



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

JUDICIAL REVIEW APPLICATION NO.103 OF 2013

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JOSEPH EGALA MAGOMERE.....EX-PARTE APPLICANT

RULING

By way of notice of motion dated 24th May 2013 under the provisions of order 53 Rule 3(1) of the Civil Procedure Rules, 2010, the Ex parte- applicant moved this court seeking order for mandamus be and hereby issued to compel the Respondent herein to make good and/or settle the amount of Kshs.290,000/= plus interest from January 2009, plus costs of Kshs.76,470/= decreed and/or awarded by the Senior Resident Magistrate court on 17/11/2011 in Bungoma CMCC No.533 of 2010 between the Ex-parte Application and the Respondent (Joseph Egala Magomere Vs. The Attorney General).

The application was supported by affidavit of Joseph Egala Magomere in which he briefly deponed that he instituted a suit in Bungoma CMCC No.533 of 2010 claiming a sum of Kshs.290,00/= plus cost and interest and after full hearing of the matter court entered judgement against the Defendant.

That since judgement was entered the Respondent has failed, refused ignored to settle decretal amount and the same remained unpaid now for over 2 years. He stated that it is imperative that the Respondent be compelled to settle and/or the amount by this court.

The Respondent filed grounds of opposition dated 26th July 2013 opposing the application on the grounds that the application is premature and misconceived in that the Exparte Applicant has not complied with section 21 of the Government Proceedings Act and order 21 rules 3 of Civil Procedure Rules in that he has not provided to the Respondent with Decree, certificate of costs and certificate of order against the Government to facilitate payment of the decretal sum.

Factual Basis of the claim

The Plaintiff/Applicant herein sued the Respondent claiming a payment of Kshs.290,000/= and facts giving rise to Plaintiff claim is that he entered into an agreement with the Defendant which defendant agreed to compensate the plaintiff a sum of Kshs.596,000/= being payment for a building erected on plaintiff's on plot Number 16 Kamukuywa, which the plaintiff surrendered to the Government.

The Applicant was paid a sum of Kshs.306,000/= leaving a balance of Kshs.290,000/= that remained unpaid.

Upon hearing the suit to wit BUNGOMA CMCC NO. 533 OF 2010, F.KYAMBIA SRM entered judgement on 17/11/2011 in favour of the Exparte Applicant against the Defendant/Respondent for the Kshs.290,000/= plus interest from January 2009 until payment in full.

That since 2011 the Respondent herein has neglected and/or refuse to satisfy the claim consequently the Exparte Applicant applied for and was granted leave to apply for an order of mandamus to compel the Respondent herein to abide by the order of court in BUNGOMA CMCC NO. 533 OF 2010.

By consent the application was argued by way of written submissions. The applicant submitted through their counsel on record that the applicant seeks an order of mandamus against the Respondent pursuant to a decree issued on 7/12/2012 and since the entry of judgement and decree and there has been no justifiable reason by the Respondents of their refusal to honour the same.

He submitted that the applicant in seeking such order of mandamus not essentially relief against the government but to compel a government official to do what the government through parliament has directed him to do. He relied on a number of supporting authorities and urged this court to adopt the reasoning and grant the orders sought as the instant case in true.

In response to grounds of opposition he submitted that the *ex parte* application is squarely on and/or the purview of order 53 as envisaged in law.

He further submitted that the respondent was served vide a letter dated 22/7/2014 with copies of the following documents the certificate of costs, a certificate of order, a decree(duly executed) and certified copy of the judgement in compliance with section 21 of the Government Act and the applicant has demonstrated efforts made towards enforcing the decree herein and since the applicant seeks to enforce the judgement against the government the only available remedy is mandamus and the instant application is merited and should be allowed with costs.

The Respondent herein did not file submissions to the *ex-parte* application.

Determination

I have analyzed the pleadings, affidavits and submissions made before this court by the appellant and the respondent taking into account all the decisions relied on. In my view, the issues for determination is whether the *Ex parte* Applicant is entitled to orders sought in the application.

The applicant herein is seeking an order of mandamus against the Respondent. Section 21 of the Government Act makes provision for satisfaction of orders against the government. 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.”

The circumstances under which judicial review order of *mandamus* are issued were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council Ex parte Gathenji & Others Civil Appeal No. 266 of 1996** *inter alia* as follows:

“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 or 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...These principles mean that an order of mandamus compels 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.”

It is my finding that the suit giving rise to the application was filed, was prosecuted and Judgment delivered on 17th November 2011 for KShs.290,000/= as general damages, interest and costs were also given. A copy of the said Judgment and decree is annexed to the affidavit of the Applicant as Exhibit No. JEM 2(b) and JEM 2(b). Also Copies of letters of demand addressed to the Office of the Attorney General dated 10th January 2012 and 11th December 2012. The *Ex parte* Applicant seeks the order of mandamus to compel the Respondents to perform a public duty which has been imposed on him as chief legal adviser of the government due to breach of agreement. They have failed to satisfy the decree to the detriment of the Applicant who has a legal right.

To determine this issue I will draw the attention of the parties to **Republic Vs. The Attorney General & Another Ex parte James Alfred Kosoro** [Misc. Application JR No.44 of 2012] Judge G.V. Odunga in similar application as this stated:

“...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 babysitting 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....The institution of judicial review proceedings in the nature of mandamus cannot be equated with execution proceedings. In seeking an order for mandamus the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a

Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In mandamus cases it is recognized that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it. In other words, mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of mandamus, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."

I adopt my reasoning in the said case.

In the present case the Respondent has not provided any convincing reason why they have not been able to settle the decretal amount . Accordingly, an order of mandamus is hereby issued directed at the Respondent compelling him to pay the Exparte Applicant KShs.290,000/= together with costs and interests being the decretal sum arising out of Bungoma CMCC No.533 of 2010.

I so order.

Dated and Delivered at Bungoma this 12th day of June, 2019.

S.N. RIECHI

JUDGE