



**Republic v Independent Electoral & Boundaries Commission; Scanad Kenya Limited
(Ex parte Applicant) (Judicial Review Miscellaneous Application E125 of 2022)
[2023] KEHC 19027 (KLR) (Judicial Review) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19027 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E125 OF 2022**

**JM CHIGITI, J
JUNE 15, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**THE INDEPENDENT ELECTORAL & BOUNDARIES
COMMISSION RESPONDENT**

AND

SCANAD KENYA LIMITED EX PARTE APPLICANT

JUDGMENT

1. The Applicant herein filed an application by way of Notice of motion dated 31st October 2022 seeking orders that: -
 1. An order of Mandamus compelling the Respondent's Chief Executive Officer to pay the Applicant the sum of KES 248,042,665.12 being the decretal amount together with interest at Court rate from the date of award until payment in full.
 2. In default, notice to show cause do issue against the Respondent's Chief Executive Officer to show cause why he should not be cited for contempt.
 3. Costs of and incidental to this Application be provided for.
2. The application is anchored on the grounds that are on the face of it supported by the Verifying Affidavit sworn on 25th October 2022 by Jimmy Mnene annexed to the Chamber Summons dated 25th October 2022, together with the Statutory Statement.



3. On 26th April 2021, this Honourable Court (Lady Justice Grace Ngenye) allowed the ex parte Applicant's Application dated 27th July 2020 and entered Judgment on Admission against the Respondent for the sum of KES 245,002,620.12 inclusive of Value Added Tax together with Costs and interests at Court rates.
4. The decree and certificate of costs are annexed and marked as JM1 and JM2 respectively.
5. The Applicant avers that the Respondent claimed that it could not pay as the National Treasury had not allocated it funds and despite numerous demands the Respondent has deliberately failed, refused and or declined to satisfy the decree.
6. Further, the Respondent has not appealed against, or set aside the Decree or Certificate of Costs subject of the instant application and no attempt has been made to challenge the Court Order.
7. The Certificate of Order for costs against the Government was duly served upon the Respondent on 6th October 2022 and due demand for payment of the amount made. A copy of the Affidavit of service annexed and marked as JM6.
8. The decretal sum emanates from services provided by the Applicant to the Respondent in the year 2007.

Analysis and determination

9. I have considered the arguments advanced by the Applicant herein. The Respondent has not filed any responses and as such the Application remains unopposed.
10. The issue for determination is whether an Order of Mandamus should issue as prayed in the Ex parte Applicant's application.
11. 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.”

12. 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.”

13. 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.”

14. In this case, the Ex parte Applicant has moved this Court to compel the satisfaction of a judgment already decreed in its favour by a competent Court of law.
15. The Applicant has demonstrated by way of evidence compliance with the provisions of Section 21 of the *Government Proceedings Act*. The respondent has not filed any Replying Affidavit to rebut the aforesaid evidence.
16. The Respondents have not given any satisfactory reason as to why the decree has not been fulfilled and 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.
17. The *Fair Administrative Action Act* shall remain a dead letter unless the Respondent and indeed all judgment debtors settle the decrees.
18. I am satisfied that the Applicant notified the Respondents of the existence of the decree, certificate of costs and the certificate of order against the Government.
19. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the *Republic v The Attorney General & Another ex parte James Alfred Koroso*, the Court held as follows:

...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 realised. Unless something is done he will forever be left babysitting 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. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.....The institution of judicial review proceedings in the nature of mandamus cannot be equated with execution proceedings. In seeking an order for mandamus the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In mandamus cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it. In other words, mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of mandamus, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such.”

Orders

The Notice of Motion dated 31st October, 2022 is allowed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE 2023

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J. CHIGITI (SC)

JUDGE

