



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**JUDICIAL REVIEW APPLICATION NO. 15 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF ORDER 53 RULE 3(1) OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

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

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE DISTRICT CO-OPERATIVE OFFICER, UASIN GISHU.....2<sup>ND</sup> RESPONDENT**

**AND**

**JESSE GITAU.....EX PARTE**

**JUDGMENT**

[1] Before the Court for determination is the Notice of Motion dated **23 April 2019**. It was filed by the law firm of **M/s Manani, Lilan, Mwetich & Company Advocates** on behalf of the *Ex-Parte* applicant pursuant to the provisions of **Sections 8 and 9** of the **Law Reform Act, Chapter 26** of the **Laws of Kenya** and **Order 53 Rule 3(1)** of the **Civil Procedure Rules** for an order of Mandamus to compel the respondents to comply with the Judgment and Decree passed in **Eldoret CMCC No. 57 of 2005** in the sum of **Kshs. 127,330/=**. It was also prayed that the costs of the application be provided for.

[2] The application was grounded upon the Statement of Facts filed by the *Ex-Parte* applicant as well as the Verifying Affidavit filed therewith. The basis assertion in the said documents is that the *Ex-Parte* applicant has a decree in his favour for **Kshs. 127,330/=** which remains unpaid to date; and that the Judgment Debtor has, without any just cause, failed, neglected and or refused to liquidate the decretal sum.

[3] The respondents filed Grounds of Opposition dated **23 September 2020** contending that:

[a] The application misconceived and bad in law and is an abuse of the court process as the prayers sought are untenable;

[b] That the applicant has failed to comply with the provisions of **Section 21** of the **Government Proceedings Act, Chapter 40** of the **Laws of Kenya**;

[c] That the reasons set forth in the application are a mere afterthought and that the Court is unable to grant the same as the

applicants are guilty of misjoinder and non-joinder;

[d] That the application is an abuse of the Court due to the fact that it fails to correct or clarify that the *Ex-Parte* applicant had complied with the requirements set out in the **Government Proceedings Act** to facilitate the payment of the decretal sum;

[e] That the application is full of falsehood, hearsay and unfounded allegations;

[f] That the application is bad in law and should be dismissed with costs to the respondent.

[4] The application was canvassed by way of written submissions, pursuant to the directions made herein on **4 March 2020**; and in support of the application, written submissions dated **25 August 2020** were filed by **Manani Lilan and Mwetich & Co. Advocates**, proposing the following issues for determination:

[a] Whether the respondent was served with the Certificate of Order;

[b] Whether the respondent is the appropriate party in the proceedings; and,

[c] Whether the *Ex-Parte* applicant is entitled to the orders sought.

[5] **Mr. Maina**, learned counsel for the *Ex-Parte* applicant made reference to the Certificate of Costs and the Certificate of Order annexed to the Verifying Affidavit and urged the Court to find that there was full compliance with the requirements of **Section 21** of the Government Proceedings Act. He also submitted that the instant application has been properly brought against the Attorney General and the concerned government agency, as mandated by **Article 256(4)(b)** of the **Constitution** as read with the **Office of the Attorney General Act, 2012**. Counsel further submitted that having participated fully in the lower court matter, the 1<sup>st</sup> respondent cannot now raise the issue of misjoinder.

[6] Lastly, it was the submission of **Mr. Maina** that, since the *Ex-Parte* applicant has demonstrated through the Statutory Statement and the Verifying Affidavit that the decree is yet to be satisfied, sufficient cause had been made for the issuance of the order of Mandamus. He relied on **Republic vs. Attorney General & Another, Ex-Parte James Alfred Koroso**, Nairobi HCJR Misc. Application No. 44 of 2013, to underscore his submission that the *Ex-Parte* application has no other option of realizing the fruits of his judgment against the Government. He accordingly prayed that the application dated **23 April 2019** be allowed and that orders be made in terms of Prayers (a) and (b) thereof.

[7] On behalf of the respondents, written submissions were filed herein dated **23 September 2020** wherein the following two issues were proposed for determination:

[a] Whether the Notice of Motion dated **23 April 2020** is competently before the Court; and,

[b] Whether the order of Mandamus can be granted herein in the circumstances given by the *Ex-Parte* applicant.

[8] **Ms. Tigoi** for the respondents cited Section 21(3) of the Government Proceedings Act and submitted that the duty to pay any money due from the Government is reposed in the Accounting Officer of the concerned Government department; and not the Attorney General; and therefore that the Accounting Officer of the relevant ministry is a necessary party to such an application. For that reason, it was the submission of **Ms. Tigoi** that the instant application is woefully incompetent for failure to enjoin the Principal Secretary of the Ministry of Interior. He relied on **Republic vs. Permanent Secretary Office of the President, Ministry of Internal Security & Another, Ex-parte Nassir Mwandih** [2014] eKLR and **June Seventeenth Enterprises Limited vs. Cabinet Secretary for Ministry of Interior and Coordination of National Government & 2 Others** [2017] eKLR, to support her posturing that the relief sought is not available against the Attorney General, whose role throughout the subject proceedings was merely to provide legal representation to the National Government pursuant to **Article 156** of the **Constitution of Kenya**.

[9] Needless to say that Mandamus is a relief available to litigants under **Article 23(3)(f)** of the Constitution, **Sections 7 and 8** of the **Law Reform Act** and **Order 53** of the **Civil Procedure Rules**. Its scope was well explicated in **Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 1** thus:

"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..."

[10] The *Ex-Parte* applicant had demonstrated that he filed **Eldoret CMCC No. 57 of 2005: Jesse Gitau vs. Attorney General** and obtained a Decree in his favour for **Kshs. 100,000/=** and a Certificate of Costs in the sum of **Kshs. 27,330/=** both dated **7 May 2008**. It was further shown that, by **22 October 2015**, when the instant application was filed, the said Decree and Certificate of Costs had not been satisfied. It cannot be gainsaid therefore that an order of Mandamus would, in the circumstances be the most efficacious remedy; there being no justification at all or explanation of any kind as to why the Decree has remained unpaid from **2008** to date. The respondents have however raised two technical issues, one being whether the application is competently before the Court; and secondly whether the respondents are the proper parties to satisfy the Decree.

[11] On whether the application dated **23 April 2019** is competently before the Court, I have given due consideration to Sections **8 and 9** of

the Law Reform Act, and Order 53 Rule 1 of the Civil Procedure Rules pursuant to which it was filed. Order 53 Rule 1 provides thus in Sub-rules (1), (2) and (3):

**(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.**

**(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.**

**(3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.**

[12] There appears to be no dispute that the *Ex-parte* applicant applied for and was granted leave to file a substantive Judicial Review application; and that it was thereupon that the application dated **23 April 2019** was filed. Although the order itself was not part of the annexed documents, a copy of the application for leave, being **Eldoret High Court Misc. Application No. 325 of 2015** dated **22 September 2015**, was filed along with *Ex-Parte* applicant's Statutory Statement. And, **Mr. Mwetich** confirmed this state of affairs on **22 September 2020**. No objection was thereafter raised in connection with the requirements of **Rule 1 of Order 53, Civil Procedure Rules**; and therefore I am satisfied that the Notice of Motion dated **23 April 2019** is indeed competent from the standpoint of **Rule 1 of Order 53, Civil Procedure Rules**.

[13] The next issue to consider is whether the *Ex-Parte* applicant complied with the requirements of **Section 21** of the **Government Proceedings Act**, which stipulates thus in **Sub-Sections (1) and (2)**:

*“(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.”*

[14] Annexed to the *Ex-Parte* applicant's Verifying Affidavit is a Certificate of Order dated **11 September 2007**, certifying that the *Ex-Parte* applicant was entitled to be paid **Kshs. 127,330/=** by the Government of Kenya; **Kshs. 100,000/=** thereof being the decretal sum and the balance being costs. It was further indicated in the Certificate of Order that the sum was due with interest from **2 October 2006** until the date of full payment; and that the sums due were payable by the Attorney General and the District Co-operative Officer, Uasin Gishu, the two respondents herein.

[15] It was the averment of the *Ex-Parte* applicant that the Certificate was served on the Attorney General as envisaged by **Section 21** of the Government Proceedings Act. Accordingly, it was expected that the Accounting Officer for the ministry in charge of Co-operatives, and not the 2<sup>nd</sup> respondent, would proceed and settle the Decree; for **Subsections (3) and (4)** of **Section 21** of the **Government Proceedings Act**, are explicit that:

*“(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.”*

[16] Accordingly, I fully associate myself with the position taken in **Republic vs. The Attorney General & Another, Ex-Parte James Alfred Koroso** that:

*“...In the present case the ex parte applicant has no other option of realizing the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realized. Unless something is done he will forever be left baby-sitting his barren decree. This state of*

affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit...”

[17] It is noteworthy however that the responsible Accounting Officer was not enjoined to these proceedings. It was for this reason that counsel for the respondents raised the issue of misjoinder if the Attorney General and the non-joinder of the Accounting Officer responsible for Co-operatives and submitted that the order of Mandamus cannot be granted in the circumstances. There is no doubt that the role of the Attorney General is indeed advisory. Article 156(4) of the Constitution of Kenya, 2010 states that:

“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.”

[18] Consequently, whereas the Attorney General’s role is to advise and represent the national government, there are numerous instances where the Attorney General has been sued on behalf of the government in his representative capacity. Hence in Peter Anyang’ Nyong’o & 10 Others vs. Solicitor General [2011] eKLR, Hon. Warsame J. (as he then was) took the following view:

“No doubt the decree is against the Attorney General but in his representative capacity. As stated earlier the Attorney General was representing one arm of the Government and if any costs or liability accrues from his representation, he is obliged to pay the costs. It is for the Attorney General to advise his clients to pay the costs which attracted his representation on behalf of the said client. Being a constitutional representative and being the principal legal advisor to the three arms of the Government, he is required to direct any arm of Government he represented to pay the costs of any suit which he acted on its behalf. Clearly, it is the duty and the function of the Attorney General to advise his client and if a particular organ refuse to pay he will be responsible on behalf of his agent...”

[19] Likewise, in Republic vs. Attorney General ex parte Kahugu Karebe (supra) it was held that:

“Though it is true that the Attorney General had been sued in RMCC 6263/1999 on behalf of the Commissioner of Police, the important point to note is that the Attorney General was the only defendant named in the suit and after full hearing of the applicant’s case on the merits, judgment was entered by a court of competent jurisdiction for the plaintiff (now applicant) against the Attorney General (Respondent). That Judgment remains valid and enforceable since there is no evidence that it has been overturned on appeal or set aside. If the Attorney General was of the view that he was not the proper party to be held liable for acts of negligence attributed to the police officer whose negligence caused personal injuries to the Applicant, he ought to have had himself struck out from the suit as the defendant so that in his place the proper party would have been brought on board as the defendant in his place. The fact that this was not done and judgment was eventually entered for the plaintiff against the Attorney General as the defendant means that the final decree was issued against the Attorney General and the Attorney General is duty bound to satisfy that decree.”

[20] It was in the light of the foregoing that, in Republic vs. Attorney General & another Ex parte Orbit Chemicals Limited [2017] eKLR, it was held that:

“... the failure to commence judicial review seeking the orders of mandamus against the accounting officer, though an irregularity, is not fatal. Considering the role of the Attorney General in such proceedings, the same ought not to be determined simply on non-joinder or misjoinder of parties. This was the position adopted in Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute Nairobi H.C. Misc. Appl. No. 594 of 2002 [2003] KLR 582, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation. This position is even more relevant to proceedings in the nature of judicial review which are neither criminal nor civil and particularly in application for mandamus where what is sought is the enforcement of a decree against the respondent not in his personal capacity but in his official capacity. In such circumstances, the respondent is simply being compelled to facilitate the payment as opposed to imposing personal liability.”

[21] As I am in full agreement with the position taken in the foregoing persuasive authorities, it follows that the argument raised by counsel for the respondent against the issuance of an order of Mandamus against the Attorney General is untenable. In the result, I find merit in the application dated 23 April 2019 and would allow the same with costs, which I hereby do. It is accordingly hereby ordered that an order of Mandamus be and is hereby issued compelling the Attorney General, the 1<sup>st</sup> respondent herein, to comply with the judgment and decree issued in Eldoret CMCC No. 57 of 2005 to pay unto the Ex-Parte applicant Kshs. 127,330/= together with interest thereon from 12

**October 2006** until the date of full payment.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2020**

**OLGA SEWE**

**JUDGE**