



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 7 OF 2019

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY,

MINISTRY OF INTERNAL SECURITY.....RESPONDENT

EX PARTE :

GEORGE NGIGE NJOROGE

JUDGMENT

The Application

1. The *ex parte* Applicant herein, George Ngige Njoroge, was the Plaintiff in **Nairobi High Court Civil Case No. 205 of 2013**, wherein judgment was delivered in his favour on 19th April 2018 as against the Principal Secretary, Ministry of Internal Security and the Attorney General, the Respondent herein. The *ex parte* Applicant was awarded Kshs 4,803,000/= as general and special damages, together with costs in the said judgment. The Respondent is sued in his capacity as the Accounting Officer in the Ministry of Internal Security.

2. The *ex parte* Applicant has now filed the instant judicial review proceedings by way of a Notice of Motion dated 17th January 2019, seeking orders of mandamus against the Respondent herein to forthwith and without delay perform his duty by causing to be paid to the *ex parte* Applicant the decretal sum plus costs and interests as follows:

- (a) Kshs 4,800,000/=, being general damages plus Kshs 3,000/- being special damages awarded on 19th April 2018.
- (b) Kshs 480,000/= being interest on general damages calculated at 12% per annum from 19th April 2018 to 18th February 2019.
- (c) Kshs 2,040/= being interest on special damages calculated at 12% per annum from 19th April 2018 to 18th February 2019
- (d) Taxed costs of Kshs 406,683/=
- (e) Interest on tax costs calculated at 14% per annum from 19th April 2018 to 18th February 2019.
- (f) Further interest at 12% on general damages of Kshs 4,800,000/= from 19th February 2019 until payment in full.
- (g) Further interest at 12% on special damages of Kshs 3,000/= from 19th February 2019 until payment in full
- (h) Further interest at 14% on Taxed costs of Kshs 406,683/= from 19th February 2019 until payment in full

3. The grounds for the application are stated in a statutory statement by his Advocates dated 16th January 2019, and a verifying affidavit sworn on the same date by *ex parte* Applicant. In summary, the *ex parte* Applicant's case was that after judgment was entered in his favour

in **Nairobi High Court Civil Case No. 205 of 2013**, his advocates extracted the decree and filed a Bill of Costs which was taxed at Kshs 406,683/= Further, that his Advocates thereafter extracted a Certificate of Order against the Government and served the Attorney General with a copy of the judgment, decree, Certificate of Taxation and Certificate of Order against the Government on 29th August 2018, However, that several inquiries by his Advocates made to the Attorney General about payment have not elicited any response. The *ex parte* Applicant annexed copies of the judgement, decree, Certificate of Taxation and Certificate of Order against Government.

4. Further, that having engaged the Attorney General, the Respondent is aware of the said judgment, and that by abdicating his responsibilities he is incurring expenses as a result of accruing interest which is being transferred to the taxpayer. Lastly, that it is only through an order of mandamus compelling the Respondent to pay the amount owed that the *ex parte* Applicant will enjoy the fruits of his judgement.

5. The Respondent did not file a response to the application despite being given several opportunities and timelines within which 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, Charles Gomba & Company Advocates filed submissions dated 9th April 2019, the Respondent's counsel did not file any submissions.

The Determination

6. The *ex parte* Applicant submitted that under section 21 of the Government Proceedings Act, the Respondent who is the Accounting Officer is mandated by law to settle the decree, and that there is no other remedy in law to compel him to satisfy the decree other than an order of mandamus. The decisions in **Republic vs Principal Secretary, Ministry of Defence & Another ex parte David Gitau Njau (2018) e KLR** and **Republic vs Attorney General & Another ex parte James Alfred Koroso (2013) e KLR** were cited in this regard. Lastly, the *ex parte* Applicant submitted that the Respondent's action in failing to pay the amount due was unlawful and unreasonable.

7. 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, (1997) e KLR**, 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..... .”

8. It is not disputed in the present application that judgment was entered in favour of the *ex parte* Applicant in **Nairobi High Court Civil Case No. 205 of 2013**. 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.

9. 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.”

10. 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.”

11. In the present application, the decretal sum due from the Respondents has not been disputed, and the Applicant in this respect annexed copies of the judgment and decree awarded in **Nairobi High Court Civil Case No. 205 of 2013**, whereby it is stated that judgment was entered for the Applicant against the Respondent for the sum of Kshs 4,803,000/= with costs of the suit.

12. The Applicant also annexed a Certificate of Costs of Kshs 406,683/= dated 22nd August 2018 in the *ex parte* Applicant’s favour after taxation of its Bill of Costs in the suit and Certificate of Order against Government that was issued in the said suit on 17th August 2018. The *ex parte* Applicant also annexed a copy of a letter of demand 28th August 2018 sent by his Advocates to the Attorney General, and which enclosed the judgement, decree, Certificate of Taxation and Certificate of Order against Government.

13. This Court therefore finds that since the *ex parte* Applicant has judgment in his 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.

14. The only clarification that needs to be made is whether any interest payable on the decretal sum. It is notable that no interest was awarded in the judgment in **Nairobi High Court Civil Case No. 205 of 2013**, and none is indicated in the decree and Certificate of Order against Government extracted therefrom. The *ex parte* Applicant in the instant application is however seeking orders that interest be paid on the decretal sum and on the costs from the date of judgment at court rates of 12% and 14% respectively. As this Court is being asked to enforce by way of mandamus a decree given by the trial Court, it has no discretion to change or add to the terms of the orders granted by the trial Court. The *ex parte* Applicant will therefore have to move the trial Court for review on the issue of any interest payable from the date of the judgment in the trial Court. The only discretion availed to this Court under section 26 and 27 of the Civil Procedure Act is as regards interest payable as from the date of this judgment.

15. In the premises, I find that the *ex parte* Applicant’s Notice of Motion dated Notice of Motion dated 17th January 2019 is merited and succeeds only to the extent of the following orders:

(a) An order of mandamus directed to the Respondent herein to comply and pay the *ex parte* Applicant Kshs 4,803,000/=, being the decretal sum awarded in **Nairobi High Court Civil Case No. 205 of 2013**, with interest thereon at the rate of 12% per annum from the date of this judgment until payment in full, and the taxed costs of Kshs 406,683/=, with interest thereon at the rate of 12% per annum from the date of this judgment until payment in full.

(b) The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 17th January 2019 of Kshs 30,000/=.

16. Orders accordingly.

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

P. NYAMWEYA

JUDGE