



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 222 OF 2019

REPUBLIC.....APPLICANT

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING & URBAN DEVELOPMENT.....2ND RESPONDENT

AND

MIKE MAINA KAMAU.....EX PARTE APPLICANT

**JUDGMENT**

INTRODUCTION

1. Pursuant to the leave of this court granted on **19<sup>th</sup>** July 2019, the applicant moved this court by way of Notice of Motion dated **18<sup>th</sup>** July 2019 expressed under the provisions of Order 53 Rule 3 of the Civil Procedure Rules, 2010, the Fair Administrative Action Act<sup>1</sup> and all the enabling provisions of the law seeking orders of *Mandamus* to compel the Principal Secretary, Ministry of Transport, Infrastructure, Housing & Urban Development and/or the Attorney General to pay him the sum of **Kshs. 847,277,351.90** with interests thereon at the rate of 12% per annum in terms of Certificate of Order against the Government issued on 2<sup>nd</sup> July 2018.

2. The applicant also prays for an order of *Mandamus* to compel the Principal Secretary, Ministry of Transport, Infrastructure, Housing & Urban Development and/or the Attorney General to pay him the sum of **Kshs. 12,259,342.73** together with interests in terms of the

<sup>1</sup> Act No. 4 of 2015.

Certificate of Order for Costs against the Government issued on 3<sup>rd</sup> July 2019. He also prays for the costs of the application.

**Grounds relied upon**

3. The factual chronology of the events which triggered the instant application is essentially common cause or not disputed. The history of this case as far as I can discern it from the pleadings is uncontroverted. It is common ground the applicant sued the Hon. Attorney General in ELC Case No. **1303** of 2014, *Mike Kamau v The Attorney General* claiming compensation for illegal demolition of his house situated on **L.R. No. 15045/4**. It is admitted that on 29<sup>th</sup> November 2011, the court entered judgment in favour of the applicant in the sum of **Ksh. 711,588,204/=** together with interests at court rates from the date of the judgment till payment in full plus costs of the suit.

4. It is uncontested that on 27<sup>th</sup> February 2019, the applicant filed a Party and Party Bill of Costs against the Attorney General which was taxed on 27<sup>th</sup> June 2019 in the sum of **Ksh. 12,259,342.73** and a Certificate of Taxation was issued on 1<sup>st</sup> July 2019. It is also uncontroverted that on 2<sup>nd</sup> July 2019 the applicant was issued with a Certificate of Order against the Government in the sum of **Ksh. 447,277,351.90** inclusive of the decretal sum and interests thereon from 29<sup>th</sup> November 2017 to 2<sup>nd</sup> July 2019. Additionally, there is no dispute that on 3<sup>rd</sup> July 2019, the applicant was issued with a Certificate of Order for Costs against the Government in the sum of **Ksh. 12,259,342.73** being the

taxed costs.

5. The applicant states that on 11<sup>th</sup> July 2019, he served the Attorney General with the Certificate of Order against the Government and the Certificate of Order for Costs against the Government and demanded payment for the said sum of **Kshs. 847,277,351/=** and **Kshs. 12,259,342.73** respectively totalling to **Ksh. 859,536,694.63** within seven days from the said date, but they have failed, refused and or neglected to pay to him.

6. He states that the said failure offends the provisions of section 47 of the Constitution and section 7 (2) (j) of the Fair Administrative Action Act<sup>2</sup> which guarantees him the right to an administrative action that is expeditious, reasonable and efficient. He further states that

<sup>2</sup> Act No. 4 of 2015.

the Attorney General has failed to discharge his duty imposed upon him under the Government Proceedings Act,<sup>3</sup> and, that, he legitimately expected the Respondents to pay him the said sum of **Ksh. 847,277,351.90** and **Kshs. 12,259,342.73**, but despite being served with the said Certificates, the Respondents have failed and or refused to pay him.

7. Lastly, the applicant states that he has not enjoyed the fruits of his judgment and unless thus court grants the reliefs sought, his constitutional rights would be infringed.

### **Respondent's grounds of opposition**

8. In their grounds of opposition filed on 25<sup>th</sup> November 2019, the Respondent's state that the orders sought are not deserving because they have appealed against the judgment vide Nairobi Civil Appeal Number 553 of 2019. They state that the orders if granted will prejudice their appeal. They also state that the application is incompetent, frivolous and an abuse of court process.

### **Respondent's Replying Affidavit**

9. Prof. Arch. Paul M. Maringa, a Principal Secretary in the Ministry of Transport, Infrastructure, Housing, and Urban Development & Public Works swore the Replying Affidavit dated 11<sup>th</sup> December 2019. He averred that the applicant obtained judgment in his favour in ELC Case Number 1303 of 2014 in respect of a parcel of land which was part of a road reserve being land reference number LR No. 8444 for the construction of Waiyaki Way-Redhill link road. He deposed that the Respondent was aggrieved by the said decision and appealed to the Court of Appeal being Civil Appeal Number 553 of 2019 and served the applicant. He deposed that the said appeal has high chances of success, hence, the need to exhaust his right of appeal.

### **The applicant's further affidavit**

10. Mike Maina Kamau, the applicant swore the further affidavit dated 28<sup>th</sup> November 2019 in reply to the Respondents' Replying Affidavit. He averred that the said appeal was filed on

<sup>3</sup> Cap 40, Laws of Kenya.

14<sup>th</sup> November 2019 out of time without leave and or extension of time as a reaction to this application.

11. He averred that there is a valid judgment, decree and Certificate of Costs and court orders against the government issued by a competent court and no stay of execution has been granted either by the court issuing the decree or by the appellate court. Additionally, he averred that under Order 42 Rule 6 of the Civil Procedure rules, 2010, an appeal does not operate as a stay of execution or proceedings under a decree or order appealed from except where an order of stay is granted by the court. He also deposed that subsequent to filing of the said appeal, he applied for the same to be struck off for being filed out of time.

12. Mr. Kamau deposed that he was aware that following the delivery of the judgment, the State Department for Infrastructure allocated the funds for settlement of the decretal sum and costs and even remitted part of the money to the first Respondent's office for onward transmission and payment, but the money has been lying unpaid for close to 2 years without sufficient cause and without any order for stay.

### **Applicant's advocates' submissions**

13. Mr. Ochieng Oduol, the applicant's counsel responding to the Respondent's argument that they have appealed against the judgment sought to be enforced cited Order 42 Rule 6 of the Civil Procedure Rules, 2010, and submitted that under the said provision, an appeal does not operate as stay of a judgment. To buttress his argument, he cited *Republic v Attorney General & Another ex parte James Alfred Koroso*<sup>4</sup> for the proposition that the mere fact that a party intends to appeal or has even appealed does not entitle him to an automatic stay, and, that, a party who needs the protection from the court ought to apply for stay of execution or proceedings.

14. Mr. Oduol submitted that the said appeal was filed out of time, precisely, two years after the delivery of the judgment which is an affront to justice and without the leave of the court or extension of time. He relied *Republic v Town Clerk of Webuye County Council & Another*<sup>5</sup> for the holding that a decree holders right to enjoy fruits of his judgment must not

<sup>4</sup> {2013} e KLR.

be thwarted, and, that, the court should adopt an interpretation that favours enforcement of the judgment and securing the accrued rights.

15. Mr. Oduol submitted that the orders sought are merited and that the application meets the grounds for the order of *Mandamus* as stated in *Republic v Kenya National Examinations Council ex parte Gathenji & 8 others*.<sup>6</sup> He further also that the applicant can only enjoy the fruits of his judgment if the second Respondent is compelled to satisfy the decree. To fortify his argument, he relied on *Republic v The Attorney General & another ex parte v James Alfred Kporoso* (supra) for the holding that the applicant has no other option of realizing the fruits of his judgment because the law bars execution against the government.

16. Lastly, Mr. Oduol submitted that the applicant has satisfied all the requirements for the order of *Mandamus* to issue in that he obtained and served a Certificate of Costs against the government but no money has been paid contrary to section **21(3)** of the Government Proceedings Act.<sup>7</sup> To fortify his argument, he cited *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security & another ex parte Fredrick Manoah Engunza* which held that 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) (2)** of the Government Proceedings Act.<sup>8</sup>

17. Mr. Munene, the Respondents' counsel argued that the orders sought are not deserved because there is a pending appeal against the judgment, and, if payment is made, the appeal will be prejudiced. He urged the orders to await outcome of the appeal, otherwise it will be rendered nugatory. He relied on *Republic v Kenya National Examinations Council ex parte*

*Gathenji & 8 others*<sup>9</sup> which described the nature of the writ of *Mandamus* and argued that if it is issued, the Respondents will be compelled to pay the decree to their prejudice.

### **Determination**

18. The starting point is that *Mandamus* will issue to compel a person or body of persons who has failed to perform a duty to the detriment of a party who has a legal right to expect the

<sup>6</sup> Civil Appeal No. 234 of 1996.

<sup>7</sup> Cap 40, Laws of Kenya.

<sup>8</sup> Ibid.

<sup>9</sup> Civil Appeal No. 234 of 1996.

duty to be performed.<sup>10</sup> Simply put, *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. Originally a common law writ, *Mandamus* has been used by courts to review administrative action.<sup>11</sup>

19. In *Republic v County Secretary, Nairobi City County & Another ex parte Tom Ojienda & Associates*<sup>12</sup> I discussed in detail the tests for granting an order of *Mandamus*. At the risk of repeating what I said in the said case, the eight tests for *Mandamus* were set out in *Apotex Inc. vs. Canada (Attorney General)*,<sup>13</sup> discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*.<sup>14</sup> These are:-

*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.*

20. Applying the above tests to the facts of this case, I find that there is no contest that the applicant holds a valid court decree. The reason offered for the refusal to pay is that an appeal has been filed against the judgment. This reason sounds attractive. However, it fails on the following grounds. *First*, it is settled law that an appeal does not operate as a stay of execution or of a proceedings under the decision appealed from unless the court issuing the

<sup>10</sup> See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

<sup>11</sup>W. G. & C. Byse, *Administrative & Review Law, Cases and comments* 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

<sup>12</sup> {2019} e KLR.

<sup>13</sup> [1993 Can LII 3004 \(F.C.A.\)](#), [1994] 1 F.C. 742 (C.A.), aff'd [1994 CanLII 47 \(S.C.C.\)](#), [1994] 3 S.C.R. 1100.

<sup>14</sup> [2003 FCT 211 \(CanLII\)](#), [2003] 4 F.C. 189 (T.D.), aff'd [2003 FCA 233 \(CanLII\)](#), 2003 FCA 233).

decree or the appellate court so orders and subject to such terms as it may impose. This is the clear language of Order 42 Rule 6 of the Civil Procedure Rules, 2010, which provides:-

*1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except insofar as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside*

21. Lucky for me, the above provision in circumstances similar to those raised in the instant application has been the subject of judicial construction by our superior courts and to me, the law is settled in this area. The High Court in *Republic v Attorney General & another Ex parte James Alfred Koroso*<sup>15</sup> when confronted with a similar argument had this to say:-

*22. It follows that the mere fact that a party intends to appeal or has even appealed does not entitle him to an automatic stay. A party who needs protection from the Court ought to also apply for stay of execution or proceedings. In this case, the Respondent neither applied for nor obtained an order for stay of either execution or proceedings. In fact according to it, it lulled itself into a false sense of security that since it could not be executed against there was no need to apply for stay. The mere fact that a party has filed a Notice of Appeal does not in itself mean that the party will in fact appeal. To allow the Respondent to hide behind its Notice of Appeal to evade its obligation under the decree may occasion a miscarriage of justice since there is no guarantee that the Respondent will in fact lodge the appeal. Apart from that the Respondent's conduct does not evince seriousness on its part to lodge the intended appeal. From the record one letter was received in court on 15th February, 2010 and the last on 21st February, 2012, a day after the current motion was filed. That is not the conduct of a person who is desirous of expediting the appeal process. The Respondent's contention that the decretal sum is excessive may be a ground for granting stay but is not the basis upon which the court would deny a successful litigant the fruits of his judgement in an application for mandamus where he does not have an alternative remedy. Accordingly, no compelling reason has been advanced by the Respondent why this application which is otherwise merited ought not to be granted.*

<sup>15</sup> {2013} e KLR.

22. The law is that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the Court so orders. It is a known principle of law that an appeal of a judgment by the unsuccessful litigant does not prevent the successful party executing the judgment immediately. Ideally, the unsuccessful party should apply for a stay of execution after judgment is delivered from the court issuing the decree and if unsuccessful from the court to which the appeal is preferred.

23. *Second*, it does not escape the courts attention that the judgment was delivered on 29<sup>th</sup> December 2017. The Certificate of Order against the Government and the Certificate of Order for Costs were issued on 1<sup>st</sup> July 2019 and 3<sup>rd</sup> July 2019 respectively. These were served upon the Respondent on 11<sup>th</sup> July 2019. No payment was made prompting the applicant to seek leave on 19<sup>th</sup> July 2019 to apply for *Mandamus* to compel the payment. Leave was granted and the substantive application was filed on 22<sup>nd</sup> July 2019. From the applicant's further affidavit, the Certificate of Delay obtained by the Respondents shows that they applied for proceedings on 5<sup>th</sup> December 2017. It shows that they collected the Certificate of Delay on 18<sup>th</sup> December 2018. The record of appeal was filed on 14<sup>th</sup> November 2019, one year after the Respondents collected the proceedings from the court and over five months after the applicant had instituted these proceedings. Clearly, the belated appeal raises questions whether it was a reaction to the instant application.

24. *Third*, to the extent that the said appeal has been used as a shield to defend the instant application, this court is perfectly in order in interrogating the relevant circumstances to interrogate the veracity of the said ground to satisfied that the appeal is not being raised to defeat justice under the guise of exercising the right to appeal. For example, the appeal was filed late, without leave and no notice of appeal was exhibited. These glaring question were left unanswered even after the appeal was attacked in the further affidavit as a ploy to defeat the execution.

25. What emerges from the above is that the appeal was filed after an inordinate delay of over one year after the proceedings were collected and over two years after the delivery of the judgment. The courts duty is to administer real and substantial justice based on the peculiar facts of the case. It is this appeal which was filed late and without leave or extension of time that the Respondents are hanging on to deny the applicant the fruits of the judgment.

I find myself unable to buy the said ground. This wisdom behind the enactment of Order 42 Rule 6 of the Civil Procedure Rules, 2010 is aimed at preventing litigants from hiding behind the mere existence of an appeal to frustrate successful litigants. I find and hold that the Respondents argument based on the existence of the said appeal collapses.

26. Perhaps, it would be fitting to recall the words attributed to Elie Wiesel, a holocaust survivor who remarked that "...we must always side with the Rule of Law." <sup>16</sup> This is because law is the bloodline of every nation. The end of Law is justice. It gives justice meaning. It is by yielding Justice that law is able to preserve order, peace and security of lives and property, make the society secure and stable, regulate and shape the behaviour of citizens, safe guard expectations, function as a means of governance, a device for the distribution of resources and burdens, a mechanism for conflict resolution and a shield or refuge from misery, oppression and injustice. Through the discharge of these functions, the law has today assumed a dynamic role in the transformation and development of societies. It has become a instrument of social change.<sup>17</sup>

27. I find it fit to cite *Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another*<sup>18</sup> in which I paraphrased the words of Baroness Helena Kennedy QC, a woman activist and chair of the British Council<sup>19</sup> who said that:-

*"Law is the bedrock of a nation, it tells who we are, what we are, what we value...almost nothing else has more impact on our lives. The law is entangled with everyday existence, regulating our social relation, and business dealings, controlling conduct, which could threaten our safety and security, establishing the rules by which we live. It is the baseline." (Emphasis added).*

28. Thus, when a party provides reasons to explain failure to comply with court orders, the reasons for declining to comply with a court order must be defensible in a court of law. The question is, whether the cited reasons in this case are defensible on the face of the clear legal position that court orders must be complied with unless and until they are varied or stayed by the issuing court or an appellate court.

<sup>16</sup>Mr. Dainius Zalimas, President of the constitutional Court of the Republic of Lithuania, *The Rule of Law and Constitutional Justice in the Modern World*, 11-14 September 2017, Vilnius, Lithuania, delivering a speech at the Farewell Dinner for the 4<sup>th</sup> Congress of the World Conference on Constitutional Justice, 13<sup>th</sup> September 2017.

<sup>17</sup> *Masinga vs Director of Public Prosecutions and Others (21/07) {2011} SZHC 58 (29 April 2011: High Court of Swaziland.*

<sup>18</sup> {2018} e KLR.

<sup>19</sup> Published in Just Law {2004}.

29. *Fourth*, there is evidence that the Respondent(s) were served with the Certificate of Order against the Government and the Certificate of Order for Costs against the Government. It follows that the applicant fully complied with the provisions of the Government Proceedings Act.<sup>20</sup>

30. The Respondents were given notice to settle the decretal amount but they refused to pay. One of the tests enumerated earlier is "*a reasonable time to comply with the demand.*" On what constitutes a reasonable notice before *Mandamus* can issue, I find that from the time the decree and Certificates of Order against the Government and Certificate of Costs against the Government was forwarded to the Respondents on 11<sup>th</sup> July 2019, and, the time this matter was filed in court in July 2019, is ample notice. In fact service of these documents was not disputed. The delay to pay is unreasonable.

31. The other test is "*an express refusal, or an implied refusal through unreasonable delay.*" *First*, as I have concluded above, "*unreasonable delay*" has been established. *Secondly*, an express refusal or even implied has also been established. The appeal cited was filed months after the instant case was filed and served. No good cause has been shown as to why payment has not been effected. *Mandamus* can issue where it is clear that there is *wilful* refusal or *implied* and or *unreasonable* delay in complying with the court order.

32. The other tests are absence of an adequate remedy to the applicant. The law does not permit execution against the government. This leaves the applicant with no other remedy, save, the writ of *Mandamus*. It is also a requirement that the order sought must be of some practical value or effect. I find no argument to the contrary. Nothing can be of great practical value than enjoying the fruits of a court judgment. It also my finding that there is no equitable bar to the relief sought. Perhaps I can add that the applicant complied with all the requirements of the Government Proceedings Act.<sup>21</sup> Lastly, flowing from the above findings and considering that there is no other available remedy, on a balance of convenience, *Mandamus* should lie.

33. It is important to point out that the failure by the Government to obey court judgments renders impotent the constitutionally guaranteed right of access to justice. As was held in

<sup>20</sup> Cap 40, Laws of Kenya.

<sup>21</sup> *Ibid.*

*Republic vs. The Attorney General & Another ex parte James Alfred Koroso* (supra) access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers.

34. Guaranteeing access to justice without honoring court judgments is a sterile formulation that sows expectations and produces frustrations. It is my belief that judgment enforcement is part of the legal process —the due process of the law— and, hence, the State must ensure that the enforcement is carried out within a reasonable time. Compliance with the judgment is part and parcel of the right to a fair trial. The enforcement of judgments is, then, an essential element of the right to a fair trial itself, thus conceived in a broad sense, in which it expresses the relation between the right to a fair trial and the right to constitutional protection under Articles 27 (1) (2) of the Constitution which guarantees the right to equal protection and equal benefit of the law.

35. It is my finding that that enforcement of the judgment is part of due process of law and that, therefore, the State should ensure that enforcement of court decrees against the Government is completed within a reasonable time. Accordingly, the right of access to justice requires that final settlement of the dispute be accomplished within a reasonable time. It is also appropriate to mention here my opinion that time has come for Parliament to consider and amend the Government Proceedings Act<sup>22</sup> to prescribe a reasonable time frame within which the Government should settle final court decrees issues against it. This is because it is a mockery of justice for a citizen to spend years and resources in court searching for justice and after obtaining a judgment, it is treated as a worthless piece of paper. On the other hand the Government loses huge sums of money paying accrued interests occasioned by delayed settlement of court decrees which can be avoided and save the tax payer from being burdened by unnecessary expenses which can be avoided.

36. Applying the tests discussed above to the facts and circumstances of this case, I find and hold that the applicant's application is merited. It follows that there is basis for the Court to grant the orders of *Mandamus* as prayed. Accordingly, I allow the application dated 22<sup>nd</sup> July 2019 and order that:-

<sup>22</sup> Cap 40, Laws of Kenya.

*a. An order of **Mandamus** be and is hereby issued compelling the Principal Secretary, Ministry of Transport, Infrastructure, Housing & Urban Development and or the Attorney General to pay to the applicant the sum of **Kshs. 847,277,351.90** with interests thereon at the rate of **12% per annum** in terms of the Certificate of Order Against the Government issued on 2<sup>nd</sup> July 2019.*

*b. An order of **Mandamus** be and is hereby issued compelling the Principal Secretary, Ministry of Transport, Infrastructure, Housing & Urban Development and/or the Attorney General to pay to the applicant the sum of **Ksh. 12,259,342.73** together with interest in terms of the Certificate of Order for Costs against the Government issued on 3<sup>rd</sup> July 2019.*

*c. **That** the Respondents do pay the applicant the costs of this suit plus interests thereon from date of taxation.*

Orders accordingly

Signed, Dated and Delivered at **Nairobi** this 8<sup>th</sup> day of **April** 2020

**JOHN M. MATIVO**

**JUDGE**