



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL MISCELLANEOUS APPLICATION NO. E002 OF 2021

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF VIHIGA.....RESPONDENT

EX-PARTE: KENCHUAN ARCHITECTS

JUDGMENT

1. The Motion for determination is dated 9th August 2021. It is by the *ex parte* applicant herein, who seeks, in the main, an order of *Mandamus* to compel the respondent to pay it a sum of Kshs. 33, 685, 061.77, due to it, as at 22nd June 2021, under certificate of order against the government, dated 21st July 2021, issued under Kakamega High Court Miscellaneous Civil Application No. 279 of 2019 (consolidated with High Court Miscellaneous Application No. 277 of 2019).

2. The application is founded on an affidavit sworn on the same date by Arch. David Situma, the Managing Director of the *ex-parte* applicant, who deposes that the *ex parte* applicant had been contracted by the respondent to provide professional consulting services for the proposed design and architectural works of the Vihiga County Assembly headquarters and renovation of the office block F/Y 2013 /2014. A dispute arose as to the consultancy contract, and the matter was referred to arbitration, and the arbitrator ruled in favour of the *ex parte* applicant, for the final amount in the sum of Kshs. 26,078,756.70. The respondent did not pay the arbitral award, leading the *ex parte* applicant to file Kakamega High Court Miscellaneous Application No. 279 of 2019, which sought the recognition and enforcement of the award. However, the respondent filed Kakamega High Court Miscellaneous Application No. 277 of 2019, seeking setting aside of the arbitral award. The two applications were consolidated. The court, through an order dated 18th December 2020, allowed the *ex parte* applicant's case, and recognized the award of the arbitrator and made it an order of the court. The respondent was dissatisfied with that decision, and appealed in Kisumu CACA No.155 of 2020.

3. The respondent sought stay of execution of the award as adopted, and stay was granted on condition that the respondent deposited a sum of Kshs. 31, 653, 818.73, as security pending appeal. The *ex-parte* applicant asserts that the respondent has failed to comply with the order dated 2nd February 2021.

4. The *ex-parte* applicant is now seeking the court to issue an order of *Mandamus* to compel the respondent to make payment under the certificate of order against the government. The test for *Mandamus* is set out in *Dragon vs. Canada (Minister of Citizenship and Immigration)* 2003 FCT 211 (CanLII) [2003] 4 FC 189 (TD) (Kellen J), which stated the factors, that must be present for the writ to issue are: there must be a public legal duty to act; the duty must be owed to the applicants; and there must be a clear right to the performance of that duty. That would mean that: the applicants have satisfied all conditions precedent; and there must have been: a prior demand for performance; a reasonable time to comply with the demand, unless there was outright refusal; and an express refusal or an implied refusal through unreasonable delay; no other adequate remedy is available to the applicants; the order sought must be of some practical value or effect; there is no equitable bar to the relief sought; and on a balance of convenience, *Mandamus* should lie.

5. The primary document when it comes to grant of *mandamus* order against the government with respect to enforcement of money decrees against the government is the certificate of order against the government. That certificate is provided for under the Government Proceedings Act, Cap 40, Laws of Kenya. Section 21 of the Government Proceedings Act provides as follows:

“21. Satisfaction of orders against the Government

(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.

(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. The *ex-parte* application highlights the existence of the contract between the respondent and the applicant. The first test is the existence of a public legal duty to act. This is not in doubt nor is it contested. The claim arises from fees for professional consulting services rendered by the *ex parte* applicant to the respondent. This was contested and the matter referred to an arbitration, and the award was made in favour of the *ex-parte* applicant. A certificate of costs was issued and served upon the respondent. Again this is not contested. It is not disputed that a certificate of order against the Government was issued and served upon the respondent. The duty to pay the said sum is owed to the *ex parte* applicant. Additionally, there is a clear right to the performance of that duty. The *ex parte* applicant has no other way of enforcing the decree other than through the order of *Mandamus*.

7. In *County Secretary Nairobi City County & another Ex-parte Samson Masaba Munikah t/a Munikah & Company Advocates* (2019) eKLR (Mativo J), the court held that *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty, compel a public duty and controls procedural delays. In *Republic vs. Permanent Secretary Ministry of State for Provincial Administration and Internal Security* (2012) (Tuiyott J), where it was held:

“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.”

8. In *Republic vs. County Secretary Nairobi City County & 3 Others; Koceyo & Co. Advocates (Ex-parte)* (2020) eKLR (Ngaah J), the court held that it is the obligation of Government, in conjunction with Treasury, to ensure that funds are allocated towards the settlement of liabilities owed by the Government. In *Republic vs Kenya National Examinations Council ex parte Gathenji and Others* (1997) eKLR (Bosire, Keiwua & Nyamu JJA), the court said:

“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.”

9. The *ex parte* applicant appears to have a solid case for grant of a *Mandamus* order. However, there is evidence that there is a pending appeal, being Kisumu CACA No. 38 of 2021, by the respondent against the *ex parte* applicant, which arises from the decree that the *ex parte* applicant seeks to execute against the respondent. The respondent has exhibited an order of the Court of Appeal, by consent of the parties, made on 2nd February 2021, for deposit of the decretal amount in an interest earning account in the names of the advocates for both sides. If that appeal is subsisting, it would be imprudent to grant an order of *Mandamus* against the respondent, and the best thing, in the circumstances, should be to hold the matter in abeyance, and await the final outcome of Kisumu CACA No. 38 of 2021. Consequently, I shall not make final orders in this matter, pending disposal of the pending appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF DECEMBER , 2021

W. MUSYOKA

JUDGE