



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
(CORAM: CHERERE-J)
PETITION NO. 07 OF 2018
IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015
AND
IN THE MATTER OF THE GOVERNMENT PROCEEDINGS ACT CAP 40
LAWS OF KENYA
AND
IN THE MATTER OF THE LAW REFORM ACT
BETWEEN
ERICK O. NYAWERE & 68 OTHERS.....PETITIONERS
AND
THE PRINCIPAL SECRETARIES, MINISTRY OF INTERIOR AND
COORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT
THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Petitioners' case

1. The Petitioners hold various Certificates of Order Against the Government arising from various suits. Constitution which remain unsettled.
2. By notice of motion dated 23.05.18 filed on even date, the Petitioners seek orders **That:**
 - 1) **An order of MANDAMUS to compel the Principal Secretaries in the Ministry of Interior and Coordination of National Government to pay the Petitioners the sum of Kshs. 39,243,130/- being the cumulative decretal sum contained in the Certificates of Order Against the Government owed to the Petitioners together with interest thereon at 14% p.a from date of respective judgments until payments in full**
 - 2) **The Respondent comply with Order (1) within 14 days of the order or of the service of the order**
 - 3) **In default, of (1) above, Notice to Show Cause do issue to the Respondents**
 - 4) **Costs be borne by the Respondents**
3. The application is supported by an affidavit sworn on 23.05.18 by **JOSEPH. N. MUSOMBA**, advocate for the Petitioners to which he has annexed Certificates of Order Against the Government issued in favour of the Petitioners which he avers remain unsettled to date.

4. The Petitioners' contend that the non-payment of the decrees denies them their right to access to justice guaranteed under Article 48 of the Constitution.

Respondent's Case

5. The respondent opposed the petition by way of a replying affidavit sworn on 05.03.19 by **Dr. (Eng.) Karanja Kibicho** one of the 3 Principal Secretaries in the Ministry of Interior and Coordination of National Government in which he asserts that the Petitioners despite being requested by the 2nd Respondent to furnish documents in support of their claims, for authentication, have failed to do so.

6. He also avers that the Government has not established a Fund to provide for funds to state organs which should be used to pay debts as a matter of statutory duty without recourse to orders of mandamus and contempt proceedings against accounting officers as was recommended in **Nahashon Omwoha Osiako & 66 Others v Attorney General Amicus Curiae Kenya Section of International Commission of Jurists (Open Society Justice Initiative) [2017] eKLR.**

7. It was additionally averred that a Task force set up by the 2nd Respondent to consider and audit pending judgments and awards and whose report will help the Government in ensuring faster settlement of decrees is still working.

8. Respondents contend that the issues in this Petition were determined in **Nahashon Omwoha Osiako case** (above) and urged the court to dismiss it.

9. In support of its case, the Respondents relied on **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR** where the court held that:

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."

Analysis and Determination

10. Section 21 of the Government Proceedings Act (*GPA*) provides that:

(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 provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, 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.

11. Order 29 rule 2 of the Criminal Procedure Rules (*CPR*) prohibits certain orders, including executions of orders and decrees by way of attachment and sale, against the Government. The effect of these provisions is that whereas execution proceedings by way of attachment and sale of the Governments assets are not available against the Government, the accounting officer of the relevant Government department is nevertheless under a statutory duty to satisfy a judgment made by the Court against that department. The statutory duty is normally enforced by way of judicial review proceedings in the nature of mandamus by which the Court compels the satisfaction of a duty that has become due. (See **Nahashon Omwoha Osiako case** (above)).

12. The nature and scope of the order of mandamus was discussed in Republic v Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996 where the Court of Appeal cited, with approval, Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89 that:

The order of mandamus is of 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.

13. In the case of Republic v Town Clerk, Kisumu Municipality ex parte East African Engineering Consultants [2007] 2 EA 441, the court held as THAT:

The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings.

14. The Petitioners have demonstrated that they are holding Certificates of Order Against the Government arising from various suits. The frustration they have undergone in trying to realize the fruits of their judgments against the Government has left them babysitting on what Odunga J referred to as *barren decrees*. (See Republic v Attorney General & Another ex parte James Alfred Koroso NRB HC JR Misc. Appl. No. 44 of 2012).

15. The Respondents' contention that the issues raised in this petition were determined in Nahashon Omwoha Osiako case (above) is far from the truth. From the foregoing therefore, I find that the Petitioners have properly moved the court by way of an application for MANDAMUS.

16. Contrary to the averment that the Petitioners despite having being requested by the 2nd Respondent to furnish documents in support of their claims, for authentication, have failed to do so, the annexure to the letter dated 08.06.18 annexed to the replying affidavit, relates to 13 claims which is a small fraction of the 69 claims.

17. Even assuming the documents requested for in the 13 claims have not been submitted, the Respondents have not offered any explanation why the other 56 claims have not been settled.

18. Obedience of court orders is not a matter of discretion and the Respondents' reliance on Kenya National Examination Council v Republic Ex Parte Geoffrey Gathengi Njoroge & 9 others (above) is with respect misplaced.

19. The fact that the Government has not established a Fund to provide for funds to state organs which should be used to pay debts as a matter of statutory duty without recourse to orders of mandamus and contempt proceedings against accounting officers as recommended in Nahashon Omwoha Osiako case (above) and the fact that a Task force has been set up by the 2nd Respondent to consider and audit pending judgments and awards is still working does not exempt the Respondents from complying with court orders..

20. Whereas I agree with the holding in Kisya Investments Ltd v Attorney General & Another [2005] 1 KLR 74 that *all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorised by statute*, my considered view from the totality of the evidence before me is that the Respondents have deliberately elected to ignore the settlement of the decrees and Certificates of Order Against the Government hereof without lawful grounds thereby abusing the statutory legal provisions which bar the Petitioners from treating the Government as any other ordinary party against whom execution of a decree can issue.

21. This attitude on the part of the Respondents is what Onyancha J (*as he then was*) in Republic v Permanent Secretary of Water Resources Management & Development ex-parte Akamba Timber and Hardware Limited MKS HC Misc. Civil Appl. No. 173 of 2004 [2006] eKLR, referred to as *...an attitude of carelessness in the manner Government Departments conduct themselves particularly where they are defendants*.

22. It is for the above reasons that I find that the Petitioners have made out a case for an order of MANDAMUS.

23. Accordingly, it is hereby ordered:

1) An order of MANDAMUS do issue to compel the Principal Secretaries in the Ministry of Interior and Coordination of National Government to pay the Petitioners the sum of Kshs. 39,243,130/- being the cumulative decretal sum owed to them as contained in the respective Certificates of Order Against the Government together with interest thereon at 14% p.a form date of respective judgments until payments in full

2) The Respondents are directed to comply with Order (1) above within 60 days of the service of this order

3) Parties are at liberty to apply

4) Costs shall be borne by the Respondents

DATED AND SIGNED THIS 11th DAY OF *December* 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistants

For the Petitioners

For the Respondents