



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC JR 1 OF 2021**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF SECTIONS 8 OF THE LAW REFORMS ACT, CAP 26**

**AND**

**IN THE MATTER OF A DECREE DATED 4<sup>TH</sup> JUNE, 2020 AND CERTIFICATE**

**OF COSTS DATED 4<sup>TH</sup> JUNE, 2020 IN TIMOTHY MACHARIA VERSUS**

**PRINCIPAL SECRETARY MINISTRY OF EDUCATION & 3 OTHERS –**

**NYAHURURU ELC NO. 182 OF 2012**

**AND**

**IN THE MATTER OF AN APPLICATION BY:**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PRINCIPAL SECRETARY MINISTRY OF EDUCATION.....1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY**

**MINISTRY OF FINANCE AND NATIONAL TREASURY.....2<sup>ND</sup> DEFENDANT**

**EX PARTE: TIMOTHY MACHARIA.....APPLICANT**

**JUDGMENT**

1. By a chamber summons dated 15<sup>th</sup> July, 2020 brought under **Order 53 Rule 1 of the Civil Procedure Rules , 2010** the ex-parte Applicant (*the Applicant*) sought leave of court to apply for an order of *mandamus* to compel the Respondents to pay him the decretal amount, interest and costs ordered in Nyahururu ELC No. 182 of 2017 – **Timothy Macharia (suing as the Administrator of the estate of John Macharia Mwangi v Principal Secretary Ministry of Education, Board of Management Silibwet Primary School, County Director of Education Nyandarua and the Hon. Attorney General.**

2. The said application was based upon the grounds set out in the chamber summons, the annexed statutory statement dated 15<sup>th</sup> July, 2020, and the exhibits thereto. The gist of the application was that despite obtaining a decree, certificate of costs, and certificate of order against the Government in the said suit, the Respondents had without lawful justification or excuse failed to settle the decretal amount despite demand. It was further contended that there was no pending appeal against the decree nor an order for stay of execution.

3. By an order dated 15<sup>th</sup> February, 2021, the Applicant was granted leave to apply for the judicial review order of *mandamus*. The Applicant was to file the notice of motion for judicial review within 21 days and serve the Respondents and the Attorney General. The material on record shows that the Applicant filed a notice of motion dated 18<sup>th</sup> February, 2021 under **Order 53 Rule 3 of the Civil Procedure Rules**.

4. The Attorney General appeared for the Respondents and filed grounds of opposition dated 25<sup>th</sup> March, 2021 opposing the application for judicial review on three main grounds. First, that the Applicant had failed to comply with the provisions of **Order 29 (3) of the Civil Procedure Rules and Section 21 of the Government Proceedings Act (Cap. 40)**. Second, that the Respondents were never served with the decree, certificate of costs, and certificate of order against the Government. Third, that the application was frivolous, vexatious and an abuse of the court process. The court was consequently urged to dismiss it with costs.

5. When the application was listed for directions on 7<sup>th</sup> June, 2021 the Attorney General sought and obtained leave to file a replying affidavit within 21 days. It was directed that the application shall be canvassed through written submissions and the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Applicant filed his submissions on 20<sup>th</sup> September, 2021 whereas the Respondents filed theirs on 22<sup>nd</sup> September, 2021. There is, however, no indication on record of the Attorney General having filed a replying affidavit despite having obtained leave to do so.

6. The court has considered the application for judicial review, the Respondents' grounds of opposition as well as the submissions on record. The court has noted that the Respondents did not file a replying affidavit to dispute the factual basis of the application for judicial review. It was not disputed that the Applicant had obtained a decree in **Nyahururu ELC NO. 182 of 2017**. It was not disputed that the Applicant had obtained a certificate of costs as well as a certificate of order against the Government as required by law.

7. The Respondents did not contend that the decree was subject to a pending appeal or that it had been stayed pursuant to an order of this court or a higher court. The only defence the Respondents raised in their grounds of opposition and written submissions was that the relevant documents necessary for settlement of the decree were not served upon them. It should be noted, however, that the Respondents did not file any affidavit to deny the issue of service or assert that service was the only impediment to settlement of the decree. The court does not accept as factual evidence the statement in the grounds of opposition that the requisite documents were never served upon the Respondents.

8. The court is satisfied on the basis of the material on record that the Applicant is entitled to the fruits of his judgment and that there is no valid reason why he should be kept waiting for much longer. There is no doubt that execution of decrees against the Government is expressly barred by **Section 21 (4) of the Government Proceedings Act**. The only option available to a decree holder is to apply for the judicial review order of *Mandamus* to compel the concerned accounting officer to perform his statutory duty as stipulated under **Section 21 (3)** of the said Act. See **Republic v Attorney General & Another Ex parte Ongata Works Limited [2016] eKLR**.

9. The upshot of the foregoing is that the court finds merit in the application for judicial review against the Respondents. Accordingly, the Applicant's notice of motion dated 18<sup>th</sup> February, 2021 is hereby allowed in the following terms:

**(a) An order of mandamus do issue compelling the Principal Secretary Ministry of Education and the Principal Secretary Ministry of Finance and National Treasury to forthwith pay to the *ex parte* Applicant the judgment debt in the sum of Kshs 6,915,000.00 plus incurred interest at 14% per annum from 4<sup>th</sup> October, 2018 until the date of full payment and pay to the *ex parte* Applicant costs which have been taxed and certified by the Registrar at Kshs 352,830.00 arising to the decree of the Environment and Land Court Nyahururu dated 4<sup>th</sup> October, 2018 and issued on 4<sup>th</sup> June, 2020 and the certificate of costs of the Registrar Environment and Land Court Nyahururu dated 20<sup>th</sup> January 2020 in Nyahururu ELC No. 182 of 2012 Timothy Macharia (suing as the Administrator of the state of John Macharia Mwangi) v the Principal Secretary Ministry of Education, Board of Management Silibwet Primary School, County Director of Education Nyandarua and the Hon. Attorney General.**

**(b) The Applicant is hereby awarded costs to be borne by the Respondents.**

**JUDGMENT DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 14<sup>TH</sup> DAY OF OCTOBER, 2021**

In the presence of:

Mr. Ondieki for the Attorney General for the Respondent

No appearance for ex -parte Applicant

Ca- Carol

.....

**Y. M. ANGIMA**

**ELC JUDGE**