



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
JUDICIAL REVIEW NO. 1 OF 2016

MILLICENT MUTHONI.....APPLICANT

VS

THE PRINCIPAL SECRETARY

MINISTRY OF HEALTH SERVICES.....RESPONDENT

JUDGEMENT

The application before the court is dated 26th January 2016. It seeks for an order of Mandamus to issue compelling Principal Secretary Ministry of Health Services the Respondent herein to pay the sum of Kshs 1,020,777/= and interest as per the Decree and Certificate of Costs dated 16.1.2012 issued by Meru Chief Magistrates Court Civil Case No. 185 of 2007 and in default, the Respondent to be committed to prison.

The Exparte applicant also sought for Costs of application. The application is supported by statement of facts and Verifying Affidavit of exparte applicant as well as annexed documents.

On 7th April 2016 Mr Kiongo for the Respondent appeared in court and promised to follow up on payment. He was not ready to proceed. He had not filed a response to the application. Mr Murango for the exparte applicant urged the court to have matter mentioned in 30 days time. Matter was fixed for mention on 26th May 2016. On 26th May 2016 Mr Kimathi for the Respondent submitted that he communicated to exparte applicants counsel that they shall have claim paid once funds are allocated in the next budget. He also said he would file a response. The court allowed the Respondent to file response within 14 days and serve on applicants counsel. In turn applicants counsel to file submissions within 14 days and serve.

The respondent was also to file submissions within 14 days of receiving exparte applicants submissions. Matter was fixed for mention on 10th November 2016. On 10.11.2016 the court was not sitting and matter was fixed for 2.2.2017.

By 2.2.2017 the Respondent had not filed a response neither had they filed submissions. This court is therefore to consider exparte applicants motions and determine the application exparte for lack of response and/or oppositions from the Respondent Principal Secretary Ministry of Health.

An order of mandamus is defined in **Halsbiery's Laws of England:-**

“As a command issuing from the High Court of Justice directed to any person, corporation of

inferior tribunal requiring him/her or them to do some particular thing specified in it which appertains to his/her or their office and is in the nature of a public duty.”

In this case the exparte applicant sought to compel the principal Secretary Ministry of Health to pay her decretal sums awarded to her in Meru Chief Magistrates Court Civil Case No. 185 of 2007 and in default the Principal Secretary be committed to Civil jail.

The exparte applicant annexed copy of judgment from which decree sought to be executed was made. It is marked MMI and it was a judgment delivered on 7th May 2011 by K.W.Kiarie SPM as he then was.

On 16th January 2012, Certificate of Costs was also drawn on even date.

The Respondents Ministry and the Principal Secretary have not settled the judgment/decretal sum owed to the exparte applicant over five years down the line either in instalments or in full.

On 7th April 2016 when the application came up for hearing Mr. Kiongo counsel for respondent asked to be allowed time to follow upon the payment. He was given upto 26th May 2016 when Mr Kimathi counsel holding brief for Mr Kiongo said that they shall have claim paid once funds are allocated in the next budget. It is five months since the financial year commenced and there is no evidence of action on the part of the respondents to demonstrate that any efforts/steps have been taken to pay out the decretal sums to the exparte applicant. The finding of the Magistrate in the original suit was as follows:

“Her case therefore succeeds for Kshs 873,113 against the second defendant (AG) with costs and interest at court rates from the date of judgement till payment in full. Right of Appeal 30 days.”

The office of the Principal Secretary is established under Article 155(1) of the constitution of Kenya 2010 and Article 155(2) provides that.

“ Each state department shall be under the administration of a Principal Secretary.”

It implies that the Principal Secretary is the Accounting officer of each State Department responsible for its human capital as well as finances.

The exparte applicants counsel in his submissions relied on the authority of HC Misc Application No. 173 of 2004 Republic vs P.S Ministry of Water Resources Management and Development and Akamba Timber Hand work Limited in which Justice Onyancha held

That Respondents being public bodies or officers under a public duty to settle a decree which is an order of the court.

The facts in the above authority is similar to the instant case and therefore persuasive.

On 23rd October, 2012 Justice W.Ouko (as he then was) in Nakuru Judicial Review Miscellaneous Application No.7 of 2012 made a similar finding compelling the Secretary Teachers Service Commission to pay decretal sums in Nakuru HCCC No. 65 of 2006. In upholding the decision of Justice W.Ouko in JR Nos.7 of 2012, Justice Janet Mulwa in Nakuru JR No. 18 of 2012 declined to set aside the orders of mandamus issued against TSC by Hon. Justice Ouko in JR No. 7 of 2012 while holding as follows:

“The functions of court faced with this situation has to do a balancing act by considering and shared values objectives and service of responsibility proportionate to public interest and policy considerations. When a statutory duty is placed upon a Government office in his official capacity and the duty is owed any person with sufficient legal interest in the performance of the duty, he may apply for an order of mandamus to enforce performance, if the said duty is clearly defined.”

Odunga J in Judicial Review applications No. 132 of 2010 Republic vs Ps, office of the President and others held:

“Taking a successful litigant in circles when adequate notices have been given would be to turn the legal process into a theatre of the absurd”

Guided by the authorities herein referred to and the facts of this case I do find that there is no reasonable basis why the respondents have not paid the decretal sums herein for over five years when no appeal was preferred against the judgement of the trial court. It is sheer sign of negligence which the court has to act upon by issuing orders prayed for.

An order of Mandamus is hereby issued compelling and/or commanding the Principal Secretary Ministry of Health the Respondent herein to pay the whole of decretal sums in Meru Chief Magistrates Court Civil Case No. 185 of 2007 with interest from the date of judgement within 42 days from date of this ruling.

In default the Principal Secretary shall be committed to civil jail for a period to be determined by the court on arrest of the Principal Secretary.

Ruling delivered and dated 3rd March 2017.

In the presence of

C/A –

Applicant

Respondent

A.Ong'injo Judge

3.3.2017