



Republic v Principal Secretary Ministry of Water & Irrigation; Zingo Investments Limited (Exparte Applicant) (Judicial Review 339 of 2018) [2023] KEHC 3701 (KLR) (Judicial Review) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3701 (KLR)

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

JUDICIAL REVIEW 339 OF 2018

JM CHIGITI, J

APRIL 20, 2023

BETWEEN

REPUBLIC APPLICANT

AND

THE PRINCIPAL SECRETARY MINISTRY OF WATER & IRRIGATION RESPONDENT

AND

ZINGO INVESTMENTS LIMITED EXPARTE APPLICANT

JUDGMENT

1. By Notice of Motion Application dated 7th November 2018, the Exparte Applicant brought these Judicial Review proceedings seeking for orders that;
 - a. The Honourable Court be pleased to grant an order of mandamus against the Respondent compelling him/her to immediately pay the sum of Kshs.308,894/= plus accrued interests at 12% p.a with effect from 2nd August 2017 till payment in full as decreed in Milimani CMCC NO.4163 OF 2011 ZINGO INVESTMENT LIMITED VS. ATTORNEY GENERAL AND JEREMIAH O. MUKHUANA.
 - b. The costs of this application be provided for.
2. The application is anchored on the grounds that are on the face of the Notice of Motion and the Applicant’s Statutory Statement and Verifying Affidavit sworn on 7th November 2018. In the Statutory



- Statement, the Applicant states that the Respondent under a public duty has totally refused to make the said payment to the Applicant and is unlawfully and unreasonably neglecting or refusing to do so.
3. In the Verifying Affidavit the Applicant depones that on 14th September, 2011, he filed a suit in Milimani CMCC NO.4163 OF 2011 ZINGO INVESTMENT LIMITED VS. ATTORNEY GENERAL AND JEREMIAH O. MUKHUANA annexed and marked as RNM1. He further depones that the matter was fully heard and on 19th June 2017 the Court entered judgment on liability at 100% against the Respondent annexed and marked as RNM3.
 4. He deponed that the Decree and Certificate of costs were extracted on 2nd August 2017 and the same together with Certificate of Order against Government were forwarded to the Respondent on 27th September 2017 asking for payment annexed and marked as RNM4. He further depones that the Respondent as the chief accounting officer of the Government has totally refused and ignored settle the decree, costs and interests now amounting to Kshs. 384,268/= as at 2nd August 2017.
 5. The Attorney General entered Appearance on behalf of the respondents. Upon service of the application on the Respondents, the Respondent filed Grounds of Opposition dated 6th December 2022.

Ex-Parte Applicant's Submissions

6. The Ex-Parte Applicants in their submissions recognized that the Respondent has a public duty to satisfy the present decree herein and the only remedy a decree holder has against the Government or any of its ministries such as this is by way of a judicial review.
7. The Ex-Parte Applicants submitted and cited the cases of R v Kenya National Examinations Council - Ex-parte Gathengi & others (1997) eKLR and Jaribu Credit Traders limited v. Nairobi County Government (2018) eKLR whereas the Respondent cited the cases of Pastoli VS. Kibale District local Government Council and Others (2008) EA and Republic vs. Kenya National Examinations Council exparte Gathengi & Others.

Analysis and Determination

8. I have considered the arguments advanced by the parties herein. The issue for determination is whether an Order of Mandamus should issue as prayed in the Ex parte Applicant's application.
9. The Respondent filed its submissions in opposing the Application. In its 2nd last paragraph of the submissions dated 6th December, 2022, the Respondent is inviting the court to take Judicial Notice of the change of guard in the Ministry and calls for time to make good their claim. To me this is a clear indication that the Respondent acknowledges that it owes the amount claimed.
10. The judgement was entered on 2nd August, 2017. This is six years ago. The Respondent has all along known that the obligation to settle was not going anywhere. The Respondents have not given any satisfactory reason as to why the decree has not been fulfilled almost five years later and what is alleged is that there has been an institutional change and thus a change of guard in the Ministry.
11. No efforts have been made towards settling the claim. The Applicant has a legitimate expectation that he shall not only access but also enjoy the fruit of the judgment.
12. The *Fair Administrative Action Act* shall remain a dead letter unless the Respondent and indeed all judgment debtors settle the decrees. A delay of six years can only translate into a deliberate refusal to pay.



13. The *Government Proceedings Act* is intended to set a procedure for the recovery of claims by beneficiaries of judgment. 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.”

14. Section 21 (3) of the said Act on the other hand provides:

“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.”

15. I am satisfied that the Applicant notified the Respondents of the existence of the decree when it extracted and served the decree, certificate of costs and the certificate of order against the Government.
16. The Applicant has a right to fair administrative action under Article 47 which he seeks to enforce before this court. It is incumbent upon the Respondent to prove that here is justification in limiting the right under Article 24 of *the Constitution*.
17. 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 realising 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 judgments 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 in-actions of public officers.”

18. The Respondent has made no effort towards discharging its duty in placing itself within the justifiable grounds that would allow it to limit the Applicant’s rights under Article 47 of *the Constitution*. Change of guard at the Ministry cannot be equated to what Article 24 of *the Constitution* provides for reasons to justify the limitation of rights.
19. Article 48 of *the Constitution* is alive and this court has a duty to promote protect and fulfil success to justice delayed is justice denied. Judicial review remedies under Article 23 of *the constitution* offers the Applicant a robust redress in the orders sought.

Orders:

20. In the premises, I am satisfied that the Ex Parte Applicant has made a case for the grant of an order of mandamus and I hereby grant the same in terms of prayer (1) of the Notice of Motion dated 7th November, 2018.
21. The Ex parte Applicant will also have costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL, 2023

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J. CHIGITI (SC)

JUDGE

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