REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 260 OF 2012

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF ENFORCEMENT AND RECOVERY OF AGREED INTEREST ACCRUED AWARDED IN NAIROBI HCCC NO. 915 OF 1998

SARA AWINJA BABU AND ANOTHER VS THE ATTORNEY GENERAL

BETWEEN

REPUBLIC.....APPLICANT

AND

THE ATTORNEY-GENERAL.....1ST RESPONDENT

THE SOLICITOR-GENERAL.....2ND RESPONDENT

EX PARTE:

SARAH AWINJA BABU AND MAURICE AWUOR BABU

RULING

The Application

1. The 1st and 2nd Applicants herein, Sarah Awinja Babu and Maurice Awuor, are administrators of the estate of the deceased Dr. Anthony Mbai Babu. This Court (Githua J.) on 23rd November 2012 issued an order of Mandamus directing the Permanent Secretary Ministry of State, Provincial Administration and Internal Security pay the Applicants the decretal sum, interest and costs as stated in the Certificate of Order against Government issued on 6th December 2011. The said Certificate of Order against Government was issued arising from judgment entered in favor of the Applicants against the Attorney General, who is the 1st Respondent herein, in High Court Civil Case Number 915 of 1998.

2. The Applicants have now moved this Court through a Notice of Motion dated 21st March 2019, in which they seek the following orders:

a) That this Court do uphold its authority and dignity and do uphold the Order of Mandamus granted herein on the 23rd November, 2012 requiring compliance of the Permanent Secretary, Ministry of State, Provincial Administration and Internal Security in enforcement and recovery of the decretal sums, costs and interest awarded in High Court Civil Case Number 915 of 1998, and compelling the Permanent Secretary to pay the sum of Kshs 28,064,692.60 as at 23rd November 2012, plus further interest from 23rd November 2012 until payment in full;

b) That this Court do take note of partial compliance of the Order of Mandamus by the said Permanent Secretary in releasing a sum of Kshs. 26,484,968.10 to the office of the Attorney General in April, 2014 and which sum the Attorney-General paid out to the Ex-Parte Applicants on the 16th September, 2014;

c) That this Court do take note that the parties agreed that the sum outstanding and due in terms of accrued interest on the principal sum and party and party costs in HCCC 915 of 1998 is a sum of Kshs. 5,576,815.50;

d) That the sum of Kshs. 5,576,815.50 was released to the office of the Attorney-General by around October, 2018 in full and final payment of the claim and in full compliance with the Order of Mandamus given on the 23rd November, 2012;

e) That the Ex Parte Applicants have complied with all the terms and conditions required by the office of the Attorney-General to facilitate payment of the said sum of Kshs. 5,576,815.50 by electronic means including executing a discharge voucher for the said Kshs. 5,576,815.50;

f) That the Office of the Attorney General has now refused to release the said sum of Kshs. 5,576,815.50 to the Ex Parte Applicants and the said refusal is unlawful and in defiance of the Order of Mandamus given on the 23rd November 2012 and also in defiance of the Decree given by this court on the 4th March, 2011 in HCCC 915 of 1998 (Nairobi).

g) That in exercise of the Court's inherent power and in protecting the proper administration of justice this Court's inherent power and in protecting the proper administration of justice this Court do order that the sum of Kshs. 5,576,815.50 held by the office of the Attorney-General be released forthwith to the Ex Parte Applicants;

h) That in default of payment of the sum of Kshs. 5,576,815.50 by the office of the Attorney-General to the Ex Parte Applicants, Notice to Show Cause do issue against the Accounting Officer of the Attorney General's Office, the Solicitor General one Kenneth Ogeto for him to show cause why he should not be cited for contempt of Court;

i) That the costs of this Application be provided for.

3. The Applicants relied on a supporting affidavit by the 1st Applicant sworn on 21st March 2018. The crux of the Applicant's case is that the order of Mandamus with a Penal Notice was duly served, and that the Permanent Secretary Ministry of State, Provincial Administration and Internal Security partly complied by releasing a sum of Kshs. 26,484,968.10 to the 1st Respondent in April 2014, which was paid to the Applicants on 16th September 2014. That upon further correspondence between the 1st Respondent and the Applicants' Advocates, it was agreed that the balance due was in the sum of Kshs. 5,576,815.50, which was accordingly released to the 1st Respondent by the Office of the President.

4. It is contended by the Applicants that the 1st Respondent has refused/declined to pay the sum owing in spite of the Applicants' compliance with the requisite conditions. It is contended that the 1st Respondent has raised a new sum on interest, whose calculation the Applicants term as irregular and unlawful, intended to deny the Applicants enjoyment of the fruits of a judgment made in their favour.

5. In response, the 1st and 2nd Respondents filed Grounds of Opposition dated 3rd May 2019 as hereunder:

a) That Section 4(4) of the Limitation of Actions Act stipulates that interest on a judgment debt can only accrue for a maximum of six years;

b) That section 26 of the Civil Procedure Act is only applicable so long as the period for payment of interest has not exceeded the six years limitation period by provided by Section 4(4) of the Limitations of Actions Act;

c) That the Respondents are entitled to the benefit of the provisions of Section 4(4) of the Limitations of Actions Act;

d) That after considering the Kshs. 26, 484,968.10 which has already paid to the Ex parte Applicants as well as Section 4(4) of the Limitation of Actions Act, the Applicants are only entitled to receive a balance of Kshs. 481,452.45 as communicated to them;

e) That the Respondents were acting in good faith in informing the Ex Parte Applicants of the legal position they are now challenging;

f) That the Ex Parte Applicants application now before Court ought to be dismissed as the Respondents have not erred in law.

The Determination

6. The instant application was canvassed by way of written submissions. The Applicants' Advocate, Ameka & Company Advocates, filed submissions dated 3rd July 2019, while Joseph Ngumbi, a Senior State Counsel in the Attorney General's Chambers filed submissions for the 1st and 2nd Respondents dated 10th July 2019.

7. It is necessary to point out at the outset that the prayers sought by the Applicants in relation to mandamus are *res judicata*, this Court (Githua J.) having previously determined on the issue of the order of mandamus and the terms thereof in the judgment delivered herein on 23rd November 2012. I cannot therefore in the circumstances seek to confirm the orders made by Githua J., as the terms of the orders by Githua J. were clear, and there is a risk that in seeking to confirm the said orders on the terms sought by the Applicants, this Court may vary final orders given by a Court of concurrent jurisdiction.

8. It is also notable that there has been substantial satisfaction of the orders of mandamus given herein, and the only contested issue is that of the interest that is due and payable, and specifically whether the claim for interest is time barred, which is the only issue that this Court has jurisdiction to determine, as a consequential issue arising from the judgment issued herein on 23rd November 2012. Likewise, until this issue is determined, the orders to commence contempt proceedings against the 2nd Respondent are premature, arising from the lack of clarity as

regards the amount of interest payable by the Respondents to the Applicants.

9. Submitting on the issue on whether the claim for interest is time barred, the Applicants argued that the said Section 4(4) of the Limitation of Actions Act concerns execution of judgments and recovery of arrears of interest. The Applicants submit that the commencement of running of time of the six-year period relates to the date on which the interest became due, which is the date when a Court of competent jurisdiction pronounced itself on the issue (the date of the judgment). It is submitted that the 1st Respondent in purporting to calculate or compute interest up to 2004 is deliberately misreading the section and misinterpreting its full tenor and effect. According to the Applicants, time on the judgment delivered on 4th March 2011 started running as from the date of its delivery. It is therefore submitted that at the time of partial payment on 6th September 2014 six years had not elapsed.

10. The Applicants relied on the decisions in **David Makau vs. Maua Mutie Ndunda, Machakos Civil Appeal No. 72 of 2004** and **Justus Ogada Agalo vs. The Managing Director Kenya Railways Corporation, (2016) eKLR** that it is only recovery of interest that can not be made after the expiry of 6 years from the date of judgment**.** The Applicants submitted that interest became due once judgment was made and interest ordered within the discretionary provisions of Section 26 of the Civil Procedure Act, adding that Section 4(4) of the Limitations of Actions Act does not uproot the provisions of Section 26 of the Civil Procedure Act. That, Section 4(4) merely puts a cap of 6 years from the date of judgment for recovery of arrears of interest. Therefore, the Respondents' unwillingness to release funds owed to the Applicants is without basis.

11. Citing Section 4(4) of the Limitation of Actions Act, the Respondents submitted that the 1st Respondent calculated the interest on general damages commencing from the date of judgment, 4th March 2011 to 16th September 2014, which is the date they made the substantial payment to the Applicants of Kshs.26, 484,968.10, which sum exceeded the sum due inclusive of interest payable thereon in respect of general damages. Further, that interest on special damages was calculated for a period of six years from the date of filing suit, 22nd April 1998 to 21st April 2004 as per the judgment in HCCC 915 of 1998. It is submitted that interests on the costs of the suit was calculated for a period of six years from the due date of filing the suit, 22nd April 1998 to 21st April 2004. According to the Respondents, the outstanding amount payable to the Applicants was therefore Kshs. 481,452.45 as stated in their letter to the Applicants dated 13th March 2019.

12. It has not been contested by the Respondents that the Applicants herein obtained a judgment in **Sarah Awinja Babu & Maurice Awuor (Suing as administrators of the estate of Dr. Anthony Mbai, Babu, Deceased) vs. Attorney General Nairobi HCCC NO. 915 OF 1998** against the Attorney General, which was ordered to be enforced by this Court in the judgment delivered herein on 23rd November 2012. The Respondent's main contention is that after considering the decretal sum and interest of Kshs. 26,484,968.10 which has already paid to the Applicants, as well as Section 4(4) of the Limitation of Actions Act, the Applicants are only entitled to receive a balance of interest of Kshs. 481,452.45 and not Kshs. 5,576,815.50 as had been the parties' prior agreement.

13. Section 4(4) of the Limitations of Actions Act provides that:

> **"(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."**

14. From the record, the disputed interest was previously mutually agreed upon by the Applicants and the Respondents, after the Respondents had partially honoured the decretal sum. The 1st Respondent, vide letter dated 27th September 2018 addressed to the Applicants, expressly states that it was in agreement with the Applicant's computed interest accrued, which was in the sum of Kshs. 5,576,518.50. The 1st Respondent then wrote a letter to the Applicants dated 22nd October 2018 confirming receipt of the sum of Kshs. 5,576,815.50 from the Office of the President, and indicated that payment would be processed electronically. The 1st Respondent also provided guidelines to be followed by the Applicants, which the Applicants complied with. Copies of these letters were annexed by the Applicants.

15. However, the 1st Respondents vide a letter dated 13th March 2019, in contrast to their letter dated 22nd October 2018, informed the Applicants that guided by section 4(4) of the Limitation of Actions Act, interest can only accrue for a maximum of 6 years, hence the Respondents had re-computed the amount payable themselves, in the sum of Kshs. 481,452.45 and not Kshs. 5,576,815.50.

16. From the record of correspondences, it is notable that the 1st Respondent has acknowledged that there is an outstanding balance of the interest payable to the Applicant and has also partially satisfied the decretal sum. Therefore, even if the Respondents were to rely on Section 4(4) of the Limitation of Actions Act, this would be negated by the provisions of Section 23(3) of the Limitation of Actions Act which provides as follows:

> **"Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment: Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt.."**

17. I am further guided by section 24 (1) and (2) of the Limitation of Actions Act which provides that:

> **"1. Every acknowledgement of the kind mentioned in section 23 of this Act must be in writing and signed by the person making it.**

2. The acknowledgement or payment mentioned in section 23 of this Act is one made to the person, or to an agent of the person, whose title or claim is being acknowledged, or in respect of whose claim the payment is being made, as the case may be, and it may be made by the agent of the person by whom it is required by that section to be made."

18. In view of the fact that the 1st Respondent acknowledged in writing in their correspondences that there was accrued interest owed to the Applicants, the Applicants' claim for interest is not time barred. In the premises, I find that the Applicants' Notice of Motion dated is only merited to this extent. The actual amount of interest owed has however become an issue of contest since the said acknowledgment, and I accordingly order that the issue of the amount of any interest due to the Applicants arising from the judgment delivered herein on 23rd November 2012 shall be decided by the Deputy Registrar of the Judicial Review Division in Nairobi, upon hearing the parties. The Applicants shall have the costs of this application of Kshs 30,000/=.

19. Orders accordingly**.**

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF OCTOBER 2019

P. NYAMWEYA

JUDGE