



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 176 of 2011

**IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF MANDAMUS AGAINST THE
PERMANENT SECRETARY, MINISTRY OF INTERNAL SECURITY OR ITS PREDECESSOR**

AND

**IN THE MATTER OF: THE GOVERNMENT PROCEEDINGS ACT, CAP 40 LAWS OF
KENYA**

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE PERMANENT SECRETARY, MINISTRY OF INTERNAL SECURITY....RESPONDENT

EX-PARTE

JOSEPH GITHINJI MWAI

GRACE MUTHONI MAGUTA

JUDGMENT

The Ex-parte Applicants, Joseph Githinji Mwai and Grace Muthoni Maguta in their capacity as the personal representatives of the Late Ian Macharia Githinji instituted suit against the Hon. Attorney General in Nairobi CMCC No.5412 of 2006 which suit terminated in their favour.

The decree annexed to the Applicants' pleadings and **marked WTI** reveals that judgment in that case was entered on 14th December 2009 and the Applicants' were awarded a sum of Kshs.430,000 together with interests at the rate of 12% per annum from 14th December 2007 till payment in full. The Applicants were also awarded costs of the suit.

A certificate of order against the Government was subsequently issued on 6th August 2010 certifying the amount due from the Government to the Applicants to be Kshs.626,711 together with further interest at the rate of Kshs.12% per annum from 15th April 2010 until payment in full.

The Applicants contend that the certificate of order against the Government was served on the Hon. Attorney General as required by the law but by the time of commencing the instant Judicial Review proceedings for an order of Mandamus, the Respondent who is the accounting officer in the Ministry of Internal Security had not effected payment of the decretal amount despite demands to do so.

Besides the prayer for an order of mandamus to compel the Respondent to settle the decretal amount, costs and interest in CMCC.5412 of 2006, the Applicants through the Notice of Motion dated 9th November 2011 also sought orders seeking committal of the Respondent to civil jail if he fails to make payment as ordered by the court.

The Respondent through State Counsel namely M/s Joy Maina opposed the motion vide grounds of opposition filed on 27th March 2012. The only objection taken to the motion by the Respondents is that it was allegedly premature, unmeritorious and that it amounted to an abuse of the court process.

The Respondent did not however dispute the applicants' claim that the Hon. Attorney General was served with a decree, certificate of costs and a certificate of order against the Government.

As the Respondent did not file a replying affidavit in this matter, the claim that the Respondent is the accounting officer in the Ministry of Internal Security was also not contraverted. Both parties filed written submissions which I have carefully considered.

Having considered the application and submissions by both counsels, it is my finding that the only issue that arises for determination by this court is whether the remedy of mandamus is available to the Applicants in this case.

It is settled law that an order of mandamus issues against public bodies or public officers to compel them to perform a public duty or a duty imposed by statute where there has been failure to perform the duty in question to the detriment of an aggrieved party.

In the context of this case, Section 21(3) of the Government proceedings Act (the Act) creates a statutory duty on Accounting Officers in the various Government ministries to satisfy decretal amounts awarded to successful litigants in civil suits filed against the Government.

Section 21 (3) states;

“If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable and the accounting officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon.”

The Respondents in their submission advanced what in my view is with respect a weak argument that the Applicants are not entitled to an order of mandamus as prayed in this case as the decretal amount awarded in the judgment sought to be enforced had not been budgeted for or its expenditure approved by parliament. They relied on the case of **Kisya Investments -Vs- Attorney General & Another (2005) eKLR.**

This authority in my view is inapplicable in this case because the Court in that case did not hold that an order of mandamus cannot issue to compel accounting officers to satisfy decretal amounts issued against the Government in civil suits. The passages in the judgment quoted in the Respondent's submissions were in my opinion quoted out of context since the court in making those statements was discussing the rationale behind the protection and immunity of the Government from execution and attachment of its property or goods in the enforcement of judgments issued against the Government. The said immunity is provided for under Section 21(4) of the Government Proceedings Act.

A reading of Section 21(3) shows that 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.

As I held in the case of **Republic -Vs- The Permanent Secretary, Ministry of State for Provincial Administration & Internal Security & Another, Exparte Fredrick Manoah Egunza, Misc. App. 31 of 2012**, 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 a remedy at any time of the year.

Once a certificate of order against the Government was issued and the same was served on the Hon. Attorney General, the Applicants' right to payment accrued and the Applicants were at liberty to enforce it at any time of the year.

The Applicants' claim that the application was premature as the sums demanded had not been budgeted for or approved by Parliament is therefore unmerited and cannot be sustained.

As is evident from Section 21(3) of the Government Proceedings Act, the Respondent being the accounting officer in the Ministry of Internal Security had a statutory duty to settle the decretal amount, costs and interest awarded to the Applicants in the aforesaid civil suit. It is not disputed that the time of filing these proceedings payment had not been effected and therefore it is clear that the Respondent had failed to perform his statutory duty under the Act to the detriment of the Applicants.

In the circumstances, I do not find any reason why this court should not issue the orders of mandamus as prayed by the Applicants in Prayer I.

As for Prayer 2, the Applicants seek orders that the Respondent or his predecessor be committed to civil jail if he fails to make payments as ordered by the court. In my view, this is a prayer which this court is incapable of granting because firstly, it is speculative in nature and secondly, the law under Section 21(4) of the Act prohibits the making of such an order. It provides that no person shall be held individually liable for payment of any money or costs due from the Government. In order to fully appreciate this point, I think it is important to reproduce Section 21(4) of the Act.

It states as follows:

“Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, and no person shall be individually liable under 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.

In view of the foregoing, it is my finding that the Applicants have demonstrated that they are deserving of the Order of Mandamus as prayed but Prayer No.2 of the application must fail.

Prayers 3 & 4 are superfluous in my view as they seek orders which are already covered under Prayer I.

In the end, the Notice of Motion dated 9th November 2012 is merited and is partially allowed in terms of Prayer I. The Applicant is also awarded costs of this application.

DATED, DELIVERED and SIGNED this 29th day of November 2012.

C.W. GITHUA

JUDGE

In the Presence of:

Florence – Court Clerk

Mr. Ayiro holding brief for M/s Wahito for the Applicants

No appearance for the Respondent