



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JUDICIAL REVIEW NO. 22 OF 2019**

**IN THE MATTER OF: STATE CORPORATION ACT, CHAPTER 446 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA SECTIONS 8 AND 9**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS**

**BETWEEN**

**MADALE TRUCKING CO. LTD.....APPLICANT**

**VERSUS**

**KENYA FERRY SERVICES.....RESPONDENT**

**AND**

**THE ACCOUNTING OFFICER KENYA FERRY SERVICES.....INTERESTED PARTY**

**RULING**

1. By an Amended Notice of Motion dated 7<sup>th</sup> October, 2019 the Ex parte

Applicant herein prays for the following orders:

1. That this Honourable Court be pleased to grant orders of mandamus directed to the Respondents herein compelling them to pay the decretal amount due amounting to Kshs. 5,285,000 in the installments agreed upon in the consent order dated 12<sup>th</sup> March, 2018.
2. THAT this Honourable Court be pleased to order that the Chief Accounting Officer of the Respondent be personally liable for the debt due to the Applicant.
3. THAT in the alternative this Honourable Court do issue orders for the attachment of the Respondents property in satisfaction of the outstanding decretal amount.
4. THAT the cost of this Application be borne by the Respondent.

2. The application is premised on the grounds set out in the Notice of Motion as well as the Supporting Affidavit by Jonas Madale who depones that he is the Director of the Applicant and that Judgment was rendered in Civil Suit No. 114 of 2014 and consent on its execution was filed on 12/3/2018 between the Applicant under which the decretal sum was to be paid as follows:

- i) Kshs. 2,000,000 on 16<sup>th</sup> March, 2018

ii)Kshs. 1,500,000 on 13<sup>th</sup> April, 2018

iii) Kshs. 1,500,000 on 11<sup>th</sup> May, 2018

iv)Kshs. 1,500,000 on 15<sup>th</sup> June, 2018

v) Kshs. 1,500,000 on 13<sup>th</sup> July, 2018

vi) Kshs. 1,085,000 on 17<sup>th</sup> August, 2018

3. The Applicant avers that the Respondents have since paid two instalments amounting to Kshs. 3,800,000 but have failed to clear a balance of Kshs. 5,285,000 and as such the Respondents' have offended the rules of natural justice by failing to honour the terms of consent and order of court.

4. The Applicant further avers that it has since suffered irreparable loss as the Banks have now threatened to auction the Applicant's goods and equipments which acted as security, due to unpaid loans and further asked this court to grant the Application.

### The Response

5. There was no response on the part of the Respondents.

### Submissions

6. The matter came up for Hearing on 11<sup>th</sup> March, 2020 where the Applicants Counsel M/s Nzamba submitted that the Applicant seeks an order of mandamus for Judgment of decretal amount of Kshs. 5,285,000 and that the Government Proceedings Act Cap 40 does not apply in this matter and thus prayed for the order to be granted.

### The Determination

7. The only issue in this application is whether or not the same should be allowed.

8. It is not in doubt that the Court in Mombasa Civil Suit No. 114 of 2014 recorded the consent in which the 1<sup>st</sup> Respondent committed itself to pay the decree by installments.

9. The Respondent is a State Corporation having been established under the Companies Act CAP 486 of the Laws of Kenya and operating under the Ministry of Transport and Infrastructure, Housing and Urban Development and mandated with the operation of ferries in the Country.

10. A consent on Judgment was entered herein and has not been complied with hence the application. The Applicant has no way of enforcing the judgment in this matter and that is the reason it has come to Court for a Mandamus Order to compel the satisfaction of the said decree.

11. A Mandamus Order was described in **Shah vs. Attorney General (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543** thus:

**“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment...The foregoing may also be thought to be much in point in relation to the applicant’s unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is preemptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designate* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is preemptory. It may be that they are answerable to the Crown but they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant’s decree. Therefore, an order of mandamus will issue as prayed with costs.”**

12. Although the 1<sup>st</sup> Respondent is a corporation with authority to sue and be sued, it is governed under the Government Proceedings Act and there is no provision of attachment of its property in execution.

This therefore means that the only way to execute the decree is by way of a compelling order of mandamus.

13. Further a State Corporation or Parastatal is not automatically subject to the Government Proceedings Act and so, this Application is well founded. It is to be noted that the Respondents have not bothered to defend the motion.

14. This Court is satisfied that the motion herein is merited and the same is allowed as presented except that Prayer No. 2 is allowed without personal liability of the 2<sup>nd</sup> Respondent for the debt. Costs shall be for the Applicant.

That is the Ruling of the Court.

**E. O. OGOLA**

**JUDGE**

**Dated, Signed and Delivered at Mombasa this 12<sup>th</sup> day of May, 2020.**

Ruling delivered in Chambers via MS Teams in the presence of:

Ms. Nzamba for Applicant

No Appearance for Respondent

Mr. Kaunda Court Assistant