



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 465 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY,

MINISTRY OF INTERNAL SECURITY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

EX PARTE :

FRANCIS KHASHIYI IVAYO

JUDGMENT

The Application

1. The *ex parte* Applicant herein, Francis Khashiyi Ivayo, was the 2nd Petitioner in **Nairobi High Court Petition No. 197 of 2012** as consolidated with **Nairobi High Court Petition No. 132 of 2011**, wherein judgment was delivered in his favour on 18th August 2016 as against the Principal Secretary, Ministry of Internal Security and the Attorney General, the 1st and 2nd Respondents herein. The *ex parte* Applicant was awarded a total of Kshs 2,136,890/= as damages, together with costs in the said judgment.
2. The *ex parte* Applicant has now filed the instant judicial review proceedings by way of a Notice of Motion dated 23rd January 2019, seeking orders of mandamus against the 1st and 2nd Respondents to pay him the sum of Kshs 2,829,492.71/=, being the decretal sum in **Nairobi High Court Petition No. 132 of 2011**, together with interest thereon at 12% per annum from 18th August 2016 until payment in full. The 1st Respondent is sued in his capacity as the Accounting Officer in the Ministry of Internal Security, while the 2nd Respondent is sued in his capacity as legal adviser to the National Government.
3. The grounds for the application are stated in a statutory statement by his Advocates dated 28th November 2018, and a verifying affidavit sworn on the same date by *ex parte* Applicant.
4. In summary, the *ex parte* Applicant's case was that after judgment was entered in his favour in **Nairobi High Court Petition No. 132 of 2011**, he obtained the decree and a Certificate of Order against the Government on 19th March 2018, for the sum of Kshs 2,829,492.71/= which included the costs of the suit and interest thereon until 7th February 2018. However, that despite several demands made on the 1st and 2nd Respondents, they have failed to settle the decretal amount and the amount due as costs and interest.
5. Further, that the 1st Respondent is under a public duty to make the said payments and is unlawfully neglecting or refusing to do so, and is acting in excess of his powers in doing so. Further, that the 1st Respondent has abdicated his duties and powers in withholding the exercise of his public duty, and has acted against the legitimate expectations of the *ex parte* Applicant. The *ex parte* Applicant annexed copies of the aforesaid judgement, decree and Certificate of Order against Government.
6. The Respondent did not file a response to the application despite being given several opportunities and timelines within which to file

submissions, but failed to do so. The Court directed that the application would be canvassed by way of submissions. Once again while the *ex parte* Applicant's Advocates on record, Mainigi Musyimi & Associates filed submissions dated 23rd April 2019, the Respondent's counsel did not file any submissions.

The Determination

7. The *ex parte* Applicant submitted that the amount due is not disputed, and that as per section 21 of the Government Proceedings Act, the Applicant is required to do no more than obtaining a Certificate of Order against the Government to prove the amount which is due to them. Further, that upon service on the Attorney General, the certificate imposes a statutory duty on the Accounting Officer to whom it is directed to pay the sums contained therein. Reliance was placed on the case of **Republic vs Attorney General & Anor ex parte Ongata Works Limited (2016) e KLR** for this position.

8. Further, that the only legal means by which the *ex parte* Applicant can recover the said amount is by way of mandamus, and the decision in **Republic vs Attorney General & Another ex parte James Alfred Koroso (2013) e KLR** was cited in this regard. Also cited was the decision in **Republic vs Principal Secretary State Department of Interior, Ministry of Interior & Coordination of National Government & Another ex parte Salim Awadh Salim & 12 Others (2018) e KLR** for the position that under Article 159 justice is required to be done without delay. Lastly, the *ex parte* Applicant relied on the decision in **Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others, [1997] e KLR** on the circumstances under which an order of mandamus can be issued, and urged the Court to compel the Respondents to settle the sums due.

9. I have considered the pleadings and submissions by the *ex parte* Applicant, as well as 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 ex parte Gathenji and 9 Others, (supra)**, 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, 4th 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..... .”

10. It is not disputed in the present application that judgment was entered in favour of the *ex parte* Applicant in in **Nairobi High Court Petition No. 197 of 2012** as consolidated with **Nairobi High Court Petition No. 132 of 2011**. The issues therefore that require to be determined are firstly, whether the Respondents are under a public duty and obligation to satisfy the decree and orders issued in favour of the *ex parte* Applicant in the said judgment, and secondly, if so, whether the Applicant is entitled to the relief he seeks.

11. 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.”

12. 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.”

13. In the present application, the amount due from the Respondents has not been disputed, and the *ex parte* Applicant in this respect annexed copies of the judgement dated 18th August 2016 and decree awarded in in **Nairobi High Court Petition No. 197 of 2012** as consolidated with **Nairobi High Court Petition No. 132 of 2011**, whereby it is stated that judgment was entered for the *ex parte* Applicant against the Respondents for the sum of Kshs 2,000,000/= for general damages, Kshs 80,000/= for future medical costs, Ksh 53,390/= for medical costs and Kshs 3,500/= for the medical report. Interest was also awarded at Court rates on each the limbs of the award from the date of the judgment until payment in full.

14. The *ex parte* Applicant also annexed a Certificate of Order against Government for Kshs 2,829,492.71 that was issued in the said suit on 19th March 2018 which in addition to above stated award, included interest of Kshs 374,564.71 from 18th August 2016 to 7th February 2018, and taxed costs of Kshs 318,038/= . The said Applicant in addition annexed copies of various correspondence on the request for payment, including letters by his Advocates dated 21st March 2018, 24th April 2018, 25th May 2018 and 1st August 2018 addressed to the Attorney General and which enclosed the said Certificate of Order against Government. The Attorney General in a letter dated 3rd September 2018 sought copies of various documents, which were duly sent by the Applicant’s advocates by way of a letter dated 13th September 2018.

15. This Court therefore finds that as the *ex parte* Applicant has judgment in its favour with respect to the demanded decretal amount and costs, and the procedure stated in section 21 of the Government Proceedings Act has largely been followed, there is a duty upon the 1st Respondent to pay a debt already decreed by a competent Court of law to be due and payable by them.

16. The only clarification that needs to be made is that of the interest payable on the decretal sum. In this regard, the amount of Kshs 2,829,492.71 in the Certificate of Order against the Government issued on 19th March 2018 to the *ex parte* Applicant includes interest on the decretal sum and costs until 7th February 2018. Interest therefore is only payable as from 8th February 2018.

1. In the premises, I find that the Applicant’s Notice of Motion dated Notice of Motion dated 23rd January 2019 is merited. I accordingly grant the following orders:

(a) An order of mandamus directed to the 1st and 2nd Respondents herein to comply and pay the *ex parte* Applicant Kshs 2,829,492.71/=, being the decretal sum and costs in **Nairobi High Court Petition No. 197 of 2012** as consolidated with **Nairobi High Court Petition No. 132 of 2011**, with interest thereon at the rate of 12% per annum from 8th February 2018 until payment in full.

(b) The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 23rd January 2019 of Kshs 30,000/=.

2. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF JULY 2019

P. NYAMWEYA

JUDGE