



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
MISC. CIVIL APPLICATION NO. 339 OF 2016

**IN THE MATTER OF AN APPLICATION BY TORINO ENTERPRISES LIMITED LEAVE TO
APPLY FOR AN ORDER OF MANDAMUS**

**IN THE MATTER OF THE HIGH COURT OF KENYA AT NAIROBI CONSTITUTION AND
JUDICIAL REVIEW DIVISION PETITION NO 38 OF 2011**

TORINO ENTERPRISES LIMITED.....APPLICANT

VERSUS

PRINCIPAL SECRETARY, MINISTRY OF STATE FOR DEFENCE....RESPONDENT

JUDGMENT

Introduction

1. By a Notice of Motion dated 8th August, 2016, the applicant herein, **Torino Enterprises Limited**, seeks the following orders:

1. That an order of mandamus now be issued and the same be directed to the Principal Secretary Ministry of State for defence, the current substantive office holder and the respondent herein.
2. That the Principal Secretary and the current substantive officer holder, Ministry of State for Defence shall comply by paying to the applicant within Seven (7) days the sum of Kshs 1,530,000,000/= together with interest thereon at 12% P.a from 4th July 2011 until payment in full being the decretal sum due and payable to the applicant in respect of the High Court of Kenya at National Constitution and Judicial Review Division Petition No. 38 of 2011.
3. That in default Notice to Show Cause do issue against the Principal Secretary and the current substantive office holder, Ministry of State for Defence for her to show cause why she should not be cited for contempt of court
4. That the costs of this application be provided for.

Applicant's Case

2. The application was based on the following grounds:

a. That by a decree of this honourable court in Petition No. 38 of 2011 - Torino Enterprises Ltd –vs- The Attorney General given on the 4/7/2011 declared that the acquisition of the suit property by the respondents was done in contravention of Article 40(3) of the Constitution of Kenya and the Land Acquisition (Act Cap 295) and thus the occupation, retention, detention and continued occupation of the said portion of the suit land amounts to compulsory acquisition without compensation contrary to Article 40(3) of the Constitution of Kenya.

b. That the respondent shall restore possession of the said land or in the alternative pay to the petitioner the sum Kshs 1,530,000,000/= being the then undisputed market value of land.

c. That the respondent has not yielded possession and the applicant is pursuing the alternative remedy of compensation in the sum Kshs 1,530,000.000/=.

d. That interest at the rate of 12% per annum from 4/7/2011 until payment in full.

e. That there is therefore an outstanding sum of Kshs 1,530,000,000/= and accrued interest thereon due and payable by the respondents to the applicant in respect of the above.

f. That the decree has been served as well as the certificate of order against the government but the respondent has not honoured the decree.

g. Execution of the decree can thus only be effected against the respondent by way of an order of mandamus.

3. The verifying affidavit, apart from confirming the aforesaid exhibited copies of the judgment dated 4th July, 2011 and decree issued on 12th July, 2011 and averred that the respondent was served and there was a return of service evidencing the same.

4. It was further deposed that despite having been served with the decree and order, the respondent failed to honour the same yet there was no order in place.

Respondent's Case

5. In response to the application, the Respondent by way of a replying affidavit sworn by himself averred that he had not failed to carry out his statutory and/or legal obligation by refusing to pay the amount found to be due. Rather he averred that the Ministry had just been served with a Certificate of Order which was mandatory for attachment of liability against the government to arise. According to the Respondent, this fact was confirmed by the affidavit of service.

6. To the Respondent the amount in issue was colossal being in excess of Kshs 1.53 billion which was meant to be paid from the public coffers. To the Respondent there was an elaborate constitutional and statutory legal regime concerning the appropriation and utilization of funds from the exchequer and that the National Treasury had neither projected nor provided for sufficient financial allocation to the Ministry in the current financial year for the settlement of the same.

7. It was the Respondent's case that it would not be reasonable for the ex parte applicant to expect that funds in excess of Kshs 1.5 billion would have been projected and made available so soon after the commencement of a new financial year outside the ordinary budgetary cycle.

8. It was disclosed that the Ministry had within the prescribed time filed and served a record of appeal being Civil Appeal No. 84 of 2012 but the same as yet to be heard and determined as the Court had prioritised the hearing of appeals depending on the year of filing and was discouraging the filing, hearing and determination of interlocutory applications in favour of fast-tracking the hearing of substantive appeals.

9. It was the applicant's case that the dispute regarding the applicant's directorship was only resolved on 1st August 2016 hence it could not be said that the Respondent refused or failed to pay the applicant in such circumstances. The Respondent averred that it would be contrary to section 21 of the **Government Proceedings Act** for him to be held individually liable for the sums owed by the Government.

10. While relying on the elaborate procedure for payment by the Government, the respondent urged the Court not to allow the application.

Determinations

11. I have considered the issues raised in this application.

12. The first issue for determination is whether this Court ought not to grant the orders sought herein on the basis of the unavailability of funds. **Githua, J in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR** expressed herself as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued 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 judgment. 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 concerned 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.*” [Emphasis mine].

13. I associate with the said decision and it is therefore my view that settlement of decretal sum by the Government and its agencies does not necessarily depend on the availability of funds. This position was appreciated by this Court in **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012** in which this Court pronounced itself as follows:

“I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its

finances and settle the sum due herein.”

14. In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations. In other words financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle a sum decreed by the Court to be due from it. That objection therefore fails.

15. The next issue is whether the orders sought herein can issue against the Respondent herein. As rightly held in **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza** (supra):

“The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued 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 judgment. 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 concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”

16. In **Shah vs. Attorney General (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** 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." [Emphasis added].

17. 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.”

18. The circumstances under which judicial review order of *mandamus* are issued were set out by the Court of Appeal in 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."...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."

19. In this case, the Applicant herein has moved this Court to compel the satisfaction of a judgement already decreed in its favour by a competent Court of law. Whereas this Court appreciates that there are circumstances such as the amount involved and the period that is required in processing payment that may lead to the delay in effecting payment, such grounds can only be used as a basis to seek indulgence to settle the same but those are not recognised grounds for declining to grant an order of *mandamus*. If the Court were to decline to grant *mandamus* on that basis the person who is entitled to payment may be left without an effective remedy despite holding a decree. Accordingly I am not satisfied that the procedure necessary to be followed before the sum can find its way into the Respondent's hand is a ground for declining to grant the order sought herein.

20. With respect to the pending appeal the law is clear that the mere existence of an appeal does not amount to stay of judgement. If the Respondent was aggrieved by the decision he had the options of seeking stay of execution either before this Court or the Court of Appeal and once a stay of execution is obtained *mandamus* cannot issue as *mandamus* compels the performance of a duty that is due and cannot be issued where the performance of the duty has been suspended.

21. In the premises I find that the pending appeal cannot be a basis for declining to issue the orders sought herein.

22. With respect to prayers 2 and 3 of the Motion it is my view and I so hold that the same are premature at this stage. It is only upon failure by the Respondent to comply with the order of *mandamus* that orders in the nature of contempt may issue. Similarly, in an application for an order of *mandamus* the Court ordinarily does not compel the Respondent to act in a particular manner for example by directing that the applicant pay the sum due within a specific period unless such period is prescribed. Where however the order is not complied with after the Respondent's attention has been drawn to the order of *mandamus* and subject to the relevant procedural law, contempt orders may be issued.

23. I associate myself with the position adopted by **Majanja, J** in Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006 that:

"...a decree holder's right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant's right of access to justice protected under Article 48 of the Constitution."

24. In my view, the reasons advanced by the Respondent for the failure to satisfy the decree are flimsy excuses meant to deny the applicant the fruits of its judgement and I have no reason to decline to grant the

orders sought herein.

Order

25. In the premises I hereby issue an order of *mandamus* against the respondent compelling him to pay the applicant the sum of Kshs 1,530,000,000/= together with interest at the rate of 12% p.a. from 4th July, 2011 till payment in full being the decretal sum due and payable to the applicant in respect of Nairobi High Court Petition No. 38 of 2011.

26. The applicant will also have the costs of these proceedings.

27. Orders accordingly.

Dated at Nairobi this 20th day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Chege for Mr Wafula for the applicant

Mr Munene for Mr Bitta for the Respondent

CA Mwangi