



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
JUDICIAL REVIEW CASE NO. 26 OF 2015

REPUBLICAPPLICANT

Versus

CHIEF EXECUTIVE OFFICER, THE
 INDEPENDENT ELECTORAL AND
 BOUNDARIES COMMISSION.....1ST RESPONDENT
 THE INDEPENDENT ELECTORAL
 AND BOUNDARIES COMMISSION.....2ND RESPONDENT

AND

M’ ANYIRI HANNINGTON GITAARI.....EX PARTE APPLICANT

JUDGMENT

Mandamus

[1] Before me is a Notice of Motion Application brought pursuant to Order 53 Rules 1,2 and 3 of the Civil Procedure Rules CAP 21 of the Laws of Kenya and Sections 8 and 9 of CAP 26 Laws of Kenya in which the Applicant seeks the following orders:

- 1. THAT an order of mandamus do issue to compel the Chief Executive Officer Independent Electoral and Boundaries Commission, and or the Commission Electoral and Boundaries Commission to satisfy and or pay up costs asses in Election Petition No. 3/2013 and all other costs incidental thereto.***
- 2. THAT, costs of this application be borne by the Respondents.***

The Application is supported by the Statement of Facts and an affidavit verifying the facts sworn by the Applicant thereof.

Brief facts

[2] Briefly the Applicant's case is that he was the Petitioner in CMCC Election Petition NO.3 of 2013 against one Alphaxard Kaumbuthu Chabari. The said Petition was heard and the Applicant was awarded costs on 4th December 2013. The Respondent in the said CMCC Election Petition NO 3/2013 was aggrieved by the decision of the court and filed an appeal to the High Court in HC Petition NO.4 of 2013 particularly on costs. The High Court heard the appeal and rendered its judgment on 17th December 2013 directing inter alia that the costs in CMCC Election Petition No. 3 of 2013 be borne by the 2nd and 3rd Respondents in CMC Election Petition No.3 of 2013.

[3] The Applicant's case, therefore, is that costs payable to the Applicant for the Lower Court were capped at Kshs 400,000 and later taxed at Kshs 319,600 which costs have not been paid to date. He further contended that the 1st and 2nd Respondents had refused, neglected and or failed to pay these costs, thus, provoking this Application.

Submissions by the Ex parte Applicant

[4] The filed written submissions to augment their position stated above. They submitted that the Respondents were served with the application for leave, order granting leave and Notice of Motion on 30th October 2015 and acknowledged receipt, but, to date they have filed no replying affidavit in opposition to the Notice of Motion herein. As such the Application had not been opposed both in fact and law. In addition, they submitted that the Respondents filed Grounds of Opposition dated 12th April 2016 in which they acknowledged the fact that they had refused to pay as they had not received funds to do so under Section 17 of the IEBC Act. The *Ex parte* Applicant concluded that he is entitled to the prayers sought in the Motion. He lamented that his journey had been long and it is time he enjoyed the fruits of his judgment.

Respondents: Funds not available

[5] The Application was opposed via Grounds of Opposition filed in court on 13th April 2016. In those grounds, the Respondents contended inter alia that this Application contravened the provisions of Section 13 (2) and 15 of the Independent Electoral and Boundaries Commission Act. They also argued that the Respondents have hitherto not been able to settle the costs claimed in this matter because they are yet to receive funds in accordance with the provisions of Section 17 of the Independent Electoral and Boundaries Commission Act. Accordingly, and for this reason, it is not true that they had refused, neglected and/or failed to pay the costs as alleged. .

Submissions by the Respondents

[6] The Respondents also filed submissions in which they reiterated the contents of the Grounds of Opposition filed. They, however, added that in view of the fact that the Ex Parte Applicant sought to hold the 1st Respondent personally liable, such orders would be injunctive in nature, and thus, the Application contravened the provisions of Sections 13 (2) of the IEBC Act as read together with Section 16 of the Government Proceedings Act. For those reasons, the Respondent believes that the Application was therefore incompetent. Consequently, it was submitted that the Applicant's claim was unnecessary as the Respondents could not be faulted for inability to pay the costs claimed.

DETERMINATION

[7] I have carefully considered this Application, the rival submissions by the parties and the authorities relied upon by the Respondents. I take the following view of the matter. It is not in dispute that the Applicant filed CMCC Election Petition No.3 of 2013 against one Alphaxard Kaumbuthu in respect of election of Member of County Assembly of Igoji West Ward; and the Petition was allowed. It is also not in doubt that the Respondent filed High Court Petition Appeal No. 4 of 2013 on costs, and the High Court on 17th September December 2013, that costs in CMCC Election Petition No.3 of 2013 to be borne by the 1st and 2nd Respondents. These costs are yet to be paid. The bone of contention, however, is that the Applicant is convinced that the Respondents had refused to pay despite several demands, thus, this

application. The Respondents argued that they had been unable to settle the costs because they had not received funds in accordance with Section 17 of the IEBC Act and that as such they cannot be said to have refused, neglected and or failed to settle the costs as it has been alleged by the Ex parte Applicant. The Applicant now seeks for an order of mandamus to compel the Chief Executive Officer of, and the Independent Electoral and Boundaries Commission to satisfy and or pay up the costs assessed in Election Petition No. 3/2013 and all other costs incidental thereto. What does the law say on order of mandamus?

Law on mandamus

[8] To answer this question, I am content to cite *in extenso* the decision of the Court of Appeal in **KENYA NATIONAL EXAMINATION COUNCIL v REPUBLIC, EXPARTE GEOFFREY GATHENJI & 9 OTHERS**, Nairobi Civil Appeal No. 266 of 1996 where it aptly summarized the purpose and reach of an order of mandamus as follows:

“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“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 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.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made 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.”

What do these principles mean? They mean that an order of mandamus will compel 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.”

[9] For further elucidation on this position of the law, see the decision by Odunga J in the case **REPUBLIC vs. THE COMMISSIONER OF LANDS AND ANOTHER EX-PARTE KITHINJI MURUGU M’AGERE, NAIROBI HIGH COURT MISC. APPLICATION NO. 395 OF 2012**, on circumstances in which an order of mandamus can issue as follows:

“The first issue is when can a Court grant an order of mandamus and what is an order of mandamus? In Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543, it was held that:

“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.”

It is an order sought under sections and 9 of the Law Reform Act, Cap 26 Laws of Kenya as read with Order 53 of the Civil Procedure Rules by person or body from the High Court of Kenya requiring any act to be done. In other words, Mandamus would issue from the alternative remedy, requesting that a statutory body etc. be compelled to fulfill its statutory obligation. So Mandamus order can issue from the High Court commanding a body or person to do that which it is its or his duty to do. It lies to secure that performance of a public duty, in the performance of which the applicant has a sufficient legal interest. The issue of Mandamus is discretionary and will only issue provided there is no other remedy available. See Tom Byakatonda on Behalf of Rushwa Growers Coop Society vs. The Board of Directors Banyankole Kweterana Coop Union Mbarara HCMA No. 29 of 1995 and Wade & Philips 9th Ed 607; Cephass Male vs. KCC [1992] KALR 159.

It is important to note, however, that an order of mandamus is not an order of specific performance, like in a contract situation. A party in a judicial review seeking an order of mandamus must show the existence of a statutory duty conferred or vested by statute upon some person, body of persons or tribunal which such person, body of persons or tribunal has failed to perform. See Republic vs. Registrar of Societies & 5 Others ex parte Kenyatta & 6 Others Nairobi HCMCA No. 747 of 2006 [2008] 3 KLR (EP) 521.

Therefore, mandamus is a peremptory order requiring the Respondent to perform a specified public duty. It does not lie for breach of a private obligation even if such obligation is owed with other public law duties to an applicant but whether a duty is to be enforced by mandamus depends on whether the duty as expressed or implied gives the applicant the right to complain. Its purpose is to compel the performance of a public duty or any act contrary to or evasive of the law. It does not lie against a public officer as a matter of course. There are bars and limitations. Courts are reluctant to direct a writ of mandamus against the executive officers of a Government unless some specific act or thing, which the law requires to be done, has been omitted. Courts proceed with extreme caution for the granting of the writ, which would result in interference by the judicial department with the management of the executive department of the Government. The conditions for its grant are that it must be shown that the public officer has failed to perform his duty; that the court would not grant mandamus where there is an alternative remedy available to the applicant; and that it may be refused if the enforcement of the order will present problems like lack of adequate supervision. See Evanson Jidiraph Kamau & Another vs. The Attorney General Mombasa H.C. Misc. Application No. 40 of 2000.

It has further been held that Mandamus is first, employed to enforce the performance of a public duty, which is imperative, not optional, or discretionary, with the authority concerned. Secondly, it is used to enforce the performance of public duties, by public authority, and not when it is under no duty under the law. However, it would seem that mandamus may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has “a public element” which may take any forms, and fall under the classic formula of “any body of persons having legal authority to determine questions affecting the rights of subjects” like non-statutory self-regulating bodies. Thirdly, mandamus may issue directing the concerned authority to act according to law. Fourthly, there must be a legal right, or substantial interest of the petitioner, the petitioner must satisfy the Court that he has a legal right, the performance of which must be done by the public authority. It must, however, be noted that by no means closing avenues for the issue of mandamus against an authority, the affected person, or persons, must have demanded justice, which must be refused. See the

Tanzania Court of Appeal decision in *Ngurangwa and Others vs. Registrar of The Industrial Court of Tanzania and Others* [1999] 2 EA 245.

It is now trite that the order of mandamus is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon 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. The order must command no more than the party against whom the application is made 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. See *Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443; Halsburys Laws of England 4th Edition Vol 1 at 111 Paras 80, 90.*

Public duty

[10] I will apply the above test to the facts of this case. Does the Respondent owe the Applicant a public duty to pay costs awarded by the court? Public duty may be imposed on a person or body of persons by a statute; such is called statutory duty. I could be wrong, but I dare venture to say that, by virtue of section 13(2) of the IEBC Act, section 21(3) of the Government Proceedings Act is pointedly important in matters of satisfaction of court decrees as is the case here. The section imposes a statutory duty on the Accounting Officer of the relevant government department (decree-debtor) to pay any sums, including costs which are duly certified by court to be due and payable in a decree; and processed in accordance with the procedure provided thereto. Under section 10(7) (c) of the IEBC Act, the Secretary to the Commission is the Accounting Officer of the Commission and for purposes of satisfaction of decrees of court he bears the statutory duty thereof. Therefore, for purposes of judicial review application an order of mandamus may issue to compel the Accounting Officer to exercise his statutory duty in relation to satisfaction of court decree against the state organ for which he is the Accounting Officer. The remedy of mandamus would be available in cases where no any other appropriate or adequate remedy exists and it is appropriate in a case such as this, as Lord Mansfield stated in a series of cases, mandamus would be...’’liberally interposed for the benefit of the subject and advancement of justice; to meet the ends of justice for a decree-holder who cannot execute his decree due to legal restrictions. But, it must be understood that an order of mandamus is not a tool of execution of decree, or in the nature of an injunction, but a remedy which merely compels public officers to perform their public duties including statutory duties to pay court decrees; again it will not specify the manner in which the person will exercise the duty. I am aware of a decision by Odunga J in High Court Judicial Review Miscellaneous Application No. 44 of 2012 **REPUBLIC vs. THE ATTORNEY GENERAL & ANOTHER EX PARTE JAMES ALFRED KOROSO** where he expressed himself thus:

‘‘...In the present case the ex parte applicant has no other option of realising the fruits of his judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that he has been awarded is realized. Unless something is done he will forever be left babysitting 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 judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment 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 recognized 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.”

Personal liability

[11] I have heard arguments being made about section 15 of the IBC Act to the effect that the CEO of IEBC is protected against personal liability under the section. True it is. But is the section appropriately invoked in answer to such proceedings for an order of mandamus? Let me cast said section below for purposes of what I will say next. The section provides:-

“15 protection from personal liability

Nothing done by a member of the Commission or by any electoral officer, shall if done in good faith for the purpose of executing the powers, functions or duties of the Commission under the Constitution or this Act, render such member or officer personally liable for any action, claim or demand”

The section protects the officer from personal liability for things he has done in good faith in the course of executing his duties. My understanding of the remedy of mandamus is that it does not impose any personal liability on the public officer or the Accounting Officer of the particular state organ or commission- the decree-debtor; it merely compels public officers to perform their public duties. Care should, therefore, be taken when invoking this section as inappropriate application of the section could be disastrous as no government or state organ would ever pay decrees against it. Perhaps, the impleading of the CEO as a respondent herein is responsible for the misconceived argument that personal liability is being imposed on the person of the current CEO for the debts of IEBC. But, it would be wrong to cite him in person or place personal liability for the debts of IEBC, which is not the case here. These arguments should be seen within the law on mandamus which relate to compulsion to perform a public duty by as opposed to imposing personal liability on the officer. On this, I specifically find support in the eminent literary work in ***HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 from paragraph 89 that:-***

“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...” [Underlining mine]

Failure to perform statutory duty

[12] The million dollar question is whether the 2nd Respondent has refused to settle the costs herein? I note that the Applicant stated in paragraph 9 of his Statement of Facts as follows;_

9. THAT, we attempted to execute against I.E.B.C, but to no avail. The warrants we obtained could not be executed at all, by virtue of sections 21, 22 and 23 read together with section 13(2) of I.E.B.C ACT.

The Respondent on the other hand submitted that Respondents have not refused, neglected and/ or failed to settle the costs awarded herein except that they were unable to settle those costs because they have not received funds in accordance with section 17 of the IEBC Act. It is the duty of IEBC to make provision for payments of court decrees in their budgetary estimates, and failure to do so can only be their mistake. It is apparent that the decree herein was passed in 2013 and these proceedings were instituted in October, 2015. The 2nd Respondent has been aware of the decree all along. Therefore, whereas their funds are allocated through the financial systems provided under section 17 of the IEBC Act, it is their duty to provide for such budgetary provisions in their financial estimates, and so their argument that they have not refused to pay except that they have not received funds for payment of this decree is completely dishonest. That notwithstanding, I have perused the record and the Ex parte Applicant has not shown in detail the exact steps he took to adhere to the procedure provided in the Government Proceedings Act for satisfaction of the decree herein. The Ex parte Applicant only made general statements such as in paragraph 13 and 15 of the Verifying Affidavit that he made attempts to have the costs settle but in vain. He annexed only one letter dated 7th May, 2015 written to the advocates for the Respondents which is not sufficient to show refusal to discharge statutory duty by the Accounting Officer of IEBC. Therefore, the court may not be truly sanctified to hold that there is a clear refusal to pay these costs. But, I should remind myself that judicial review is now a constitutional relief and when it is sought the court should fashion appropriate relief for the ends of justice to be met. Accordingly, in this case:-

(a) I issue an order of mandamus against the Accounting Officer of IEBC to pay the decretal sum herein.

(b) However, and without telling the Respondent how to pay the decree herein, I am prepared to give the 2nd Respondent the benefit of the doubt and suspend the order of mandamus for a period of six months to enable them make budgetary provision for the payment of and to pay the decretal sum herein.

(c) In default of (b) above, the Accounting Officer of IEBC is hereby compelled to pay the decree herein immediately upon such default.

(d) Each party shall bear own costs of the application. It is so ordered.

[14] I thank counsels for their industry.

Dated, signed and delivered in open court this 29th day of November, 2016

F. GIKONYO

JUDGE

In the presence of:

Wamache advocate for Ondari advocate for the applicant

No appearance by respondents

F. GIKONYO

JUDGE