



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 278 OF 2019

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND CO-ORDINATION

OF NATIONAL GOVERNMENT.....RESPONDENT

EX PARTE APPLICANT:

MARY LISILIH PESA

JUDGMENT

The Application

1. The *ex parte* Applicant herein, Mary Lisilihi Pesa, was the Plaintiff in **Milimani Chief Magistrates Civil Case No. 4878 of 2016**, wherein judgment was delivered in her favor on 6th October 2017 as against the Inspector of Police and Attorney General. The *ex parte* Applicant was awarded Kshs 4,014,000/= as general and special damages for being maliciously and unlawfully shot by a police officer, together with interest and costs in the said judgment. The *ex parte* Applicant has now sued the Principal Secretary in the Ministry of Interior and Co-ordination of National Government, who is the Respondent herein, as the person who is under a statutory duty to pay the said decretal sum.
2. The *ex parte* Applicant filed the instant judicial review proceedings by way of a Notice of Motion dated 25th October 2019, seeking orders of mandamus against the Respondent to compel him to satisfy the decree in **Milimani Chief Magistrates Civil Case No. 4878 of 2016**, and to pay the *ex parte* Applicant the sum of Kshs 4,408,746/- together with further interest of 12% per annum from 18th January 2018 on the general damages, and from 7th October 2017 on the special damages, until payment in full. The *ex parte* Applicant also requested for the costs of the application to be provided for.
3. The grounds for the application are stated in a statutory statement by the *ex parte* Applicant's Advocates dated 19th September 2019, and a verifying affidavit and supplementary affidavit sworn on the same date and on 4th October 2019 respectively by the *ex parte* Applicant. In summary, the *ex parte* Applicant's case was that after judgment was entered in her favour in **Milimani Chief Magistrates Civil Case No. 4878 of 2016**, a decree was issued and costs were certified at Kshs 256,825/=. She annexed a copy of the decree with the stated costs issued on 21st February 2018. However, that despite various demands made, as evidenced by copies of correspondence sent to the Attorney General which she attached, the Respondent has failed to make good the decree
4. The Respondent did not file any response to the application despite being served with the application.
5. The Court directed that the application would be canvassed by way of submissions. The *ex parte* Applicant's Advocates on record, Solonka & Company Advocates filed submissions dated 14th February 2020 wherein the foregoing facts were reiterated, and it was submitted that the Respondent is the person under a statutory duty to pay the decretal sum on behalf of the Government. The Advocates cited various judicial decisions in support of these submissions.

The Determination

6. I have considered the pleadings and submissions by the *ex parte* Applicant, as well as the discussion by the Court of Appeal on the nature of the remedy of mandamus in its decision in **Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others, (1997) e KLR**, wherein it was held as follows:

“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“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.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed..... .”

7. It is not disputed in the present application that judgment was entered in favour of the *ex parte* Applicant in **Milimani Chief Magistrates Civil Case No. 4878 of 2016**. The issues therefore that require to be determined are firstly, whether the Respondent is under a legal duty and obligation to satisfy the decree and orders issued in favour of the *ex parte* Applicant in the said judgment, and secondly, if so, whether the *ex parte* Applicant is entitled to the relief she seeks.

8. Section 21 of the Government Proceedings Act provides as follows as regards the requirements to be met in the enforcement of orders as against Government in civil proceedings:

“(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.”

9. In addition, execution proceedings against a government or public authority can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body. This was the holding in **Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) e KLR** where J. Githua held as follows:

“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.”

10. In the present application, the Applicant in this respect annexed copies of the judgment and decree awarded in **Milimani Chief Magistrates Civil Case No. 4878 of 2016**. The *ex parte* Applicant also annexed a copy of a letter dated 30th April 2018 sent by her Advocates to the Attorney General, and which enclosed a copy of the judgment, the decree and Certificate of Order against Government. Lastly, the Respondent has not disputed the demands for payment made, or the finding in the judgment in **Milimani Chief Magistrates Civil Case No. 4878 of 2016**, that officers in his Ministry were responsible for the acts leading to the *ex parte* Amount and costs, and the procedure stated in section 21 of the Government Proceedings Act has largely been followed, there is a duty upon the Respondent to pay a debt already decreed by a competent Court of law to be due and payable by them.

12. The only clarification that needs to be made is as regards the interest payable on the decretal sum. It is notable that interest on the decretal sum at court rates was awarded by the trial Court in its judgment in **Milimani Chief Magistrates Civil Case No. 4878 of 2016**, but with different payment periods with respect to the general damages, which was from the date of judgment, and for special damages from the date of filing suit. A perusal of the judgment reveals that the trial Court awarded general damages of Kshs 4,000,000/= and special damages of Kshs 14,400/= in this regard. As this Court is being asked to enforce by way of mandamus a decree given by the trial Court, it has no discretion to change or add to the terms of the orders granted by the trial Court as regards interest, and will therefore provide for the same.

13. In the premises, I find that the *ex parte* Applicant's Notice of Motion dated 25th October 2019 is merited and succeeds to the extent of the following orders:

(a) An order of mandamus be and is hereby issued directed to the Respondent herein to comply and pay the *ex parte* Applicant Kshs 4,014,000/= and Kshs 256,825/=, being the decretal sum and costs awarded in **Milimani Chief Magistrates Civil Case No. 4878 of 2016**, with interest at court rates on the general damages awarded of Kshs 4,000,000/= from the date of judgment, and on the special damages awarded of Kshs 14,400/= from the date of filing suit, until payment in full.

(b) The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 25th October 2019 of Kshs 20,000/=.

14. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 14TH DAY OF MAY 2020

P. NYAMWEYA

JUDGE