



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 13 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

EXPARTE

JOHN WANYOIKE KAMAU.....1ST SUBJECT

JOSEPH KAMAU MUIGAL.....2ND SUBJECT

JOHN WAINAINA NJUGUNA.....3RD SUBJECT

DAVID NDEGWA MUREITHI.....4TH SUBJECT

JUDGMENT

1. The *Ex Parte* Applicants herein sued the Respondent and one, Bernard Hinga, in Nakuru Chief Magistrate's Civil Suit No. 54 of 2008 on a claim for general damages for unlawful arrest, detention, and malicious prosecution, special damages and costs and interests of the suit.
2. A final judgment was entered on 24/10/2011 in favour of the Applicants and against the Respondent and Bernard Hinga. The judgment was for general damages for Kshs. 300,000/- and Kshs. 25,550/- as special damages. The liability was both joint and several.
3. Neither Bernard Hinga nor the Respondent satisfied the decree arising from the judgment.
4. The Respondents having declined, refused and/or neglected to pay the sums due, the Applicants, pursuant to leave granted by the Court, took out Judicial Review Proceedings seeking the following single prayer:

An Order of Mandamus to compel the Attorney General to satisfy the decretal sum and costs totaling to Ksh 663,995/= in Nakuru CMCC No. 54 of 2008.

5. The Honourable Attorney General did not enter appearance despite being served. In the last two scheduled hearings Mr. Weche and Ms. Cheruiyot from the State Law Office appeared in Court and pledged to enter appearance and file responses. However, on the day the suit was scheduled for hearing neither of them showed up. They also had not filed any file any Grounds of Objection or Replying Affidavit to the Application.
6. I have, therefore, treated this Application as un-opposed. Still, I am required to satisfy myself that it is appropriate to issue the orders sought.
7. It is not in doubt that section 21(4) of the Government Proceedings Act prohibits execution against the Government. The said provision states:

Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, 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.

8. However section 21 (1) of the Act provides:

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.

9. Section 21 (3) of the said Act on the other hand provides:

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.

10. As many decisions in our jurisdiction have pointed out, the effect of these provisions is that whereas execution proceedings as are known to law are not available against the Government, the Accounting Officer for the Government department concerned is nevertheless under a statutory duty to satisfy a judgement made by the Court against that department. That Accounting Officer can be compelled by an order for mandamus to do so. This is what the Applicant seeks here.

11. As the Court of Appeal said in **Republic vs. Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996** while citing with approval **Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89:**

The order of mandamus is of 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.

12. In the present case, the Applicant has obtained a Certificate of Costs against the Government as required by the Statute. They have served it on the Attorney General as required by the Statute. The Attorney General has failed to make the payments. The Honourable Attorney General is under a duty to make the payment and no lawful justification for non-payment has been proffered.

13. In the circumstances, the order prayed for by the Applicants is merited. It is hereby granted as prayed in the Notice of Motion dated 12/06/2018.

14. Orders accordingly.

Dated and delivered at Nakuru this 14th day of March, 2019

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JOEL NGUGI

JUDGE