



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JUDICIAL REVIEW CASE NO. E018 OF 2021**

**IN THE MATTER OF: AN APPLICATION FOR**

**JUDICIAL REVIEW ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF: EXECUTION OF THE DECREE DATED 27/05/2019**

**ISSUED IN MOMBASA CHIEF MAGISTRATE COURT CASE NO.65 OF 2018;**

**STEPHEN MWASI NGOMA VS. THE ATTORNEY GENERAL**

**AND**

**IN THE MATTER OF: SECTIONS 8 AND 9 OF THE FAIR ADMINISTRATIVE ACTION**

**ACT NO.4 OF 2015; SECTIONS 20 AND 21 OF THE GOVERNMENT PROCEEDINGS ACT ,**

**CAP 40 LAWS OF KENYA AND ORDER 53 RULE 3(1) OF THE**

**CIVIL PROCEDURE RULES,2010**

**BETWEEN**

**STEPHEN MWASI NGOMA.....APPLICANT**

**VERSUS**

**ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND**

**COORDINATION OF NATIONAL GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**RULING**

**THE APPLICATION**

1. The Notice of Motion Application before the Court is dated 25/5/2021. The application prays for the following orders:

**(a) That an of mandamus be issued to compel the Respondents to forthwith pay the sum of Kshs. 1,146,902.00 to the Applicant as ordered by the court on 13<sup>th</sup> July,2020 in Mombasa Chief Magistrate Case No.65 Of 2018; Stephen Mwasi Ngoma Vs.The Attorney General together with interest to date ,within thirty (30) days of this honourable court's order.**

**(b) That the costs of this application be provided for.**

2. The application is premised on the grounds set out therein and the Verifying Affidavit of Stephen Mwasi Ngoma sworn on 14/4/2021.

3. The Applicant's case is that the Applicant was charged in **KWALE RESIDENT MAGISTRATE COURT CRIMINAL CASE NO. 1425 OF 2009; REPUBLIC V STEPHEN MWASI NGOMA** by the State. The case went through a full trial and the Applicants were acquitted vide a judgement dated 8/6/2009. The Applicant filed **MOMBASA RESIDENT MAGISTRATE COURT CIVIL CASE NO. 999 OF 2011** against the 1<sup>st</sup> Respondent for malicious prosecution. The matter went for full hearing and a judgement was delivered on 17/10/2018 wherein the Applicant was awarded Kshs. 500,000.00 in general damages, Kshs. 200,000.00 together with costs and interest from the date of the judgment till payment is made in full. Although the Respondents were served with decree and the Certificate of Order against the Government, the Respondents have failed and/or refused to settle the decretal sum thus necessitating the action herein.

4. The Applicant avers that the failure by the Respondents to discharge their duty to settle the decretal sum as required by law is gravely lackadaisical and prejudicing the Applicants as the Applicants are unable to enjoy the fruits of their judgement after their successful litigation in the aforesaid matter.

### **The Response**

5. The 1<sup>st</sup> Respondent filed grounds of opposition dated 27/7/2021. The 1<sup>st</sup> Respondent avers that the manner in which the judgment was entered was opaque as the original court file could not be traced nor were the Respondents served with any judgment notice in regard to the judgment to enable them apply for stay of execution of the judgment or leave to file an appeal in time.

6. The 1<sup>st</sup> Respondent further avers that the Applicant deliberately by passed the 1<sup>st</sup> Respondent in regard to service of the Certificate of Order for Costs, Decree and Judgment and is now looking for a scape goat in the 2<sup>nd</sup> Respondent two years after judgment was entered in their favour.

7. The 1<sup>st</sup> Respondent states that given the manner in which the ex-parte Applicants have inordinately delayed in service of the requisite documents for payment upon the Respondents being certificate of order for costs, decree and judgement, they shouldn't benefit on their indolence. Further the ex-parte Applicant's deliberate delay in executing the decree since judgment was entered on 17/10/2018 was well calculated to ensure that the ex-parte Applicant acquires as much interest on the decretal sum as possible to their advantage.

### **Submissions**

8. Parties filed submissions which I have carefully considered and the issue that emerge for determination is:

**Whether the Applicant deserves the orders sought and if they have met the requirements of Section 21 of The Government Proceedings Act.**

9. The court in **Republic v County Secretary Migori County & another Ex parte Linet Magambo [2020] eKLR** held:

**"Whether an order of mandamus can lie; the scope of an order of mandamus was discussed in the decision of Republic v Kenya National Examination Counsel ex parte Gathenji & Others, [1997] eKLR** where it was held:

***"The next issue we must deal is this; what is the scope and efficacy of an order of mandamus?"***

***The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from 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."***

10. The court in the case of **Susan Wayua v Attorney General & another [2019] eKLR** stated that:

**"In my view the Applicant seeks the order of mandamus to compel the Respondents to perform a public duty which has been imposed on them due to their negligence. They have failed to satisfy the decree to the detriment of the Applicant who has a legal right. Justice J. V. Odunga in the case of REPUBLIC V ATTORNEY GENERAL & ANOTHER EX-PARTE ONGATA WORKS LIMITED [2016] eKLR referred to the case of R (REGINA) V DUDSHEATH, EX PARTE, MEREDITH [1950] 2 ALL E.R. 741, AT 743, where Lord Goddard C. J. held as follows:**

**"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy... "**

**The Applicant suffered loss and injury and judgment was entered in their favour. The Respondents failure to comply will be an injustice occasioned to the Applicant. Judge G. V. Odunga in the case of REPUBLIC VS. ATTORNEY GENERAL & ANOTHER EX-PARTE ONGATA WORKS LIMITED [2016] eKLR referred to the case of REPUBLIC VS. PERMANENT SECRETARY, MINISTRY OF STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY EXPARTE FREDRICK MANOAH EGUNZA [2012] eKLR where Githua J stated 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. 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. I have considered the documents annexed to the Applicant’s Verifying Affidavit and am satisfied that the Applicant has met the requirement of the Section 21 of the Government Proceedings Act.

12. Accordingly, the application is allowed with costs to the Applicant.

**Dated, Signed and Delivered at Mombasa this 20<sup>th</sup> day of September, 2021.**

**E. K. OGOLA**

**JUDGE**

Ruling delivered via MS Teams in the presence of:

Mr. Mkok for Respondent

No appearance for Applicant

Ms. Peris Court Assistant