



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 202 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL.....RESPONDENT**

**EX PARTE :**

**JOHN MBUGUA WAKAHU**

**JUDGMENT**

**The Application**

1. John Mbugua Wakahu, the *ex parte* Applicant herein, (hereinafter “the Applicant”), filed a suit against the Attorney General on 12<sup>th</sup> June, 2012 namely **Nairobi Chief Magistrate’s Civil Case Number 3089 of 2012- John Mbugua Wakahu –vs- The Hon. Attorney General**, claiming special damages from the Ministry of Defence arising out of a motor vehicle accident that occurred on 15<sup>th</sup> June, 2011. Judgment was delivered in the said suit on 13<sup>th</sup> May, 2015, and the Applicant was awarded damages of Kshs. 295,897/- plus interest thereon at 12% per annum from 12<sup>th</sup> June, 2012. Costs in the suit were assessed at Kshs. 74,950/- and a certificate thereto issue on 11<sup>th</sup> May, 2016. He also stated that a Certificate of Order Against the Government issued on 29<sup>th</sup> August, 2016.

2. The Applicant has now filed an application before this Court by way of a Notice of Motion dated 18<sup>th</sup> October 2018, in which he seeks the following orders:

**a) An order for Judicial Review by way of an order for mandamus directed to the Principal Secretary of the Ministry of Defence as the accounting officer of the Ministry of Defence to make payment of the amount of Kshs. 526,857.33 with further interest at 12% per annum from 12<sup>th</sup> June, 2012 until payment in full in satisfaction of the decree issued in Nairobi Chief Magistrate’s Civil Case No. 3089 of 2012- John Mbugua Wakahu –vs- The Attorney General.**

**b) Costs to this application be borne by the Respondent.**

3. The Application is supported by the grounds on its face and the Supporting Affidavits of John Mbugua Wakahu sworn on 16<sup>th</sup> May, 2018 and the Further Affidavit of Margaret Miringu sworn on 8<sup>th</sup> October, 2018.

4. According to the Applicant, the Principal Secretary of the Ministry of Defence as the Accounting Officer of the Ministry of Defence is by law required to satisfy the judgment herein, the Certificate of Order Against the Government having been served upon the Hon. Attorney General on 16<sup>th</sup> September, 2016. In a nutshell, he averred that the decretal sum due to the Applicant from the Attorney General as at 15<sup>th</sup> July, 2016 is Kshs. 526,857.33 as set out in the Certificate of order against the government with further interest of 12% per annum from 16<sup>th</sup> July, 2016 until payment in full. He therefore urged the court to allow the application.

5. Margaret Miring, an advocate from the firm of Advocates representing the Applicant in this suit, in addition annexed the judgment delivered on 13<sup>th</sup> May, 2015 by Hon. Nchoe, Resident Magistrate in **Nairobi Chief Magistrate’s Civil Case Number 3089 of 2012- John Mbugua Wakahu –vs- The Hon. Attorney General** to her Further Affidavit.

6. Hamilton Harrison & Mathews Advocates for the Applicant filed submissions dated 4<sup>th</sup> December 2018, wherein it was contended that the Applicant holds a valid decree and certificate of order against the Government, but that the judgement remains unsatisfied to date with no recourse available to him to enforce the decree in the usual manner of attachment or arrest and committal to civil jail, save for moving the court by way of judicial review pursuant to Section 21 of the Government Proceedings Act. Counsel also submitted that the Applicant had legitimate expectation that an order of the court will be obeyed particularly by a government officer, and relied on the case of **Kenya National Examination Council –vs- Republic Ex-parte Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR** where the court examined the scope of an order of Mandamus.

7. Counsel further submitted that the Principal Secretary of the Ministry of Defence as the Accounting Officer of the Ministry of Defence is by law required to satisfy the judgment and relied on the case of **Republic –vs Attorney General & Another Ex-parte Ongata Works Limited (2016) eKLR** where it was held that once the certificate of order against the Government is served on the Hon. Attorney General, Section 21(3) of the Government Proceedings Act imposes a statutory duty on the accounting officer to pay the sums specified in the said order to the person entitled or to his advocate, together with any interest lawfully accruing thereon.

8. In conclusion, the Applicant stated that no reason had been put forward by the Respondent's failure to settle the decretal amount which continues to accrue interest thereby denying the Applicant the fruits of his judgment, and adding an unnecessary burden on the tax payer by way of interest that continues to accrue. He therefore urged the court to grant the orders sought and to compel the Respondent to settle the decretal amount.

9. The Attorney General who was the Respondent herein did not file any response or submissions to the said application.

### **The Determination**

1. I have considered the pleadings by the Applicant, and 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 exparte Gathenji and 9 Others, [1997] eKLR**, 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..... .”**

2. It is not disputed in the present application that judgment was entered in favour of the Applicant in **Nairobi Chief Magistrate's Civil Case Number 3089 of 2012- John Mbugua Wakahu vs The Hon. Attorney General**. The issues therefore that require to be determined are firstly, whether the Principal Secretary of the Ministry of Defence is under a public duty and obligation to satisfy the decree and orders issued in favour of the Applicant in the said judgment, and secondly, if so, whether the Applicant is entitled to the relief he seeks.

3. 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.”

4. 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)** 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.”

5. In the present application, the amount due from the Respondent has not been disputed, and the Applicant in this respect annexed copies of the judgment delivered on 13<sup>th</sup> May 2015, and decree and certificate of costs issued on 11<sup>th</sup> May 2016 in **Nairobi Chief Magistrate’s Civil Case Number 3089 of 2012- John Mbugua Wakahu vs The Hon. Attorney General** whereby it is stated that judgment was entered for the Applicant against the Respondent for the sum of Kshs 295,897/=, with interest and costs. The decree was for the amount of Kshs 399,501.48 made up of the principal sum and interest thereon at 12% from 12<sup>th</sup> June 2012 to 13<sup>th</sup> May 2015. The certificate of costs was for an amount of Kshs 74,950.00.

6. The Applicant also annexed a Certificate of Order against Government that was issued in the said suit on 29<sup>th</sup> August 2016, for the amount of Kshs 526,857.33 being the decree amount and further interest thereon at 12% per annum from 14<sup>th</sup> May 2015 until 15<sup>th</sup> July 2016, and costs. A letter dated 14<sup>th</sup> September 2016 by its Advocate to the Respondent, attaching the aforesaid judgment, decree and Certificate of Order against Government. All these document bore stamps acknowledging receipt by the Respondent.

7. As to whether the Principal Secretary of the Ministry of Defence is under a duty to pay the said amount, this Court however notes that while the Applicant is seeking an order of mandamus against the Principal Secretary of the Ministry of Defence, the said Principal Secretary was not joined as a party to these judicial review proceedings, and the Applicant has only sued the Attorney General.

8. The effect of such non joinder of the Principal Secretary and whether it is fatal to this application was discussed by Odunga J. in **Republic v Attorney General Ex Parte Zeitun Juma Hassan [2017] eKLR** as follows:

“19. It is therefore clear that in applications for *mandamus* seeking to compel the satisfaction of a decree, it is the accounting officer of the relevant government department that is obliged to satisfy the decree notwithstanding the fact that the said officer was not a party to the trial proceedings and that in fact the only defendant therein was the Attorney General. Therefore whereas I agree with the position in **Peter Anyang’ Nyong’o & 10 Others vs. Solicitor General [2011] eKLR**, that it is for the Attorney General to advise his clients to pay the costs which attracted his representation on behalf of the said client and that 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; I however do not subscribe to the view that if any costs or liability accrues from his representation, he is obliged to pay the same and that if a particular organ refuses to pay he will be responsible on behalf of his agent.

20. It is however my view that the failure to commence judicial review proceedings 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. It is therefore my view that whereas misjoinder or non-joinder may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed where the substance of the reliefs sought can still be realised notwithstanding the irregularity. Article 159(2)(d) of the Constitution enjoins this Court to administer justice without undue regard to technicalities of procedure, as long as the rules of natural justice are adhered to. At the end of the day the entity which is bound to settle the decree is the national Government and not the said officer in his personal capacity.”

9. I am in agreement with the position held in the said case that the Attorney General as the principal legal adviser of Government, is under a duty to represent, and advise the Principal Secretary of the Ministry of Defence on the outcome of this case, and more particularly so in this case as he was the party that was sued in on behalf of the Ministry of Defence in **Nairobi Chief Magistrate’s Civil Case Number 3089 of 2012- John Mbugua Wakahu vs The Hon. Attorney General** . The Ministry of Defence was also found culpable in the said suit, and as such is the one under a duty to pay the decretal sum to the Applicant, through its accounting officer.

10. This Court therefore finds that as judgment was already entered in favour of the Applicant with respect to the demanded decretal amount and costs, the procedure stated in section 21 of the Government Proceedings Act has largely been followed, and there has been a demand for payment made to the Respondent, there is a duty upon the Principal Secretary in the Ministry of Defence who is the relevant accounting officer, to pay a debt already decreed by a competent Court of law to be due and payable by them.

11. The only clarification that needs to be made is that of the rate of interest payable on the decretal sum, in that the Certificate of Order against the Government as stated hereinabove indicated that the demanded amount of Kshs 526,857.33 was of the decree amount and interest thereon at 12% per annum until 15<sup>th</sup> July 2016. Therefore interest payable on the said amount is as from 16<sup>th</sup> July 2016 and not 12<sup>th</sup> June 2012 as sought by the Applicant in the Notice of Motion dated 18<sup>th</sup> October 2018.

12. In the premises, I find that the Applicant’s Notice of Motion dated 18<sup>th</sup> October 2018 is merited. I accordingly grant the following orders:

**(a) An order of mandamus is hereby issued compelling the Principal Secretary of the Ministry of Defence as the accounting officer of the Ministry of Defence to effect payment of the sum of Kshs. 526,857.33 with interest thereon at 12% per annum from 16<sup>th</sup> July, 2016 until payment in full, to John Mbugua Wakahu, the Applicant herein, in satisfaction of the decree issued in Nairobi Chief Magistrate’s Civil Case No. 3089 of 2012- John Mbugua Wakahu vs The Attorney General.**

**(b) Due to the misjoinder or non-joinder of parties, there will be no order as to costs.**

13. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 13<sup>TH</sup> DAY OF FEBRUARY 2019**

**P. NYAMWEYA**

**JUDGE**