



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 202 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL

REVIEW BY WAY OF MANDAMUS AGAINST THE PRINCIPAL

SECRETARY, MINISTRY OF HEALTH

AND

**IN THE MATTER OF SECTION 8 OF THE LAW REFORM ACT, CHAPTER 26 OF
THE LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES 2010**

AND

**IN THE MATTER OF SECTION 8 OF THE LAW REFORMS ACT, CHAPTER 26 OF
THE LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES 2010**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY, MINISTRY OF HEALTH...1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

GEOFFREY GATWAI MWANGI.....EX-PARTE

JUDGMENT

1. On 22nd July 2015, the exparte applicant herein **Geoffrey Gatwai Mwangi** received judgment in his favour against the Attorney General vide Kerugoya Chief Magistrate's Court Civil Suit No. 181 of

2010. The judgment and decree was in respect of a claim for general damages and special damages arising from a road traffic accident involving the plaintiff/applicant herein who was a pedal cyclist and motor vehicle registration No. GK A 317 G. The plaintiff/exparte applicant herein was awarded kshs 560,000 general damages less 20% contributory negligence; kshs 2,000 special damages; costs of the suit and interest.

2. Decree was drawn and issued on 19th May 2016 and a Certificate of Order Against the Government was issued on 19th December 2016.

3. The parent Government Ministry on whose behalf the Attorney General was sued and to whom the accident motor vehicle belonged is the Ministry of Health.

4. The exparte applicant's counsels L.G. Kimani embarked on the journey of asking for payment of the decretal sum from the defendant by submitting copies of decree and Certificate of Order Against the Government as shown by letters dated 25th August 2016, reminders dated 6th December 2016; 1st February 2017 and 27th March 2017 to no avail.

5. As execution cannot issue against the Government, the exparte/applicant /plaintiff in the civil suit approached this court on 28th April 2017 vide chamber summons dated 10th April 2017 seeking leave of court to institute Judicial Review proceedings (orders) of mandamus to compel the respondents to pay to the applicant the decretal sum in **Kerugoya Chief Magistrate's No. 181 of 2010 Geoffrey Gatwai Mwangi vs The Honourable Attorney General** being shs 685,221 inclusive of costs and interest thereon at court rates. The court granted leave to the exparte applicant to apply for mandamus on 15th May 2017 interpartes as the respondent's counsel Miss Maina had no objection to such leave being granted.

6. The exparte applicant dutifully filed the substantive notice of motion on 3rd May 2017 seeking for mandamus to compel the respondents to pay the aforesaid decretal sum together with costs of these Judicial Review proceedings.

7. The exparte applicant also filed a further affidavit annexing the judgment of Kerugoya CM CC 181/2010 between him and the Attorney General.

8. The respondents never filed any replying affidavit or grounds of opposition opposing the application but made a submission at the hearing on 11th December 2017, contending that the Ministry was advised to pay but that they had not received copy of judgment and that the Ministry was waiting for budgetary allocation of funds from the Treasury to release the funds. However, there was no affidavit filed by the respondent.

9. In support of the application for mandamus, the exparte applicant relied on the statutory statement verifying affidavit and a further affidavit annexing copies of judgment in the Kerugoya matter, Certificate of Order Against the Government, Decree in the Kerugoya case and copies of letters forwarding the said documents to the Attorney General and to the Ministry of Health asking for payment/settlement of the decree.

10. Mrs Kimani counsel for the exparte applicant submitted that there is abdication of a public duty on the part of the respondents to settle decree and that it was upon the Honourable Attorney General to obtain a copy of judgment and forward it to the Ministry of Health asking the latter to settle decree.

11. The respondent's counsel Miss Mutsomi only submitted that the Ministry had been advised to settle the claim and that the applicant's counsel delayed to send them a copy of judgment.

12. Having considered the exparte applicant's claim herein and the respondent's submission from the bar by Miss Mutsomi, the only issue for determination is whether the applicant is entitled to the judicial review remedy of mandamus sought, to issue against the respondents.

13. The Judicial Review order of mandamus issues to compel performance of a legal/statutory/constitutional or public duty owed by the respondent to the ex parte applicant or interested party seeking or entitled to such remedy and which the respondent has declined, failed or neglected to perform. Therefore the ex parte applicant has to prove that there exists a legal or public duty owed to him by the respondents and which duty the respondents have declined to perform.

14. Section 21(4) of the Government Proceedings Act Cap 40 Laws of Kenya prohibits execution against the Government. The Section stipulates:

“(4) Save as provided in this Section, No execution of 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.”

15. The same section at Subsection (1) stipulates:

“(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 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 costs (if any) ordered to be paid to the applicant.”

16. Under Section 21(3) of the said Act,

“ 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 party thereof, shall be suspended, and if the certificate has not been issued, may order any such direction to be inserted therein.”

17. What the above statutory provisions espouse is that no execution against the government can be levied. Equally, no person can be personally held to account for settlement of a decree against the Government.

18. However, the Accounting Officer of the relevant Government Department is under a statutory duty to satisfy a judgment made by the court against that particular government department.

19. This is where the order of mandamus comes in to compel performance of a statutory duty as was held in the famous case of **Republic vs Kenya National Examination Council ex parte Gathenji & 8 Others CA 234/96** that mandamus issues:

“ to compel performance of a public duty and that its purpose is to remedy the defects of justice and so it will issue to the end that justice may be done, in all cases where there is a specific legal right and no specific remedy for enforcing that right and it may issue in cases where although there is alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

20. Thus, Mandamus issues to compel performance of a legal duty in accordance with the law where there is failure to perform such public duty. (see **Shah vs Attorney General (No. 3) Kampala HC Miscellaneous No. 31/1969[1970] EA 543; Republic vs Town Clerk of Kisumu Municipality Exparte East African Engineering Consultants [2007] 2 EA 441; Republic vs Dudsheath Exparte Meredith [1950] 2 ALL ER 741.**

21. In this case, therefore, the court is called upon to compel the satisfaction of a legal duty owed by the 1st respondent to the applicant which is, settlement of a lawful decree of the court issued in Kerugoya CM CC 181/2010, which decree is long overdue for settlement upon service of a certificate of order against the government on the 1st respondent on 9/2/2017.

22. The respondents have not appealed against the decree of the said Kerugoya Court and neither is there any stay of execution of decree pending some other action.

23. Neither is there any other alternative remedy for the applicant to realize the fruits of his lawful judgment. In my humble view, the applicant has satisfied this court that he has a valid decree of a court of competent jurisdiction against the respondents and that the Accounting Officer of the Ministry of Health is under a legal duty placed on him/her by Section 21(3) of the Government Proceedings Act Cap 40 Laws of Kenya, to settle such decree on behalf of the Government Department.

24. There is no legal requirement for copy of judgment to be served upon the respondents by the applicant especially where it is clear that the matter proceeded interparties as was in the instant case, with full participation of the respondents.

25. Further, the respondent's counsel conceded in court by her submissions that they had advised the Ministry of Health to settle the decree. There is no way the office of Attorney General could have advised the Accounting Officer to settle decree if there was any doubt as to the legality or validity of the decree in the Kerugoya CM CC181/2010. The amount for settlement has already been ascertained and determined by the subordinate court by way of a decree and Certificate of Order Against the Government hence there is no genuine dispute as to the exact decretal amount to be payable to the exparte applicant.

26. The exparte applicant has no other alternative means of recovering the sums due to him by decree of court of competent jurisdiction. He cannot be allowed to hold a barren decree when there is a specific duty imposed by statute (sec 21 of the Government Proceedings Act) on the 1st respondent to settle decree. There is no discretion given to the Accounting Officer, to pay or chose not to pay or settle a decree of the court.

27. Accordingly, this court is left with no other order or remedy to bequeath to the exparte applicant other than the remedy of mandamus to compel the 1st respondent to settle decree in Kerugoya CM CC 181/2010 as decreed on 22nd July 2015 and quantified vide Certificate of Order Against the Government issued on 19th December 2016 for reasons that the 1st respondent has not demonstrated the willingness to settle the said decree without being compelled to do so.

28. There is no legal requirement that the Accounting Officer only settles decrees after budgetary allocation and a Parliamentary approval of government expenditure in a given financial year. See **Miscellaneous Application 193/2015 Republic vs Attorney General & Another Exparte Ongata Works Limited [2016] e KLR.**

29. Accordingly, the order which commends itself for this court to grant is to allow the exparte applicant's application for mandamus dated 22nd May 2017 and I hereby issue judicial review order of mandamus compelling the 1st respondent Principal Secretary and Accounting Officer of the Ministry of Health to pay to the exparte applicant the sum of kshs 685,221.00 as per the Certificate of Order Against the Government dated 19th December, 2016 issued in Kerugoya CM CC No. 181/2010. The

exparte applicant will also have costs of these Judicial Review proceedings.

Dated, signed and delivered in open court at Nairobi this 2nd day of February 2018.

R.E. ABURILI

JUDGE

In the presence of:

Mrs Kimani for the applicant

Miss Daido for Respondents

CA: Kombo