



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. J.R. APPLICATION NO. 41 OF 2011

REPUBLIC.....APPLICANT

VERSUS

PERMANENT SECRETARY (MINISTRY OF TRANSPORT)....RESPONDENT

EX PARTE : GODFREY NJIHIA WAHOME

RULING

Introduction

1. By a Notice of Motion dated 9th July, 2015 the *ex parte* applicant herein, **Godfrey Njihia Wahome**, seeks the following reliefs:

1. That this honourable Court be pleased to review and vary its judgment and decree of 8th March 2013 to provide for the order of Mandamus to extend to interest accruing on the decrial sum in High Court Civil Case No. 87 of 2009 at Nairobi.

2. That this honourable court be pleased to direct that a certificate of order against the government do issue for the sum due to the Ex parte applicant as per paragraph 20 of the affidavit in support of this application.

3. That the costs of this application be paid by the respondent.

Applicant's Case

2. According to the Applicant, on or about 18th November, 2003 he was involved in a road traffic accident involving motor vehicle KAR 214A and GK X628 on Waiyaki Way in Nairobi and as a result of the said accident he suffered a crushed pulseless right mid leg, dislocation of the right hip and a fracture of the right palm. The applicant consequently instituted a suit against the respondent (represented by the Attorney General) and the said **James Ongundu Ondiri** named in paragraph 5 above in Civil No. CMCC 12245 of 2004 at Milimani Commercial Courts, Nairobi.

3. It was averred that on 2nd November, 2010 **Dulu J.** delivered judgment in the applicant's favour for a total sum Kshs 4,199,120.00/= in damages, plus the certified cost thereon and interest thereon after full hearing of the matter and subsequently the deputy registrar of the high court certified the costs of the suit at Kshs. 230,364.36/=. The Court then issued a Certificate of Order against the Government certifying the

full sum due to Kshs 5,893,806.10/= on 14th January, 2011. Owing to the respondent's failure to settle the said sum of Kshs 5,893,806.10 the applicant instituted these judicial review proceedings for an order of Mandamus on which application was allowed on 8th March, 2013 by the **Korir, J.** who also awarded the applicant costs thereof to be assessed by the Taxing Officer of the court.

4. It was averred that the costs of the judicial review proceedings were assessed by a ruling date 8th November, 2013, at Kshs 78,525/=. However due to the failure by the Respondent to settle the said sum, the applicant instituted contempt of Court proceedings and according to the applicant, at the time of filing the contempt application, there was due and owing the sum of Kshs 8,308,586.75 as at 31st August 2014 which sum continued to rise on account of accruing interest. However the respondent eventually only paid a sum of Kshs 7,643,108/= on 18th March, 2015 on the threat of being cited for contempt of court.

5. It was contended that this Court directed the deputy Registrar on 27th March, 2015 to prepare a certificate of order against the government in respect of the balance owing on account of accrued interest. However, the Deputy Registrar has now written to the ex parte applicant's lawyers pointing out her inability to do so in light of the lack of reference to interest accrual on the decretal sum.

6. It was therefore the applicant's case that there is sufficient reason for review of the judgment and decree to provide for payment of the interest accruing on the decretal sum in line with the judgment and decree of the High Court at Nairobi in Civil Case No. 87 of 2009 sought to be enforced through these judicial review proceedings. It was the applicant's case that there is now due and owing to him the sum of Kshs 1,013,123.75 as at 18th March, 2015 being the balance of the decretal sum and interest accrued to that date.

7. He also averred that there is therefore sufficient reason for this court to direct that a certificate of Order Against the Government do issue for the sum due to him of Kshs 1,013,123.75 as at the said date.

Respondents' Case

8. In response to the application, the Respondent fled the following grounds of opposition:

- 1. That the application is defective, has no merits and is based on the misconception of the law, vexatious and an abuse of the court process.**
- 2. That the matter offends the provisions of Order 53 of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act as they are the only provisions that apply to Judicial Review.**
- 3. That In response to paragraph 20 the ex parte Applicant cannot seek for orders of interests on costs which the Courts in High Court Civil Case No 87 of 2009 and High Court Judicial Review JR case No 41 of 2011 did not issue. The calculation on interest on costs is erroneous as that was not provided for in Justice Dulu's judgment. It was also not provided for in Hon Justice Korir's judgment and the same cannot be issued now.**
- 4. That In an application for mandamus the Court can only compel the Respondent to undertake the duty imposed by the judgment and not anything else. It is not upon the Court determining an application for an order of mandamus or review as in the present circumstance to determine the intention of the Judge who granted the decree being enforced. Any such determination ought to be sought in the original suit being HCC 87 OF 2009 and not in the application for enforcement thereof. *See Republic v Attorney General & another Exparte James Alfred Koroso [2013] eKLR***
- 5. That further to the foregoing, the application is not within the purview of Judicial Review Court neither does it meet the basic tenets of judicial review application. It is seeking a substantive review and variation of this Court's judgment which is not possible within these**

proceedings. The High Court does not have the power to review its decisions in a judicial review application under order 53 of The Civil procedure rules. See Court of appeal decision in Biren Amritlal Shah and another v Republic and 3 others [2013] eKLR.

6. That the provisions of sections 1A, 1B, 3A Civil Procedure Rules & article 159(2)(d) invoked on the face of the application do not confer jurisdiction on the court to grant the said orders neither do they apply to Judicial Review. See Kuria Mbae v The Land Adjudication Officer, Chuka and Another Nairobi HCMCA No 257 of 1983 and Jotham Mulati Welamondi v The Electoral Commission of Kenya Bungoma HC Misc Appl No 81 of 2002 [2002] 1 KLR 486.

7. That to grant the order for review would fundamentally and radically change the judgment to be reviewed and would open a new front to litigation thus amounting to an abuse of court. See Sara Lee Household & Body care (K) Ltd vs Damji Pramji Mandavia Kisumu HCCC No 114 of 2004.

8. That determination of the question of REVIEWING the orders of mandamus to cover interest on costs & amount payable is not a matter falling within the ambit of judicial review process. This is underpinned in the decision of the Hon. R.P.V Wendoh J. in the case of Arthur Kinuthia Albert v Permanent Secretary, Ministry of Health (2008) eKLR.

9. That the orders for mandamus can only compel payment based on the judgment, decree and certificate of order against government as was duly shown in the above cited case of Arthur Kinuthia Albert v Permanent Secretary, Ministry of Health (2008) eKLR.

10. That the Application dated 9th July 2015 does not satisfy the threshold for the reviewing of the grant of orders of Mandamus under section 8 and 9 of the Law Reform Act and Order 53 rule 3 of the Civil Procedure Rules. The Respondent therefore, pray that the said Application be dismissed with costs.

Determination

9. I have considered the application the subject of this ruling, the affidavit in support thereof, the grounds of opposition as well as the submissions on record.

10. In Republic vs. Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996, the Court of Appeal cited, with approval, Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89 thus:

"The order of mandamus is of 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 and 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."

11. In the English case of R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 All E.R. 741, at 743, Lord Goddard C. J. said -

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it 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. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere

in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges. "

12. In Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441, it was held:

“The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the *mandamus* order using this method. There is only one rider – an officer can only be committed where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...Local Authorities Transfer Fund Act, which provides funds to local authorities, part of which should be used to pay debts does not provide for their attachment since section 263A of the Local Government Act prohibits it. It just enables the Local Authorities to honour their debt obligations including those covered by a mandamus order. The Local Authorities have to pay as a matter of statutory duty or in the case of mandamus in obedience to the order from the state or the Republic. There is no provision in the LATF Act for attachment or execution”.

13. 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, *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 designate* 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."

14. I have reproduced the aforesaid decisions in order to show the circumstances under which the Court exercises its supervisory or judicial review jurisdiction in granting an order of *mandamus*. What comes out clearly from the foregoing is that 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.

15. With respect a claim for mandamus against the Government to settle decretal sum, the position was correctly stated by Githua, J in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR 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."

16. The position 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 was also adopted by Wendoh, J in Arthur Kinuthia Albert vs. Permanent Secretary, Ministry of Health [2008] eKLR 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."

17. It follows that an order of mandamus can only issue in respect of the sum certified in the said order as due.

18. In this case, according to **Korir, J's** judgement which is sought to be reviewed, the applicant sought an order of mandamus to compel the payment for the sum of Kshs 5,893,806.10 being the decretal sum in HCCC No. 87 of 2007 at Nairobi as per the Certificate of Order against the Government dated 14th January, 2011. In his judgement **Korir, J.** rightly in my view found that this was what the applicant was asking him to compel the respondent to pay and he accordingly granted the same.

19. In this application, the applicant seems to be seeking from this Court an order reviewing the said judgement in order to award a sum of money which was not sought for. That application for judicial review can only be commenced by leave is clear. Therefore a party cannot in subsequent proceedings seek an order for which leave was never sought and granted which seems to be what the applicant is seeking in this application.

20. To review the decision of **Korir, J** in the manner sought would have the effect of altering the said decision in its material aspects. The decision whether or not to review a Court's decision was well captured by the Court of Appeal in **Mumby's Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002**, where it was held that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must however be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of the law therefore cannot be a ground for review.

21. In my view to grant the orders sought in this application would result into a re-hearing of the case in whole or in part with fresh orders not contemplated in the earlier judgement being granted. That is not the purpose of review. In other words, an application for review should not be granted if it will result into the grant of orders, which were not contemplated. See **Abasi Balinda vs. Fredrick Kangwami & Another [1963] EA 557**

22. Consequently, this Court cannot review the said decision in the manner sought herein.

Order

23. In the result the Notice of Motion dated 9th July, 2015 fails and is dismissed with costs.

24. It is so ordered.

Dated at Nairobi this 20th day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mutua for Mr Thiga for the applicant

Mr Odhiambo for the Respondent

Cc Mwangi