



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 79 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY, STATE DEPARTMENT

OF INTERIOR, MINISTRY OF INTERIOR & COORDINATION

OF NATIONAL GOVERNMENT.....1ST RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF

THE NATIONAL TREASURY.....2ND RESPONDENT

AND

THE ATTORNEY GENERAL.....INTERESTED PARTY

EX PARTE : JASTON ONGULE ONYANGO

JUDGMENT

The Application

1. The *ex parte* Applicant herein, Jaston Ongule Onyango, was the Petitioner in **High Court Petition No. 530 of 2012- Jaston Ongule Onyango vs The Attorney General**, wherein judgment was delivered in his favour on 28th October 2012, and general damages of Kshs 4,000,000/= with interest at court rates from the date of judgment until payment in full, together with special damages of Kshs 4,950/= were awarded to him for malicious prosecution.
2. The Applicant has now filed these judicial review proceedings by way of a Notice of Motion dated 16th March 2018, seeking orders of mandamus against the Respondents jointly and severally to pay to him the judgment debt in the sum of Kshs 5,359,040/= arising from the aforesaid judgment, together with all accrued and accruing interest on the decretal sum at 12% per annum.
3. The Respondents are firstly, the Principal Secretary in the Department of Interior, Ministry of Interior and Co-ordination of the National Government, who is sued in his capacity as the accounting officer responsible for the National Police Service and liable to comply with court orders requiring payment from the said Ministry. The Applicant also sued the second Respondent the Principal Secretary, Ministry of National Treasury in his capacity as the Accounting Officer in the said Ministry, who is responsible for facilitating allocation of funds to government Ministries to *inter alia* enable compliance with court orders requiring monetary payment from such ministries in for settlement of judgment debts.
4. The Applicant relied on a statutory statement by his Advocates dated 26th February 2018, and a verifying affidavit that he swore on the same date, wherein it was stated that a duly certified decree was issued in Petition No 350 of 2012, and that party and party costs in the said

Petition were taxed at Kshs 250,699/= on 3rd March 2017 in the Applicant's favour, and a Certificate of Taxation duly issued on 13th March 2017. Further, that on 27th March 2017, the Court issued a Certificate of Order against the Government in the said Petition in the total sum of Kshs 4,925,847/=, which was inclusive of the decretal sum, interest on the decretal sum at the time and the party and party costs. The Applicant annexed copies of the aforesaid documents to his verifying affidavit.

5. He further averred that the certified Decree, Certificate of Taxation, Certificate of Order against the Government and judgment and a request for settlement were duly served on the 1st Respondent and the Attorney General on 5th April 2017 and, their receipt was acknowledged. However, that despite follow up by the Applicant's Advocates on record and issuance of notice of these judicial review proceedings, there has been no response from the Respondents. That as a result, the judgment debt has escalated on account of interest and now stands at Kshs 5,372,207/= as at 22nd February 2018, and continues to accrue interest.

6. Lastly, that no appeal has been filed against the judgment in the Petition, and there are no orders of stay of execution of the same. Therefore that the disregard, neglect and disobedience of the said judgment and orders of the Court is a violation of the constitutional values of management of public finance, the rule of law, equality before the law, and human dignity.

The Determination

7. The Respondents, though served with the application did not enter appearance or file any response. The Applicant urged the application through written submissions dated 14th June 2018 filed by Mbugua Mureithi & Co Advocates, his Advocates on record. It was contended therein that the facts stated in the foregoing and this application are not contested by the Respondents.

8. Further, that by section 21(3) of the Government Proceedings Act, the legal obligation to settle a judgment debt appearing on a Certificate of Order against the Government is immediate, unless an appeal has been lodged or there is a suspension order of the certificate by the court. Reliance was placed on the decision by Odunga J. in **Republic vs Principal Secretary of Defence and Another ex parte David Gitau Njau & 9 Others (2018) eKLR** for this position, and for the submission that failure to make funds available to pay a judgment debt is itself a failure to carry out a statutory obligation which is amenable to an order of mandamus.

9. The decision in **Republic vs The Attorney General & Another ex parte James Alfred Koroso (2013) e KLR** was also cited for the submission that an order of mandamus is the only remedy open to a decree holder to realize a judgment debt against the Government, since section 21(4) of the Government Proceedings Act prohibits execution by attachment against the Government. On the prayer for costs, the Applicant urged that since the principle is that costs follow the outcome of the cause, should the Applicant be successful he be awarded costs particularly given the casual attitude of the Respondents in their obligation to meet the judgment debt.

10. I have considered the arguments by the Applicant, and 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] eKLR**, 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..... .”

11. It is not disputed in the present application that judgment was entered in favour of the Applicant in **Nairobi High Court Petition No. 530 of 2012- Jaston Ongule Onyango vs The Attorney General**. 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 Applicant in the said judgment, and secondly, if so, whether the Applicant is entitled to the relief he seeks.

12. The Respondents are departments of Government. 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.”

13. Execution proceedings against a government or public authority can thus 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 also 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.”

14. In the present application, the 1st Respondent is the accounting officer in the Government ministry that is in charge of the Police Service, which was found to have maliciously prosecuted the Applicant in the judgment delivered by Mumbi Ngugi J. in on 28th October 2015 in **Nairobi High Court Petition No. 530 of 2012- Jaston Ongule Onyango vs The Attorney General**. The amount due from the 1st Respondent has not been disputed, and the Applicant in this respect annexed copies of the judgment and decree awarded in **Nairobi High Court Petition No. 530 of 2012- Jaston Ongule Onyango vs The Attorney General**.

15. I however find that as no liability was found on the part of the 2nd Respondent’s office in the said judgment, it cannot be held accountable for payment of the damages and costs awarded in the judgment. There was thus a mis-joinder of the 2nd Respondent to this extent.

16. The Applicant also contended that he had made demands for payment of the costs, and annexed a copy of a letter dated 5th April 2017 forwarding the said judgment, the decree dated 6th May 2016, the Certificate of Taxation dated 13th March 2017, and the Certificate of Order Against the Government dated 27th March 2017 to the Attorney General, with a stamp of the Office of the Attorney General dated 5th April 2017 acknowledging receipt. The said documents were also annexed.

17. This Court therefore finds that as judgment was already entered in favour of the Applicant 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.

18. The only amount due that needs to be clarified is of the interest that is to be paid by the Respondents, which the Court in **Nairobi High Court Petition No. 530 of 2012- Jaston Ongule Onyango vs The Attorney General** indicated in its judgment would be paid on the global award of damages of Kshs 4,000,000/= with interest at court rates from the date of judgment until payment in full. Thus, the interest payable on the said award is simple interest at the court rate of 12%, and from the date of the said judgment on 28th October 2015.

19. In the premises, I find that the Applicant's Notice of Motion dated 16th March 2018 is merited. I accordingly grant the following orders:

(a) An order of mandamus directed to the Principal Secretary in the Department of Interior, Ministry of Interior and Co-ordination of the National Government, to comply and pay the Applicant herein, Jaston Ongule Onyango, the sum of Kshs 4,000,000/=, with interest thereon at the rate of 12% per annum from the date of judgment in **Nairobi High Court Petition No. 530 of 2012- Jaston Ongule Onyango vs The Attorney General** until payment in full, and to also pay the Applicant special damages of Kshs 4,950 /=- and the taxed costs of Kshs 250,699/=-, which were also awarded in in the said judgment.

(b) The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 16th March 2018 of Kshs 50,000/=.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF OCTOBER 2018

P. NYAMWEYA

JUDGE