



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NO. 184 OF 2016

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF
MANDAMUS**

AND

**IN THE MATTER OF CHIEF MAGISTRATE'S COURT AT NAIROBI, CIVIL SUIT NO. 1577
OF 2012**

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT CHAPTER 21 LAWS OF KENYA

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT (NO. 4 OF 2015) OF
KENYA**

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE CABINET SECRETARY

MINISTRY OF DEFENCERESPONDENT

EXPARTE

LITELINE ENTERPRISES LIMITED

JUDGMENT

1. Vide Notice of Motion dated 28th April 2016, the Exparte applicant herein Liteline Enterprises

Limited seeks from this court Judicial Review Orders of Mandamus compelling the respondent Cabinet Secretary Ministry of Defence to pay shs 924, 554 plus interest at 18% per annum being outstanding balance owed to it from the decree dated 5th November 2015 arising from judgment issued on 30th April 2015 in CMCC 1577/2012 against the respondent at Milimani commercial courts.

2. The applicant also seeks for Judicial Review Orders of Mandamus to compel the respondent show cause why the money has not been settled and why the respondent should not be committed to civil jail.

3. The application was filed on 3rd May 2016 pursuant to the leave granted on 2nd April 2016 to commence the judicial review proceedings. The applicant relies on the grounds contained in the statutory statement, verifying affidavit in support of the application for leave filed in 21st April 2016 and the supporting affidavit of Hardeep Panesar the director of the exparte applicant sworn on 28th April 2016, as well as the annexures thereto.

4. In the grounds and affidavits, it is deposed that the sum due is balance of the decreed sum after the respondent paid part of the decree totaling to shs 1,237,559.50 on 23rd September 2014 and that despite reminders to clear the balance due, the respondent had neglected.

5. There was no replying affidavit filed within the time given to the respondent as the one filed on 21st September 2016 without leave of court was struck out.

6. The application was argued orally before me, with Miss Ogutu representing the applicant and Miss Maina representing the respondent and urging on points of law.

7. Miss Ogutu's submissions echoed the application, the grounds and depositions of Mr Hardeep Panesar.

8. In her response, Miss Maina on behalf of the respondent contended that the respondent is misjoined to these proceedings hence the application should be struck out as he was not a party to the suit in the court below.

9. Secondly that the claimed sum was settled before judgment hence the interest should only be from date of default to settlement thus from 19th October 2010 to 23rd September 2014. Thirdly that there have been no contempt proceedings to warrant a committal to civil jail orders sought.

10. I have carefully considered the application for Judicial Review Orders of Mandamus dated 28th April 2016. The issues for determination are:

- 1) Whether the application is properly before the court for misjoinder of parties.
- 2) Whether the applicant is entitled to the orders sought
- 3) What orders should this court make?
- 4) Who should bear the costs of the application.

11. On the issue of misjoinder, the court notes that the decree dated 5th November 2015 as given on 30th April 2015 names the Honourable Attorney General, Permanent Secretary Ministry of State of Defence and Capital Construction Ltd as defendants. The same applies to the Certificate of Order against the Government dated 24th February 2016 and given on 24th February 2016.

12. On the other hand the application herein names the Cabinet Secretary Ministry of defence as the respondent who should be ordered to pay the decretal sum. Indeed, there is a misjoinder of parties who hail from the same Ministry of Defence. The accounting officer of a Ministry is the Principal

Secretary who is answerable to the Cabinet Secretary. However, the law is clear that misjoinder of parties does not render proceedings a nullity.

13. In addition Section 100 of the Civil Procedure Act empowers this court at any time and on such terms as to costs or otherwise as it may think fit amend any defect or error in any proceeding –in a court and all the necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.

14. In this case, the real issue for determination is whether there is any decree money due and owing by the Ministry of Defence to the applicant. I am satisfied that the naming of the Cabinet Secretary as opposed to the Principal Secretary Ministry of Defence was a procedural error in the proceeding which is curable by an amendment and by application of Sections 1A,1B,and 3A of the Civil Procedure Act and Article 159 of the Constitution which enjoins this court to administer justice without regard to undue procedural technicalities. In addition the error committed and the amendment herein will not occasion any prejudice to the respondent as none has been demonstrated.

15. Accordingly, on my own motion, I hereby amend the proceedings herein to substitute the Cabinet Secretary with the Permanent Secretary Ministry of Defence.

16. On the second issue of whether the amount claimed is due, the respondent's counsel contends that the claim was settled in 2014 before judgment and that therefore interest should only be from the date of default to the date of settlement in 2014. I have perused decree in CM CC 1577/2012. In that case, judgment was entered on 30th April 2015 by Honourable C. Obulutsa Mr (SPM) for shs 1,116,108.00. Interest was calculated from the date of default and it was added as shs 909,827 from 19th October 2010 totaling shs 2,025,936.41. There are also costs of the suit. If indeed the respondent paid the claimed sum on 23rd September 2014 before judgment as admitted by the applicant and as the claim was a liquidated one, I am in agreement with the respondents' counsels submissions that the principal sum was settled before judgment and therefore interest would only run from date of default on 10th October 2010 to the date when the sums were settled which is on 23rd September 2014 and not later than that date. Accordingly, I uphold the objection by the respondent.

17. On whether the Mandamus order for Notice to show cause should issue, I find that Notice to show cause is a process of enforcement or execution of the order of mandamus if issued compelling payment of the sums due. In this case there is no execution proceeding, which proceeding would follow issuance of Judicial Review orders of Mandamus. Accordingly, the prayers No. 2 and 3 of the Notice of Motion are premature and are not available to the exparte applicant at this stage.

18. On what orders this court should make, I note the interest on the decree as extracted on 30th April 2015 and issued on 5th November 2015 was erroneous as it covered the period beyond the date when the sums due as claimed was settled. It therefore follows that decree is amenable to an amendment. This court has no jurisdiction at this stage in Judicial Review proceedings to amend the decree issued in CM CC 15177/2012. The parties must return to the trial court for appropriate action.

19. In the end, I find that the applicant has not satisfied the court that it is entitled to the Judicial Review Orders of Mandamus as prayed and accordingly I hereby dismiss the application dated 28th April 2016 with no orders as to costs.

20. Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 21st day of September 2016.

R.E. ABURILI

JUDGE

In the presence of Miss Ogutu for applicant

Miss Maina for Respondents

CA: Adline