



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

JUDICIAL REVIEW APPLICATION NO. 4 OF 2016

IN THE MATTER OF AN APPLICATION BY MACHARIA WAIGURU FOR JUDICIAL REVIEW ORDER OF MANDAMUS PURSUANT TO LEAVE GRANTED ON 26/07/2016

AND

IN THE MATTER OF ORDERS 53 RULE 3(1)

REPUBLIC..... APPLICANT

AND

THE HON.ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY, INTERNAL SECURITY AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

EX-PARTE APPLICANT:

MACHARIA WAIGURU

RULING

1. The Notice of Motion is dated 2nd August, 2016 and was filed in court on the 17th August, 2016 pursuant to the leave granted by this court on 26th July, 2016. The Ex-parte Applicant sought the following orders:

(a) That this honorable court be pleased to issue Judicial Review Orders of Mandamus to compel the respondents to pay interest due on the principal amount in CMCC 448/10 Nyeri from the date of receipt of the money by the 1st respondent until the said money was released.

(b) The costs of this application be provided for.

2. The application is premised on a supporting affidavit made by Macharia Waiguru and likewise by a Statement attached thereto;

3. At the hearing hereof the applicant appeared in person and highlighted his written submissions; the respondents relied on the Replying Affidavit filed on the 28/11/2016; hereunder is a brief summary of the rival submissions made;

THE EX-PARTE APPLICANTS' CASE

4. The applicant seeks an order of mandamus directing the Principal Secretary in charge of Internal Security to pay accrued interest in the sum of Kshs.108,500/-; the ex-parte applicant claims that he is entitled to the interest that had accrued between the months of March 2014 to July 2015 which translates to a total period of 18 months;

5. It is not in dispute that the applicant filed a suit in the High Court Nyeri which was transferred to the lower court for hearing and determination; that judgment was entered in favour of the applicant and he was awarded damages in the sum of Kshs.350,000/-; as submitted the decretal sum together with interest upto 2014 amounted to Kshs.540,000/-; that the applicant signed a discharge voucher on 10th December, 2014; a payment voucher was issued on the 10th January, 2015 and final authority for payment was issued on the 2nd April, 2015;

6. The 1st respondent when forwarding the sum to the applicants account omitted the bank's code number therefore the monies were not deposited in the applicants account and the sums were returned to the payee with the remarks "**invalid account number**";

7. Arising from this gross negligence the applicant seeks redress in the form of unpaid accrued interest; and prays that a new discharge voucher be drawn for his signature;

8. The applicant also prayed that costs be provided.

RESPONDENT'S RESPONSE

9. In response the 1st respondent opposed the application and relied on its Replying Affidavit; it was averred therein that the decretal sum plus interest was fully paid to the applicant and the same was acknowledged; that the respondent has not failed to comply; that the judicial review proceedings are unfounded and are an abuse of the court process;

10. That the order for mandamus can only issue when there was blatant disregard of a court judgment/order or an omission by a public authority in doing that which ought to be done under the law; that this was not the case herein;

11. That the application was an afterthought and a calculated attempt by the applicant to unjustly enrich himself;

12. Counsel prayed that the application be dismissed with costs to the respondent.

ISSUES FOR DETERMINATION;

13. After taking into consideration the oral presentation, the written submissions and the Replying Affidavit the following are the issues framed for determination;

(i) Whether the application herein was filed outside the time limit of twenty-one days;

(ii) Whether the order sought is merited.

ANALYSIS

Whether the application herein was filed outside the time limit of twenty-one days;

14. The application is brought under the provisions of Order 53 Rule 3(1) of the Civil Procedure Code; leave was sought and was granted by this honorable court on the 26th July, 2016;

15. Order 53 Rule 3(1) provides as follows;

Order 53(3)(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court.....”

16. The operative words in Order 53 Rule 3(1) are;

“.....shall be made.....”

17. The words demonstrate that the timelines are mandatory rules of procedure that ought to be strictly adhered to reference is made to the case of **Wilson Osolo vs John Ojiambo Ochola & the Hon.AG CA No.6 of 1995** where the Court of Appeal held;

“It is a mandatory requirement of Order 53 Rule 3(1) of the Civil Procedure Rules then that notice of motion must be filed within 21 days of granting of such leave. No such notice of motion having been apparently filed within 21 days on 15 February 1985 there was no proper application before the Superior Court. This period of 21 days could have been extended by a reasonable period had there been an application under the Civil Procedure Rules.”

18. This issue of defective pleadings was raised by the respondent pursuant to the Preliminary Objection dated the 29th September, 2016; after granting the applicant leave the court ordered that the substantive application be filed within 21 days; the court record indicates that the substantive application was filed on the 17th August, 2016 which was one day after and outside the time limit as had been directed by the court; the last day for filing the substantive motion ought to have been on the 16th August, 2016;

19. The application was therefore filed out of time; the applicant did not make any application for the enlargement of time; this court has judicial notice that the applicant is an advocate and that he was acting in person from the onset and therefore he can only attribute the mistake of failing to adhere to time lines, to no-one else but himself;

20. Therefore in the absence of any application for enlargement of time the application is found not to be properly before the court and that it is incompetent;

Whether the order sought is merited.

21. The applicant has to establish that there has been fore-bearance by the respondent; in that it has completely refused to pay the decretal sum and that he has no other recourse; as is required before an order of mandamus to issue.

22. The applicant avers that the amount for damages was in the sum of Kshs.350,000/-; that the decretal sum together with accrued interest at the time of signing the discharge voucher was Kshs.540,000/-; this court notes that the discharge voucher was duly executed by the applicant and that there is evidence of payment made by the respondent to the applicants bank of the said sum of Kshs.540,000/-;

23. The applicant contends that even after signing the discharge voucher there was a delay in payment and that interest continued to accrue;

24. Upon perusing the Discharge Voucher this court has noted the wording therein which is as set out hereunder;

‘WHICH I ACCEPT IN FULL AND FINAL SETTLEMENT of all claims of whatsoever nature howsoever arising against the Government in connection with CASE NO. CMCC 448 OF 2010 MACHARIA WAIGURU VS AG.

IN CONSIDERATION of the said payment I undertake to indemnify the Government of Kenya

and/or its agents or servants against any further claims made by me or my representatives/agent and/or successor(s) arising out of the aforesaid claim/suit and any matter/event relating thereto.”

25. The Discharge Voucher is found to have been duly executed by the applicant and witnessed by an advocate and it is supported by consideration which was duly paid even though not immediately;

26. Upon signing the applicant did not declare that he was signing it conditionally that any further interest that accrued be paid before the matter is put to rest; nor was the discharge voucher signed on a **“without prejudice basis”**; This court reiterates that the applicant is a fully fledged advocate and is not illiterate so as to claim that he had no benefit of legal advice.

27. This court reiterates that the applicant is a fully fledged advocate and is not illiterate so as to claim that he had no benefit of legal advice.

28. In essence the issue here is not the validity of the Discharge Voucher but whether the respondent has blatantly disregarded the judgment or being a public authority it has breached or failed to comply with the court order or has omitted to do that which ought to have been done under the law;

29. This court is satisfied that the decretal sum and interest thereon was duly paid to the applicant; and reiterates that the applicant has not demonstrated that the respondent has blatantly refused to comply and/or to honor the judgment as required to warrant an order of mandamus; the order sought therefore is not merited.

FINDINGS AND DETERMINATION

30. The application is found to have been filed outside the statutory time lines and is found to be incompetent; the order for mandamus is also found to be un-merited.

30. The application is hereby dismissed.

31. The respondent shall have costs of this application.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 25th day of May, 2017.

HON.A.MSHILA

JUDGE