



Chomba t/a Range Merchant v Principal Secretary, Ministry of Water, Sanitation and Irrigation & another (Judicial Review Miscellaneous Application E010 of 2022) [2023] KEHC 746 (KLR) (Judicial Review) (9 February 2023) (Judgment)

Neutral citation: [2023] KEHC 746 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E010 OF 2022
AK NDUNG'U, J
FEBRUARY 9, 2023**

BETWEEN

JOHN CHOMBA T/A RANGE MERCHANT APPLICANT

AND

PRINCIPAL SECRETARY, MINISTRY OF WATER, SANITATION AND IRRIGATION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The application before this Court is the amended Notice of Motion application dated April 26, 2022 seeking the following orders;
 - i. An order for Mandamus to compel the Principal Secretary Ministry of Water Sanitation and Irrigation to pay the decretal sum together with the accrued interest as ordered by the Honourable Magistrate Court in Civil Case No.10632 of 2018 in its final decree dated May 17, 2019 further leading to A certificate of Order dated 15th of September,2019 against the Government for the decretal sum together with unpaid interest Plus costs Certified by the Taxing Master for a total of Kshs 30,763,068.37/=.
 - ii. Costs of this Application be awarded to the Applicant in any event.”
2. The application is supported by a Statutory Statement dated April 26, 2022 and a Verifying and Supporting Affidavit both of which are sworn by John Chomba on even date.
3. The Applicant’s case is that pursuant to the Court’s judgement of May 7, 2019 the 1st Respondent was directed to pay the decretal sum of Kshs 9,629,600/= together with interest from February 1,



2002 to September 2019 at the rate of 12% per annum together with costs. According to the *Ex parte* applicant the amount due as tabulated in the Certificate of Order against Government is the sum of Kshs 30,763,068.37/=. The Applicant contends that all efforts to recover this sum have failed.

4. In rebuttal the Respondents filed Grounds of Opposition dated October 7, 2022 in which they contend that the instant application is frivolous, vexatious and an abuse of the court process, that it does not meet the threshold of issuing the order of mandamus sought, that there are no orders sought against the 2nd Respondent and therefore it ought to be struck off the proceedings. It is also argued that Judicial review deals with the decision-making process and not the merits of the decision.
5. I have considered the arguments advanced by the parties herein and the issue for determination is whether the Respondents have a legal duty to satisfy the decree subject of these proceedings and whether the Applicants have satisfied the conditions precedent to warrant the orders sought.
6. I note from the positions taken by the parties that it is not in contention that there is a valid court order pending fulfilment by the Respondents herein. Further, that the Respondents have not denied having been served by the Applicant in accordance with the provisions of Section 21 of the *Government Proceedings Act* which provides thus;

“(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.”

7. Section 21 (3) provides as follows;

“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.”

8. In their submissions the Respondents contend that a party seeking Judicial Review orders must first prove that the decision or act complained of is tainted with illegality, irrationality and/ or procedural impropriety as was held in the case of *Pastoli vs. Kabale District Local Government Council and Others* [2008] 2 EA 300.



9. It is also their argument that that there has been an institutional change and thus a change of guard in the ministry and therefore they seek more time to have the Principal Secretary Ministry of Water, Sanitation and Irrigation make good his claim.
10. The Applicant on the other hand contends that the Respondents were accorded proper Notice or demand for performance. Further, that they were equally accorded reasonable time to comply prior to filing of the application for Mandamus yet they are yet to comply with the court order and the Applicant is yet to receive the decretal sum as ordered by court. It is argued that the Respondents have not disputed the existence of the said decree and order and equally they have not disputed having been served with the said certificate of order and the demand letters for compliance.
11. Under what circumstances is an order for mandamus merited? The Court of Appeal in the case of *Republic v Kenya National Examinations Council Ex Parte Gathenji & 8 Others Civil Appeal No 234 of 1996*, 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.”
12. The Court in the case of *Republic v The Attorney General & Another ex parte James Alfred Koroso (2013) eKLR* held as follows;

“...in the present case the ex parte applicant has no other option of realizing the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realized. Unless something is done he will forever be left baby-sitting 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 judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers.”
13. In the instant case before this Court I note that the decree in question is the one issued on May 17, 2019 and I also note that the firm of Murangasia & Associates Advocates served the 2nd Respondent on two occasions that is on September 9, 2019 and October 28, 2019 with the Decree and Certificate of Order Against Government. There is therefore no valid reason proffered as to why the decree herein has not been satisfied.
14. The only way for the Applicant to enjoy the fruits of the court's judgement is through the issuance of an order of mandamus compelling the Respondents to comply with the court's orders.



15. For reasons above stated, I allow the Applicant's application dated April 26, 2022 with costs. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2023

A. K. NDUNG'U

JUDGE

