



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 238 OF 2015

IN THE MATTER OF : JUDGMENT ENTERED IN FAVOUR OF THE APPLICANTS AGAINST THE ATTORNEY GENERAL, THE FORMER MINISTRY OF LIVESTOCK DEVELOPMENT, THE MINISTRY OF AGRICULTURE LIVESTOCK AND FISHERIES AND THE PRINCIPAL SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK AND FISHERIES IN NAIROBI HIGH COURT CIVIL , CASE NUMBER 488 OF 2013 ON 30TH JUNE, 2014.

IN THE MATTER OF : COSTS CERTIFIED IN FAVOUR OF THE APPLICANTS AGAINST THE ATTORNEY GENERAL, THE FORMER MINISTRY OF LIVESTOCK DEVELOPMENT, THE MINISTRY OF AGRICULTURE LIVESTOCK AND FISHERIES AND THE PRINCIPAL SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK AND FISHERIES IN NAIROBI HIGH COURT CIVIL CASE NUMBER 488 OF 2013 ON 4TH AUGUST 2014

IN THE MATTER OF: AN APPLICATION BY ASSOCIATED ARCHITECTS, HONGO AND ASSOCIATES, OTIENO ODONGO AND PARTNERS AND NGILU & ASSOCIATED FOR AN ORDER OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

CABINET SECRETARY OF AGRICULTURE,

LIVESTOCK AND FISHERIES.....2ND RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF

AGRICULTURE, LIVESTOCK & FISHERIES.....3RD RESPONDENT

ASSOCIATED ARCHITECTS.....EX-PARTE APPLICANT

HONGO ASSOCIATES.....EX-PARTE APPLICANT

OTIENO ODONGO & PARTNERS.....EX-PARTE APPLICANT

NGILU & ASSOCIATES.....EX-PARTE APPLICANT

JUDGMENT

1. By a notice of motion dated 26th October 2015 the exparte applicants Associated Architects , Hongo and Associates, Otiemo Odongo & Partners and Ngilu and Associates seeks from this court Judicial Review order of mandamus to compel the respondents to pay to the applicants within 14 days of the order, the sum of kshs 84,505,999.99 being the judgment decreed in their favour against the respondents in Nairobi HCC CC 488/2013 on 30th June 2014, together with interest at 3% above the Central Bank of Kenya base lending rate prevailing from time to time from 25th June 20008 until payment in full, kshs 57,006,339.16 as at 25th October 2013.

2. The applicants also sought an order of mandamus to issue compelling the respondents to pay to the applicants within 14 days of the

order a sum of kshs 667,192.00 being costs awarded to the applicants in Nairobi HCC 488/2013 on 4th August 2014 and interest accruing thereon. They also prayed for costs of these proceedings.

3. The applicants' case as per the grounds and statutory statement and verifying affidavit sworn on 26th October 2015 by **Kamawe Ngugi** is that on 30th June 2014 the High Court in HCCC 488/2013 delivered judgment in their favour against the respondents for a sum of kshs 84,505,999.99 together with interest at the rate of 3% above Central Bank of Kenya a base lending rate prevailing from time to time from 25th June 2008 until payment in full (thus, as at 25th October 2013 interest stood at shs 57,006,339.10).

4. Later costs were certified in favour of the applicants in the said suit on 4th August 2014 in the sum of kshs 667,192.00 but that despite decree and certificate of order against the respondents being issued, the respondents have completely failed to pay in contravention of a public duty to settle decree of the court, hence these proceedings by way of Judicial Review.

5. The annexures include pleadings in HCC 488/2013 between the applicants and the respondents herein decree, certificate of order against the government served on the Attorney General on 23rd September 2014 and affidavit of service so that effect by Ancut Muumbi Munyao, a court process server.

6. The certificate of order is for kshs 84,505,999.99 being the principal sum, interest of shs 57,006,339.16. Costs of the suit kshs 667,192 and interest on costs from 5th August 2014 until payment in full.

7. The annexures also show a letter dated 30th May 2015 written by L. Muiruri Ngugi Senior Principal Litigation Counsel on behalf of the Attorney General to the Permanent Secretary State Department of Livestock in the Ministry of Agriculture, Livestock and Fisheries being a reminder to settle the amount decreed as per the certificate of Order Against the Government to avoid protracted litigation with resultant costs and escalation of interest.

8. There is also evidence that the applicant had been asking for payment vide their advocate's letters of 15th June 2015 served on all the respondents on 16th June 2015.

9. Further, the applicants annexed letters addressed to the rest of the respondents by the Honourable Attorney General advising them to settle decree.

10. The respondents nonetheless opposed the application herein for mandamus and filed grounds of opposition on 6th October 2016 contending, among others, that the 2nd respondent Cabinet Secretary Ministry of Agriculture, Livestock and Fisheries was not an accounting officer with the responsibility of administering the Ministry hence it had been wrongly joined to the proceedings, that the Attorney General is the principal legal adviser to the Government in accordance with Article 156 of the Constitution; and that it had discharged its constitutional mandate when it wrote to the Permanent Secretary – 3rd respondent on 11th July 2013 and on several other occasion, to advise the later to settle the debt of kshs 84,505,999. That therefore the Attorney General is not a party to the contract which may have been entered into by the applicants and the 3rd respondent and that the Attorney General is not a judgment debtor in the decree as perceived by the applicants.

11. It was further contended that the 3rd respondents had made efforts to settle the said debt by writing to the National Treasury seeking for additional funds and the requisite authority to settle the debt; but that regrettably, due to budgetary constraints, the debt remains unsettled.

12. It was also contended that the orders sought if granted will occasion unnecessary embarrassment to the respondents. The application was canvassed orally on 30th January 2018 with Miss Mwangi counsel urging the application on behalf of the exparte applicant and Miss Maina a holding brief for Mr Kiarie for the respondents.

13. Miss Mwangi submitted that the respondents have a public and legal duty to settle decree of the court as they never appealed against it. It was submitted that as at the time of hearing of the application, the principal sum had been paid by installments but the interest had remained unpaid as calculated by the Deputy Registrar on 23rd November 2017, on the directions of the court.

14. It was submitted that the main suit upon which decree was issued was a claim for liquidated damages for breach of contract. It was submitted that the judgment and decree awarded the applicants interest on the principal sum and interest on costs.

15. In opposing the application, Miss Maina relied on the grounds of opposition filed on 6th October 2015 and submissions filed on 26th September 2017 contending that interest on the principal sum under the circumstances would not accrue since parties agreed that payment would be made by installments over several financial years.

16. Counsel for the respondents relied on public interest to urge the court to decline the application because the respondents s had done their level best to settle the claim by 7th June 2017 amounting to shs 142,179,531 in favour of the exparte applicants which amount included the assessed costs hence interest is not payable to the applicant on account of public interest.

17. In brief rejoinder, Miss Mwangi for the exparte applicants submitted that the application is not opposed because the purported grounds of opposition of 6th October 2015 relate to the chamber summons for leave to apply for mandamus and not these proceedings for mandamus.

18. Further, it was submitted that this court had on many occasions allowed the respondents to settle the decretal sum hence the court should issue the orders as prayed.

DETERMINATION

19. I have considered all the foregoing and in my humble view, the main issue for determination in this matter is whether the prayers sought are available to the applicants.

20. There is no dispute that this application is not opposed since the so called grounds of opposition filed on 6th October 2015 were in response to the chamber summons for leave to apply upon which Honourable Korir J did on 6th October 2015 grant leave to the ex parte applicant to institute these proceedings for mandamus against the respondents.

21. Thereafter, the applicant filed the substantive notice of motion on 27th October 2015 pursuant to the said leave and since then, the respondents' counsels always appeared in court seeking for time to settle the amount as the Attorney General had received funds from the Ministry and were processing the payments in favour of the applicants' counsels. This appears to be the main reason why this matter has procrastinated in court from 2015 and as conceded by the parties, the applicants and respondents agreed to have the decree settled by installments. As at the time of hearing the main motion, the principal decretal sum had been settled leaving out interest.

22. However, there is no agreement on settlement of interest and therefore in the absence of any agreement or consent between the parties on waiver of interest, this court cannot and has no jurisdiction to review the decree of the court of competent jurisdiction to decline interest. Only an appellate court could determine whether interest as decreed on the principal sum and on costs could be set aside or varied.

23. The argument by the respondents' counsel that it was in the public interest that interest accrued and as calculated by the Deputy Registrar is not paid does not make any legal or even factual sense. What the respondents are asking this court to do by their arguments is that this court should amend decree and certificate of Order Against the Government in HCC 488/2013 and remove interest since the principal sum has been cleared by installments after such decree and order against the government had been issued. Such argument makes no legal sense and unless there is a consent reached by the parties to waive interest, this court would be sitting on appeal of the judgment and decree of the court of competent jurisdiction by determining whether interest as awarded to the applicants herein who are the decree holders in HCC 488/2014 is payable or not.

24. This court will not accept or be swayed in that direction which sets a dangerous trend. It was upon the respondents to persuade the applicants to consider waiving interest awarded on costs and on the principal sum, and they still have that opportunity to do so even after this judgment is delivered.

25. The applicants have a decree and certificate of Order Against the Government for the principal sum which has been settled by installments. They were awarded costs and interest on both principal sum and on costs of the suit in the Superior Court.

26. The certificate of Order Against the Government and decree were served on the Accounting Officer of the Ministry responsible for settlement of decree and they have paid the principal sum only leaving out interest. There is no alternative remedy for the applicants to revert to, to satisfy their lawful decree issued by a court of competent jurisdiction.

27. And as there can be no execution against the Government, the only avenue provided for in law under Section 21 of the Government Proceedings Act is to effect service of certificate of Order Against the Government and the Accounting Officer or upon the Attorney General and upon their receipt of the said certificate the accounting officer becomes duty bound to settle the decree of the court.

28. The letter filed in this court on 14th November 2017 by the applicants' counsel Ms Njoroge Regeru and Company Advocates reveals that as at that date of 10th July 2017, that office had received kshs 142,179,531.2 from the respondents being towards settlement of decretal sum and received as follows.

15/12/2015 - kshs 71,000,000

24/11/2016 – kshs 36,000,000

10/7/2017 - kshs 35,179,531

29. On 22nd November 2017 the Deputy Registrar of the Commercial and Tax Division of the High Court calculated interest on the principal sum and found that the total balance of interest due is 25,012,401.23 whereas interest on costs is kshs 667,192. Interest on costs of kshs 273,566.9 had not been settled hence the total thereof is kshs 940,758.90 as at 22nd November 2017. Therefore, the total outstanding interest is shs 25,953,160.13 on the principal and on costs.

30. Mandamus issues to compel performance of a public or statutory obligation or duty. The applicants, it is clear, have exhausted all the processes and what remains is for the respondents to satisfy the balance of decree and sums as per the certificate of Order Against the Government issued in favour of the applicants. That duty to pay the outstanding sum is bestowed upon the Accounting Officer of the Government State Department, and that the 3rd respondent Principal Secretary, Ministry of Agriculture, Livestock and Fisheries, and not the Cabinet Secretary or the Attorney General.

31. The Attorney General is not an Accounting Officer and is only sued in civil litigation as the principal legal advisor to the Government on behalf of the respective Government Ministries and Departments. He cannot be held liable to settle decree which is issued against him on

behalf of other Government Ministries/Department.

32. It therefore follows that mandamus cannot issue against the Attorney General in matters where he is sued in a representative capacity unless the subject litigation directly affects his office.

33. It is for that reason alone that I would find and hold that mandamus cannot in this case, issue against the Attorney General as enjoined to these proceedings and neither can it issue against the Cabinet Secretary of the Ministry who is not the Accounting Officer of the Government Department.

34. The Principal Secretary is under a duty to satisfy decree in HCC 488/2013 and decree is principal sum, costs and interest as decreed by the court. That is what Section 21(3) of the Government Proceedings Act contemplate that once a certificate of Order Against the Government is served on the Attorney General, the Accounting Officer must pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.

35. In the instant case, the certificate of order against the Government having been served on the Attorney General and the Accounting Officer, the duty to settle the decree and any interest lawfully accruing as stipulated therein and as calculated by the Deputy Registrar of the Superior Court on 22nd November 2017 crystallized. It must be settled as a matter of law unless parties agree otherwise. It is also in the public interest that orders of the court which are not appealed against and which have not been set aside or stayed are implemented to the letter.

36. This court has no discretion to waive the interest lawfully accrued and decreed by the Superior Court. Accordingly, I find and hold that the applicants have satisfied this court that they are entitled to the Judicial Review orders of mandamus as sought in the motion dated 26th October 2015.

37. However, as there is concession that the principal sum has been settled, the decree to be drawn by the Deputy Registrar shall take into account such payments already received by the applicants from the respondents.

38. In addition, decree shall only issue against the 3rd respondent Principal Secretary/Accounting Officer.

39. Costs follow the event, and to the successful litigant. However, they are granted in the discretion of the court. This court does appreciate that the applicants hereto are the successful litigants and that the respondents have made payments of the principal sum leaving out interest.

40. The sums payable are no doubt coming after many years of waiting for the applicants who are also tax payers. The respondents offer essential services to this country. They do not sell any goods for profit. They rely on public taxes to settle such decrees.

41. To avoid escalation of costs which are indeed a big burden to the Kenyan tax payer. I shall exercise my discretion and order that each party shall bear their own costs of these Judicial Review proceedings.

Dated, signed and delivered in open court at Nairobi this 5th day of March, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Miss Mwangi for the exparte applicants

N/A for the Respondents

CA: Kombo