby sitting his barren decree, which state of affairs cannot be allowed to prevent under our 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.

18. Further, those parties should not put road blocks in the path of a decree holder from realizing the fruits of their judgments. The applicant prayed for the orders sought.

19. In opposition, Miss Maina for the respondents submitted, reiterating her grounds of opposition as reproduced in this case maintaining that the Attorney General has no statutory mandate or responsibility to settle the decretal sums on behalf of other government offices; that the Attorney General was sued only on behalf of the Ministry of Finance and Planning as per the judgment of the court below; that he is not the accounting officer of the National Treasury; that this court's jurisdiction is limited by the Law Reform Act and not expansive by judicial craft to grant prayer No. 2 of the notice of motion which presupposes that the outcome of the application is prejudged which is offensive to the right to a fair hearing stipulated in Article 50 of the Constitution as it would also take away the respondent's right of appeal under Section 8(5) of the Law Reform Act Cap 26 Laws of Kenya. The respondent's counsel urged the court to dismiss these judicial review proceedings with costs to the respondents.

## **DETERMINATION**

20. I have carefully considered the applicant's notice of motion, the grounds as supported by the statutory statement verifying affidavit, submissions by his counsel and the decisions relied on. I have also considered the respondent's grounds of opposition, the submissions and case law cited.

21. The issue for determination is whether the order of mandamus is available to the applicant against the respondents jointly and severally to settle decree in Nairobi CM CC 1320 of 2003.

22. As correctly submitted by the applicant's counsel, Miss Ndungu, Mandamus is available to compel performance of a public duty and is the most extensive of remedial nature. In judicial review it is issued by the court, commanding an inferior tribunal, body or authority exercising judicial or quasi judicial jurisdiction, 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.

23. The purpose of mandamus as a Judicial Review remedy 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 albeit there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual ( see **Halsbury's Laws of England 4<sup>th</sup> Edition Vol 1 page 111 from paragraph 89** (cited with approval in **Kenya National Examinations Council v Republic Exparte Geoffrey Gathenji Njoroge & 9 Others (supra)**).

24. As was correctly submitted on behalf of the applicant by his counsel, there is no other way of realizing the fruits of his judgment since he is barred by Section 21(4) of the Government proceedings from executing against the Government.

25. It is also not in dispute that the applicant has a valid Judgment, Decree and Certificate of Order against the Government in Nairobi CMCC 13420 of 2003 which decree has never been satisfied following its issue on 21<sup>st</sup> April 2015. That being the case, the only available remedy is by way of Judicial Review order of mandamus to compel settlement of that decree, and that cannot be equated with execution of a decree or an attachment process. It is not sought to make any individual occupying a Government office personally or individually liable for any order for any payment but merely to oblige a government officer in his official capacity to pay or settle the decree in accordance with a duty placed upon them by the law and as occupants of those offices.

26. However, mandamus can only issue against an Accounting Officer of a particular Government entity or institution, compelling him to do a duty imposed on him by the law and where he has declined to enforce or perform that public duty, the court may find him in contempt of court order( See **Republic Vs Attorney General & Other Exparte James Koroso (supra)**).

27. Nonetheless, as correctly submitted by the respondent's counsel, the court in considering proceedings for mandamus cannot commit the Accounting Officer for contempt, without according him or her an opportunity to comply with the order of mandamus.

28. Contempt of court proceedings only follow after the respondent (public officer) has been compelled to perform that public duty by order of the court and the respondent declines or neglects to do so.

29. In this case, however, another angle to these proceedings has been brought out by the respondent's counsel, which is that the Attorney General who is not an Accounting Officer for the National Treasury, but that he was used in his representative capacity on behalf of the Government Ministry of Finance and Planning as it then was and now the Ministry of Finance and the National Treasury, he cannot even in his official capacity be compelled to settle decree, jointly and or severally with the National Treasury.

30. On the part of the applicant, it is submitted that the Attorney General was the primary party to the suit giving rise to the decree and that decree was issued against him hence it is upon his office to ensure payment is made to settle decree.

31. I agree with the respondent's counsel's submissions on this issue entirely for reasons that unless the Attorney General is sued for acts or omissions committed or omitted to be done by his office as established under Article 156 of the Constitution and as operationalised by the Office of the Attorney General Act, the Attorney General being the Principal Legal advisor to the Government remains just that in all representative legal proceedings where other Government or State Department are sued but in the name of the Attorney General.

32. It therefore follows that albeit the Attorney General is the primary party to the suit and the only party as such, he cannot carry the legal duty of settling the decree or enforce the order issued against the specific Government Ministry or State Government on whose behalf the Attorney General was sued.

33. And even assuming that the office of the Attorney General is sued in its own capacity, the Attorney General not being the Accounting Officer of the Office of the Attorney General cannot be compelled to settle decree or to enforce an order of the court. It is the Solicitor General, who is the Accounting Officer of the Office of the Attorney General and Department of Justice.

34. In this case, however, as I have stated the Attorney General was sued in representative capacity on behalf of the then Ministry of Finance and Planning. After August 27<sup>th</sup> 2010, the Ministry was restructured and is now the Ministry of Finance and National Treasury as contemplated in Article 225 of the Constitution.

35. That being the case, although the Attorney General is the primary party to the suit giving rise to the decree which remains unsettled, the person who is liable to be compelled to settle that decree is as disclosed in the pleadings and judgment of the trial court, and that person is the Principal Secretary, State Department of Finance and the National Treasury, who is also the Accounting Officer of the that Ministry/ State Department. This is so because the cause of action arose from breach of agreements or contracts entered into between the then Ministry of Finance and the exparte applicant herein, and moreso, the judgment of 21<sup>st</sup> April 2015 is clear that the Ministry admitted owing the claimed sum of money. The Attorney General's duty and mandate was to provide legal advise on how to deal with some of the contractual issues and not to assume liability on behalf of the Ministry of Finance.

36. Furthermore, page 5 of the said judgment is clear that the Ministry having admitted the claim, they should pay the plaintiff the sums of money owed and as admitted, with interest at court rates from 1<sup>st</sup> July 1977 and 1<sup>st</sup> December 2000 respectively. The sums of money concerned a contract for shs 918,225 and shs 240,000 respectively.

37. Accordingly, I find without hesitation that it is the Principal Secretary, Ministry of Finance and National Treasury who is liable to settle decree in Nairobi CMCC 13420/2003 and not the Attorney General's office.

38. As such, I proceed and issue Judicial Review order of mandamus directed at the Principal Secretary, Ministry of Finance and the National Treasury, compelling him to solely pay to the applicant James Samuel Mburu the sum of shs 1,714,361 One million, seven hundred and fourteen thousand, three hundred and sixty one only being decretal sum owed to him in Nairobi Chief Magistrate's Court Civil Suit No.13420/2003 inclusive of interest at court rates of 12% per annum as was calculated by the Chief Magistrate's Court in the decree issued on 17<sup>th</sup> August 2015, and any other further interest that may have accrued therefrom in accordance with the judgment of the court dated 21<sup>st</sup> April 2015 until payment in full.

39. On prayer No. 2, I decline to grant the same as it is premature. I order that the sums due and owing shall be settled within (150) one hundred and fifty days from the date hereof and in default, the exparte applicant shall be at liberty to take out contempt of court proceedings as appropriate to enforce compliance with this court order.

40. The Attorney General is accordingly discharged from any liability and from the judicial review proceedings as a judgment debtor in view of the aforestated. He however remains the legal counsel to the 1<sup>st</sup> respondent as that is a constitutional mandate of the Office of the Attorney General.

41. I order that each party shall bear their own costs of these Judicial Review proceedings for reasons that although the money has been owing for a long time thereby attracting huge interest, the matter was pending in the Chief Magistrate's Court for 12 years from 2003 until 21<sup>st</sup> April 2015 when judgment was delivered.

42. Accordingly, it cannot be said that it has taken long to settle decree and therefore the court must not encourage escalation of costs between parties which will be a burden to the Kenyan tax payers. It is in the public interest that costs be kept to the bare minimum to protect the diminishing public resources. Those are the orders of the court.

**Dated, signed and delivered in open court at Nairobi this 27th day of February 2017.**

**R.E. ABURILI**

**JUDGE**