



IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

(CORAM: A.K. NDUNG'U J.)

MISCELLANEOUS CIVIL APPL. NO. E115 OF 2021

GREENWOOD PRINTERS &

STATIONERS LTD.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....RESPONDENT

JUDGMENT

1. Greenwood printers and Stationers Limited have moved this court vide a Notice of Motion dated 24th July, 2021 seeking orders:

i. An Order of Mandamus to compel the Respondent to pay the decretal sums awarded in MCCC/1249/2019 – Greenwood Printers Limited versus Independent Electoral and Boundaries Commission as per the Certificate of Order Against the Government issued on 18th June, 2021.

ii. The costs of this suit be paid by the Respondent.

2. The application is premised on the affidavit of Peter Njoroge Ng'ang'a and the Statutory Statement on record and on 9 grounds listed on the face thereof the gist of which is that the applicant was awarded a sum of Ksh. 526,500 with interest from the date of filing suit against the respondent vide a Judgment of the Chief Magistrate's Court in MCCC/1240 of 2019. The sum was not paid necessitating the current application since the respondent is subject to Government Proceedings Act in terms of S13(2) of the IEBC Act.

3. It is urged that the applicant applied for a Certificate of Order against Government which certificate was issued on 18th June, 2021. The same was served on the Chief Executive Officer/Secretary of the respondent under the cover of a letter dated 15th July, 2021 demanding settlement of the decretal sums by close of business on 23rd July, 2021. There was no compliance.

4. The application is opposed and in a replying affidavit, Douglas Kipruto Bargorett acknowledges the indebtedness but adds that the process to settle the decretal sum was delayed since after the judgment, the respondent sought funds from National Treasury and the process took long.

5. By the time a Certificate of Order against the Government dated 18th June, 2021 was served on the respondent, the processing of payment as per the Decree and Certificate of Costs was ongoing and the exercise was at the tail end and cancelling it and starting afresh would have delayed the payment more.

6. Subsequently, Sh. 726,886.65 was deposited with the respondent's advocates for onward transmission to the applicant. It is averred that the Kenya Revenue Authority (KRA) made a demand for VAT on the said sum in the mistaken belief that the same was legal fees received by the advocates. The VAT issue was resolved in October, 2021.

7. It is further averred that on 8th October, 2021, a cheque for Ksh. 726,886 was forwarded to the applicant's advocates and the outstanding balance is Ksh. 122,592.98 which the respondent is processing. The application is said to have been unnecessary as the same was filed on 30th July, 2021 when the respondent had already forwarded Sh. 726,886 to its advocates for onward transmission to the applicant.

Determination

8. The law on circumstances under which the court will issue an Order of Mandamus compelling payment of a decretal sum has now been settled by our courts.

9. In addition to proving the existence of a decree against the respondent, an applicant must abide by the procedure in Section 21 of the Government Proceedings Act. The Section 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.”

10. In Republic Vs Permanent Secretary Ministry of State for Provincial Administration and internal Security Exparte Fredrick Manoah Igunza [2012] eKLR, Githua J expounded the law correctly when she stated;

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.”

11. The effect of these provisions is that whereas execution proceedings as known in law are not available against the Government, the Accounting Officer of a Government Department or a Government body subject to the Government Proceedings Act is nevertheless under a statutory duty to satisfy a judgment made by court against that department or body.

12. In the case of Republic vs The Attorney General & Another Ex parte James Alfred Koroso [2013] eKLR Odunga J while expounding on an order of mandamus cited with approval the case of Shah vs Attorney General (No.3) Kampala HCMC no. 31 of 1969 (1970) EA 543 where Goudie J, expressed himself, inter alia, as follows:

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment...The foregoing may also be thought to be much in point in relation to the applicant’s unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty...Since mandamus originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law...English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting “simply in his capacity of servant”. There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a mandamus would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of mandamus will lie for the enforcement of the duties...With regard to the question whether mandamus will lie, that case falls within the class of cases when officials have a

public duty to perform, and having refused to perform it, mandamus will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile ... It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government....Whereas mandamus may be refused where there is another appropriate remedy, there is no discretion to withhold mandamus if no other remedy remains. When there is no specific remedy, the court will grant a mandamus that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a mandamus is to go, then mandamus will go... In the present case it is conceded that if mandamus was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of mandamus must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament... In the court's view the granting of mandamus against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise, there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and 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 Treasury Officer of Accounts 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 recognized that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown 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. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as persona designata, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for mandamus by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by mandamus on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which mandamus will not lie for this reason alone are comparatively few...Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as persona designate to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore, an order of mandamus will issue as prayed with costs." [Emphasis added].

13. In our instant suit, the applicant has demonstrated the existence of a decree of court against the respondent which at the time of filing of the Notice of Motion herein was not satisfied. The applicant has exhibited the necessary Certificate of Order against the Government and it is not denied that the order was served on the CEO of the respondent. In line with the decision in **Permanent Secretary, Ministry of State for Provincial Administration and Internal Security (Supra)**, the respondent enjoys no special privileges with regard to liability arising from the decree and is obligated to pay up subject to the applicant following the correct procedure.

14. Since the respondent enjoys immunity from execution and attachment of property in satisfaction of a decree, the decree can only be enforced through an order of Mandamus compelling the Accounting Officer of the respondent to pay and satisfy the decree. This is the correct path the applicant has taken and the necessary Certificate of Order against the Government has been obtained.

15. It cannot be disputed that the respondent relies on funds from the National Treasury which funds are budgeted for in advance. It is also true that the process consumes time. In my view, the Government and Government entities are under an obligation to streamline their operations and inefficiencies in their systems should not be visited adversely on their creditors and keep them away from enjoying their fruits of judgment.

16. Indeed, Section 21(3) imposes a statutory duty on the Accounting Officer concerned to pay the sums specified in the Certificate of Order to the person entitled or to his advocate together with any interest accruing thereon, and as Githua J, observes in **Permanent Secretary Provincial Administration and Internal Security** case, this provision does not condition payment to budgetary allocation and Parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.

17. The explanation that the respondent forwarded a cheque to their advocates for onward transmission to the respondent but there was delay arising from Kenya Revenue Authority queries is an internal matter between the Respondent and their Advocates which does not satisfactorily answer the default.

18. Following the principles set on **Republic vs Kenya National Examinations Council Ex parte Gathenji & 8 others, Civil Appeal No. 234 of 1996**, am satisfied that the applicant has laid sufficient grounds for issuance of an Order of Mandamus.

19. With the result that the Notice of Motion dated 24th July, 2021 is wholly successful and is allowed in terms of prayer 1. For avoidance of doubt the sums payable to the applicant shall be the sum in the Certificate of Order against Government less monies received by the applicant as at the date of this Judgment. The Applicant shall have costs of the Motion.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY FEBRUARY, 2022

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A. K. NDUNG'U

JUDGE