



Republic v Attorney General; Bor (Exparte) (Miscellaneous Civil Application 7 of 2021) [2023] KEHC 755 (KLR) (10 February 2023) (Ruling)

Neutral citation: [2023] KEHC 755 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CIVIL APPLICATION 7 OF 2021
REA OUGO, J
FEBRUARY 10, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

THE ATTORNEY GENERAL RESPONDENT

AND

COSMAS KIBET BOR EXPARTE

RULING

1. Vide a chamber Summons application dated the November 25, 2021 filed in Court on the December 3, 2021 the ex-parte applicant seeks that he be granted leave to apply for Judicial Review orders in the nature of Mandamus, to pay the ex-parte applicant, Cosmas Kibet Bor, the decretal sum of Kshs.2,901,003.00 inclusive of general damages, interest and costs all as assessed and or awarded in Kisii Chief Magistrate’s Court Case No. 6 of 2017.
2. The application is supported by the Statement of John Lemaiyan Towett (John) and 4 grounds on the face of the application. According to John the ex-parte applicant Cosmas Kibet Bor the decree holder in Kiss CMCC No. 6 of 2017 obtained a judgment dated 10th July 2018 in his favor in the sum of Kshs. 1,762,000.00 and she was awarded Kshs. 262, 000.000 as special damages all which remain unsatisfied to date. The Ex-parte Applicant’s costs were assessed at Kshs. 194.900.000. He obtained a certificate of Order against the Government of Kenya, dated 18th October 2021, pursuant to Order 29 rule 3 of the *Civil Procedure Rules* (2010) and section 21 of the *Government Proceedings Act*. That to date the Government of Kenya through the Attorney General have failed to satisfy the decree in Ogembo PMCC No. 6 of 2017.



3. The verifying affidavit of Cosmas Kibet Bor gives details the background of the application together with attachments of the proceedings and judgment in Ogembo PMCC No. 6 of 2017 including the Certificate of Order against the Government dated the November 3, 2021.
4. The application was opposed the respondent filed Grounds of Opposition stating the following; that the application is premature and contrary to the relevant legal provision. That the orders sought cannot be issued as the same are not supported by factual evidence and/or law. That the application is bad in law, lacks merit and amounts to complete abuse of the Court process.
5. The application was canvassed by way of oral submissions. M/s Kusa for the Ex-parte Application sought the orders in the Chamber Summons and reiterated the facts as deponed by the ex-parte applicant Cosmas Kibet Bor.
6. Miss Osebe for the Respondent argued that the application is pre-mature. She submitted that the conditions of granting a *Mandamus* order was laid out in the case of *Dragon v Canada* and *R v ex-parte J. Wambui Ndirangu* [2021]eKLR. That the applicant has not satisfied all the conditions set out in law. That there must be prior demand of performance and reasonable time to comply. That the applicant has satisfied the first 2 limbs but not the 3rd one is in contention. That the judgment was delivered on the July 10, 2018. That they served documents on the Attorney General on the 11 November 2021 and the application was filed on the 3/12/2021 barely a month after they were served with the documents and that it was not sufficient time to forward the file to the client. That the delay by the Applicant to serve the documents is to cause interest to accrue and that therefore the application is pre-mature. That the court should give them time and therefore the application should be dismissed.

Determination

7. The issue for determination is whether the applicant is entitled to the orders sought. As correctly submitted by the respondent the test for mandamus was set out in *Apotex Inc v Canada (Attorney General)* which 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.



8. The tests must be satisfied before an order of mandamus is issued. In this matter the first 2 tests have been met, however the applicant has failed to show that there was a prior demand for performance before filing this application. There is a Certificate of Order against the Government dated November 3, 2021. There is no demand letter after the issuance of the said certificate. Refusal to pay has not been demonstrated or established. Failure to comply with the set conditions leaves this court with no choice but to decline the order of Mandamus that is being sought by the applicant. The application is premature and is therefore dismissed. Each party to bear its own cost.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT KISII THIS 10TH DAY OF FEBRUARY 2023.

R. E. OUGO

JUDGE

In the presence of:

Miss Kusa For the Applicant

Miss Osebe For the Respondent

Orwasa C/A

