



REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

(CORAM: CHERERE-J)

PETITION NO. 2 OF 2020

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW BY WAY OF ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE CERTIFICATE OF ORDER AGAINST THE GOVERNMENT ISSUED ON 15<sup>TH</sup> FEBRUARY, 2017

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 21 OF THE GOVERNMENT PROCEEDINGS ACT CAP 40 LAWS OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

LAW REFORM ACT

BETWEEN

REPUBLIC.....APPLICANT

AND

THE ATTORNEY GENERAL.....RESPONDENT

AND

DOREEN KELLEN MIRITI.....EX-PARTE APPLICANT

RULING

**Ex-parte Applicants' case**

1. The Ex-parte Applicant holds an Amended Certificate of Order Against the Government dated 27<sup>th</sup> January, 2017 arising from **MERU CMCC 543 "B" OF 2007**

2. By notice of motion dated 05<sup>th</sup> March, 2020 filed on 06<sup>th</sup> March, 2020, the Ex-parte Applicant seeks orders **That:**

1) An order of MANDAMUS do issue to compel the Respondent to pay the sum of Kenya shillings one million eighty six thousand (Kshs. 1,086,000/-) being the decretal sum in **MERU CMCC 543 "B" OF 2007** together with Kshs. One hundred sixty-three thousand, seven hundred and thirty-five (163,735/-) being the certified costs thereon together with interest at thereon at 12% p.a from date of filing of the suit until payment in full

2) Such other orders and reliefs that the Honourable Court may deem appropriate in the circumstance

3) Costs be provided for

3. The application is supported by an affidavit sworn by the Ex-parte Applicant on 05<sup>th</sup> March, 2020 to which he has annexed the Amended Certificate of Order Against the Government dated 27<sup>th</sup> January, 2017 issued in favour of the Ex-parte Applicant which she avers remains unsettled to date.

#### **Respondent's Case**

4. The respondent opposed the petition by way of grounds of opposition dated 15<sup>th</sup> February, 2021 on the ground that the judgment in favour of the Ex-parte Applicant was jointly and severally against the Respondent and 3 others.

#### **Analysis and Determination**

5. Section 21 of the Government Proceedings Act (*GPA*) provides that:

**(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 provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, 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. Order 29 rule 2 of the Criminal Procedure Rules (*CPR*) prohibits certain orders, including executions of orders and decrees by way of attachment and sale, against the Government. The effect of these provisions is that whereas execution proceedings by way of attachment and sale of the Governments assets are not available against the Government, the accounting officer of the relevant Government department is nevertheless under a statutory duty to satisfy a judgment made by the Court against that department. The statutory duty is normally enforced by way of judicial review proceedings in the nature of mandamus by which the Court compels the satisfaction of a duty that has become due. (See **Nahashon Omwoha Osiako & 66 Others v Attorney General Amicus Curiae Kenya Section of International Commission of Jurists (Open Society Justice Initiative) [2017] eKLR**).

7. The nature and scope of the order of mandamus was discussed in **Republic v Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996** where the Court of Appeal cited, with approval, Halsbury's Law of England, 4<sup>th</sup> Edn. Vol. 7 p. 111 para 89 that:

**The order of mandamus is of 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.**

8. In the case of **Republic v Town Clerk, Kisumu Municipality ex parte East African Engineering Consultants [2007] 2 EA 441**, the

court held as THAT:

**The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings.**

9. The Ex-parte Applicant has demonstrated that she is holding an Amended Certificate of Order Against the Government arising from **MERU CMCC 543 “B” OF 2007** which remains unsettled.

10. The frustration she has undergone in trying to realize the fruits of her judgment against the Government has left her babysitting on what **Odunga J** referred to as ***barren decrees***. (See **Republic v Attorney General & Another ex parte James Alfred Koroso NRB HC JR Misc. Appl. No. 44 of 2012**).

11. The Respondent’s contends that the judgment was jointly and severally against several defendants and that it is not the only one liable to settle the decree. My answer to that contention is to be found in the case of **High Court (Milimani Commercial Courts) Civil Case No. 423 of 2002 Kenya Airways Limited v Mwaniki Gichohi and Njeru Njathika Nyagah (UR)** where **Ringera, J** (*as he then was*) stated as follows:

**“The concept of joint and several liability comprehends one judgement and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however double compensation is not allowed and accordingly whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendant(s).”**

12. It is for the above reasons that I find that the Ex-parte Applicant has made out a case for an order of MANDAMUS.

13. Accordingly, it is hereby ordered:

**1) An order of MANDAMUS be and is hereby issued to compel the Respondent to pay to the Ex-parte Applicant the sum of Kenya shillings one million eighty-six thousand (Kshs. 1,086,000/) - being the decretal sum in MERU CMCC 543 “B” OF 2007 together with Kshs. One hundred sixty-three thousand, seven hundred and thirty-five (163,735/-) being the certified costs thereon together with interest at thereon at 12% p.a form date of judgment in the suit until payment in full**

**2) Costs shall be borne by the Respondent**

**DATED IN MERU THIS 15TH DAY OF JULY 2021**

**T.W. CHERERE**

**JUDGE**

**Court Assistant - Morris Kinoti**

**For the Ex-parte Applicant - Ms. Kiyuki for Kithome L. Mutinda & Co. Advocates**

**For the Respondent - N/A**