



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 599 of 2001

MARY KARIRU MARIGU.....
.....APPLICANT

Versus

THE PERMANENT SECRETARY
IN THE OFFICE OF THE PRESIDENT, DEPARTMENT OF DEFENCE.....
.....RESPONDENT

RULING

Before me is the application dated 15th September 2005, filed in court on 16th September 2005. It is brought under Section 3A Civil Procedure Act, Order 21 Rule 18(2) and order 50 Rule 1 Civil Procedure Rules. The applicant seeks the following orders:

- 1) that service of the notice to show cause issued by the court on 24th August 2005 be dispensed with.
- 2) A warrant of arrest be issued against the Permanent Secretary, Office of the President in charge of defence.
- 3) Costs of this application be borne by the Permanent Secretary, Office of the President in charge of defence.

The application is premised on grounds found on the face of the application and a supporting affidavit sworn by George Gitonga Murugara, counsel for the applicant.

Though the respondent did not file any papers in opposition to the application, Mr. Chahale appeared at the hearing and opposed the application on points of law.

The applicant has judgment against the respondent. On 26th September 2001, this court issued an order of mandamus directing the Permanent Secretary, Office of the President, Department of Defence to pay the applicant Kshs.481,536.35 plus interest. Some of the decretal sum was paid save for Kshs.75,000/=

which is still due and owing.

The applicant seeks that service of Notice to show cause be dispensed with because it has proved impossible for applicant to serve the Permanent Secretary with the Notice to show cause. Efforts by Mr. Wakahu, Mr. Gitonga's clerk to serve the Permanent Secretary have been fruitless as the Military Officers at the DOD will not let him. Counsel's complaint to the Hon. Attorney General have gone unanswered. It is counsel's belief that the Permanent Secretary is deliberately refusing to satisfy the decree of the court to defeat justice.

Mr. Chahale in response urged that under Order 28 Rule 2 (2) Civil Procedure Rules, no order against the Government may be made under Order 21 Civil Procedure Rules. Order 21 governs the execution process. He further urged that Section 21 (4) of Government proceedings Act Cap 40 prohibits the imposition of personal liability on any person in respect of payments due from the Government. It is Mr. Chahale's contention that the order sought does impose personal liability and this court has no jurisdiction to grant it. He relied on the case of **KISYA INVESTMENTS LTD V ATTORNEY GENERAL & ANOTHER H.C.A. 2832 4990** in which Justice Visram and Mohamed Ibrahim sitting in the constitutional court interpreted Section 21 (4) of the Government Proceedings Act. Order 28 Rule 2 (2) is not couched in mandatory terms. It reads;

"No order against the Government 'may' be made under Order 21 (execution of decrees or orders)....."

Since the word used is 'may' the court is left with discretion so that in some situations, considering the circumstances of each case, the court can make orders against the Government under Order 21 Civil Procedure Rules.

Section 21 (4) of the Government Proceedings Act Cap 40 provides:

".....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 of the payment by the Government or any Government Department, or any office of the Government as such, of any money or costs."

In the case of KISYA INVESTMENTS the court found that Under Section 21 (4) of the Government Proceedings Act, any individual liability of any person in respect of payments due from the Government is expressly prohibited. The judges noted the correct position to be that the law expressly excludes any of any obligation on the Permanent Secretary or any other person to be personally liable for fulfillment or satisfaction of dues from the Government. These are the interpretations that the court gave in construing Section 21 (4) of the Act. I totally subscribe to that interpretation.

The Government Proceedings Act being a substantive law, it takes precedence over Order 28 Civil Procedure Rules, which is subsidiary legislation. In my view, both provisions have to be read together so that the court has discretion to make orders against the Government under Order 21 Civil Procedure Rules in deserving cases but the said orders cannot issue to one in their personal capacity.

The applicant's reason for seeking the above order is that the process server has attempted to serve the Permanent Secretary with Notice to show cause but failed. The applicant attached a note from the process server who supposedly attempted to serve. The court would expect that the said process server would swear an affidavit as to the attempts made to serve the Permanent Secretary. The note that is annexed is not evidence of the attempts made to serve the Permanent Secretary.

This is an old matter of 2001. I have seen an earlier application in which the court made orders of

warrant of arrest on 30th October 2003. It is not clear whether the Permanent Secretary was ever arrested.

Though Mr. Gitonga argued that they want the Permanent Secretary to appear in court to show cause, prayer 1 of the application is clear that they seek the dispensing with the Notice to show cause issued by court on 24th August 2005 and instead request that a warrant of arrest to issue against the Permanent Secretary Office of President in charge of Defence. An order of warrant of arrest would mean that the Permanent Secretary would be put in prison if he does not comply. It may touch on his personal liberty when under warrant of arrest. It involves personal liability which Section 21 (4) of Government Proceedings Act prohibits.

In the circumstances the court cannot grant the said order. In my view the best cause to take is to serve Notice to show cause on the Permanent Secretary. As earlier noted, there is no evidence to show that the process server has actually attempted to serve the Permanent Secretary with the Notice to show cause. This court cannot grant the prayer for warrant of arrest in view of the provisions of the Government Proceedings Act and the application dated 15th September 2005 is hereby dismissed. Costs to be in the cause.

Dated and delivered this day of 2006.

R.P.V. WENDO

JUDGE