



**Action Aid v Attorney General & another (Judicial Review Application E068 of 2022)
[2023] KEHC 23209 (KLR) (Judicial Review) (6 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23209 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E068 OF 2022
J NGAAH, J
OCTOBER 6, 2023**

BETWEEN

ACTION AID APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

PERMANENT SECRETARY MINISTRY OF DEFENCE 2ND RESPONDENT

JUDGMENT

1. The application before court is the applicant’s notice of motion dated 2 September 2022 expressed to be brought under sections 8 and 9 of *Law Reform Act*, cap. 26, the *Government Proceedings Act* and Order 53 of the Civil Procedure Rules.

The motion seeks one primary prayer of mandamus which is framed as follows: “

1. An Order compelling the 1st and 2nd Respondents to pay to the Applicant the sum of Kshs. 671,606.00 with interest thereon at the rate of 12% per annum from 3rd December,2015 in terms of the Certificate of Order against the Government issued on 11th July,2018 until payment in full arising from Milimani CMCC No. 1986 of 2003 Action Aid Versus The Attorney General.”

2. The application is based on a statutory statement dated 17 March 2022 and an affidavit sworn on even date by Mr. Amos Wandago, the learned counsel for the applicant.

The applicant’s case is that on 3 December 2015 the court entered judgment in its favour in Milimani Chief Magistrates Court Civil Case No. 1986 of 2003. The decretal amount together with interest was Kshs. 671, 606.00/=.



3. A Certificate of Order against the government dated 11 July 2018 was issued and served upon the Attorney General on 25 January 2022. However, the 2nd respondent has failed, refused or neglected to settle the decree in accordance with the certificate or at all. According to the applicant, the refusal to pay is contrary to Article 47 of *the Constitution* of Kenya and section 7(2) (i) of the *Fair Administrative Action Act*, 2015 which provisions of the law guarantee the applicant expeditious, reasonable and efficient administrative action.

It is also deposed that the respondents have failed to discharge the duty imposed by the *Government Proceedings Act*, Cap 40 and frustrated the applicant's legitimate expectation which is that it was to be paid the decretal sum upon determination of its claim in the magistrates' court.

4. Dr. Ibrahim M Mohamed, the 2nd respondent, filed a replying affidavit opposing the application. He denies having been served with the certificate of order against government and swears that only the 1st respondent was served. Since he has not been served, Dr. Mohammed contends, he cannot be said to have failed to comply with the order and pay the applicant. The 1st respondent who was served is not the accounting officer. Accordingly, he states that the application for mandamus is premature.

Even then, he urges, satisfaction of a decree is an expenditure that can only be paid from the funds allocated by parliament and, therefore, a provision for such an expenditure must first be made in budget. Dr. Mohamed has further urged that all ministries of the Government of Kenya receive annual financial allocations from the consolidated fund through an annual budget prepared and tabled by each ministry in the month of July of each financial year and approved by parliament. As at the time of swearing his affidavit on 20 September 2022, this exercise had been undertaken and, apparently, the applicant's decree had not been catered for in the budget. Accordingly, it would be impossible to settle the decree out of the budgetary allocation in which no provision had made for settlement of the applicant's decree.

I have considered the submissions by both counsel for the applicant and the respondents.

5. One fundamental fact which is that the applicant holds a decree against the 1st respondent and which decree remains unsatisfied is not in dispute. Two reasons proffered by the 1st respondent why the decree has not been settled are, first, that only the 1st respondent was served with the certificate of order against the government and, secondly, no budgetary allocation was made for payment in what I suppose is the 2022/2023 annual budget.

The answer to the question whether the 2nd respondent ought to have been served with the certificate of order against government and whether he was indeed served is both a question of law and fact. As far as law is concerned, section 21 of the *Government Proceedings Act* which generally deal with the manner and procedure on enforcement of orders and decrees against Government would shed some light. This section reads as follows:

21. Satisfaction of orders against the Government

- (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.

- (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.
- (3) 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.

- (4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.
- (5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.

6. Nowhere in this provision is it suggested that the 2nd respondent, as the accounting officer in the ministry of defence ought to be served with certificate of order against government. Contrary to the respondents' argument, according to section 21(2), it is the Attorney General rather than the accounting that ought to have been served.

Under Article 156 (4) (b) of *the Constitution*, the Attorney General represents the National Government in court or in any other proceedings in which the National Government is a party other than criminal proceedings. The presumption is that it is incumbent upon the Attorney General to liaise with his client and bring to its attention the certificate of order against the government once he has been served with the certificate.

Of course, there would be nothing wrong in a decree holder serving the certificate upon the accounting officer referred to in section 21(1) of the Act but the Act is express that it is the Attorney General who may be served. In short, an application for enforcement of payment would not fail because the accounting officer was not served if it can be proved that his legal representative, the Attorney General, was served.

7. There is, therefore, no legal basis for the 2nd respondent's argument that he could not settle the decree because the certificate of order against the Government was served on the Attorney General and not him. As a matter of fact, his argument is contrary to what the law states.

The second reason that the decree cannot be satisfied merely because a budgetary allocation was not made for satisfaction of the decree is also not plausible. It is not plausible because section 21(1) does not say that settlement of a decree is subject to a budgetary allocation to any ministry or government



department in any particular financial year. If such an exception was necessary, the legislature would have stated so in clear and unambiguous terms.

And even if the 2nd respondent was to be given the benefit of doubt that the applicant could not be paid out of the budgetary allocations in the 2022/2023 budgetary cycle, he has not stated why the provision for settlement of this decree was not made in the current budgetary cycle.

8. In the absence of any reason or any valid reason why the applicant's decree cannot be settled, there is every reason to compel the 2nd respondent by way of mandatory or mandamus order to pay.

But why a mandatory order?

One of the ways through which decrees or orders are enforced is, of course, execution or attachment. However, the Government is protected from such process of execution or other similar process in enforcement of decrees or orders by section 21(4) of the *Government Proceedings Act*.

In the face of this protection from execution or attachment, the only available route open to the applicant is to compel the 2nd respondent to perform his statutory duty under section 21(3) of the Act and pay what has been decreed as due and owing to the applicant. In other words, only the order of mandamus would be the appropriate order under the circumstances.

9. According to Halsbury's Laws of England/Judicial Review (volume 61 (2010) 5th Edition)/5. Judicial Remedies/ (1) Introduction paragraph 689:

A mandatory order is, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal requiring him, or them, to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty (See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL). The breach of duty may be a failure to exercise a discretion, or a failure to exercise it according to proper legal principles.”

10. This is reiterated in paragraph 703 which states:

A mandatory order is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or it to do some particular thing specified in the order which appertains to his or its office and is in the nature of a public duty... the purpose of a mandatory order is to compel the performance of a public duty, whether of an inferior court or tribunal to exercise its jurisdiction, or that of an administrative body to fulfil its public law obligations. It is a discretionary remedy.”

11. And with particular reference to public officers who, like in the instant case, fail to perform their duty, paragraph 706 is clear that a mandamus order may be issued to compel them to carry out the duty. It reads as follows:

706. Public duties by government officials.

If public officials or public bodies fail to perform any public duty with which they have been charged, a mandatory (mandamus) order may be made to compel them to carry out the duty (See *R v Metropolitan Police Comr, ex p Blackburn* (No 3) [1973] QB 241, [1973] 1 All ER 324, CA; *R v London Transport Executive, ex p GLC* [1983] QB 484, [1983] 2 All ER 262, DC.)”

12. The applicant has demonstrated, and it is not in dispute, that it duly extracted a certificate of order against government and that the same was duly served upon the 1st respondent. At any rate, it has not



been suggested that it defaulted in any step prescribed under section 21 of the Act as to disentitle it to the order of mandamus.

A demand for payment having been made, and the 2nd respondent having failed to pay, no other evidence is required to demonstrate that the 2nd respondent has failed to perform a public duty with which he is charged under section 21(3) of the *Government Proceedings Act*. A mandamus order would properly issue in such circumstances.

Accordingly, I hereby allow the applicant's motion dated 2 September 2022 in terms of prayer (1). The applicant will also have costs of the application. It is so ordered.

SIGNED, DATED AND DELIVERED ON 6 OCTOBER 2023

NGAAH JAIRUS

JUDGE

