



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 274 OF 2018**

**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.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**EX PARTE APPLICANT: LILIAN NINI KANGARA**

**JUDGMENT**

**The Application**

1. The *ex parte* Applicant herein, Lilian Nini Kangara, was the Plaintiff in **Milimani Chief Magistrates Civil Case No. 7250 of 2014**, wherein judgment was delivered in her favor on 13<sup>th</sup> February 2018 as against one Joseph Gathonga and the Attorney General, the defendants therein. The *ex parte* Applicant was awarded a total sum of Kshs 6,077,834.10 as general and special damages and liability was apportioned on a 50:50 basis between the two defendants . The *ex parte* Applicant was also awarded the costs of the suit plus interest thereof.
2. The *ex parte* Applicant accordingly filed the instant judicial review proceedings by way of a Notice of Motion dated 18<sup>th</sup> July 2018, seeking orders of mandamus against the 1<sup>st</sup> Respondent to compel him to pay to her the sum of Kshs. 3,241,135.45/=, being 50% of the damages and costs awarded in **Milimani Chief Magistrates Civil Case No. 7250 of 2014** as at the date of extracting the decree, plus further accrued interest thereon until payment in full. The *ex parte* Applicant also prayed that 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 4<sup>th</sup> July 2018, and a verifying affidavit sworn on the same date 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. 7250 of 2014**, she extracted the decree on the 27<sup>th</sup> March, 2018 and consequently served the said decree and certificate of costs on the Respondents herein with a request for settlement, but the 1<sup>st</sup> Respondent did not make good the payment requested.
4. Further, that despite numerous reminders to the Respondents, the 1<sup>st</sup> Respondent has failed, refused and/or neglected to settle the decretal amount which is still due and accruing interests and further costs. The *ex parte* Applicant annexed a copy of the said judgment and decree with the stated costs issued on 21<sup>st</sup> February 2018, and a bundle of such correspondence with the Respondents.
5. The Respondents did not file any response despite being duly served with the application.
6. The Court directed that the application would be canvassed by way of submissions. The *ex parte* Applicant's Advocates on record, Mudeshi Muhanda and Company Advocates filed submissions dated 14<sup>th</sup> February 2020 wherein it was submitted that a decree and certificate of order against government was duly issued upon the 1<sup>st</sup> Respondent pursuant to Section 21(1) of the Government Proceedings Act. However, that the 1<sup>st</sup> Respondent has failed to honour the terms of the judgement and has to date not remitted any moneys towards

settlement as required under section 21 (3) of the said Act. Therefore, that the *ex parte* Applicant has no other option of realizing the fruits of her judgement apart from mandamus, since she is barred from executing against the government

7. The *ex parte* Applicant's Advocates cited various judicial decisions in support of these submissions including **Shah vs Attorney General (No. 3) Kampala [1970] EA 543**, **Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR**, **Republic vs Principal Secretary, Ministry of Lands and Physical Planning Ex Parte Orbit Chemicals Limited [2017] eKLR** and **Republic vs. The Attorney General & Another ex parte James Alfred Koroso, High Court Judicial Review Miscellaneous Application No. 44 of 2012.**

### **The Determination**

8. 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, 4<sup>th</sup> 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 Chief Magistrates Civil Case No. 7250 of 2014**. The issues therefore that require to be determined are firstly, whether the 1<sup>st</sup> 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.

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 *ex parte* Applicant annexed copies of the judgment and decree awarded in **Milimani Chief Magistrates Civil Case No. 7250 of 2014**. The *ex parte* Applicant also annexed copies of letters dated 17<sup>th</sup> April 2018 and 29<sup>th</sup> June April 2018 sent by her Advocates to the National Police Service and Attorney General, seeking payment of the decretal sum. The *ex parte* Applicant has however not annexed any evidence of a Certificate of Order against Government issued in respect of the decretal sum, nor evidence of the service of the same on the Attorney General as required by section 21 of the Government Proceedings Act.

13. To this extent the current proceedings are premature, as the requisite procedure has not been followed by the *ex parte* Applicant, and the Notice of Motion dated 18<sup>th</sup> July 2018 is accordingly struck out with no order as to costs. The *ex parte* Applicant is however at liberty to commence fresh judicial review proceedings against the Respondents for an order of mandamus, once the procedure in the Government Proceedings Act has been complied with.

14. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> 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 *ex parte* Applicant’s and Respondents’ Advocates on record.**

**P. NYAMWEYA**

**JUDGE**