



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 502 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY,

STATE DEPARTMENT OF INTERIOR.....RESPONDENT

EX PARTE :

- 1. LI WENJI**
- 2. PENG ZHANG**
- 3. CATHAM PROPERTIES**

JUDGMENT

The Application

1. The 1st and 2nd *ex parte* Applicants herein, Li Wenji and Peng Zhang, are the Assistant General Manager and Director respectively of Catham Properties Limited, which is the 3rd *ex parte* Applicant herein. The said Applicants were the Petitioners in **Li Wen Jie & 2 Others vs Cabinet Secretary, Interior & Co-ordination of the National Government & 3 Others, Nairobi Constitutional and Human Rights Petition No 354 of 2016**, wherein judgment for various orders and costs was delivered in their favour on 23rd March 2016, as against the Ministry of Interior and Co-ordination. Following taxation of the costs, the *ex parte* Applicants were awarded and issued with a Certificate of Taxation, and a Certificate of Order of Costs against the Government for the sum of Kshs 1,080, 941.60.

2. The *ex parte* Applicants have now filed the instant judicial review proceedings by way of a Notice of Motion dated 5th March 2019, seeking orders of mandamus against the Principal Secretary, State Department of Interior, to compel him to them the sum of Kshs. 1,080,941.60/- and that the costs of the application be provided for. The *ex parte* Applicants have sued the said Principal Secretary in his capacity as the Chief Accounting Officer in the Ministry of Interior and Co-ordination, and as the person mandated to, and under a duty to pay the said sum.

3. The facts that form the basis of the application are as stated in the foregoing, and are detailed in a statutory statement by the *ex parte* Applicants' Advocates dated 21st December 2018, and a verifying affidavit sworn on 29th November 2018 by the 1st *ex parte* Applicant. The said Applicants annexed copies of the petition and judgment delivered in **Li Wen Jie & 2 Others vs Cabinet Secretary, Interior & Co-ordination of the National Government & 3 Others, Nairobi Constitutional and Human Rights Petition No 354 of 2016**, and of the Certificate of Costs and Certificate of Order of Costs Against the Government issued to them on 1st February 2018 and 13th March 2018 respectively. They further averred that they demanded that the Respondent pays the amount to it by way of a letter of demand dated 14th May 2018, a copy of which was also annexed.

4. The Respondent in response filed Grounds of Opposition dated 13th December 2019, in which the main ground was that there was no evidence that the relevant Ministry, being that of Interior and Co-ordination, had been served with a demand letter of payment, and that the demand letter produced by the *ex parte* Applicants dated 14th May 2018 was addressed to the Attorney General, who has no statutory

mandate or responsibility to settle decretal sums on behalf of other Government offices. Therefore, that the instant application is premature, and has not met the threshold for orders of mandamus to issue.

The Determination

5. After various adjournments consented to by the parties in an effort to settle the matter, this Court directed that the application would be canvassed by way of submissions after a settlement out of court was not forthcoming. The *ex parte* Applicants' Advocates on record, Kamau Kuria & Company Advocates filed submissions dated 8th January 2020. The Respondent's submissions were dated 3rd February 2020, and were filed by Ms. Annette Nyakora, a Senior State Counsel in the Attorney General's Chambers.

6. The Applicants relied on Article 48 of the Constitution and the decisions in **Dry Associates Limited vs Capital Markets Authority and Another Interested Party Crown Berger (K) Ltd [2012] eKLR**, **Joseph Nyamamba and 4 Others vs Kenya Railways Corporation [2015] eKLR** and **Republic vs. Town Clerk of Webuye County Council & Another [2014] eKLR** to submit that their right to access to justice includes enforcement of decrees and orders issued by a court. Reliance was also placed on section 21 of the Government Proceedings Act and the decision in **Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza [2012] eKLR**, for the procedure for enforcing a decree or order issued against the government.

7. The Applicants in this regard contended that law is clear that the Certificate of Order of Costs against the Government is served on the Attorney General and not the relevant ministry, and that the Attorney General has admitted receiving the letter dated 14th May, 2019 demanding payment. Furthermore, that the Attorney General was on record for the Applicants in the Petition, and it is a general rule of practice and professional ethics that advocates of a party go through the opposing party's advocates, where represented.

8. Lastly, the Applicants submit that the institution of judicial proceedings against the accounting officer of a Ministry to enforce a decree or an order, is the only remedy for a litigant who has a decree or Certificate of Order against the Government as held in **Republic vs Attorney General and Another ex parte James Alfred Koroso [2013] eKLR**. Further reliance was placed on the decision in **Republic vs Kenya Broadcasting Corporation ex parte Dorcas Florence Kombo [2018] eKLR**, that if the court were to decline to grant mandamus, applicants would be left without an effective remedy despite holding a decree.

9. The Respondent on the other hand submitted that the Attorney General only represents Government Ministries in civil matters and works as the Principal legal advisor of all Government Ministries. Therefore, that the Applicants ought to have demanded for payment by writing to the Principal Secretary Ministry of Interior and Co-ordination of National Government. Furthermore, that section 21 of the Government Proceedings Act prescribes that the party to whom an Order of Mandamus is to be directed is the Accounting Officer of the respective party. The decision in **James Samuel Mburu vs Attorney General & Another [2017] eKLR**, was cited for the position that the Attorney General cannot carry the legal duty of settling the decree, or enforce the order issued against the specific Government Ministry or State Government on whose behalf he is sued.

10. Therefore, that since the Respondent is the accounting officer of the Ministry of Interior and Co-ordination of National Government and was not served with a Certificate of Order against the Government, Decree or any demand letter asking for payment, the claim that there has been willful refusal by on his part to pay is not true. Reliance was placed on the decisions in **Republic vs County Secretary, Nairobi City County & Another Ex Parte Wachira Nderitu Ngugi & Co. Advocates (2016) eKLR**, **Republic vs Attorney General & 2 Others Ex-Parte Associated Architects And 3 Others, [2018] eKLR** and **Republic vs Attorney General & Another Exparte Duncan Mugambi T/A Wright Auctioneers [2019] e KLR** for these submission, and for the procedure and requirements for an order of mandamus to issue.

11. I have considered the pleadings and submissions by the *ex parte* Applicants and Respondent, 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..... .”

12. It is not disputed in the present application that judgment for costs was entered in favour of the Applicants in **Li Wen Jie & 2 Others vs Cabinet Secretary, Interior & Co-ordination of the National Government & 3 Others, Nairobi Constitutional and Human Rights Petition No 354 of 2016**. In addition, the Applicants did provide evidence of the said judgment, a Certificate of Taxation and a Certificate of Order of Costs against the Government for the sum of Kshs 1,080,941.60. The outstanding issues therefore that require to be determined are firstly, whether the Respondent is under a legal duty and obligation to satisfy the order for costs issued in favour of the Applicants, and secondly, if so, whether the Applicants are entitled to the relief they seek.

13. On the first issue, 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.”

14. It is evident from section 21(3) above that the person who is responsible for the payment of any damages or costs awarded against the Government is the accounting officer of the Ministry or public body concerned, who is the one under a statutory duty to satisfy a judgment made by the Court against that Ministry or body. This position was explained in **Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) e KLR** by Githua J. 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.”

15. The Respondent disputes the procedure adopted by the Applicant, and claims that it is the Accounting officer and not the Attorney General who ought to be served with the demand for payment in claims against the government. It appears that the Respondent has conflated the issue of liability and duty to pay, with that of the procedure to be applied in claims for payment of decretal sums made against the Government. The Respondent in this regard cited various judicial authorities in its argument, which this Court will proceed to examine.

16. In **James Samuel Mburu vs Attorney General & Another** [supra], Aburili J. held that although the Attorney General was sued as the primary party in that suit, he was sued in a representative capacity, and the person who was liable and would be compelled to settle that decree was the person disclosed in the pleadings and judgment of the trial court, who was the Principal Secretary, State Department of Finance and the National Treasury. A similar holding was made by Chepkwony J. in **Republic vs Attorney General & Another Exparte Duncan Mugambi T/A Wright Auctioneers** [supra], which is also distinguished on the ground that the holding of the Court in

that case was that since the 2nd Respondent was the Auctioneers Licencing Board, which was a corporate body, it could not be represented by the Attorney General.

17. In **Republic vs Attorney General & 2 Others ex parte Associated Architects And 3 Others**, [supra], Aburili J. explained the legal position as regards the liability vis-vis procedure for payment of debts due from the Government, in so far as the Attorney General and Accounting officers of Ministries are concerned as follows:

“31. The Attorney General is not an Accounting Officer and is only sued in civil litigation as the principal legal advisor to the Government on behalf of the respective Government Ministries and Departments. He cannot be held liable to settle a decree which is issued against him on behalf of other Government Ministries/Department.

32. It therefore follows that mandamus cannot issue against the Attorney General in matters where he is sued in a representative capacity unless the subject litigation directly affects his office.

33. It is for that reason alone that I would find and hold that mandamus cannot in this case, issue against the Attorney General as enjoined to these proceedings and neither can it issue against the Cabinet Secretary of the Ministry who is not the Accounting Officer of the Government Department.

34. The Principal Secretary is under a duty to satisfy a decree in HCC 488/2013 and a decree is principal sum, costs and interest as decreed by the court. That is what Section 21(3) of the Government Proceedings Act contemplates that once a certificate of Order Against the Government is served on the Attorney General, the Accounting Officer must pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”

18. The above judicial authorities cited by the Respondent therefore support the position that liability for Government debts lies with the Accounting officers of the Ministries or public bodies concerned, while the procedure to be followed is that the Attorney General must be served with the Certificate of Costs against Government, in his capacity as the principal legal adviser and representative of the national government. In the present application the person disclosed and pleaded in the present application as being liable for the decretal sum due to the Applicants is the Principal Secretary of the State Department of Interior, and it is not disputed that he is the accounting officer of the Ministry of the Interior and Co-ordination. He is therefore properly sued as the person who is liable for, and has the legal duty to pay the said decretal sum.

19. The procedure required to be followed for payment of damages or costs due from the Government to be effected by the Accounting Officer, is provided in section 21 (1) and (2) of the Government Proceedings Act. The decree holder is in this regard only required to serve the Certificate of Costs on the Attorney General, as the legal representative of the accounting officer, who then advises and arranges for the accounting officer to make the payment. This position was reiterated in **Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza (supra)**. The *ex parte* Applicants did in this regard bring evidence of service of the Certificate of Costs against the Government on the Attorney General, by way of a letter of demand dated 14th May 2018 sent to him, which enclosed the said Certificate.

20. This Court therefore finds that since the *ex parte* Applicants have judgment in their favour with respect to the demanded decretal amount and costs as against the Ministry of Interior and Co-ordination, the Respondent as the Accounting Officer in the said Ministry has been properly sued and is liable for payment of the said decretal sum. In addition, the Attorney General was also properly served with the Certificate of Order against the Government in accordance with the procedure stated in section 21 of the Government Proceedings Act, which has been detailed in the foregoing.

21. Lastly, as the Attorney General is the legal representative of the national Government in civil proceedings under Article 156(4) of the Constitution, the Respondent is deemed to have been aware of the said Certificate of Order against the Government. Article 156(4) provides as follows:

4) The Attorney-General—

(a) is the principal legal adviser to the Government;

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

The Office of the Attorney General Act No 49 of 2012 in this respect specifically provides in section 5(1) that one of the functions of the Attorney General is representing the national Government in all civil and constitutional matters in accordance with the Government Proceedings Act.

22. In the premises, I find that the *ex parte* Applicants' Notice of Motion dated 5th March 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 Principal Secretary, State Department of Interior, compelling him to pay the Applicants herein the sum of Kshs. 1,080,941.60 being the decretal sum awarded in **Li Wen Jie & 2 Others vs Cabinet Secretary, Interior & Co-ordination of the National Government & 3 Others**, Nairobi Constitutional and Human Rights Petition No 354 of 2016 .

(b) The Applicants shall have the costs of the Notice of Motion dated 5th March 2019 of Kshs 30,000/=.

23. Orders accordingly.

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

P. NYAMWEYA

JUDGE