



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISC. CIVIL APPLICATION NO. 280 OF 2016

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

EX PARTE: ZEITUN JUMA HASSAN

JUDGEMENT

Introduction

1. By a Notice of Motion dated 22nd July, 2016, the applicant herein, **Zeitun Juma Hassan**, seeks orders of mandamus compelling the Respondent to effect payment upon the applicant for the sum of Kshs 3,913,299.56 as well as the costs of these proceedings.
2. According to the applicant, she filed a Constitutional Petition No. 57 of 2011 seeking inter alia general damages arising from the violation of her deceased husband's rights and upon hearing of the said petition, the Court awarded her prayers including the sum of Kshs 3,000,000.00 being general damages as well as the costs of the said proceedings.
3. It was however averred that the said sum remains unpaid to date hence the total outstanding sum now stands in the sum of Kshs 3,913,299.56 which sum is unpaid despite the demand therefor having been made.

Respondent's Case

4. In opposition to the application, the Respondent averred that it was only sued in the said proceedings a legal adviser of the Government on behalf of thither 4 respondents who were police officers at the time of the deceased's death. The said police officers, it was averred were employed by the National Police Service which fall under the Ministry of Interior and Co-ordination of National Government and not the Respondent, who is not the counting officer in the said ministry for the purposes of settling claims hence mandamus cannot issue against the Respondent as the Respondent does not receive any budgetary allocation from the Treasury to settle claims on behalf of other ministries.
5. It was further averred that the state counsels who were handling the matter left the Respondent's employment without initiating the process of informing the said ministry of the decretal sum hence the

sum due herein was not factored in the budgetary allocation for the year 2016/2017. As a result the ministry is not in a position to settle the said outstanding amount.

6. To the Respondent, it cannot be personally held liable for the government liability and lack of funds from the Treasury though it has not refused to pay the same.

Determinations

7. I have considered the issues raised in this application.

8. The first issue for determination is whether the Respondents herein are under a legal duty to satisfy the decree the subject of these proceedings. Article 156(4) of the Constitution of Kenya, 2010 provides that:

The Attorney-General—

a) is the principal legal adviser to the Government;

b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

9. It was therefore submitted that Court jurisprudence has it that when Attorney General is sued on behalf of the government he is obliged to advise his client to pay any costs and liabilities that arise out of his representation failure to which, the duty shall rest on him and in this respect reliance was placed on **Peter Anyang' Nyong'o & 10 Others vs. Solicitor General [2011] eKLR**, in which **Warsame J.** expressed himself as follows:

“No doubt the decree is against the Attorney General but in his representative capacity. As stated earlier the Attorney General was representing one arm of the Government and if any costs or liability accrues from his representation, he is obliged to pay the costs. It is for the Attorney General to advise his clients to pay the costs which attracted his representation on behalf of the said client. Being a constitutional representative and being the principal legal advisor to the three arms of the Government, he is required to direct any arm of Government he represented to pay the costs of any suit which he acted on its behalf. Clearly, it is the duty and the function of the Attorney General to advise his client and if a particular organ refuse to pay he will be responsible on behalf of his agent. In that regard the Solicitor General being the accounting officer of the Attorney General was rightly sued by applicants. In my mind the applicants clearly and correctly sued the Solicitor General and are entitled to the orders sought.”

10. It is therefore true that under Article 156(4) of the Constitution the Attorney-General represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. In **Council of Governors & 6 Others vs. Senate [2015] eKLR**, a three judge bench of the High Court expressed itself as hereunder:

“The question we must therefore answer is whether it is mandatory to sue the Attorney General where the conduct of the Senate or its proceedings are in issue...it is clear to us that the Constitution, 2010 allows the Attorney General the right to represent the National Government in Court proceedings but does not stipulate that the Attorney General should be sued in all instances where any organ of the National Government has been sued and to say otherwise would be absurd.”

11. In my view the mere fact that a person has a right to be legally represented by another does not necessarily mean that that other person takes over the liability of the person he represents. To hold to the

contrary would in my view be clearly untenable. However section 12(1) of the *Government Proceedings Act*, provides as hereunder:

Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.

12. In my view, this is what is referred to as a “deeming” provision. As was held in **Prof. Peter Anyan’g Nyong’o and 10 Others vs. Attorney General of Kenya & Others EACJ Reference No. 1 of 2006 [2007] 1 EA 5; [2007] 2 EA 5; [2008] 3 KLR (EP) 397:**

“The word “deemed” is commonly used both in principal and subsidiary legislation to create what is referred to as *legal or statutory fiction* and the legislature uses the word for the purpose of assuming the existence of a fact that in reality does not exist...The word “deemed” is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.”

13. In other words for the purposes of institution of civil proceedings, the Attorney General is deemed as the department of Government concerned and any judgement obtained against the Attorney General in such proceedings is deemed as a judgement against the said department. It is in that respect that I understand the holding in **Republic vs. Attorney General ex parte Kahugu Karebe [2012] eKLR** that:

“Though it is true that the Attorney General had been sued in RMCC 6263/1999 on behalf of the Commissioner of Police, the important point to note is that the Attorney General was the only defendant named in the suit and after full hearing of the applicant’s case on the merits, judgment was entered by a court of competent jurisdiction for the plaintiff (now applicant) against the Attorney General (Respondent). That Judgment remains valid and enforceable since there is no evidence that it has been overturned on appeal or set aside. If the Attorney General was of the view that he was not the proper party to be held liable for acts of negligence attributed to the police officer whose negligence caused personal injuries to the Applicant, he ought to have had himself struck out from the suit as the defendant so that in his place the proper party would have been brought on board as the defendant in his place. The fact that this was not done and judgment was eventually entered for the plaintiff against the Attorney General as the defendant means that the final decree was issued against the Attorney General and the Attorney General is duty bound to satisfy that decree.”

14. The question is who is then under a legal obligation to satisfy such a judgement after the same has been given? Section 21(1) of the *Government Proceedings Act* provides:

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.

15. Section 21 (3) of the said Act on the other hand provides:

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.

16. The effect of these provisions is that whereas execution proceedings as are known to law are not available against the Government, the accounting officer for the Government department concerned is nevertheless under a statutory duty to satisfy a judgement made by the Court against that department.

17. The procedure in such matters was dealt with extensively in Shah vs. Attorney General (No. 3) Kampala HCCM No. 31 of 1969 [1970] EA 543 where Goudie, J held, *inter alia*, as follows:

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...The foregoing may also be thought to be much in point in relation to the applicant’s unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty...English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting “simply in his capacity of servant”. There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a *mandamus* would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of *mandamus* will lie for the enforcement of the duties...With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile...It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government...Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go...In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the

Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of *mandamus* must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament..."

18. The Court continued:

"In the court's view the granting of *mandamus* against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata*, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few...*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designate* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice...The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of *mandamus* will issue as prayed with costs."

19. It is therefore clear that in applications for *mandamus* seeking to compel the satisfaction of a decree, it is the accounting officer of the relevant government department that is obliged to satisfy the decree

notwithstanding the fact that the said officer was not a party to the trial proceedings and that in fact the only defendant therein was the Attorney General. Therefore whereas I agree with the position in **Peter Anyang' Nyongo & 10 Others vs. Solicitor General [2011] eKLR**, that it is for the Attorney General to advise his clients to pay the costs which attracted his representation on behalf of the said client and that being a constitutional representative and being the principal legal advisor to the three arms of the Government, he is required to direct any arm of Government he represented to pay the costs of any suit which he acted on its behalf; I however do not subscribe to the view that if any costs or liability accrues from his representation, he is obliged to pay the same and that if a particular organ refuses to pay he will be responsible on behalf of his agent.

20. It is however my view that the failure to commence judicial review proceedings seeking the orders of *mandamus* against the accounting officer, though an irregularity, is not fatal. Considering the role of the Attorney General in such proceedings, the same ought not to be determined simply on non-joinder or misjoinder of parties. This was the position adopted in **Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute Nairobi H.C. Misc. Appl. No. 594 of 2002 [2003] KLR 582**, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation. This position is even more relevant to proceedings in the nature of judicial review which are neither criminal nor civil and particularly in application for *mandamus* where what is sought is the enforcement of a decree against the respondent not in his personal capacity but in his official capacity. In such circumstances, the respondent is simply being compelled to facilitate the payment as opposed to imposing personal liability.

21. It is therefore my view that whereas misjoinder or non-joinder may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed where the substance of the reliefs sought can still be realised notwithstanding the irregularity. Article 159(2)(d) of the Constitution enjoins this Court to administer justice without undue regard to technicalities of procedure, as long as the rules of natural justice are adhered to. At the end of the day the entity which is bound to settle the decree is the national Government and not the said officer in his personal capacity.

22. It was contended by the 2nd Respondent that there is no budgetary allocation to settle this claim. **Githua, J in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR** expressed herself 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. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues. [Emphasis mine].

23. I associate with the said decision and it is therefore my view that settlement of decretal sum by the Government whether National or County does not necessarily depend on the availability of funds. This position was appreciated by this Court in **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012** in which this Court pronounced itself as follows:

“I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein.”

24. In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations. In other words financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle a sum decreed by the Court to be due from it. The liability of the Government arises as soon as a judgement of a Court of competent jurisdiction is given. What however the successful party cannot do is to enforce the same unless and until certain procedural steps are taken and the enforcement can only by way of an application for an order of *mandamus*.

25. In the premises I find merit in the Notice of Motion dated 22nd July, 2016.

Order

26. Consequently, an order of *mandamus* is hereby issued compelling the accounting officer, Ministry of Interior and Coordination of National Government, who is the Principal Secretary in the said ministry, to effect payment upon the applicant herein, **Zeitun Juma Hassan**, in the sum of Kshs 3,913,299.56.

27. Due to misjoinder or non-joinder of parties, there will be no order as to costs. It is so ordered.

Dated at Nairobi this 20th day of March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Onsongo for Miss Kilonzo for the applicant

CA Mwangi