



Mutiso v Director of Public Prosecution & another (Judicial Review Miscellaneous Application E051 of 2023) [2024] KEHC 8370 (KLR) (Judicial Review) (10 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8370 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E051 OF 2023**

JM CHIGITI, J

JULY 10, 2024

BETWEEN

PETER MUTUA MUTISO APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION 2ND RESPONDENT

JUDGMENT

1. By way of a Notice of Motion dated 20th June, 2023 - the Application said to be brought under Order 53 Rule 3 of the Civil Procedure Rules, 2010 – the Applicant seeks for the following orders:
 1. The Honourable Court be pleased to grant an order of *mandamus* directed to the Respondents, the Director of Public Prosecutions, The Director of Criminal Investigation, to pay the sum of Kshs. 585,250/= being the Certified costs in Nairobi JR. NO. 349 OF 2019 at Nairobi together with interest thereon at 14% per annum from 24th November, 2021 until payment in full.
 2. The costs of this application be provided for.
2. The Application is accompanied by a Statutory Statement, and a Supporting Affidavit of Richard Mubua Mutiso - both dated 18th April, 2023.
3. The Applicant’s case is that the Director of Public Prosecutions (DPP), and the Director of Criminal Investigations (DCI) are unlawfully neglecting or refusing to make a payment to him [the Applicant]. That they have acted in excess of their powers, and without any powers in refusing to carry out their public duties.



4. It is contended that the DPP, and DCI have wrongfully abdicated or abandoned their duties and powers in withholding the exercise of their public duty by not making the payment. The Applicant maintains that despite making a demand, they continue to refuse to carry out their public duty. That no other remedy exists at law to compel these public offices to make the payment.
5. The Application is opposed by the 1st and 2nd Respondents through a Replying Affidavit dated 16th October, 2023 deponed by Achochi Henry Nyabuto, the Senior Principal Prosecution Counsel at the Director of Public Prosecutions. The deponent stated that the issues in this matter were placed before this Court [presided over by Justice A. K. Ndungu] *vide* a Notice of Motion dated 6th July, 2022 in Misc. Application No. 349 of 2019.
6. In the matter [349 of 2019], that a determination was made on 16th March, 2023 which struck out the said Application - on grounds that the Certificate of Taxation had not been served timeously on the Respondents - however, the court retained the right of the Applicant to approach it [court] within the correct procedure.
7. The deponent averred that they were served with the Certificate of Taxation and Bill of Cost, by the Applicant's counsel, to which they forwarded the same to the Solicitor General - vide a letter dated 8th May, 2023 and copied to the Applicant - for purposes of processing payment from the exchequer.
8. Further that the ODPP has no vote for payment of damages and in any event the decree holder has to seek payments with the treasury/ Exchequer through the Attorney General's Office.
9. It is maintained that the Applicant has not exhaustively follow up his claim with the relevant Government departments before approaching this court; and that at best this matter can be settled out of court. Thus, that the Application for order of mandamus is therefore misplaced, without merit and should be dismissed.
10. To buttress their cases, the parties filed their written submissions. The Applicant's submissions are dated 18th October, 2023. The 1st and 2nd Respondent's submissions are dated 13th February, 2024.
11. Supporting the Application, the Applicant submitted that he has written severally to both Respondents [ODPP and DCI] demanding payments - and served the judgment, the decree, and the Certificate of Order against the Government - the same is yet to be paid. It is maintained that the claim in this matter is against the Director of Public Prosecutions and the Director of Criminal Investigation as they were the Respondents in JR.NO. 349 OF 2019 from which the sum emanates.
12. To the Applicant, the Respondents having acknowledged the service of the decree, and the Certificate of Order against Government but yet to settle the monies amounts to neglecting and refusing to pay the Applicant in satisfying the courts decree.
13. Opposing the Application, the 1st and 2nd Respondent submitted that the court has the discretion to issue a mandamus order, and a party seeking it must demonstrate a legal right to perform a public duty. The 1st Respondent, an independent office, has no financial autonomy and therefore has no vote for the payment of damages.
14. It is averred that the procedure for payment of damages or costs due from the government is provided in section 21 (1) and (2) of the [Government Proceedings Act](#).
15. In sum, it is posited that execution proceedings against a government or public authority can only be against the accounting officer or chief officer, who is under a statutory duty to satisfy a court judgment. The government is protected from execution and attachment of its property under Section 21(4) of the [Government Proceedings Act](#); and payment is 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. Reliance is placed in the case of *Republic v Principal Secretary, State Department of Interior, Ministry of Interior & Coordination of National Government & 3 others* [2018] eKLR; and *Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security* (2012) eKLR.

16. It is submitted that the decree holder is only required to serve the Certificate of Costs on the Attorney General, who then advises and arranges for the accounting officer to make the payment. That in this instant case, the Applicant did not bring any evidence of service of the Certificate of Costs against the Government on the Attorney General - by way of a letter of demand.
17. The 1st and 2nd Respondents maintains that they have not failed to perform their duty to the detriment of the Applicant, who has a legal right to expect the duty to be performed. Therefore, that the order of *mandamus* has no basis in fact and law.
18. After a careful consideration of the Application, the responses thereto, the annexures, and the learned counsel's submissions; the following issues crystalizes for determination: Whether the orders of mandamus should issue as prayed by the Applicant.

Analysis and Determination

19. It is settled law that before an order of mandamus is issued, an Applicant must abide by the procedure in Section 21 of *Government Proceedings Act* which provides:

“(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.”

- (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.
- (3) 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.”

20. The circumstances under which judicial review order of mandamus are issued were discussed in the case *Republic v Kenya National Examinations Council Ex Parte Gathenji & 8 Others* Civil Appeal No 234 of 1996, where the Court of Appeal cited with approval, Halsbury’s Law of England, 4th Edition. Vol. 7 p. 111 para 89 thus:

“The order of mandamus is of most extensive remedial nature and is in 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 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.”...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

21. Further, this court is guided and agrees with the findings in the case of *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoh Egunza* [2012] eKLR where it was held as follows;

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. 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. This provision does not condition payment to budgetary allocation and parliamentary approval



of Government expenditure in the financial year subsequent to which Government liability accrues.” [Emphasis Added]

22. In the instant case, the Applicant has moved this Court to compel the satisfaction of a judgment already decreed in its favor by a competent Court of law.
23. From the record filed in the court, it is not in dispute that the Applicant obtained a Certificate of Order and Cost against the Government. However, service of the same was only done on the Respondents herein. The evidence shows that the Attorney General was not served by the Applicant as stipulated under Section 21(2) of the [Government Proceedings Act](#).
24. For clarity, it is not only sufficient to obtain the necessary certificate, but the same obtained documents must also be served upon the proper party, in this circumstance being the Attorney General.
25. In the premises, the Applicant has not made a case for the grant of an order of mandamus, and I hereby decline to grant the same in terms of prayers sought. The Notice of Motion dated 20th June, 2023 is unmerited and the same is dismissed with no orders as to cost.

It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 10TH DAY OF JULY, 2024.

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CHIGITI J (SC)

JUDGE

