



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

JUDICIAL REVIEW NO. E001 OF 2021

METHODIST CHURCH IN KENYA TRUSTEES REGISTEREDAPPLICANT

VERSUS

PRINCIPAL SECRETARY, MINISTRY OF INTERNAL SECURITY/PRINCIPAL

SECRETARY MINISTRY OF INTERIOR AND CO-ORDINATION OF

NATIONAL GOVERNMENTRESPONDENT

JUDGMENT

1. Pursuant to the ex-parte chamber summons dated 7/12/2020 the ex-parte applicant was granted leave on 10/6/2021 to apply for orders of Judicial review in the nature of mandamus directed at the respondent and commanding it to pay to the ex-parte applicant the sum of Kshs. 5,145,089 plus interests at 12% pa from the 5/11/2020 till payment in full. Consequent to that leave the substantive notice of motion dated 21/6/2021 was filed on the 14/7/2021 and made a prayer for the said order of Judicial review plus costs of these proceedings.
2. The grounds set out in both the chamber summons and the notice of motion as well as the statement of facts and the verifying affidavit were that ex-parte applicant filed Meru H.C petition No. 4 of 2020 against the A.G and 7 others which petition was allowed on 5/11/2020 with several orders being granted among them general damages of kshs. 3,000,000/= plus costs and interests. The costs were subsequently taxed in the sum of Kshs. 2,145,089 on 26/4/2021.
3. In terms of the dictates of the Government Proceedings Act, the ex-parte applicant sought and obtained Certificate of Costs and Certificate of Order against the Government for the general damages and costs then made a demand for settlement but no payment has been made hence the current application so that court orders are obeyed. The pleadings, judgment, Certificate of Costs, Certificate of Order against the Government and demand for payment were all exhibited as annexures JN 1 – 6 in the verifying affidavits
4. By an affidavit of service sworn by Karanja Munyori advocate on the 16/7/2021, service of the notice of motion was demonstrated satisfactorily to have been effected on the 16/7/2021 but no response was ever filed in opposition to it.
5. On 22/7/2021 and again on 7/10/2021 one Mr. Kendi advocate attended court on behalf of the respondent requested for time to file a reply but later informed the court that he had sought instructions from the line ministry but none ever came. On the 22/7/2021 when the respondent was given 21 days to file the response, the court set timelines for filing submissions and the ex-parte applicant did file submissions even though no response had been filed. The respondent on his part did not even file submissions even on matters of law if any was available.
6. Accordingly, this matter proceeds on the basis and undertaking that even though the respondent was served and indeed instructed counsel who attended court twice, it never filed response nor submissions.

SUBMISSIONS BY THE EX-PARTE APPLICANT

7. Having set out the facts to the effect that he has a judgment which remain unsettled despite full compliance with the statutory requirements, the ex-parte applicant then submitted the law to stand that where the facts pleaded by one side are not rebutted by other the side, the pleaded facts remain the true position to be believed by the court. In support of such preposition counsel cited to court the decision in **Punch Nigeria Ltd Vs Attorney General 1996 Commonwealth Human Rights law digest and Kariuki Gathitu Vs Attorney General (2013) Eklr.** Section 21 of the government proceedings Act was cited for the position that once an accounting officer of a department of Government against which a decree has been issued is served with a certificate of order, he shall pay the sum on the certificate to the decree holder or his advocate unless there be granted an order of stay by the court.

8. Also cited to court were the decisions in **Republic Vs Permanent Secretary Ministry of state for Provincial Administration and Internal Security ex-parte Fredrick Wanah Egunya (2012) eKLR** and **Republic Vs Attorney General and another ex-parte James Alfred Koroso (2013) Eklr** for the proposition that the only avenue available to a decree holder against the Government is an order for mandamus and that the duty to pay imposed by section 21 (3) of the Government proceedings Act is not conditional upon budgetary allocations. The decisions in **Republic Vs Principal Secretary ministry of Defence, ex-parte George Kariuki Waithaka (2019) eKLR** was cited for the proposition that it is an imperative that court orders be complied with for the maintenance of law and order and for the sake of upholding the authority and dignity of the court. Lastly, the decision in **Jasbir Singh Rai & 3 others Vs Dr Lochan sign Fai & 4 others (2014) eKLR** was cited for the law on costs that the costs are awarded not to punish the judgment debtor but to help the decree holder recover his expenses in fighting the action. The conduct of the respondent in not settling the decree when due was highlighted to have been the only reason this cause was filed and therefor the costs have been necessitated by that conduct for which reason the respondent ought to reimburse the costs incurred

DETERMINATION

9. For any litigant succeeding against the government, the law forbids direct execution by the ordinary and usual means of enforcing a decree against non-government litigants. The only available avenue is the remedy of mandamus. Here I do find that there was full compliance with the requirement of Government proceedings Act by procurement and service of both certificate of costs and order against the government. There is an averment in the verifying affidavit that the said certificate of costs and certificate of order were duly served and demand made for settlement without any action by the respondent. Not even a bare denial was raised against the fact of service of the said documents.

10. In the absence of a replying affidavit to controvert the statement of facts as verified by the verifying affidavit, I do find and must take it, that the verifying affidavit and its contents are true and uncontested.

11. Being uncontested, it follows that the decree in favour of the ex-parte applicant in Meru High court Petition No. 4 of 2010 remain unsettled when it ought to have been settled way back in late 2018 when the certificate of costs and order against the government were issued served and demand for payment made. That decree is an order of the court given after due process in application of the law for which every person in Kenya, natural and juristic, including state organs like the respondent, is bound to observe. Here I find that in failing to pay the decree when due, the respondent has failed on its obligation to observe the rule of law and therefore I invite the tool for compliance by way of mandamus which I direct at the respondent and compelling it to pay to the ex-parte applicant the full decretal sums, comprising general damages of Kshs. 3,000,000 and taxed costs of Kshs. 2,145,089 making an aggregate sum of Kshs. 5,145,089.

12. I do consider and find that in bringing this action, the ex-parte applicant was left with no option having baby -sat his impotentialised decree for years. He was constrained to approach the court out of an apparent reluctance by the respondent to meet a legal obligation. Having been so constrained and at a cost, the respondent having invited the litigation by an otherwise less commendable conduct must be called upon to reimburse the costs thus incurred. I award the costs of the cause to the ex-parte applicant.

13. There is a prayer on interests on the decretal sum at 12% from the date of judgment till payment in full which I find to be unavailable to the ex-parte applicant. I find it unavailable and incapable of grant in that the laws mandates that the right to recover interest on a judgment sum must be brought not later than 6 years.^[1] Here the judgment was delivered on the 5/11/2010. The right to recover interest on that judgment ought to have been brought not later than the 4/11/2016 but was not brought till 18/01/2021. It was brought too late and was thus time barred.

14. The end result is that the court issues an order of mandamus in terms of prayer 1, in the notice of motion dated 21/6/2021, compelling the respondent to pay to the ex-parte applicant the sum of Kshs. 5,145,089 only.

15. The costs of this suit is awarded to the respondent on the basis of uncontested proceedings.

DATED, SIGNED AND DELIVERED AT MERU THIS 9TH DAY OF DECEMBER, 2021

PATRICK J.O OTIENO

JUDGE

In presence of

Mr. Munyori for the ex-parte applicant

No appearance for the respondent

PATRICK J.O OTIENO

JUDGE

^[1] Section 4 (4) limitation of Actions Act

