



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 111 OF 2019

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

EX PARTE:

JOSEPHAT MUCHIRI NDEGWA

JUDGMENT

The Application

1. The *ex parte* Applicant herein, Josephat Muchiri Ndegwa, is the decree holder in **Milimani CMCC NO. 6933 of 2014**, wherein he obtained judgment in his favour against the Respondents herein on 23rd December 2016, for general damages of Kshs 1,000,000/- and costs. His costs were subsequently taxed at Kshs 145,165/= and he was issued with a Decree and Certificate of Stated Costs dated 4th April 2017, and a Certificate of Order against the Government dated 28th April 2017 for the decretal sum of Kshs 1,177,644.54/= inclusive of interest until 20th April 2017.

2. The *ex parte* Applicant subsequently filed the instant judicial review proceedings by way of a Notice of Motion application dated 12th September 2019, seeking an order of mandamus to compel the 2nd Respondent to pay him the sum of Kshs 1,000,000/=, plus costs and interest thereon at court rates from 23rd December 2016 to the date of payment in full, being the decretal sum arising out of **Milimani CMCC NO. 6933 of 2014**. The *ex parte* Applicant also prayed that the Respondents be compelled to pay the costs of the application.

3. The above-stated facts are detailed in a statutory statement dated 10th April 2019, and a verifying affidavit and supplementary affidavit deposed to by the *ex parte* Applicant on 10th April 2019 and 6th August 2019 respectively. He annexed thereto copies of the judgment, Decree, Certificate of Stated Costs and Certificate of Order against the Government issued to him in **Milimani CMCC NO. 6933 of 2014**. He also annexed demand letters seeking payment of the decretal sum that he sent to the Attorney General's office dated 2nd May 2017 and 6th December 2017, 19th June 2018 and 8th February 2020. The letter dated 2nd May 2017 also enclosed a copy of the judgment, decree and certificate of costs.

4. In summary, the *ex parte* Applicant's case is that despite having been served with copies of the judgment, Decree, and Certificate of Order against the Government issued in **Milimani CMCC NO. 6933 of 2014**, and no appeal having been proffered against the said judgment, the Respondents have defaulted, refused and failed to pay the decretal sum. Therefore, that the Respondents are not only in civil contempt of the law, but have absconded their duty to maintain public confidence in government offices and the legal system generally.

5. The Respondents did not file any response to the application, despite being given the opportunity to do so.

The Determination

6. The application was canvassed by way of the *ex parte* Applicant's written submissions dated 25th February 2020, wherein he reiterated the

facts and grounds for his application. The *ex parte* Applicant submitted that he had fulfilled the conditions for the issuance of an order of mandamus, and cited the decision in **Republic vs Attorney General & Another Ex parte James Alfred Koroso (2013) eKLR** for the position that the only way to enjoy the fruits of his judgment was to compel payment of the decretal sum by an order of mandamus against the 2nd Respondent.

7. Furthermore, that 2nd Respondent is liable to pay the entire decretal sum as the judgment in **Milimani CMCC N0. 6933 of 2014** was entered jointly and severally against the defendants therein. The decisions in **Francis Muchene Kanyenje vs Dominic Karanja Gachanja & 2 Others (2018) e KLR** was relied upon in this respect. Lastly, reliance was placed on section 27(1) of the Civil Procedure Act for the submission that the costs should be awarded to the *ex parte* Applicant, as he had discharged his burden of proof.

8. I have considered the *ex parte* Applicant's pleadings and submissions, and I am guided by the decision and discussions by the Court of Appeal on the nature of the remedy of mandamus 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.....”

9. It is not disputed in the present application that judgment was entered in favour of the *ex parte* Applicant in **Milimani CMCC N0. 6933 of 2014**. The issues therefore that require to be determined are firstly, whether the 2nd 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 he seeks.

10. 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.”

11. 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.”

12. In the present application, the decretal sum due from the Respondents has not been disputed, and the *ex parte* Applicant in this respect annexed copies of the judgment, decree and Certificate of Costs awarded in **Milimani CMCC NO. 6933 of 2014**. The *ex parte* Applicant also annexed a copies of the demand letters sent to the Attorney General, and which enclosed the decree and Certificate of Order against Government. Lastly, the 2nd Respondent has not disputed the finding in the judgment in **Milimani CMCC NO. 6933 of 2014** that the police officers in his Ministry were responsible for the acts leading to the *ex parte* Applicant being awarded damages, and that the damages and costs were awarded against the defendants therein, including the 1st respondent, jointly and severally.

13. This Court therefore finds that since the *ex parte* Applicant has judgment in her favour with respect to the demanded decretal amount and costs, and the procedure stated in section 21 of the Government Proceedings Act has been followed, there is a duty upon the 2nd Respondent to pay a debt already decreed by a competent Court of law to be due and payable by them.

14. In the premises, I find that the *ex parte* Applicant’s Notice of Motion dated 12th September 2019, is merited, and succeeds to the extent of the following orders:

i. An order of mandamus be and is hereby issued directed to the 2nd Respondent herein to comply and pay the *ex parte* Applicant the sum of Kshs 1,145,165/=, being the decretal sum and costs awarded in Milimani CMCC NO. 6933 of 2014, and interest thereon at court rates from 23rd December 2016 to the date of payment in full.

ii. The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 12th September 2019 of Kshs 30,000/=.

15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF OCTOBER 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the Applicant’s and Respondents’ Advocates on record.

P. NYAMWEYA

JUDGE