



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW**

**MISCELLANEOUS APPLICATION NO. 323 OF 2016**

**IN THE MATTER OF AN APPLICATION BY SAIRA BANU GANDROKHIA AND SAIMA**

**SHOUKAT ALI KHAN FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES ORDER 53**

**AND**

**IN THE MATTER OF CMCC NO. 64 OF 2010 BEFORE THE CHIEF MAGISTRATE'S COURT  
AT NAIROBI**

**AND**

**IN THE MATTER OF PART IV OF THE GOVERNMENT PROCEEDINGS ACT**

**AND**

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT**

**SAIRA BANU GANDROKHIA.....1<sup>ST</sup> APPLICANT**

**SAIMA SHOUKAT ALI KHAN.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**PRINCIPAL SECRETARY MINISTRY OF INTERIOR AND COORDINATION**

**OF NATIONAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. By a notice of motion dated 28<sup>th</sup> July 2016 pursuant to leave to apply granted on 26<sup>th</sup> July 2016,

the ex parte applicants Saira Banu Gandrokhia & Saima Shoukat Ali Khan seek from this court Judicial Review order of mandamus to issue compelling and directing the respondents Principal Secretary Ministry of Interior and Coordination of National Government and the Attorney General to pay to the ex parte applicants the decretal sum of kshs 2,415,358 as decreed by the Senior Principal Magistrate's Court in Chief Magistrate's Civil case No. 64 of 2010; and that costs of the application be provided for.

2. The notice of motion is supported by the statutory statement and verifying affidavits sworn by Saira Banu Gandrokhia and Saima Shoukat Ali Khan sworn on 25<sup>th</sup> July 2016 accompanying the chamber summons dated 25<sup>th</sup> July 2016 for leave to apply.

3. This court did grant to the ex parte applicant's leave to institute Judicial Review proceedings on 26<sup>th</sup> July 2016 and ordered that the said substantive motion be filed and served upon the respondents within 21 days of the date of leave.

4. The substantive motion was dutifully filed within 21 days on 29<sup>th</sup> July 2016.

5. The ex parte applicant's case is that on 19<sup>th</sup> January 2007 they were charged with the offence of stealing by clerk contrary to Section 281 of the Penal Code in criminal case No. 551/2007 and that after a full trial, they were acquitted of the charges in a judgment delivered on 15<sup>th</sup> February 2009.

6. Following their acquittal, the ex parte applicants instituted a civil suit against the Attorney General on behalf of the police who prosecuted them, for malicious prosecution. The Police department falls under the Ministry of Interior and Coordination of National Government.

7. That on 19<sup>th</sup> June 2012, judgment was entered in favour of the ex parte applicants and it was decreed that the ex parte applicants were each and jointly entitled to shs 2,070,358 together with costs of shs 344,510.000 amounting to kshs 2,414,358.00.

8. That Certificate of Order was served upon the respondents on 19<sup>th</sup> June 2015 but that despite several reminders to date, the ex parte applicants have refused, failed and or neglected to settle the decree.

9. That as the provisions of Section 21(4) of the Government Proceedings Act prohibit attachment of Government property, the order that commends itself against the Government for failure to settle decree is mandamus s to compel such payment.

10. Further, that the provisions of Section 70 of the Public Finance Management Act mandate the 1<sup>st</sup> respondent as the accounting officer of the concerned Ministry to satisfy the decretal sum.

11. Copies of the judgment in the civil suit, decree, certificate of costs, Certificate of Order against the Government and several reminders for settlement were annexed as exhibits.

12. In response to the notice of motion, the respondents filed a replying affidavit sworn by C.F. Kimani, Legal Officer, Office of the President on 21<sup>st</sup> November 2016 in which he deposes that they received a letter from the Attorney General's office advising payment of shs 3,454,510 to the ex parte applicants herein being decretal sum in the civil suit.

13. That they projected and requested the National Treasury for the said sum of money to be allocated in the 2016/2017 financial year but that they received a letter from Treasury indicating that there was no budget allocation for settlement of legal claims for the Ministry in the budget allocation for the year 2016/2017.

14. That therefore the Ministry is currently not in a position to settle the decretal sum.

15. According to Mr Kimani, an individual should not be held liable for Government liability and lack of funds from the National Treasury and that the 1<sup>st</sup> respondent has not refused to pay the exparte applicants.

16. The parties advocates submitted orally before me on 6<sup>th</sup> December 2016 with Mrs Mugo urging on behalf of the exparte applicants and relying on the statement, the verifying affidavits and exhibits; that this court should grant the orders sought as prayed.

17. Miss Gathoka on behalf of the respondents submitted, relying on the replying affidavit whose contents I have reproduced above and stated that the 1<sup>st</sup> respondent had not refused to settle decree but that money was requisitioned from the National Treasury but that the same was never allocated hence the delay.

18. Counsel further submitted that the respondents acknowledge the debt due but that until the National Treasury releases the funds they would not be in a position to pay. Further, that they have made further request and as soon as the money is released, the decree herein shall be settled.

### **Determination**

19. I have considered the exparte applicant's notice of motion, the supporting documents, statutory statement and verifying affidavit. I have also considered the replying affidavit and the respective parties' advocates oral submissions.

20. The issue for determination is whether the orders sought are available to the exparte applicant.

21. Section 21(4) of the Government Proceedings Act provides:

***“ Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the government of any such money or costs as aforesaid, and no person shall be individually liable 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.”***

22. In **Kisya Investments Ltd vs Attorney General & Another [2005] 1 KLR 74** the High Court comprising Ibrahim and Visram JJ(as they were then) held:

***“ History and rationale of government's immunity from execution arises from the following.....Firstly, there has been a policy in respect of Parliamentary control over revenue and this is three fold and is exercised in respect of (i) The raising of revenue (by taxation or borrowing);(ii)Its expenditure; and (iii) The audit of public accounts. The satisfaction of decree or judgments is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government's expenditure. It is for this reason that Section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the monies provide by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorized by statute, and any unauthorized payment may be recovered. As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (Section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that parliament is very jealous of its control over the expenditure and this is as it should be. No ministry or department has any ready funds at all times to satisfy decrees or judgments- while existence of claims and decrees may be known to the ministries and departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the government expenditure. The second situation, which arises from the above, is that once a decree or judgment is obtained against the government, it would***

*require some reasonable time to have it forwarded to the Ministry of Finance, Treasury, Controller and Auditor General etc for scrutiny and approvals for it to be paid from the consolidated fund. The Ministries and Departments do not have their “own” funds to settle such decrees or payments and considering the nature of the government structure, procedures, red tape and large number of claims, this could take a long time. If execution and or attachment against the government were allowed, there is no doubt that the government will not be able to pay immediately upon passing of decrees and judgments and will be inundated with executions and attachments of its assets day in day out. Its buildings will be attached and its plans and equipment will be attached, its vehicles, aircraft, ships and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneers hammer.*

*No government can possibly survive such an onslaught. The government and therefore the state operations will ground to a halt and paralyzed and soon the government will not only be bankrupt but its constitutional and statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the law that prohibits execution against and attachment of the government assets and property.”*

23. In view of the above position which I concur with, the Civil Procedure Rules do not permit execution against the Government including County Governments and therefore the only remedy available to the decree holders against the Government is the remedy of Judicial Review by way of an order of mandamus to compel the Government and more particularly the Accounting Officer of the relevant State Department to settle the decree of the court.

24. In **Republic V Attorney General Exparte James Alfred Koroso JR 44/2012** Honourable Odunga J stated:

*“.....in the present case, the exparte applicant has no other option of realizing the fruits of this 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 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 judgments due to road blocks 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 or 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 of 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 case upon him by Parliament. The fact that an 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 case 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 the 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 employer of the concerned public officer and to uphold the dignity and authority of the court."*

25. From the above judicial decisions which though persuasive but good law, it is clear that the only remedy available to such a decree holder against the Government is judicial review remedy of mandamus to compel the Accounting Officer of the relevant Ministry or State Department to settle the material decree.

26. In the instant case, the respondents do not dispute the decree. They, infact, acknowledge the indebtedness in terms of the decree. It therefore follows that the exparte applicant's who are the decree holders have rights which have crystallized, to enjoy the fruits of their lawful judgment and those rights must not be curtailed. That right must be safeguarded and enforced by the court as espoused in Article 159(2) (a) and (b) of the Constitution that justice shall be administered without delay, and the applicant's right to access Justice under Article 48 of the Constitution protected.

27. The 1<sup>st</sup> respondent is under a public duty to settle decree of the court made in favour of the exparte applicants, in order that justice may at the end of the day be served because there is no other remedy available to the exparte applicants.

28. Since 2012 when the decree in CMCC 64/2010 was made, the exparte applicant's counsel has made several correspondences to the respondents asking for payment but all has fallen on deaf ears. The decretal sums due to each of the exparte applicants, severally and jointly is shs 2,070,848 as per Certificate of Order against the respondents with costs of shs 344,510 issued on 16<sup>th</sup> May 2015. That sum remains unsettled.

29. In view of the foregoing, the respondents cannot be heard to say that they have no money to settle the decree together with certificate of stated costs since 5<sup>th</sup> November 2012 and which decree was drawn and submitted to the Solicitor General.

30. The affidavit sworn by C.F. Kimani legal officer Ministry of Interior and Coordination of National Government does not contain a single annexure to show that indeed the Ministry of Interior advised the National Treasury of the decree herein in good time for settlement to avoid escalation of interest and costs.

31. That being the case, the order that commends itself in these Judicial Review proceedings is a Judicial Review order of mandamus compelling the 1<sup>st</sup> respondent to settle decree in Milimani CMCC 64/2010 between the exparte applicants herein and the Attorney General.

32. In the end, I find this application for Judicial Review merited and proceed to grant and issue the order of Mandamus compelling the Principal Secretary, Ministry of Interior and Coordination of National Government who is the Accounting Officer of the Ministry/State Department to settle decree in Milimani CMCC 64/2010 amounting to shs 2,415,358.00 such sums shall be paid to the exparte applicants within a period of one hundred and eighty days (180) from the date hereof.

33. In default of such settlement, the ex parte applicant is at liberty to apply, upon expiry of the stated period.

34. Costs shall be in the cause.

Dated, signed and delivered in open court at Nairobi this 9th day of December 2016.

**R.E. ABURILI**

**JUDGE**

In the presence of Miss Mugo for the ex parte applicant

Mr Munene for the respondents

CA: Lorna