



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MISC. CIVIL APPLICATION NO. E10 OF 2021

IN THE MATTER OF AN APPLICATION BY SCENERIES

LIMITED FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF NAIROBI HIGH COURT CONSTITUTIONAL

AND HUMAN RIGHTS DIVISION MISCELLANEOUS CONSTITUTIONAL APPLICATION

NO. 1 OF 2016; SCENERIES LIMITED v NATIONAL LANDS COMMISSION AND 2 INTERESTED PARTIES

REPUBLIC.....APPLICANT

=VERSUS=

NATIONAL LAND COMMISSION.....RESPONDENT

EX PARTE SCENERIES LIMITED

JUDGMENT

Introduction

1. By a chamber summons dated 22nd May, 2021 filed under Order 53 Rule 1 of the Civil Procedure Rule, 2010, the Applicant sought leave to apply for the Judicial Review Order of Mandamus to compel the Secretary, National Land Commission to pay the Applicant Ksh 7,240,682 plus interest at 14% per annum from 4th December 2017 till payment in full together with costs of the Application.

2. Upon leave being granted on 18th October 2021, the Applicant filed the substantive motion dated 19th October 2021 seeking the following orders:

i) An Order of Mandamus to compel the Secretary, National Land Commission to pay the Applicant Ksh 7,240,682 plus interest at 14% per annum from 4th December 2017 till payment in full.

ii) Costs of the Application be provided for.

3. When the matter came up for directions on 16th November 2021, it was directed that the application for judicial review be canvassed through written submissions. Parties were given timelines within which to file and exchange their respective submissions. However, the material on record shows that the Applicant filed their submissions whereas the Respondent's submissions were not on record by the time of preparation of the judgment.

The case for the Exparte Applicant

4. The Application for judicial review was based upon the grounds set out in the Application dated 19th October, 2021, the statutory statement, and the verifying affidavit accompanying the said summons. It was the Exparte Applicant's case that they had filed ***High Court Misc. Constitutional Application No. 1 of 2016: Sceneries Limited v National Land Commission & 2 Others*** challenging the National Land

Commission's purported determination of 26th July 2016, which was in contravention of their right to property under Article 40 of the Constitution, right to a fair hearing under both Articles 25 and 50 of the Constitution and contempt of court.

5. On 23rd February 2017, the High Court delivered a judgment in their favour and they proceeded to tax their bill. The bill of costs was taxed and allowed in the sum of Ksh 7,240,682 on 4th December 2017 and a certificate of taxation was issued on 25th January 2018.

6. Following the issuance of the certificate of taxation, the Applicant applied for and obtained on 27th January 2020 a Certificate of order against the Government for the said Ksh 7,240,682.

7. Despite demand on 1st February 2020, that the Respondent pays the amounts due to it, the Respondent has failed, declined and/or neglected to settle.

8. It was also the exparte applicant's case that the Respondent through its Accounting Officer of the Commission within the meaning of section 21 of the Government Proceedings Act and section 20 (4) (b) of the National Land Commission Act is mandated and has a duty to pay all claims against the Government as ordered by the court. In support of this position, Counsel relied on several cases including; the case of Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fedrick Manoah Egunza [2012] eKLR, Republic v Attorney General and Another ex parte James Alfred Koroso [2013] eKLR and Republic v Kenya Broadcasting Corporation ex parte Dorcas Florence Kombo [2018] eKLR.

9. The exparte applicant also submitted that the issue of lack of budgetary approval or lack of funds as was deposed by the Respondent in their Affidavit, is not a defence since the law doesn't condition settlement of a decretal amount by public entity on budgetary allocations. In support of this position, Counsel relied on the cases of Republic v County Government of Nairobi & 2 Others ex parte Kingpost Limited [2021] eKLR, Jaribu Credit Traders Limited v Nairobi County Government [2018] eKLR and Republic v Principal Secretary, Ministry of Defence & Another exparte David Gitau Njau & 9 Others [2018] eKLR.

10. It was argued for the Applicant that that the Respondent was liable to settle the claim since the judgment had directed that the Respondent and the 1st Interested Party to pay the costs of the proceedings to the Applicant and the second interested party. Counsel submitted that where liability is to be borne jointly or severally, the decree holder has the right to elect to direct his claim against one of the judgment debtors or making against each judgment debtor individually. In support, counsel cited the cases of Republic v PS Internal Security ex parte Joshua Mutua Paul [2013] eKLR, Gedion Muthoka Muasya v Urbanus Mulele Musyoki & Another [2019] eKLR and Republic v County Government of Marsabit & 2 Others ex parte Gerald Michael Eremonye & 9 Others.

The Respondent's case

11. The application was opposed vide a Replying Affidavit sworn by **Brian Ikol, the Deputy Director Legal Affairs on 16th December 2021.** He deposed that since the costs are to be borne by both the Commission and Hon. Ngengi Muigai who was the 1st Interested Party, they were only responsible for half of the amount as the rest was to be paid by the 1st Interested party to the earlier suit. It was contended that the Application was flawed since the orders sought in the application did not conform to the order regarding costs that was made in the judgment.

12. The Respondent averred that it is a constitutional commission established by Article 67 and 248 of the Constitution. Accordingly, it is subject to Article 249(3) of the Constitution which provides that parliament shall allocate funds and therefore funds needed to pay costs would be subject to Parliament's approval. It was contended that the Commission can only pay the costs owed once the sum is included in its budget as approved.

Analysis and Determination

13. The Court has considered the application for judicial review and the submissions filed by the Applicant. The court is of the opinion that the following key issues arise for determination herein:

i. Whether the Applicant have made out a case for the grant of the judicial review order sought?

ii. Who shall bear the costs of the application?

Issue No. I

Whether the Applicant has made out a case for the grant of the judicial review order sought?

14. The principles that guide the Court when dealing with an application for judicial review remedy of mandamus was stated in the Court of Appeal case of Commission on Administrative Justice vs Kenya Vision 2030 Delivery Board & 2 others [2019] eKLR. Wherein the court stated as follows:

“As observed by the Judge and correctly so in our view, the principle that guides the High Court when dealing with the scope and efficacy of an order of mandamus was crystalized by the Court in Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroje & 9 others [1997] eKLR namely:

“The order of mandamus is of most extensive remedial nature and is in the form of 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 of 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 it may issue in cases where although there is an alternative remedy, yet the mode of redress is not convenient, beneficial and effectual."

15. This position was reiterated in the English case *of R vs Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741* where it was stated as follows:

"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."

16. In the instant case, the ex parte applicant in obtaining a decree and subsequently the certificate of order against the Government, acquired a specific legal right which gave rise to the Commission's statutory obligation through its accounting officer to pay the decretal amount of Ksh 7,240,682 as specified in the certificate of order against the Government. As per the judgment that was delivered by **Majivo J.** on 23rd February 2017, costs were to be paid by the Respondent and the 1st Interested party and as such the Applicant has a right to elect which party to pursue their costs. The Respondent has both a statutory and public duty to satisfy the decree issued by a competent court in favour of the exparte applicant. It is not disputed that by the time these proceedings were commenced, the Respondent had failed and/or neglected to fulfill its aforesaid duty to the detriment of the exparte applicant despite the fact that no appeal had been lodged against the judgment.

17. The Respondent averred that it is a constitutional commission established by Article 67 and 248 of the Constitution. Accordingly, it is subject to Article 249(3) of the Constitution which provides that parliament shall allocate funds and therefore the funds needed to pay costs would be subject to Parliament's approval. The Commission can only pay the costs owed once the sum is included in its budget as approved. On this aspect, the Court is bound to adopt an interpretation that favours enforcement and as far as possible secures accrued rights. The values of the Constitution particularised under **Article 10**, the obligation of the court to do justice to the parties and to do so without delay under **Article 159(2)(a)** and **(b)** and the applicant's right of access to justice protected under **Article 48** of the Constitution. Hence therefore there is nothing unconstitutional for an applicant enforcing his decree that is due against a government entity and the mere fact that the same has not been budgeted for cannot be a ground for not settling the said decree. On the contrary it will be absurd and contemptuous should the respondent prolong the settlement of the said decree.

18. In my view, the ex parte applicant is perfectly in order to seek the order of mandamus to compel the respondent to satisfy the decree. The exparte applicant has also sought for the said amount to be paid together with interest at 14% per annum from 4th December 2017. In the instant case, it was not until 27th January 2020 when the certificate of order against the Government was issued by the court. As such the respondent's liability to pay the said sum to the applicant under Section 21 of the Government Proceedings Act arose only after that date and I would direct as such.

19. In the circumstances and as aptly submitted by the exparte Applicant, the Court is satisfied that the exparte Applicant has made out a strong case for grant of the judicial review orders sought. I have no reason to deny them this order.

Issue No. 2

Who shall bear the costs of the application?

20. On the issue of costs, the courts have ultimate discretion. The exparte applicant's amount of Ksh 7,240,682 has been pending since 4th December 2017 albeit in different court proceedings. In my view awarding further costs herein will prolong the matter. Towards this end, litigation must come to an end and for that reason, I will direct each party to bear its own costs of the Application.

Final orders

21. Accordingly, for the reasons set out above, this Court finds that the Applicant's Notice of Motion dated 19th October 2021 is merited, and is allowed as follows:

i) A writ of Mandamus compelling the Secretary, National Land Commission, to pay the Applicant an amount of Ksh 7,240,682/- plus interest at 14% per annum from 27th January 2020 till payment in full is hereby issued.

ii) Each party to bear its own costs of the application.

22. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH 2022.

E. K. WABWOTO

JUDGE

In the Virtual Presence of: -

Ms. Nduta Kamau for the Exparte Applicant.

Ms. Cecilia Masinde for the Respondent.

Court Assistant: Caroline Nafuna