



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Misc Civ Appli 173 of 2004

REPUBLIC
APPLICANT

VERSUS

PERMANENT SECRETARY MINISTRY OF WATER RESOURCES
MANAGEMENT & DEVELOPMENT
DEFENDANT

AND

AKAMBA TIMBER & HARDWARE LTD. EX PARTE
APPLICANT

R U L I N G

The application before the court is dated 1.11.2004. It seeks an order of Mandamus to issue compelling the Permanent Secretary, Ministry of Water Resources Management and Development to pay the decretal amount ordered and due under Machakos High Court Case No. 92 of 1993. The application also seeks for costs of this application.

The application is supported by an affidavit sworn on 12.11.2004 and is also grounded upon a statement of facts and Chamber Summons under which the leave to file this motion was granted.

This application is shown to have been served upon the Attorney-General of Kenya or his authorised agents. Earlier, a certificate under the provisions of Order 28 rule 3 showing the amount due together with other relevant document inclusive of the plaint, the judgement entered, the decree and certificate of costs as well as the interests due, were accompanying the certificate aforementioned. But neither the Attorney-General nor the Ministry of Water Resources Management and Development, settled the claim. This led to this application being filed, and as already mentioned above, the Attorney General, as usual from that State Office, neither attended court nor was represented by any other counsel. As a result the applicant was allowed to proceed ex parte.

In his arguments to this court Mr. Makau, Senior representing the applicant states that every civil effort to recover the due amount has failed. That the amount indicated is truly due to be settled by the Ministry concerned which has a legal duty to do so through the Attorney-General, but that the respondent has deliberately refused to settle the sum of Kshs.1,551,656/- due.

I have considered the material and arguments before me. The application is not opposed. If therefore there is no legal bar against granting an order of Mandamus to compel settlement of the decree in question, then this court has no reason not to grant this application.

I have considered this application carefully. I observe that a judgement was lawfully obtained against the respondents who are a Government department after they failed to file appearance and defence. Thereafter they were properly served with a certificate under Order 28 rule 3 of the Civil Procedure Rules which is in compliance with the provisions of S.21 of the Government Proceedings Act (Cap 40). The substance of these provisions is to bring to the notice of the Government the decretal sums due to be lawfully settled by the Government, with a view that the latter should settle the same with the costs due. They affirm the position that no ordinary proceedings for execution of a decree can be brought against the Government, except to bring notice to it and expect it to act responsibly to settle the decree due.

This then leads to the situation we have now before the court. What happens where or when the court ignores to settle a decree and certificate of costs without lawful grounds. The decree holder has his rights to obtain the fruits of his judgement but he has no means of enforcing his such rights owing to statutory legal provisions which bar him from treating the Government as any other ordinary party against whom execution of a decree can issue!

In my view this position has made the Government departments adopt an attitude of carelessness in the manner they conduct themselves particularly where they are defendants. What is more unsatisfactory, however, is the conduct of the Attorney-General's office in relation to civil cases brought against the Government. More often than not, the Attorney-General's office will not file appearance or defence. Where by "good luck" such appearance if filed, defence will rarely be filed. Where even by great good luck the defence is filed, there will be no appearance or representation during the hearing of the suit. The result is that a judgement will be entered against the Government. The battle will however be only starting since the government will ignore requests to settle the resultant decree. That is why I believe, decree holders have recently resorted to the use of the superior order of Mandamus to secure a settlement from the Government. This is a very unsatisfactory state of affairs in respect to the Attorney General's office and may be a strong stand from the Attorney-General against the aforementioned negligence by his civil section officers may be necessary strongly called for. A different approach would be to remove protection against the government so that direct execution can proceed against it as it does against any other ordinary citizens.

Turning now to the case before the court, it will be noted that the superior order of Mandamus has been utilised from time to time to compel the Government through its various department and through the Attorney-General, to settle court decrees. The Order is directed at the particular officer in the Government who has a duty to settle the decree, to do so. Mandamus is a judicial superior order issued as a command usually by the High Court to an inferior court, tribunal, body or person, ordering it or the person, to perform a public or statutory duty. The order is in a group of three called prerogative powers, the other two being the Certiorari and Prohibition. They are also called Review Orders. They were intended to correct a wrong or illegal performance or non-performance of the inferior tribunals or bodies or persons who could be judicial, and quasi-judicial but now include administrative bodies or persons. They can therefore now be directed not at the inferior courts, tribunals or quasi-judicial bodies only, but also public bodies and officers in the performance of their duties. Properly used, these orders are intended to bring out faster but more effective results. As stated by Lord Diplock in the case of **O'Reilly v. Mackman** (1982) 3 All.ER, 1129, at page 1131 –

“The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.”

In this case before me, there is no doubt that the respondents are public bodies or officers. I am also satisfied that they have a public duty to settle a decree which is an order of court. They have not raised any ground why they should not settle the decree. The applicant has no alternative mode of having his judgement satisfied so that he can enjoy it. Under these circumstances it is my view and finding proper to

compel the respondents to settle the decree by the issue of a Mandamus order as prayed.

The end result is that an order of Mandamus shall issue forthwith, directed at the Permanent Secretary, Ministry of Water Resources Management and Development, compelling him to pay to the applicant, through the Applicant's advocates, a sum of Kshs. 1,551,556/- plus costs and interests accrued, within a period of 60 days. In default, the decree holder is at liberty to start contempt proceedings. Orders accordingly.

Dated and delivered at Machakos this 3rd day of March 2006.

D. A. ONYANCHA

JUDGE