



Mutua & another (Suing as the Legal Representatives and Administrators of the Estate of Cosmus Mutuku Mutua) v Attorney General & another (Miscellaneous Application E018 of 2023) [2023] KEHC 20729 (KLR) (Judicial Review) (20 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20729 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E018 OF 2023
JM CHIGITI, J
JULY 20, 2023

BETWEEN

ANN NDINDA MUTUA 1ST APPLICANT

GEDION MUTISYA MUTUA 2ND APPLICANT

**SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF
THE ESTATE OF COSMUS MUTUKU MUTUA**

AND

ATTORNEY GENERAL 1ST RESPONDENT

DIRECTOR, NATIONAL YOUTH SERVICE 2ND RESPONDENT

JUDGMENT

Background

1. Following the leave of court granted on the March 9, 2023 the Applicants by a Notice of Motion dated March 13, 2023– under Order 53 Rule 3 of the [Civil Procedure Rules, 2010](#); and Sections 8 and 9 of the [Law Reform Act](#), Cap 26 Laws of Kenya – sought for orders:
 1. That the court be pleased to issue an order of *mandamus* directed against the 1st Respondent, the Attorney General of the Republic of Kenya and the 2nd Respondent, the Director National Youth Service compelling them to pay Kshs 3,154,548/= being the decretal sum awarded in Nairobi CMCC No 7220 of 2016.
 2. That the costs of and incidental to this application be borne by the Respondent.



2. The Application was supported by a Statutory Statement, a Verifying Affidavit, and a Supporting Affidavit - all dated March 7, 2023 and affidavits sworn by Ann Ndinda Mutua.
3. It is the Applicant's case that a Certificate of Order against the Respondent for the decretal amount of Kshs 3,154,548/- was issued and duly served on them (Respondent). That despite several demands for payment, the Respondent has blatantly declined and/or refused to pay the decretal amount - in flagrant disobedience of a court order.
4. According to the Applicants, the failure to pay/settle the decretal amount, the Respondent (specifically the 2nd Respondent) derogates from its obligations under Section 21 of the Government Proceedings Act; which in turn compromises the right of the Applicants to enjoy the fruits of their litigation. Also, that the law does not allow other modes of execution against the Government pursuant to Government Proceedings Act, Cap 40 Laws of Kenya.
5. The Application is unopposed. There is evidence of service upon the Respondents, before this court.
6. To buttress their case, the Applicants filed their written submissions dated April 18, 2023 wherein, in sum, they posited that the Respondents are under a public duty and obligation to satisfy the orders issued in their favour (Applicants) in the judgment in CMCM No 7220 of 2016; and also maintained that they are entitled to the reliefs sought in this instant suit. Authorities were cited in the submissions.
7. After careful consideration of the Application, the counsel's submissions, and the authorities cited, I find the following issue for determination arising:

Whether the Orders of Mandamus Should Issue as Prayed by the Applicant.

8. 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.”

9. 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.”

10. 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.”

11. In the matter at hand, the Applicant has moved this Court to compel the satisfaction of a judgment already decreed in its favour by a competent Court of law.
12. From the record filed before this court, there is evidence of a Decree issued on February 10, 2023; and Certificate of Order against the Government was obtained as its dated February 16, 2023. Further, there it is evident that the Applicant has served the 1st Respondent with the same, as there is acknowledgment of receipt by the 1st Respondent by their stamp markings.

Disposition:

13. From the foregoing, it is clear that the Applicant fully comply with Section 21 of *Government Proceedings Act*. In the premises, I am satisfied that the ex-parte Applicants have made a case for the grant of an order of mandamus.

Order:

14. The notice of motion dated March 13, 2023 is allowed with costs.

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

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J. CHIGITI (SC)

JUDGE

