



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 31 of 2012

IN THE MATTER OF: THE CIVIL PROCEDURE ACT, CAP 21 LAWS OF KENYA

*BETWEEN*

REPUBLIC .....APPLICANT

AND

THE PERMANENT SECRETARY, MINISTRY OF STATE FOR PROVINCIAL

ADMINISTRATION AND INTERNAL SECURITY.....RESPONDENT

THE HON. ATTORNEY GENERAL.....INTERESTED PARTY

EXPARTE

FREDRICK MANOAH EGUNZA

JUDGEMENT

Pursuant to leave granted on 25th January 2012, the Exparte Applicant herein Fredrick Manoah Egunza moved this court by way of a Notice of Motion dated 6th February 2012 and filed on 8th February 2012 seeking an order of Mandamus directed against the Permanent Secretary, Ministry of State for Provincial Administration and Internal Security compelling him to pay the Exparte Applicant (*hereinafter referred to as the Applicant*) a sum of Kshs.120,780,000 together with interest at the rate of 120% until payment in full in accordance with a decree and certificate of costs issued by a subordinate court in Chief Magistrate's Civil Case No.6253 of 2010. The Applicant also applied to be awarded costs of the suit.

The notice of motion is supported by the supporting affidavit sworn by the Applicant on 6th February 2012 annexed to the motion, the statutory statement dated 24th January 2012 and the verifying affidavit sworn on even date annexed to the chamber summons seeking leave to commence judicial review proceedings filed on 25th January 2012.

The Applicant's case is well captured in the Applicant's verifying affidavit in which he deponed that he had sued the Hon. Attorney General, the Interested Party herein in CMCC 6253 of 2010 in his official capacity as the legal representative of the Government of Kenya on behalf of the Commissioner of Police, Office of the President claiming special damages in the sum of Kshs.148,521 and General damages for alleged breach of his constitutional rights to liberty, freedom of movement among others more specifically described in the plaint dated 5th October 2010 annexed as exhibit *marked FMEI*.

According to the Applicant, he was partially successful in his claim and judgment was entered in his favour against the Interested Party in the sum of Kshs.88,521 together with half the costs of the suit and interest. A decree and a certificate of costs were subsequently extracted which have been annexed as exhibits marked “**FME5**”. The certificate of order against the Government shows clearly that the total sum payable to the Applicant from the Government was Kshs.120,780/- the same amount in respect of which an order of mandamus is being sought against the Respondent in this case.

Upon being served with the notice of motion, the Hon. Attorney General through Joy Maina, Litigation Counsel opposed the motion through grounds of opposition filed on 28th February 2012 in which the Respondent and the Interested Party claimed that the Applicant's motion was fatally defective, unmeritorious, premature and that it was an abuse of the court process. The claim that the Applicant's suit was premature and therefore unmeritorious was expounded on behalf of the Respondent by the Interested Party in the written submissions filed on 2nd March 2012.

Learned State Counsel submitted that as the Hon. Attorney General was served with the certificate of order against the Government on 30th November 2011, the Respondent's liability to pay the said sums to the Applicant under Section 21 of the Government Proceedings Act arose only after that date and that it was premature for the Applicant to commence proceedings for an order of mandamus only two months later for the purpose of enforcing payment of the sums decreed in CMCC 6253 of 2010. The court was asked to take judicial notice of the fact that all ministries of the Government of Kenya receive annual financial allocations from the consolidated fund through annual budgets prepared and tabled by each ministry in the month of July of each year and approved by Parliament.

It was the Respondent's view that the Applicant's claim having fallen due for payment on 30th November 2011, its payment could only be enforced after July of the following year after the same had been factored into the ministry's budgetary allocations and its expenditure approved by Parliament. To support their submissions on this point, the Respondent relied on the case of **Kisya Investment Ltd Vs Attorney General and Another HCC 2832 of 1990.**

On his part, Mr. Khayega learned counsel for the Applicant in his written submissions filed on 5th April 2012 denied that the proceedings herein were premature and contended that through the judgment in the subordinate court and the certificate of order against the Government which was duly served on the Hon. Attorney General, the Applicant had acquired a specific legal right which had a specific remedy which the Government was bound to satisfy being its liability in tort and having satisfied the requirements prescribed under the Government Proceedings Act, and having not received any response from the Respondent, the Applicant was entitled to the relief sought in this case.

The Applicant relied on the case of **Republic -Vs- Permanent Secretary of State in the Office of the President, Misc. Civil Appn. No.225 of 2008 (Nakuru).**

Having considered the parties rival submissions in this matter including the authorities cited, it is my considered view that the Respondent's submissions that the Applicant's suit is premature having been filed two months after service of the certificate of order against the Government are misconceived and lack any legal basis.

It is not disputed that the Applicant is the successful litigant in CMCC 6253 of 2010 and that he has a decree in his hands in the sum of Kshs.120,780 and an order awarding him half the costs of the suit and interest. The decree and order were issued against the Attorney General on behalf of the Government of Kenya. The Applicant's right to payment accrued on 30th November 2012 when he served the Attorney General with a certificate of costs against the Government under Section 21 of the Government Proceedings Act. The right of payment having accrued and having not received any response from the Respondent in two months, the Applicant was by law entitled to approach the court for redress if he felt aggrieved by the Respondent's inaction or failure to satisfy the decretal amount within two months.

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.

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.

Having read through the case of **Kisya Investments Ltd -Vs- Attorney General & Another (Supra)**, it is my opinion that the discussion of the two judge bench at Page 17, 18 and 19 which was quoted and relied upon by the Respondent in its submissions was quoted out of context. The learned judges made the remarks reproduced by the Respondent in his submissions when describing the internal mechanisms that Government ministries go through when making provisions to satisfy decrees for money issued against the Government. The court in making those observations was trying to rationalize the purpose and usefulness of the immunity and protection given to the Government against attachment of its goods and properties in execution of monetary decrees.

The court did not make a finding in that case that successful litigants should not move with reasonable speed to enforce payment of decrees issued in their favour against the Government.

In my view, the service of the certificate of order against the Government on the Attorney General on 1st December 2011 constituted a demand for payment and the fact that no response or payment was received by the Applicant from the Respondent for two months was sufficient reason for the Applicant to construe that the Respondent had neglected to perform his statutory duty to pay under Section 21(3) of the Government Proceedings Act. The Applicant was therefore entitled to move to court to seek an appropriate remedy. The Applicant cannot be faulted for being vigilant.

In the case of **R Vs Kenya National Examination Council Exparte Geoffrey Gathenji & 9 Others, Civil Appeal No.266 of 1996** the Court of Appeal while discussing the remedy of mandamus cited with approval a passage in Halsbury's Laws of England 4th Edition Vol. 1(1) Page 111 paragraph 89 and 90 wherein the authors have stated;

**“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.....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”.**

As stated earlier, in obtaining a decree against the Government and serving the Attorney General with the certificate of order against the Government, the Applicant acquired a specific legal right which gave rise to the Government's statutory obligation through the accounting officer of the ministry concerned to pay the decretal amount as specified in the certificate of order against the Government. The Respondent being the accounting officer in the Ministry of State for Provincial Administration and Internal Security had both a statutory and public duty to satisfy the decree issued by a competent court in favour of the Applicant. It is not disputed that by the time these proceedings were commenced, the Respondent had failed and/or neglected to fulfill his aforesaid duty to the detriment of the Applicant despite the fact that no appeal was lodged by the Government against the judgment entered in his favour in the subordinate court.

In view of the foregoing, I am satisfied that the Applicant has demonstrated that he is deserving of the relief sought in the notice of motion dated 6th February 2012.

The application is therefore allowed with the result that an order of **mandamus** is hereby issued commanding the Respondent to satisfy the order of the court issued on 30th November 2011 by paying the Applicant a total sum of **Kshs.120,780** together with interest at the rate of **12%** per annum from 9th November 2011 until payment in full. Each party to bear its own costs .

**Dated, Signed and Delivered** by me at Nairobi this 25<sup>th</sup> day of **September** 2012.

**C. W. GITHUA**  
**JUDGE**

***In the presence of:***

Florence - Court Clerk

..... for Applicant

..... for Respondent

..... for Interested Party