



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Miscellaneous Civil Suit 225 of 2008

REPUBLIC.....APPLICANT

VERSUS

PERMANENT SECRETARY OF STATE IN THE

OFFICE OF THE PRESIDENT.....RESPONDENT

JUDICIAL REVIEW - *Order of mandamus - when it may be granted - to compel an authority to do that which it is required to do under the law.*

RULING

By a Notice of Motion dated and filed on 3rd March 2009, the Applicant sought -

(a) *an order of mandamus compelling the Hon. The Attorney - General to satisfy the decretal sum of Kshs 1,013,770/= together with costs and interest till payment in full awarded to the subject in Nakuru CMCC No. 1723 of 2003.*

(b) *Costs of the appellant in any event.*

By an Affidavit of Service sworn on 5th May 2009, by one Julius Kamotho Njoga, a licensed Process Server duly authorized to serve court process, the motion was served upon the Attorney-General's Legal Clerk - authorized to accept service of process on behalf of the Attorney-General - who acknowledged service by stamping on 8th April 2009 and signing on the copy which was duly filed in court. There is no affidavit in Reply filed by the Attorney-General and so technically the Motion ought to be granted or is not opposed either by way of such affidavit in reply or grounds of opposition.

However, the Appellant's Counsel filed skeleton arguments on 29th September 2009, giving the basis of the Application; the judgment in Nakuru CMCC No. 1723 of 2003, the issue by the court of a certificate pursuant to Section 21 of the Government Proceedings Act (Cap. 470, Laws of Kenya).

When this matter was argued before me on 4th February 2010, Mr. Kahiga appeared for the Appellant whereas Mr. Onyiso, State Counsel appeared for the Attorney General, the Respondent. Whereas Mr. Onyiso left the matter to determination by the court, Mr. Kahiga relied upon his skeleton arguments, and the decision of the Court of Appeal in the case of **KENYA NATIONAL EXAMINATIONS COUNCIL vs. REPUBLIC, ex-parte GEOFFREY GATHENJI & 9 OTHERS [1996] LLR 483** where that court discussed most lucidly

the nature of the various Judicial Review orders of *certiorari*, *prohibition* and *mandamus* (which last order the Applicant seek).

In its discussion on the Judicial Order of *mandamus* the Court of Appeal cited the passage in **HALSBURY'S LAWS OF ENGLAND**, 4th Edn. Vol. 1, p. III para 89, wherein the learned authors of that work say:-

"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 him or them to do so some particular thing therein specified which appertaining 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."

An at paragraph 90 headed "**Mandate**", the said authors state -

"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 imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is held, a mandamus cannot command the duty in question to be carried out in a specific way."

Section 3 of Government Proceedings Act, (*supra*), provides that any private person may sue the government for acts of its servants or agents and Section 4(1) of the said Act declares that Government is subject to all those liabilities in tort to which, if it were a private person of full age and capacity it would be subject -

- (a) in respect of torts, committed by its servants or agents;
- (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer.

Government liability in tort is however predicated upon the servant or agent being himself liable for the tortious act, and the Government having given instructions to the servant or agents to perform the functions out of which the tortious act was committed (S. 4 (1), and 4(3) of Government Proceedings Act).

Section 13A of the said Act prohibits institution of any proceedings against the Government unless thirty days notice has first been given in writing to the Attorney-General. And Section 21 provides for the issue of a certificate of the order containing particulars of any judgment and orders therein and the Government is bound to satisfy that order, once served upon the Attorney-General.

In this application, (Nakuru CMCC No. 1723 of 1997), the Applicant states that Notice was given to the Attorney-General in accordance with Section 13A of the Government Proceedings before the suit was filed. The suit was heard and after taking of evidence, judgment was pronounced on 18th March 2005. A Certificate of the Order of costs giving particulars of the General and Special Damages and Interest was issued on 25th May 2005 in the sum of Kshs 1,013,770/= inclusive of costs and interest.

It is thus clear to me that the Applicant has in its hands, a clear and unequivocal judgment which cries for satisfaction, and has remained unsatisfied for well over five (5) years since the issue of the Certificate Order - on 28th March 2005. The Government through the Attorney General (who is sued under Section 13 of the Government Proceedings Act, is bound to satisfy that judgment and order by virtue of the provisions of Section 53(4)(1) (proviso) and 3 4(3) and 21 of the said Act. That duty is both statutory and common law on the doctrine of vicarious liability as codified in those provisions.

The Applicants have by virtue of the judgment and certificate of the order, acquired a specific legal right, which has a specific legal remedy that the Government is bound like any other ordinary subject or citizen to satisfy its liabilities in tort.

Having satisfied all the requirements of the Government Proceedings Act for enforcement of its rights, I have no hesitation at all in granting the Applicant the orders sought in the Motion dated and filed on 3rd March 2009.

There shall therefore issue an order of mandamus, commanding the Respondent to satisfy the order of court issued on 18th March 2005 by payment to the ex parte Applicant the sum of Kshs 1,013,770/=. The Applicant shall also have the costs of the Motion.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 22nd day of April, 2010

M. J. ANYARA EMUKULE

JUDGE