



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 335 OF 2019

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

EX PARTE APPLICANT:

ANTONIE KUBONDO MURUNGA

JUDGMENT

The Application

1. The *ex parte* Applicant herein, Antonie Kubondo Murunga, is the decree holder in a decree given by the Environment and Land Court in Nairobi in **Nairobi ELC Case No. 569 of 2011**, wherein judgment was given in his favour against the Respondent herein on 27th September 2017. The judgment awarded the *ex parte* Applicant an indemnity of Kshs.15,000,000/=; general damages of Kshs.2,000,000/=; and special damages of Kshs 147,046/=; together with costs and interest at court rates.
2. The *ex parte* Applicant consequently filed the instant judicial review proceedings by way of a Notice of Motion application dated 19th May 2020, in which it is seeking the following orders:-
 1. **That an order of mandamus do issue against the Respondent directing the Respondent to pay to the Applicant the sum of Kenya Shillings Twenty One Million, Six Hundred and Seven Thousand, Nine Hundred and Thirty Eight and Sixty Cents (Kshs.21,607,938.60) together -with interest on this decretal amount at court rates as from 1st October, 2019 until payment in full.**
 2. **That an order of mandamus do issue directing the Respondent do pay costs of these proceedings with interest at court rates.**
3. The said application is supported by a statutory statement dated 18th November 2019, and a verifying affidavit and supplementary affidavit sworn on the same date and on 5th February 2020 respectively by Livingstone Maina Ombete, the *ex parte* Applicant's advocate on record.
4. The main ground for the application is that the *ex parte* Applicant has duly served the Respondent with the decree, certificate of taxation in respect of costs, and an order against Government, arising from the judgement delivered in his favour in ELC No. 569 of 2011. However, that there has been no response from the Respondent.
5. The *ex parte* Applicant annexed copies of the pleadings filed, and judgment delivered in **Nairobi ELC No. 569 of 2011**, as well as the decree, certificate of taxation and certificate of order against Government issued consequent to the said judgment. Also annexed was a letter dated 1st October 2019 his advocates wrote to the Respondent seeking payment of the decretal sum.
6. The Respondent did not file any response to the application, despite being given the opportunity to do so.
7. The application was canvassed by way of the *ex parte* Applicant's written submissions dated 28th May 2020, wherein he reiterated the

facts and grounds for his application. The *ex parte* Applicant submitted that the law is clear that a litigant who obtains a decree against the Government has no other remedy if the Government ignores to honour that decree, except to bring to court an application such as the present one. He averred that the only avenue open to such a litigant by which he can enforce the decree is to apply for the order of Mandamus to ensure that he receives the fruits of his litigation. Reliance was placed on the case of **Kenya National Examinations Council v Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR** for this submission.

8. The *ex parte* Applicant contended that the Respondent has a duty under the law to pay him the decretal amount, interest and costs, and that there has been no communication from the office of the Respondent for the last three years despite the fact that they defended the primary suit, were present when the judgment was delivered, and were duly served with all documents requisite for payment of the money decree granted therein. Therefore, that in the premises, the only option the *ex parte* Applicant has is the relief prayed for in the application.

The Determination

9. I have considered the *ex parte* Applicant's pleadings and submissions, and in arriving at a determination, I have also considered the holding by the Court of Appeal on the nature of the remedy of mandamus in its decision in **Republic vs Kenya National Examinations Council exparte Gathenji and 9 Others, [1997] e KLR**. The said Court held as follows in this regard:

“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, 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.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel 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....”

10. It is not disputed in the present application that judgment was entered in favour of the *ex parte* Applicant in **ELC Case No. 569 of 2011**. The issues therefore that require to be determined are firstly, whether the Respondent is under a public duty and obligation to satisfy the orders issued in favour of the Applicant in the said judgment, and secondly, if so, whether the *ex parte* Applicant is entitled to the relief he seeks.

11. Section 21 of the Government Proceedings Act in this regard provides as follows as regards the requirements to be met in the enforcement of orders as against Government organs in civil proceedings:

“(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.”

12. Execution proceedings against a government or public authority can thus only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body. This was also the holding in Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) where J. Githua held as follows:

“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.”

13. The Respondent has an accounting officer for purposes of section 21 of the Government Proceedings Act, and who is also the officer responsible for its liabilities. The *ex parte* Applicant in this respect annexed a copy of a letter dated 1st October 2019 sent to the Solicitor General, the accounting officer at the Office of the Attorney General, annexing the decree, judgment, Certificate of Costs and Certificate of order against Government issued in Nairobi ELC Case No. 569 of 2011, and seeking payment of the decretal sum and costs. It is notable in this respect that the subject judgment herein was issued against the Attorney General as the Respondent.

14. As to the actual amount of costs due from the Respondent, the *ex parte* Applicant annexed copies of a Certificate of Order against the Government issued on 19th September 2019 for the decretal sum of Kshs 20,968,179/=, which included interest upto 1st September 2019, and of a Certificate of Costs against the Government dated 19th September 2019 for taxed costs Kshs 639,759.60, both of which were not contested.

The Disposition

15. In the premises, I find that the *ex parte* Applicant’s Notice of Motion dated 19th May 2020 is merited. I accordingly grant the following orders:

I. An order of mandamus directed to the Solicitor General as the Accounting Officer at the Office of the Attorney General, compelling him to pay to the *ex parte* Applicant the sum of Kenya Shillings Twenty One Million, Six Hundred and Seven Thousand, Nine Hundred and Thirty Eight and Sixty Cents (Kshs.21,607,938.60) being the decretal sum and costs awarded to the *ex parte* Applicant in Nairobi ELC Case No. 569 of 2011, together with interest on the said decretal amount at court rates as from 1st October, 2019 until payment in full.

II. The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 19th May 2019 of Kshs 30,000/=.

16. Orders accordingly.

DATED, AND SIGNED AT NAIROBI THIS 9TH DAY OF APRIL 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant’s and Respondent’s Advocates on record.

P. NYAMWEYA

JUDGE