



**Republic v National Social Security Fund Board Of Trustees;
Kamau (Exparte Applicant) (Miscellaneous Civil Application
E017 of 2022) [2023] KEELC 17891 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17891 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION E017 OF 2022
EK WABWOTO, J
JUNE 8, 2023
IN THE MATTER OF AN APPLICATION FOR AN ORDER OF
MANDAMUS
AND
IN THE MATTER OF MILIMANI ELC CIVIL SUIT NO 104 OF
2007;
NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES-
V-**

BETWEEN
REPUBLIC APPLICANT
AND
**NATIONAL SOCIAL SECURITY FUND BOARD OF
TRUSTEES RESPONDENT**
AND
MIKE MAINA KAMAU EXPARTE APPLICANT

JUDGMENT

Introduction

1. By a chamber summons dated 23rd August, 2022 filed under order 53 rule 1(2) and (3) of the *Civil Procedure Rules*, 2010, the Ex parte Applicant sought leave to apply for the Judicial Review Order of Mandamus to compel the Managing Trustee, National Security Fund to pay the Applicant Ksh



- 5,303,372 plus interest at 14% per annum from 8th August 2020 till payment in full together with costs of the Application.
2. Upon leave being granted on 17th January 2023, the Ex parte Applicant filed the substantive motion dated 23rd January 2023 seeking the following orders:
 - i) That an order of mandamus do issue compelling the Managing Trustee National Social Security Fund to pay to the Ex parte Applicant herein Mike Maina Kamau Ksh 5,303,372 plus interest at 14% per annum from 8th August 2020 till payment in full.
 - ii) That costs of the Application be provided for.
 3. The application was supported by the Statutory Statement and verifying affidavit by Mike Maina Kamau both dated 23rd August 2022. The application was premised on the following grounds:
 - a. Judgment was delivered on 22nd November 2019, in Milimani ELC Civil Suit No 104 of 2007; *National Social Security Fund Board of Trustees v Geoffrey Chege Kirundi & 3 others*, dismissing the case with costs to the Defendant; the Ex-parte Applicant was the 2nd Defendant in that suit;
 - b. The Applicant filed his Bill of costs in that suit which was taxed and allowed in the sum of Ksh 5,303,372 on 8th August 2020; a certificate of taxation was issued on 12th January 2022;
 - c. Despite demand on 19th January 2022 that the Respondent pays the amounts due to him, it has failed/neglected to pay the said amount to the Applicant;
 4. When the matter came up for directions on 6th March 2023, the Respondent was granted 7 days to file a response. Upon service, the *Ex Parte* Applicant was granted a further 7 days to file further submissions. The matter was set down for a further mention on 27th April 2023 to confirm compliance and set a judgment date.

The case for the Applicant

5. The Exparte Applicant filed submissions dated 6th March 2023. Relying on the case of *Dry Associates Limited v Capital Markets Authority and Another Interested Party Crown Berger Ltd* [2012], the Ex parte Applicant submitted that under article 48 of the *Constitution* and *Government Proceedings Act*, he was entitled to access justice and enjoy the fruits of the judgment.
6. The Ex parte Applicant also submitted that the institution of judicial proceedings against the accounting officer of a statutory corporation was the only remedy for a litigant who has a decree against the government. On this, he relied on the cases involving *Samuel Ngari Githinji v CDF Board and Another: Equity Bank Limited (Garnishee)*[2021]eKLR and *Republic v Attorney ex-parte James Alfred Koroso*[2013] eKLR.
7. With regard to costs, it was submitted that awarding of costs is not to penalize the losing party party but to recoup the expenses of the successful litigant. (See Supreme Court case of *Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 others* [2014] eKLR) On this premise the Court was welcomed to consider the conduct of the parties and the subject of litigation as in the case of *Republic v Communication Authority of Kenya and another ex-parte Legal Advice Centre aka Kituo Cha Sheria* [2015]eklr to find that the Ex-parte Applicant was deserving of costs in this application.



The Respondent's case

11. The application was opposed vide a Replying Affidavit sworn by Caroline Rakama, the Principal Legal Officer on 23rd March 2023. She deposed that the application offends the provisions of section 6 of the *Civil Procedure Act*, order 22 of the *Civil Procedure Rules* and the doctrine of exhaustion of remedies.
12. It was contended that the Court lacked jurisdiction to hear and determine the Application by virtue of section 6 of the *Civil Procedure Rules* as the proceedings were sub-judice. Furthermore, it was argued that a stay of execution had been granted pending the hearing and determination of the Respondent's Appeal Application vide Civil Appeal No. E025 of 2023 therefore there existed a real danger in this instant Court issuing conflicting orders.
13. In written submissions dated 20th April 2023, it was argued that the Applicant should adhere to order 22 rule 6 of the *Civil Procedure Rules* which obligated the decree holder to apply to the court which passed the decree through an application in accordance with Form No 14 of Appendix A. Relying on the case of *Mohammed Hussein, Halima Mohamed & another (suing as the administrators of the estate of Amina Mohamed v County Government of Narok* [2017]eKLR, it was argued that applicant has not given any reason to usurp the jurisdiction of the trial court in compelling the Managing Trustee to settle the costs. Moreover, by the contravention of order 22 rule 6, this Court lacked jurisdiction to grant any of the reliefs sought. It was also contended that it would be a travesty of justice to compel the Managing Trustee of NSSF to pay the Applicant when the said Trustee had not been made a party to the suit.

Analysis and Determination

14. The Court has considered the application and the submissions and is of the opinion that the following key issues arise for determination herein:
 - i. Whether the Applicant have made out a case for the grant of the judicial review order sought?
 - ii. Who shall bear the costs of the application?

Issue No. I

Whether the Applicant has made out a case for the grant of the judicial review order sought

14. The principles that guide the Court when dealing with an application for a mandamus remedy was stated in the Court of Appeal case of *Commission on Administrative Justice v Kenya Vision 2030 Delivery Board & 2 others* [2019] eKLR. Wherein the court stated as follows:

“As observed by the Judge and correctly so in our view, the principle that guides the High Court when dealing with the scope and efficacy of an order of mandamus was crystalized by the Court in *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR namely:

“The order of mandamus is of most extensive remedial nature and is in the form of 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 of 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 it may issue in cases where although there is an alternative remedy, yet the mode of redress is not convenient, beneficial and effectual.”

15. This position was reiterated in the English case of *R v Dudsbeath, ex parte, Meredith* [1950] 2 ALL E.R. 741 where it was stated as follows:

“It is important to remember that “mandamus” is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it.”

16. In the instant case, the ex parte applicant in obtaining a decree and subsequently the certificate of order against the Government, acquired a specific legal right and manifested a consequent statutory obligation to the Respondent through its accounting officer to pay the decretal amount of Ksh 5,303,372 as specified in the certificate of order against the Government. The Respondent has both a statutory and public duty to satisfy the decree issued by a competent court in favor of the ex parte applicant. It is not disputed that by the time these proceedings were commenced, the Respondent had failed and/or neglected to fulfill its aforesaid duty to the detriment of the ex parte applicant despite the fact that an appeal had been lodged against the judgment. In so far as the appeal of the judgment as expressed vide Civil Appeal No. E025 of 2023 is undisputed, the issuance of order of stay of execution have been made as mere averments, without substantial evidence to support the claim.
17. In my view, the ex parte applicant is perfectly in order to seek the order of mandamus to compel the respondent to satisfy the decree. The ex parte applicant has also sought for the said amount to be paid together with interest at 14% per annum from 8th August 2020. In the instant case, it was not until 12th January 2022 when the certificate of taxation against the Government was issued by the court and subsequently served on 19th January 2022. As such the respondent’s liability to pay the said sum to the applicant under section 21 of the [Government Proceedings Act](#) arose only after that date and I would direct as such.
19. In the circumstances, the Court is satisfied that the Applicant has made out a strong case for grant of the judicial review orders sought. I have no reason to deny them this order.

Issue No. 2

Who shall bear the costs of the application

20. On the issue of costs, the courts have ultimate discretion. The ex parte applicant’s amount of Ksh 5,303, 372.00 has been pending since 8th August 2020 albeit in different court proceedings. In my view awarding further costs herein will unnecessarily prolong the suit and therefore I hereby direct each party to bear its own costs of the Application.

Final orders

21. Accordingly, for the reasons set out above, this Court finds that the Applicant’s Notice of Motion dated 23rd January 2023 is merited, and is allowed as follows:
- i) An order of Mandamus compelling the Managing Trustee National Social Security Fund to pay to the Ex parte Applicant herein Mike Maina Kamau Ksh 5,303,372.00 plus interest at 14% per annum from 19th January 2022 till payment in full is hereby issued.
 - ii) Each party to bear its own costs of the application.



22. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF JUNE 2023.

E. K. WABWOTO

JUDGE

In the Virtual Presence of: -

Ms. Nduta Kamau for the Applicant.

Mr. Ochieng for the Respondent.

Court Assistant: Caroline Nafuna

