



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc. Appli. 349 of 2008

HALAL MEAT PRODUCTS LIMITED.....APPLICANT

Versus

THE PERMANENT SECRETARY

MINISTRY OF LIVESTOCK DEVELOPMENT.....RESPONDENT

JUDGMENT

The Notice of Motion dated 17th June 2008 is brought pursuant to Order 53 Rule 3 Civil Procedure Rules and Section 8 (2) of the Law Reform Act. The ex parte Applicant Halal Meat products, got judgment in High Court 1655/1986 for the sum of Kshs.2,352,821,766/= with interest of 12% thereon as from 1st June 2007 till payment in full. According to the Applicant the Respondent who is the Permanent Secretary Ministry of Livestock Development has not paid the sums and the Applicant therefore seeks an order of mandamus to compel the Respondent to pay and 2^{ndly} that the Respondent be compelled to hand over the Applicants abattoir at Bul-Bul Ngong as ordered by the court on 7th October 2005. The Motion is supported by the statement and verifying affidavit of Mohamed Ali Motha the Managing Director of the Applicant, both dated 12th June 2008.

The application was opposed and the Permanent Secretary Mr. Patrick Khaemba swore an affidavit dated 26th September 2005. The Applicant obtained judgment in HCC 1655/1986 on 7th October 2005 for a sum of Kshs.1,807,772,000/= in terms of the judgment of the court exhibited as MAM 1 (a). A counterclaim was entered for the Respondent for the sum of Kshs. 27,701,127/= against the Applicant plus interest at the rate of 12% p.a as from 21st August 1989 to the date of judgment and the Respondent was to bear the costs too.

The decree prepared in respect thereof is exhibited as MAM 1 (b). An application to stay the execution was dismissed (MAM 3). The Applicant prepared and served a certificate of order dated 9th October 2007 (MAM 4). The Applicant contends that despite several reminders for payment, the Respondent has refused or neglected to pay the said decretal sum. The Applicant has exhibited several letters (MAM 5) in which he made demands for payment but to date there has been no payment.

Counsel for the Applicant, Mr. Gautama indicated to court that they had earlier filed HMISC1189/07 seeking similar orders but the same was struck out on a technicality and they filed this application. That was not disputed. When this matter came up for hearing on 26th September 2008 the parties recorded a consent to the effect that the Counsel who had conduct of the matter was engaged in a Commission of Enquiry and they agreed that the hearing proceeds to hearing on 31st October 2008 without fail. When the

matter came up for hearing on 31st October 2008, Mr. Onyiso, Counsel for the Respondent applied for adjournment for reasons that the Court of Appeal had ordered a stay till the outcome of a ruling by that court. Mr. Gautama objected to that application on the basis that the court never made such an order. That the Respondent had filed an intended application for stay. The application was argued on 22nd October 2008 where the Applicants herein urged that it was a deliberate move to delay this matter and that that Court of Appeal never made any orders, pending its ruling. Indeed Mr. Onyiso, Counsel for the Respondent was unable to avail to this court any extracted order from that court. This court therefore decided to proceed with the hearing for the reasons that the parties had consented to hearing this matter today and there was no order of the Court of Appeal staying these proceedings.

Mr. Khaemba the Permanent Secretary in Charge of the Ministry of Livestock Development, deponed that the verifying affidavit is not sworn by a person authorized to do so and that what is sought in the Notice of Motion is enforcement of a private right and does not fall within the ambit of Judicial Review envisaged under Order 53 Civil Procedure Rules. That an Appeal from HCC 1655/1986 is still pending and that the court will be moved for stay orders. He exhibited a copy of a Notice of Appeal – as PK 1 He deponed that the sums are colossal and if the intended appeal succeeds, the Applicant may not be able to refund it and that the determination of this application should await the said Appeal.

There is no doubt that the Applicant got judgment against the Respondent on 7th October 2005. A decree was drawn dated 25th October 2006 and a certificate of order issued against the Respondent on 9th October 2007. It is also not disputed that the sums still remain unpaid to date despite demands and reminders that the same be paid.

The Respondent contends that the verifying affidavit is sworn by a person not qualified. The deponent of the verifying affidavit describes himself as the Managing Director and Chairman of the Applicant and further states that he is authorized by the Applicant to swear the affidavit on its behalf. There is no evidence that he is not authorized to do so and the Respondent contention that he is not authorized has no basis.

The 2nd objection to this application is that an appeal has been filed against the judgment of the High Court. The Respondent has exhibited a Notice of Appeal filed in court on 21st October 2005. There is no evidence that an appeal has been filed since the notice was filed 3 years ago. In fact the Permanent Secretary contradicts himself in his affidavit. Whereas at paragraph 4 he depones that there is an appeal, already filed, at paragraph 5 he refers to an intended appeal. It is obvious that the Permanent Secretary is not sure of what he is talking about or he is not being truthful. If an appeal exists the number is not disclosed nor is there evidence of the appeal.

Mr. Onyiso told this court that in fact the Court of Appeal had made orders staying these proceedings which allegation Mr. Gautama refuted. Mr. Onyiso was unable to produce any order issued by the Court of Appeal staying these proceedings. In any event why has the Respondent not filed any appeal or sought stay since 2005? Apart from the Notice of appeal Filed in October 2005 there is no evidence of an appeal having been filed.

Lastly, the Respondent objects to this application on grounds that the Applicant is attempting to enforce a private law right against the Respondent. The Court of Appeal in the case of **KENYA NATIONAL EXAMINATION COUNCIL V REP CA 266/96** said as follows regarding the scope of an order of mandamus,

“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.” –

(Halsburys Laws of England 4th Ed Volume I page 111 paragraph 89)

The claim herein arises out of a suit that was filed against the Government which acquired the Applicants abattoir unlawfully and failed to compensate the Applicant. Under the Government Proceedings Act suits against the Government lie against the Attorney General see Section 12 of Government Proceedings Act Cap 40 Laws of Kenya. Under S. 21 (3) of the same Act, it is provided that an order for payment of any money by way of damages or costs shall be paid by the accounting officer for the Department concerned. In this case, the accounting officer for the Ministry of Livestock is the Permanent Secretary and he has been properly enjoined to these proceedings. It is the duty of the Permanent Secretary to pay and an order of mandamus can lie against him.

In sum I find that there being no pending appeal in this matter, the Respondent has failed or neglected to pay the Applicant the decretal sum due to the Applicant following a judgment of this court and an order of mandamus will hereby lie commanding the Respondent as prayed in the Notice of Motion dated 17th June 2008. The Applicant will also have costs of the Application.

Dated and delivered this 3rd day of November 2008.

R.P.V. WENDOH

JUDGE

Present:

Mr. Apopo)

Mr. Kihiko)

Holding brief for Satish Gautama for Applicant

Mr. Onyiso for the Respondent

Daniel: Court Clerk