



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

JUDICIAL REVIEW CIVIL APPLICATION No 5 OF 2016

IN THE MATTER OF THE APPLICATION BY VINCENT

ALUKHULA FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS

AND IN THE MATTER OF ENFORCEMENT OF THE JUDGMENT OF

THE CHIEF MAGISTRATE'S COURT AT KAKAMEGA IN

CIVIL CASE NO 290 OF 2012

B E T W E E N:

VINCENT ALUKHULA MALIKA.....APPLICANT

AND

(1) THE PRINCIPAL SECRETARY, MINISTRY OF WATER AND SANITATION

(2) THE HON. THE ATTORNEY-GENERAL.....RESPONDENTS

R U L I N G

1. The Court has before it an Application for leave to issue a suit of mandamus against the two Respondents who are public bodies. The Applicant is the Widower of a woman who while working along the roadside was involved in a collision with a vehicle bearing the Registration/Index No. GKQ 378. The Applicant's wife was killed as a result. He sued the Ministry both on behalf of the Estate (as administrator) and on behalf of the Dependents. The Learned Trial Court in effect dismissed part of the claim of the Estate by awarding nothing for loss of life expectancy but making an award for pain and suffering as well as special damages. The Dependents (the minor children of the Deceased) fared a little better and were granted an award for loss of dependency as well as the costs of the suit. The Judgment was delivered on 15th July 2015 and the Decree was extracted on 13th April 2016 in the sum of KShs.1,375,725.00 (One million three hundred and seventy five thousand seven hundred and seventy five shillings only). To date the decree has not been satisfied and interest is continuing to run.

2. The Applicant seeks the following orders:

“a) *THAT* the applicant herein, VINCENT ALUKHULA MALIKA, be and is hereby granted leave to apply for an Order of Mandamus to compel Joseph Wiragu Irungu, the Principal Secretary Ministry of Water and Sanitation, to pay him in full the amount stated in the decree and certificate of costs given by the Chief Magistrate's court at Kakamega in civil Case No.290 of 2012 between the applicant as plaintiff and the Hon. The Attorney General-, on behalf of the respondent, as the defendant in the total sum of Kenya Shillings Two Million four Hundred and Thirty Thousand and thirteen shillings and twenty cents (Kshs.2,430,013.20) as at 15th April, 2021 together with the costs of this application and interest on the said amount at court rate as from 16th day of April, 2021 until payment in full

b) *THAT* the cost of this application be in the cause.

3. The Application is brought under **Order 53 Rule 1(2) of the Civil Procedure Rules**. The Statement of Facts sets out the background and sets the amount due as KShs.2,430,013.20 (Two million four hundred and thirty thousand and thirteen shillings and twenty cents). The Statement of Facts sets out that after a fully contested trial the Plaintiff succeeded and was awarded the sums contained in the decree. The Applicant thereafter attempted to obtain payment but to no avail – for a period of almost 6 years.

4. It appears that the Applicant has already obtained an order of mandamus, or in other words a “Decree” was issued signed by a Deputy Registrar of this Court on 19th December 2016 with no reference to the High Court Judge who made the Order. Unsurprisingly, efforts to enforce that decree were to no avail. Subsequently it appears an application for contempt of court was issued and the ruling thereon delivered by Hon Mr Justice Ngaah Jairus on 5th March 2021. A copy of that Ruling is not annexed to the Application, however Counsel for the Applicant states that this Application is an application for leave to bring mandamus proceedings and that this is the correct court because the Decree emanates from a court subordinate to this Court.

5. In his Affidavit in Support of the Application, Mr Ombete states that:

“10. THAT consequently the applicant who had a decree of mandamus issued by this Honourable Court applied to the High Court, at Nairobi to commit the respondent to civil jail for contempt...

11. THAT the defendant had stated, and the Hon. Mr Justice Ngaah Jairus agreed with them, that an application for contempt of court can only be brought against the accounting office of the Ministry concerned since he is the person who is supposed to obey the order of mandamus....”.

As a consequence the Advocate finds himself in the position where he must start afresh and apply for leave to enable the applicant to obtain an order of mandamus against the respondent personally so as to comply with the requirements said to have been laid down by Hon Mr Justice Ngaah. The Applicant therefore applies for leave to allow him to institute mandamus proceedings against the Respondent to enforce the Decree.

6. The Court notes from the statement of facts that the Applicant is a resident of Kwhwisero sub-county of Kakamega County. Following the death of his wife he was left to bring up their children on his own. He had successfully instituted proceedings and has been trying unsuccessfully to obtain satisfaction of the Decree issued by the CM’s Court. Aside from the fact that the wrong procedure was adopted, he has been waiting an inordinately long time to be paid. In the circumstances, enforcement proceedings are appropriate.

7. In this case the correct procedure is for enforcement against the Ministry, in other words the Ministry of Water and Sanitation. For reasons that are unclear, the Applicant moved straight to contempt of court proceedings, which were doomed to failure as no individual had been named as the contemnor.

8. In the circumstances, it is now Ordered and Directed that:

(1) The Applicant be and is hereby granted leave to bring mandamus proceedings against the Ministry of Water and Sanitation through its Chief Accounting Office, whether that is the Principal Secretary Joseph Wairagu Irungu or any other natural person fulfilling that role.

(2) Such Application must be filed and served within 28 days of the date hereof

(3) The Application for mandamus shall be limited to recovery of the sums contained in the Decree dated 13th April 2016 and Costs together with interest at Court rates from the date of judgment until the date of payment;

(4) For the avoidance of doubt the order purporting to be an order of mandamus granted by an unnamed Deputy Registrar purportedly of the High Court of Kakamega is declared to be unenforceable as it is fatally flawed.

9. Costs of this Application are reserved to be dealt with the costs of the substantive application.

Order accordingly,

FARAH S. AMIN

JUDGE

SIGNED AND DATED AND DELIVERED AT THE HIGH COURT IN KAKAMEGA ON THIS THE 17TH DAY OF JUNE 2021

In the Presence of:

Court Assistant:

Judgment delivered electronically through the MS Teams Platform