



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI COMMERCIAL COURT

JUDICIAL REVIEW MISC. APPLICATION NO. 283 OF 2016

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO ISSUE TO FILE AN
APPLICATION FOR JUDICIAL REVIEW IN FORM OF ORDERS OF MANDAMUS AGAINST
THE CABINET**

**SECRETARY FOR THE MINISTRY OF LAND HOUSING AND
URBAN DEVELOPMENT**

AND

**IN THE MATTER OF EXECUTION OF DECREE DATED 16TH
NOVEMBER, 2015 IN THE HIGH COURT AT NAIROBI IN HIGH
COURT MISCELLANEOUS CIVIL CAUSE NUMBER 125 OF 2015**

**NAIROBI INVOLVING ITALBUILD IMPORTS LIMITED
(DECREE HOLDER) AND MINISTRY OF PUBLIC WORKS /OR**

ITS SUCCESSOR MINISTRY AND THE HONOURABLE

ATTORNEY GENERAL (JUDGEMENT CREDITOR)

BETWEEN

REPUBLIC.....APPLICANT

AND

HON ATTORNEY GENERAL.....RESPONDENT

EX PARTE: ITALBUILD IMPORTS LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 11th October, 2016, *the ex parte* applicant herein, **Italbuild Imports Limited** (wrongly described in the title as the applicant), substantially seeks an order of *mandamus* against the Respondent herein, the Attorney General to satisfy the decree in High Court Miscellaneous Civil Cause Number 125/2105 dated 16th November, 2015. It, of course also seeks the ancillary order for provision of costs.

Applicant's Case

2. According to the Applicant's statement of facts, it declared a dispute against the Ministry of Public Works after which the dispute was referred to arbitration. On 25th November 2013 the arbitral tribunal awarded the applicant a sum of Kshs. 14, 637, 813.07.00. Pursuant thereto, the applicant filed HC Misc Civil Cause No. 125 of 2015 (Nairobi) for recognition and enforcement of the said arbitral award as a decree of the court.

3. It was averred that the Ministry of Public works and the Attorney General who are the respondents in HC Misc. Civil Cause No. 125 of 2015 did not object to the orders sought and on 22nd April, 2015 the High Court recognized the arbitral award as a decree of the court and granted leave for the said award to be enforced as a decree of the Court. Accordingly, the decree was signed on 16th November, 2015 and served upon the Respondents on 23rd November, 2015.

4. It was however averred that despite notice, the Ministry of Public Works (and now The Ministry of Housing and Urban Development) has declined to settle the said decree. The applicant contended that the appropriate mode of execution against the government is by way of orders of *mandamus* against the accounting officer of the relevant Ministry. In this instance the principal secretary of the Ministry of Land Housing and Urban Development is the accounting officer. Further, the Ministry of Land Housing and Urban Development is the successor

5. Ministry to the Ministry of Public works.

6. There was a verifying affidavit but the same limited to exhibiting the supporting documents.

Respondent's Case

7. The application was responded to by way of a replying affidavit sworn by **George N. Macgoye**, the Director of Administration at the State Department of Public Works in the Ministry of Transport, Infrastructure, Housing and Urban Development.

8. According to the Respondents, it was decreed by **Lady Justice Amin** that the sum of Kshs 14,637,813.07 plus interests be paid by the 1st and 2nd Respondents to the Ex parte Applicant. In furtherance of attempt to conclude the matter, the Respondents prepared a payment certificate in the amount of Kshs. 20,637,960.93 being the principal amount plus interest up to December 2016.

9. It was averred that though the Respondents projected and requested the National Treasury for the said decretal amount to be allocated in the 2016/2017 budget, the National Treasury did not allocate any funds for settlement of any legal claims in that financial year. It was however averred that the Respondents had written to the National Treasury indicating that there was no budget allocation for settlement of legal claims for the Ministry in the budget allocation for the years 2016/2017 and sought guidance on how to resolve the matter.

10. The Respondents therefore averred that they were therefore not in a position to settle the decretal amount on this matter and the same was budgeted for in the budgetary allocation for the 2017/2018. However, only Kshs 409,344.00 was allocated to the Ministry to cater for all Legal dues/fees, Arbitration and Compensation payments out of an amount of Kshs 20,637,960.00 which they had asked for in respect of **Ms. Italbuild Imports Limited**.

11. It was averred that upon receipt of budgetary allocations from Treasury, the Respondents wrote a letter to Treasury requesting them to relook and reallocate funds to these projects. However, before the Respondents received from the exchequer, the Kshs 409,344.00 had been reduced to Kshs 307,008.00.

12. The Respondents' case was that an individual should not be held liable for Government liability and lack of funds from the National Treasury. They explained that Government Budget Cycle is bureaucratic and complex, and they prayed for 6 (six) months as the ministry awaits the budget allocation to settle the decretal amounts plus the interest herein as they had not in any way refused to pay the Ex parte Applicant herein.

Determination

13. It is not in doubt that section 21(4) of the **Government Proceedings Act** prohibits execution against the Government. The said provision states:

Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, 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.

14. However section 21 (1) of the Act provides:

“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.”

15. Section 21 (3) of the said Act on the other hand provides:

“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.”

16. The effect of these provisions is that whereas execution proceedings as are known to law are not available against the Government, the accounting officer for the Government department concerned is nevertheless under a statutory duty to satisfy a judgement made by the Court against that department. As was held by **Lord Goddard C. J.** in the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, at 743**, *Mandamus is neither a writ of course nor a writ of right, but will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy.* See also **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants[2007] 2 EA 441.**

17. This procedure was dealt with extensively in Shah vs. Attorney General (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543 where Goudie, J eloquently, in my view, expressed himself, which expression I fully associate myself with, *inter alia*, as follows:

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...The foregoing may also be thought to be much in point in relation to the applicant’s unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty...Since *mandamus* originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law...English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting “simply in his capacity of servant”. There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a *mandamus* would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of *mandamus* will lie for the enforcement of the duties...With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile... It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government...Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go... In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant’s decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of *mandamus* must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament...In the court’s view the granting of *mandamus* against the

Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata*, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few...*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designata* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of *mandamus* will issue as prayed with costs."

18. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the Republic vs. The Attorney General & Another ex parte James Alfred Koroso, I expressed myself as hereunder:

"...in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current 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. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.....The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the Court’s displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court.”

19. I also associate myself with the views expressed by Githua, J in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoh Egunza [2012] eKLR that:

“The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issues 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 judgement. 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 sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues. The Respondent’s claim that the Applicant should have waited until the start of the next financial year to enforce payment of the decree issued in his favour cannot be sustained firstly because it has no legal basis and secondly because it is the responsibility of the Government to make contingency provisions for its liabilities in tort in each financial year so

that successful litigants who obtain decrees against the Government are not left without remedy at any time of the year.”

20. In my view it is the obligation of the government department concerned in conjunction with the Treasury to ensure that funds are allocated towards the settlement of the liabilities owed by the Government. The failure to do so amounts to failure to perform a statutory obligation hence warrants the grant of an order of *mandamus*. Whereas difficulties in the settlement of decretal sum may be a basis for seeking accommodation with respect to settlement, such difficulties cannot be a basis for seeking that an otherwise application for *mandamus* ought not to be granted.

21. The circumstances under which judicial review order of *mandamus* are issued were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** *inter alia* as follows:

“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 or 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...These principles mean that an order of *mandamus* compels 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.”

22. Therefore as was appreciated in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) there is a specific legal right but no specific legal remedy available for enforcing that right as execution cannot issue against the Government in the ordinary way. In such circumstances it is clear that an order of *mandamus* may go forth in order to remedy the defects of justice.

23. Accordingly, there is a duty imposed on the accounting officer in the Ministry of Transport, Infrastructure, Housing and Urban Development, who is the Principal Secretary therein to settle the decree the subject these proceedings. As stated hereinabove, once the certificate of order against the Government is served on the Attorney General, section 21(3) of the ***Government Proceedings Act*** imposes a statutory duty on the accounting officer to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. In this case there is no dispute as to the existence of the said certificate.

24. In the result, I hereby grant an order of *mandamus* directed to the Principal Secretary, Ministry of Transport, Infrastructure, Housing and Urban Development compelling him to satisfy the decree in High Court Miscellaneous Civil Cause Number 125/2015 dated 16th November, 2015.

25. The costs of these proceedings are awarded to the ex parte applicant to be borne by the Respondent.

26. It is so ordered.

Dated at Nairobi this 23rd day of October, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Jin for the applicant.

CA Ooko