



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Republic v Cabinet Secretary, Ministry of Transport and Infrastructure Development
& another; PN Mashru Limited (Exparte Applicant) (Judicial Review Miscellaneous
Application E006 of 2021) [2024] KEHC 2355 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2355 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E006 OF 2021

OA SEWE, J

MARCH 7, 2024

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR
ORDERS OF MANDAMUS UNDER ARTICLE 47 OF THE CONSTITUTION;
SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS
OF KENYA AND ORDERS 53 OF THE CIVIL PROCEDURE RULES**

AND

IN THE MATTER OF ARTICLES 201(D) AND 221 OF THE CONSTITUTION

AND

IN THE MATTER OF PUBLIC FINANCE MANAGEMENT ACT

AND

IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT

AND

IN THE MATTER OF CONTEMPT OF COURT ACT 2016

AND

2.

**IN THE MATTER OF UNSATISFIED JUDGMENT DEBT AGAINST THE CABINET
SECRETARY MINISTRY OF TRANSPORT AND INFRASTRUCTURE DEVELOPMENT
AND THE ATTORNEY GENERAL IN THE SUM OF KSHS. 7, 225,285.00
DELIVERED ON THE 21ST MAY 2021 IN MOMBASA CMCC NO. 529 OF 2013**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

**THE CABINET SECRETARY, MINISTRY
OF TRANSPORT AND INFRASTRUCTURE**



DEVELOPMENT1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT
AND
N. MASHRU LIMITED.....EX PARTE APPLICANT

BETWEEN

REPUBLIC APPLICANT

AND

THE CABINET SECRETARY, MINISTRY OF TRANSPORT AND
INFRASTRUCTURE DEVELOPMENT 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT

AND

PN MASHRU LIMITED EXPARTE APPLICANT

JUDGMENT

- (1) Before the Court for determination is the Notice of Motion dated 3rd December 2021. It was filed on behalf of the ex parte applicant on the 9th December 2021 upon leave being granted by the Court to that effect on 19th November 2021. The application is expressed to have been filed under Section 8 of the *Law Reform Act*, Chapter 26 of the Laws of Kenya, and Order 53 of the Civil Procedure Rules for the following orders:
- (a) That an order of Mandamus do issue against the respondents jointly and severally compelling them jointly and/or severally to pay to the applicant the unsatisfied judgment debt in the sum of Ksh. 7,222,285/= which is inclusive of Kshs. 2,907,700/=, interest thereon of Kshs. 4,001,550/= together with costs of Kshs. 315,623/= arising from the judgment of Hon. Nabibya (SRM) in Mombasa CMCC No. 529 of 2013: P.N. Mashru Ltd v Ministry of Roads and the Attorney General, delivered on the 21st May 2021.
 - (b) That in default of compliance with the order of Mandamus and upon failure to pay the total decretal sum of Kshs 7,225,285, the order of Mandamus be deemed as sufficient notice under Section 30(1) of the *Contempt of Court Act*, 2016 to the office of the persons holding the offices of the 1st and 2nd respondents requiring them to show cause why contempt of court proceedings should not be commenced against them in thirty (30) days after service of the order of Mandamus.
 - (c) That in default of compliance with the order of Mandamus and upon failure to pay the decretal sum of Kshs. 7,225,285/= and on failing to show sufficient cause for non-compliance with the order of Mandamus, the ex parte applicant be at liberty to commence contempt of court proceedings against the persons holding the offices of the 1st and 2nd respondents for them to be personally summoned to court and be committed to civil jail for contempt of this Court.
 - (d) That the respondents be condemned to bear costs of the application.



- (2) The application was premised on the affidavit of Jitendra Popatlal Narendra Mashru sworn on 18th November 2021 and the grounds set out in the Statutory Statement filed therewith. The affiant averred that the applicant is the registered owner of Motor Vehicle Registration No. KBC 187F; and that, on or about the 7th May 2009, the applicant's authorized driver was driving the said motor vehicle along Mombasa-Nairobi Highway when, at Manyani Area, Motor Vehicle Registration No. GK-964L was so negligently driven by an employee of the Ministry of Roads that it hit the applicant's said motor vehicle, thereby occasioning it extensive damages.
- (3) Mr. Mashru further deposed that the applicant instructed the firm of M/s Oloo & Chatur Advocates formerly Menezes Oloo & Chatur Advocates, to institute legal action against the Ministry of Roads and the Attorney General for compensation. Accordingly, the said Advocates filed Mombasa High Court Civil Case No. 5 of 2010 which was subsequently transferred to the Chief Magistrate's Court and assigned a new citation, namely, Mombasa Chief Magistrates Civil Case No. 529 of 2013. At paragraph 11 of his affidavit, Mr. Mashru added that the suit was heard and determined by Hon. Nabibya, SRM on the 21st May 2021; whereby the applicant was awarded Kshs. 2,907,700/= plus costs and interest.
- (4) The contention of the applicant is that the decretal sum together with interest thereon and costs remain unpaid to date, in spite of having extracted the Decree and the Certificate of Costs as well as Certificate of Order against the Government for service on the Ministry concerned. Hence, it was averred by Mr. Mashru that it is clear from the foregoing that the 1st respondent has failed, ignored and/or neglected to perform his statutory duty and/or obligation to have the decretal sum paid to the applicant. He therefore prayed that the application be allowed in the circumstances. To buttress the averments in its Verifying Affidavit, the applicant annexed several documents thereto, including the judgment of the subordinate court and the Certificates of Order against the Government issued pursuant to Order 29 Rule 3 of the Civil Procedure Rules.
- (5) A perusal of the record shows that the application is unopposed in the sense that no response whatsoever was filed in respect thereof for purposes of Order 51 Rule 14 of the Civil Procedure Rules. Instead the respondents filed a Notice of Motion dated 4th March 2022 seeking stay of proceedings pending the hearing and determination of an application before the lower court dated 31st August 2021 for setting aside judgment. A perusal of the record shows that the application before the lower court was dismissed vide a ruling delivered by Hon. Nabibya, SRM, on 2nd August 2022. Consequently, counsel for the respondents conceded on the 21st March 2023 that their application for stay of proceedings had been overtaken by events. By then, directions had been given for the application to be canvassed by way of written submissions.
- (6) Counsel for the applicant relied on the applicant's written submissions filed herein on 16th March 2022. He essentially reiterated the facts as deposed to in the Supporting Affidavit and pointed out that the application is unopposed; and therefore ought to be allowed as prayed. The record also shows that although counsel for the respondents asked for time to file written submissions on their behalf, no such submissions were filed. Nevertheless, it is the duty of the Court to consider the subject application on its merits. Indeed, in *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR the Supreme Court held:

“...as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The



Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter...”

(7) Accordingly, having taken into consideration the application and the averments made by the applicant in support thereof, it is indubitable that the applicant obtained judgment on 21st May 2021 in Mombasa CMCC No. 529 of 2013. There is no dispute that the applicant was awarded Kshs. 2,907,700/= plus costs and interest. A decree to that effect was extracted along with a Certificate of Costs and both have been annexed to the applicant’s Supporting Affidavit as Annexure JPNM-8. The assertion by the applicant that the decree remains unsatisfied has also been proved by the applicant to the requisite standard.

(8) While the applicant is perfectly entitled to seek an order of Mandamus to enforce the said Judgment and Decree, it is noted that one of the respondents cited by the applicant is the Attorney General, the 2nd defendant herein. The question to pose therefore is whether the 2nd respondent is a proper party to these proceedings. That question is pertinent because Article 156(4) of *the Constitution* is explicit that:

The Attorney-General—

- (a) is the principal legal adviser to the Government;
- (b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and
- (c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

(9) On the other hand, Section 21(3) of the *Government Proceedings Act*, Chapter 40 of the Laws of Kenya provides that:

If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

10. It is plain therefore from the foregoing provision that the person responsible for ensuring payment is the Accounting Officer of the government entity concerned. I find succor in this posturing in *Republic v Attorney General & another Ex parte Orbit Chemicals Limited* [2017] eKLR, wherein Hon. Odunga, J. (as he then was) had occasion to consider the provisions of Section 21 of the *Government Proceedings Act* with a view of ascertaining who is under a legal obligation to satisfy a judgment against the Government. Here is what the learned Judge had to say:

27. It is therefore clear that in applications for mandamus seeking to compel the satisfaction of a decree, it is the accounting officer of the relevant government department that is obliged to satisfy the decree notwithstanding the fact that the said officer was not a party to the trial proceedings and that in fact the only defendant therein was the Attorney General... that it is for the Attorney General to advise his clients to pay the costs which attracted his



representation on behalf of the said client and that being a constitutional representative and being the principal legal advisor to the three arms of the Government, he is required to direct any arm of Government he represented to pay the costs of any suit which he acted on its behalf; I however do not subscribe to the view that if any costs or liability accrues from his representation, he is obliged to pay the same and that if a particular organ refuses to pay he will be responsible on behalf of his agent.”

(11) Similarly, in *James Samuel Mburu v Attorney General & another* [2017] eKLR, it was held: -

31. I agree with the respondent’s counsel’s submissions on this issue entirely for reasons that unless the Attorney General is sued for acts or omissions committed or omitted to be done by his office as established under Article 156 of *the Constitution* and as operationalised by the Office of the Attorney General Act, the Attorney General being the Principal Legal advisor to the Government remains just that in all representative legal proceedings where other Government or State Department are sued but in the name of the Attorney General.

(12) A look at the Judgment by the trial court reveals that the 1st respondent was the principal party in the suit. The 2nd Respondent was only enjoined as the legal adviser of the government who, under Section 12 of the *Government Proceedings Act*, is mandated to represent the National Government in civil proceedings. It is therefore my considered finding that, in this particular instance, the 2nd respondent is not compellable in respect of the debt that is the subject of the instant application.

(13) That said, the only issue for determination is whether the applicant has made out a good case to warrant the issuance of the orders sought in its application dated 3rd December 2021. The main prayer sought is an order of Mandamus. Needless to say that Mandamus is a relief available to litigants under Article 23(3)(f) of *the Constitution* and Order 53 of the Civil Procedure Rules. Its scope was well explicated in Halsbury's Laws of England, 4th Edition, Volume 1 thus:

“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...”

(14) In addition to the Judgment, Decree and Certificate of Costs, the applicant subsequently obtained a Certificate of Order dated 16th July 2021 against the Government in the sum of Kshs. 7,225,733/= inclusive of the decretal sum, taxed costs, and interest thereon. The applicant averred that it served the 2nd Respondent with two Certificates in their Mombasa office as well as at the Nairobi office. The letters were dated the 24th August 2021, 6th October 2021, and 13th October 2021 respectively. As was pointed out in *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security, Ex Parte Fredrick Manoah Egunza* [2012] eKLR, the applicant has no other way of realizing the decree passed in its favour. In that case, Hon. Githua, J, aptly pointed out that:

“Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given



immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the *Government Proceedings Act* (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”

(15) Similarly, in *Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another* [2018] eKLR, Hon. Mativo, J. (as he then was) held: -

29. Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in *Apotex Inc. vs. Canada (Attorney General)*, [23] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. [24] The eight factors that must be present for the writ to issue are:-

- (i) There must be a public legal duty to act;
- (ii) The duty must be owed to the Applicants;
- (iii) There must be a clear right to the performance of that duty, meaning that:
 - a. The Applicants have satisfied all conditions precedent; and
 - b. There must have been:
 - I. A prior demand for performance;
 - II. A reasonable time to comply with the demand, unless there was outright refusal; and
 - III. An express refusal, or an implied refusal through unreasonable delay;
 - (iv) No other adequate remedy is available to the Applicants;
 - (v) The Order sought must be of some practical value or effect;
 - (vi) There is no equitable bar to the relief sought;
 - (vii) On a balance of convenience, mandamus should lie.

(16) All these conditions have been satisfied herein. Moreover, the respondents utterly failed to proffer any reason why the decree has not been settled. In the premises, I entertain no doubt at all that the remedy sought is warranted; as otherwise, the applicant would be left at the mercy and whims of the respondents as to when and whether his decree would come to fruition. Hence, I entirely agree with the sentiments expressed by Hon. Odunga, J. in *Republic vs. the Attorney General & Another, Ex parte James Alfred Keroso* [2013] eKLR that:

“...Unless something is done, he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light



of the provisions of Article 48 of the Constitution which enjoins the state to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya..."

B. Whether directions ought to issue herein for contempt of court:

- (17) One of the applicant's prayers was that, in the event an order of Mandamus is granted, the same be treated as sufficient notice under Section 30 (1) of the Contempt of Court Act, 2016 to the persons holding the offices of the 1st and 2nd respondents. Further, the applicant urged that, given the failure to pay the decretal sum and failure to show sufficient cause for non-compliance, the applicant be at liberty to commence Contempt of Court Proceedings against the Respondents.
- (18) First and foremost, it is vital to point out that the Contempt of Court Act, 2016, was declared unconstitutional in the case of Kenya Human Rights Commission v Attorney General & another [2018] eKLR and cannot therefore be invoked in aid of the applicant. Secondly, the court in considering the application for Mandamus cannot give directions on contempt of court, without according to the accounting officer concerned an opportunity to comply with the orders of the court. Lastly, contempt of court proceedings would only lie in the event of disobedience by the public officer concerned, after having been served with an order of Mandamus for compliance. For these reasons, I have no hesitation in holding that prayers 2 and 3 Of the application are untenable.
- (19) In the result, the applicant's Notice of Motion dated 3rd December 22. 2021 succeeds partially and orders granted in respect thereof as follows: [a] An order of Mandamus be and is hereby issued directed to the 1st respondent, namely, the Cabinet Secretary, Ministry of Transport and Infrastructure Development, to pay to the Ex parte Applicant the sum of Kshs. 7,225,733/= being the decretal amount passed in Mombasa CMCC NO. 529 OF 2013.
- (b) Prayers No. 2 and 3 are dismissed.
- (c) The 1st respondent to bear the costs of the said application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 7TH DAY OF MARCH 2024

OLGA SEWE

JUDGE

