



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW MISC. APPLN NO. 1 OF 2017**

**REPUBLIC ..... APPLICANT**

**AND**

**PHILIP KIPKEMBOI MURREY ..... EX PARTE APPLICANT**

**VERSUS**

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

**RULING**

The applicant filed a Notice of Motion dated 29<sup>th</sup> May 2017 under *Order 53* of the *Civil Procedure Rules* seeking orders that;

a) The court grant an order of mandamus directed to the respondent compelling them to comply by paying the decretal sum of Kshs. 362,200/-, costs at Kshs. 153,886/- and interest for decree at 7% from 21<sup>st</sup> June 2001 of Kshs. 319,676/- making a total sum of kshs. 799,762/- with an interest rate of 14% p.a from 10<sup>th</sup> November 2015 till payment in full being the decretal sum and costs in respect of Eldoret CMCC No. 238 of 2014.

The application is based on the following grounds;

- a) The Ex parte Applicant and the Attorney General were plaintiff and defendant respectively in Eldoret CMCC 238 of 2014.
- b) Judgment was entered against the Attorney general and in favour of the Ex-parte Applicant on 31<sup>st</sup> July 2015 and a decree issued on 10<sup>th</sup> November 2015 for the sum of Kshs. 362,200/-, costs at Kshs. 153,886/- and interest for decree at 7% from 21<sup>st</sup> June 2001 of Kshs. 319,676/- making a total sum of kshs. 799,762/-
- c) The defendant has taken no steps to satisfy the decree.
- d) The Ex-Parte Applicant has a right to enjoy the fruits of judgment.

**APPLICANT'S CASE**

The certificate of costs against the Attorney General and decree both issued on 25<sup>th</sup> February 2016 were served upon the Attorney General on 20<sup>th</sup> April 2016 as per section 21 of the Government Proceedings Act. The Attorney General failed to honour the decree and certificate of costs. The applicant relied on the case of **Republic v The Attorney General & Another Ex-Parte James Alfred Koroso (2013) eKLR** on mandamus orders and their application.

The Attorney General is under obligation to pay the decretal sum and the costs of the suit. The office of the Attorney General is obliged to obey the law and discharge all its statutory and legal obligations. It is the duty of the government to abide by the law which includes compliance with court orders. He relied on the case of **Republic v Town Clerk of Webuye County Council & Another HCCC 448 of 2006** on the decree holder's right to enjoy the fruits of his judgment. He further cited *Section 21* of the *Government Proceedings Act* and *Article 159(2)* of the *Constitution of Kenya*.

He further submitted that he has done all that is required to demand payment of the decretal sum and all efforts have been ignored. Given the limitation of time to satisfy the decree he has been left with no choice but to file for orders of Mandamus.

**RESPONDENT'S CASE**

The respondent filed submissions and grounds of opposition to the application. The opposition is premised on the grounds that;

- a) The applicant failed to comply with *Section 21* of the *Government Proceedings Act*.
- b) The Application is an afterthought and the plaintiff is guilty of non-joinder and misjoinder.
- c) The application is an abuse of the court process as it fails to clarify whether the applicant complied with the requirements for settlement of payment by the Government.

The respondent submitted that as per *Section 21(3)* of the *Government Proceedings Act* the accounting officer of the relevant ministry is a necessary party and the application is incompetent as it fails to enjoin the permanent secretary of the Ministry of Interior to compel payment of the decretal sum. He relied on the case of **Republic v Permanent Secretary Office of the President, Ministry of Internal Security and Another Ex-Parte Nassir Mwandishi (2014) eKLR.**

He further submitted that it would be erroneous for parties and the court to infer that the Attorney General is the accounting officer and therefore under an obligation to ensure that the Government will satisfy judgment. The provisions of the *Government Proceedings Act* are mandatory in their terms therefore the orders if granted will be a mere paper order without any hope of enforcement.

The respondent cited the case of **June Seventeenth Enterprises Limited v Cabinet Secretary for Ministry of Interior and Coordination of National Government and 2 others [2017] eKLR** where it was held mandamus will not be granted in situations where the duty of the Government official is not defined or is advisory.

The orders sought are untenable as they cannot be enforced and there is no party to hold accountable if said orders are not complied with. It is not in dispute that judgment was given in favour of the applicant, what is in dispute is whether the Attorney General as the legal representative of the Government is the accounting officer and therefore under duty to satisfy the decretal amount.

He prayed that the application be dismissed with costs for want of merit.

#### ISSUES FOR DETERMINATION

- a) Whether the Applicant complied with the Provisions of section 21 of the *Government Proceedings Act*
- b) Whether the order for Mandamus is enforceable against the Attorney General

#### WHETHER THE APPLICANT COMPLIED WITH THE PROVISIONS OF SECTION 21 OF THE GOVERNMENT PROCEEDINGS ACT

*Section 21* of the *Government Proceedings Act* provides;

##### 21. Satisfaction of orders against the Government

(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.

**(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.**

Section 21(3) of the Act provides that the accounting officer for the Government department concerned pay the person entitled to the amount stated in the certificate of costs where the order provides for payment of money.

In Shah vs. Attorney General (No. 3) Kampala HCCM No. 31 of 1969 [1970] EA 543 the court held;

**Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do**

**or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...**

This therefore establishes the principles behind granting orders for Mandamus as;

- a) The duty is in the nature of a public duty.
- b) The duty affects the rights of an individual.
- c) There is no more appropriate remedy.
- d) The person or authority to whom it is issued must be under a statutory or legal duty to do or not to do something.
- e) The duty is of an imperative nature

It is a requirement that the orders are to be issued to a party who is under a statutory duty to do something. The applicants have not demonstrated that the respondent had a duty *per se*, the compliance with court orders is not a statutory duty that is specific to the Attorney General. The applicants would have been better placed to file contempt proceedings. Complying with court orders is not in the nature of a public duty. There exists a more appropriate remedy of contempt proceedings.

In the premises the application fails as it has not met the threshold required for orders of Mandamus to be granted.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 22<sup>nd</sup> day of July, 2019.**

In the absence of;

Mr. Tum for the Applicant

Mr. Tigor for the Respondent

Ms Sarah - Court assistant