



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**JUDICIAL REVIEW APPLICATION NO.MISC E081 OF 2020**  
**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS**  
**BETWEEN**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**PRINCIPAL SECRETARY, MINISTRY OF DEFENCE.....1<sup>ST</sup> RESPONDENT**  
**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**  
**EX PARTE APPLICANT: LUCY NDUTA WAMBUI**

**JUDGMENT**

1. Lucy Nduta Wambui, the *ex parte* Applicant herein, has moved this Court in an application brought by way of a Notice of Motion application dated 16<sup>th</sup> February 2021, wherein she is seeking orders of mandamus directed to the Respondents to settle the decretal sum awarded in **Nairobi CMCC No. 7724 Of 2017 - Lucy Nduta Wambui vs Cabinet Secretary, Ministry of Defence & The Attorney General** of Kshs 998,452.60 together with interest at the rate of 12% p.a. from 13/01/2020 until payment in full. She also prays that the costs of the application.
2. The said application is supported by a statutory statement dated 15<sup>th</sup> December 2020, and a verifying affidavit sworn on the same date, and a further affidavit sworn on 20<sup>th</sup> January 2021 by the Applicant. The main ground for the application is that judgment for the decretal sum was awarded in favour of the *ex parte* Applicant in **Nairobi CMCC No. 7724 Of 2017 - Lucy Nduta Wambui vs Cabinet Secretary, Ministry of Defence & The Attorney General**. However, that the Respondents have without any lawful authority and justification failed to pay the decretal sum despite demands made requesting settlement of the same.
3. The *ex parte* Applicant annexed the decree and the Certificate of Order against Government issued in **Nairobi CMCC No. 7724 Of 2017 - Lucy Nduta Wambui vs Cabinet Secretary, Ministry of Defence & The Attorney General** on 20<sup>th</sup> January 2020, and the judgment delivered in the said case on 20<sup>th</sup> November 2018, which is the basis for the said decree and certificate. The *ex parte* Applicant also annexed copies of letters to the Attorney General dated 21<sup>st</sup> October 2020 and 27<sup>th</sup> November 2018, requesting for payment of the decretal sum, and enclosing the said judgment and Certificate of Order against Government.
4. There was no response filed by the Respondents.

**The Determination**

5. This Court directed the parties to canvass the instant application through written submissions. The *ex parte* Applicant through its Advocate, K. Kibiku & Company Advocates, filed written submissions dated 17<sup>th</sup> February 2021 wherein the averments set out in the foregoing were reiterated.
6. The *ex parte* Applicant placed reliance on the provisions of section 21(4) of the Government Proceedings Act which bar execution or attachment against government properties, and the only recourse available to her is an order of mandamus against the 1<sup>st</sup> Respondent as the principal accounting officer at the Ministry of Defence. The decision in **Republic vs Principal Secretary of State Department of Interior & Coordination of National Government & National Treasury ex parte Salim Awadh Salim & 11 Others (2017) e KLR** was cited for

this position.

7. The Respondents did not file any submissions.

8. I have considered the *ex parte* Applicant's pleadings and submissions, and I am also guided by the holding of the Court of Appeal on the nature of the remedy of mandamus in its decision in **Republic vs Kenya National Examinations Council ex parte 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, 4<sup>th</sup> 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....”**

9. The requirements for an order of mandamus to issue were further explained by Mativo J. in **Republic vs Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another [2018] eKLR** as follows:

**“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in *Apotex Inc. vs. Canada (Attorney General)*, [23] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. [24] The eight factors that must be present for the writ to issue are:-**

- (i) There must be a public legal duty to act;**
- (ii) The duty must be owed to the Applicants;**
- (iii) There must be a clear right to the performance of that duty, meaning that:**
  - a. The Applicants have satisfied all conditions precedent; and**
  - b. There must have been:**
    - i. A prior demand for performance;**
    - ii. A reasonable time to comply with the demand, unless there was outright refusal; and**
    - iii. An express refusal, or an implied refusal through unreasonable delay;**
    - iv. No other adequate remedy is available to the Applicants;**
    - v. The Order sought must be of some practical value or effect;**
    - vi. There is no equitable bar to the relief sought;**
    - vii. On a balance of convenience, mandamus should lie**

10. The issues therefore that require to be determined are firstly, whether the Respondents are under a public duty and obligation to satisfy the orders issued in favour of the *ex parte* Applicant, and secondly, if so, whether the *ex parte* Applicant is entitled to the relief she 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 under the Government Proceedings Act can 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 Githua J. 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. As to whether the Respondents herein are under a duty to pay the subject decretal sums, an order of mandamus is normally issued when an officer or an authority by compulsion of law or statute is required to perform a duty, and that duty, despite demand in writing, has not been performed. It is not disputed in the present application that judgment was entered in favour of the *ex parte* Applicant **Nairobi CMCC No. 7724 Of 2017 - Lucy Nduta Wambui vs Cabinet Secretary, Ministry of Defence & The Attorney General** as against the Respondents. The *ex parte* Applicant in this respect annexed copies of the Certificates of Order Against the Government issued in her favour against the 1<sup>st</sup> Respondent, for the sum of Kshs 998,452/60= inclusive of interest awarded until 13/1/2020, and also brought evidence to show that she has made several demands and requests for payment which have not been heeded to by the Respondents, wherein the judgment and Certificate of Order against Government were also enclosed.

14. There is thus an implied refusal on the part of the Respondents to pay the demanded sums. It is also notable in this respect that the 1<sup>st</sup> Respondent, being the accounting officer in the relevant Ministry, is the one under a duty to pay the decretal sum

### **The Disposition**

15. In the premises, I find that the *ex parte* Applicant’s Notice of Motion dated 16th February 2021 is merited. I accordingly grant the following orders:

**I. An order of mandamus to compel the Principal Secretary, Ministry of Defence to pay to the *ex parte* Applicant herein the sum of Kshs 998,452.60, being the decretal sum awarded to the *ex parte* Applicant in Nairobi CMCC No. 7724 Of 2017 - Lucy Nduta Wambui vs Cabinet Secretary, Ministry of Defence & The Attorney General of together with interest thereon at the rate of 12% p.a. from 13/01/2020 until payment in full.**

**II. The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 16<sup>th</sup> February 2021 of Kshs 30,000/=.**

16. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 9<sup>TH</sup> DAY OF NOVEMBER 2021**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF NOVEMBER 2021**

**A. NDUNG’U**

**JUDGE**