



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW 45 OF 2013

RUFUS MAINA NJIHIA.....PLAINTIFF

VERSUS

BOARD OF GOVERNORS LORETO HIGH SCHOOL.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The *Ex Parte* Applicant herein sued the Respondents in Nakuru Chief Magistrate's Civil Suit No. 1997 of 1999 over personal injury he sustained following a road traffic accident involving a Motor Vehicle owned by the 1ST Respondent.
2. Judgment was entered in the suit against the Respondents jointly and severally for general damages of Kshs. 340,000/-; costs of the suit and interests at court rates till payment in full.
3. A decree was drawn on 05/11/2012 for Kshs. 417,447/- and additional court fees of Kshs. 16,230/-. The total is Kshs. 433,675/-.
4. The Respondents have declined, refused and/or neglected to pay the sum. Consequently, the Applicant, pursuant to leave granted by the Court, took out Judicial Review Proceedings seeking the following two prayers:

1. This honourable court be pleased to issue an Order in the nature of a Mandamus directed to the Respondent's compelling and/or commanding them to pay the sum of Ksh 433,675/= plus interest at Court's rate from the date of filing suit till payment in full being the decretal sum inclusive of costs in Nakuru CMCC No. 1997 of 1999, pursuant to Section 20 and 21 of the Government Proceedings Act.

2. That costs of this Application be provided for.

5. The Honourable Attorney General entered appearance but did not file any Grounds of Objection or Replying Affidavit to the Application. When the parties appeared before me on 26/06/2018, Mr. Ondieki, Learned State Counsel, asked for 40 days to follow up the matter because it was likely to be paid by an Insurance Company. He later on indicated that the Honourable Attorney General was interested in settling the matter. He asked for several mention dates to get instructions. Ultimately, on 04/03/2019, Mr. Ondieki informed the Court that the Honourable Attorney General had not yet paid and that, since he had no further instructions, the Honourable Attorney General was not going to file any more documents in the case. He requested for a judgment based on the documents filed.

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 orders prayed for by the Applicant are eminently merited. They are hereby granted as prayed in the Notice of Motion dated 26/03/2018.

14. Orders accordingly.

Dated and delivered at Nakuru this 7th day of March, 2019

.....

JOEL NGUGI

JUDGE