



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. APPLICATION NO. 304 OF 2015

**IN THE MATTER OF AN APPLICATION BY JUSTINO PITIAS FOR JUDICIAL REVIEW
ORDERS OF MANDAMUS**

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY MINISTRY OF TRANSPORT

& INFRASTRUCTURE.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL2ND RESPONDENT

EX PARTE JUSTINO PITIA

RULING

Introduction

1. By a Notice of Motion dated 4th November, 2015 the *ex parte* applicant herein, **Justino Pitias**, seeks the following reliefs:

1. THAT a writ of mandamus do issue directing the Principal Secretary, Ministry of Transport and Infrastructure to settle and/or pay Kshs 631,926.36 being the outstanding decretal amount which was awarded in Nairobi HCCC No. 4253 of 1983 together with costs plus interest.

2. That costs of this application be in the cause.

Applicant’s Case

2. According to the Applicant, he filed suit against the 2nd Respondent on behalf of the 1st Respondent by way of Plaint in HCCC No. 4253 of 1983 claiming wrongful eviction after early retirement from Government service and also for pension dues. On 19th June 1991 the High Court of Kenya awarded to him Kshs 121,585.00 being general and special damages for unlawful eviction as a result thereof and further ordered the respondent to pay his pension dues which were calculated in the sum of Kshs 195,039.00. He was also awarded interest at 12% per annum from

- the date of judgment until payment in full.
3. The 1st Respondent however only paid the sum of 195,039.00 as pension dues without including the general and special damages for unlawful eviction plus the interest which according to him amounts to Kshs 631,926.36 from the date of judgment.
 4. On 26th August, 2014 the applicant instructed his advocates to demand payment of the outstanding decretal amount to which the 1st Responded on 29th April 2015 requesting for the applicant's pensions number to enable them compute and settle the outstanding decretal amount. Despite that the 1st respondent has failed, refused and/or ignored to settle the outstanding decretal sum hence these proceedings.

Respondents' Case

5. In response to the application the Respondents filed the following grounds of opposition:
 1. **That there is no valid court order requiring the respondents to pay the ex parte applicant the amount claimed.**
 2. **That as evidence from the ex parte applicants own documents (see letter dated 14th August 2000) the ex parte applicant acknowledges receipt of cheque No. 003251 for Kshs 144,350 dated 27th July 2000 and admits that the same was in final settlement on special and general damages.**
 3. **That from the bundle of correspondence adduced by the ex parte applicant it is apparent that there is a dispute on whether there is any amount due and owing and also on the exact quantum on the same is any, which is a civil issue for determination and which issue this court when exercising its judicial review jurisdiction cannot deal with**
 4. **That there has been no claim made against the director of pensions for any pensions due if any, even after the 1st Respondent directed the ex parte applicant to the said office as the appropriate office to seek redress (see letter dated 29th April 2015 annexed to the ex parte applicant's affidavit) and the director of pensions is not a party in the present proceedings.**
 5. **That as was stated in the letter to the ex parte applicant by the commission on administrative justice the ex parte applicant is litigating on a dispute regarding calculations on 12% court interest which ought to be determined as provided by law and which cannot be properly addressed in a judicial review application (see letter dated 23rd June 2014 from the said commission annexed to the ex parte applicants affidavit)**
 6. **That in any event charging interest on interest would be tantamount to charging compound interest which the High Court in HCCC No. 4253 of 1983 never granted the ex parte applicant.**
 7. **The present application is made contrary to the provisions of Section 21(4) of the Government proceedings Act.**
 8. **The present application is made contrary to the provisions of Section 8(1) of the Law Reform Act.**
 9. **The present application is made contrary to the provisions of Section 21 (4) of the Government Proceedings Act**
 10. **The present application is made contrary to the provisions of Section 26 of the Government Proceedings Act as read together with Sections 4 (1) (e) and Section 4 (4) of the Limitations of Actions Act.**

Determination

6. I have considered the issues raised herein.
7. The applicant has exhibited a copy of the decree in HCCC No. 4253 of 1983 by which he was awarded general damages, special damages, pension, interests and costs. The applicant acknowledges that the 1st Respondent paid the pension but denies that he was paid general damages. He however claims a sum of Kshs 631,926.36 which according to him is interest from the date of judgement.
8. 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.

9. 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.”

10. 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.”

11. These provisions were the subject of the decision of **Githua, J** in **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR** in which the learned Judge expressed herself as follows:

“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."

12. In this case the applicant has not exhibited any certificate of order against the Government as required by the law. In the absence of such a certificate, and in light of the fact that the applicant is not clear whether or not he has been paid special and general damages as alleged by the Respondent, this Court cannot compel the Respondents to pay the applicant the said general and special damages. However what is clear is that under section 21 of the *Government Proceedings Act*, the respondents are only under an obligation to pay the amount for the time being contained on the face of the certificate. This was the position adopted by **Wendoh, J** in **Arthur Kinuthia Albert vs. Permanent Secretary, Ministry of Health [2008] eKLR** which position I associate myself with and in which the learned Judge expressed herself *inter alia* as follows:

"The question I pose is whether it is this court to determine what sum is payable in terms of interest. Judicial review merely deals with the decision making process but not the merits of the decision. In my view, the applicant's Counsel is calling upon this court to determine whether or not interest was payable to them and I am of the view that that is not the purview of this court's jurisdiction. The figure of interest included in the decree is foreign to the judgement in CMCC 773/03. Interest may vary according to what the Plaintiff has pleaded in the plaint. It is outside this court's jurisdiction to assume and to determine whether or not interest was payable or how much is payable. Since the court in CMCC 773/03 had not specifically ordered for payment of interest it was upon the Applicant to move the court which gave the judgement for a review of its orders on account of there being an error on the face of the record. This court's jurisdiction is limited to compelling the Respondent to pay based on the judgement, decree and certificate of order but it is not to determine what is due to the Applicant and this court would decline to grant the order prayed."

13. The Court only compels the satisfaction of a duty that has become due. In matters where the applicant claims that the Respondent ought to be compelled to pay a certain amount of money it does not suffice to simply aver that the Respondent is under an obligation to settle its liability to the Applicant. The Applicant must go a step further and prove that the sum claimed is actually due. Where therefore liability is admitted or proved, the next stage is to prove the actual quantum payable and where the said sum is yet to be determined an order of *mandamus* cannot for forth for payment of the said sum.

14. In other words where there is a condition precedent necessary for the duty to accrue, an order of *mandamus* will not be granted until that condition precedent comes to pass. Therefore where there is a genuine dispute as to the exact sums payable, the Court will not by an order of *mandamus* compel the Respondent to exercise that duty until the dispute is sorted out. As was appreciated in **Newton Gikaru Githiomi & Anor vs AG/Public Trustee Nairobi HC JR 472 of 2014**:

"It must be remembered that judicial review orders are discretionary. Since they are not guaranteed, a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. Further, as the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does

not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised.”

15. Whereas the Court may compel the performance of the general duty where such duty exists, it will however not compel its performance in a particular manner for example by compelling the respondent to pay a particular amount unless that amount has been ascertained. This position was appreciated by the Court of Appeal in the Court of Appeal in Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996 as follows:

“The order must command no more than the party against whom the application 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...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. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...” [Emphasis added].

16. In the circumstances the applicant has failed to prove how much money if any is due to him.
17. In the premises this application is incompetent and is hereby struck out but with no order as to costs.
18. It is so ordered.

Dated at Nairobi this 19th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Musyoki for Mr Mutua for the applicant

Cc Mutisya