



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

JUDICIAL REVIEW NO. E001 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS

REPUBLIC.....APPLICANT

VERSUS

PRINCIPAL SECRETARY MINISTRY OF LIVESTOCK &

FISHERIES DEVELOPMENT.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

MARGARET KASIVA KYALO

MONICAH MUKUI KYALO.....EX-PARTE APPLICANTS

RULING

1. By leave granted on 1/02/2021 the Ex-parte Applicant filed the requisite Notice of Motion dated 3/02/2021 seeking the following reliefs:-

(a) That an order of mandamus do issue compelling the 1st Respondent Principal Secretary Ministry of Livestock and Fisheries Development and the 2nd Respondent the Attorney General to pay the Applicant the sum of Kshs. 412,442/45 being the decretal sum in Machakos CMCC No.807 of 2015 together with interest at 12% per annum from 9th October 2017 until payment in full.

(b) The costs of the application be paid by the Respondents.

2. The application is supported by the statement of facts and affidavits of the Ex-parte Applicants. The Applicants case is that they have already obtained a judgement in their favour and which now awaits settlement by the Respondents who have willfully refused and or neglected to satisfy thereby warranting an order of mandamus. The Applicants maintain that they have already served the Respondents with the extracted decree for **Kshs. 412,442/45** as well as the certificate of Order against the Government issued on 19/4/2018 pursuant to section 21 of the Government Proceedings Act which have been duly served upon the Respondents but who have declined to pay up the monies. The Applicants contend that the Respondents are in contempt of court.

3. The Application is unopposed as there is no response filed thereto by the Respondents.

4. It is not in dispute that execution of judgements and decrees against the Government follows a rigid procedure pursuant to the provision of section 21 of the Government Proceedings Act (Cap 40 Laws of Kenya). It is from here that successful litigants armed with a judgement and/or decree approach the courts for an order of mandamus to compel a department of government or officer therein to satisfy the said judgement or decree. Mandamus is a discretionary remedy granted by the court judiciously and it serves to compel a public authority to perform its public duty and it is a remedy that controls procedural delays. Before an order of mandamus is issued, an Applicant must demonstrate the existence of certain factors as enunciated in the case of **Dragan –vs- Canada (Minister of Citizenship and Immigration) [2003]** and which comprise the following:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicant;

(iii) There must be a clear right to the performance of that duty:-

(a) The applicant has satisfied all conditions precedent;

(b) There must have been:

- A prior demand for performance.

- A reasonable time to comply with the demand unless there was outright refusal.

(iv) An express refusal, or an implied refusal through unreasonable delay,

(v) No other adequate remedy is available to the Applicant,

(vi) The order sought must be of some practical value or effect,

(vii) There is no equitable bar to the relief sought,

(viii) On a balance of convenience, mandamus should lie.

5. Stemming from the above factors, the Applicants were also expected to strictly adhere to the due provisions of section 21 of the Government proceedings Act which are as follows:-

“21(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 an officer of 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 required to be taxed, at any time after the costs have been taxed, whichever is later, issue to that person a certificate in the prescribed form containing particulars to 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, 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 department or any officer of the government as such, of any money or costs.

(5) The section shall, with necessary modification, 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. Being guided by the above principles and provisions of section 21 of the Government Proceedings Act, it is noted that the Applicants duly sued the Respondents vide **Machakos CMCC No. 807 of 2015** wherein the Respondents participated in the proceedings culminating in a judgement delivered in favour of the Applicants dated 9/10/2017. The Applicants have duly extracted a decree and certificate of costs. They have also obtained a certificate of order against the Government dated 19/04/2018. All these have been duly served upon the Respondents for payment of the said sum but they have not settled the same. The Applicants have maintained that they have no other remedy available in law to have the Respondents make good the judgement. It is clear that the Respondents have a legal duty to satisfy the judgement and their failure to do so warrants the Applicants to resort to the judicial review remedy of mandamus. Already, the Respondents despite being served with the present application have opted not to file a response thereto and hence the application remains unopposed. It is also instructive that the Respondents have never preferred an appeal against the judgement dated 9/10/2017 as well as challenge the certificate of taxation and the certificate of order against the Government. The Respondents have had plenty of time to make the payments but they have deliberately refused and/or neglected to do so. The time now is ripe to compel the Respondents which are public authorities to perform their legal duty by settling the amounts of **Kshs. 412,442/45** now due and owing to the Ex-parte applicants. It is common knowledge that most private citizens who have obtained judgements against Government bodies or officers of Government departments are always taken round in circles and rarely get paid in good time. Due to those problems the last port of call is always the remedy of judicial review order of mandamus. The

Applicants herein appear to be in the same situation and hence the request for an order of mandamus is merited in the circumstances.

7. In the result, I find merit in the application dated 3/02/2021. The same is allowed as prayed.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2021.

D. K. KEMEI

JUDGE

DELIVERED AT MACHAKOS THIS 2ND DAY OF NOVEMBER, 2021.

G. V. ODUNGA

JUDGE