



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 530 OF 2016

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR & COORDINATION

OF NATIONAL GOVERNMENT.....2ND RESPONDENT

EX PARTE: RUTH WANGARI THUNGU

JUDGEMENT

Introduction

1. By a Notice of Motion dated 3rd November, 2016, the ex parte applicant herein, **Ruth Wangari Thungu**, seeks orders of *mandamus* compelling the respondents to pay the decretal sum of Kshs 1,947,386.00 inclusive of 6% interest since 7/12/2009 to Gitau J.H. Mwara Co. Advocates until payment in full within thirty (30) days from the date of judgment of this court as well as the costs of these proceedings.

2. The application was supported by a very scanty three paragraph verifying affidavit in which apart from confirming the averments in the Statement of Facts, nothing of substance was deposited therein. The said verifying affidavit was clearly very economical in terms of the factual averments. It is now trite that it is the verifying affidavit which contains the facts rather than the statement. This was held by the Court of Appeal in **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000** where the Court restated the law that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. Accordingly, the ex parte applicant ought to ensure that the verifying affidavit contains all the factual information that he intends to rely upon. In that case it was held that:

“The application for leave was grounded on the matters set out in the statement accompanying the application and in the verifying affidavit. The statement is required by rule 1(2) of Order LIII of the Civil Procedure Rules to set out the name and description of the applicant, the relief sought, and the ground on which it is sought. The facts relied on are required by the rule to be in the verifying affidavit not in the statement as largely happened in this case.”

3. This was the position adopted in **Bespoke Insurance Brokers vs. Philip Kisia, the Town Clerk City**

Council of Nairobi & Another [2013] eKLR where it was held that;

“Thirdly, the respondents argued that the statutory statement does not adhere to the provisions of Rule 1(2) of Order 53 Civil Procedure Rules. According to the said rule a statutory statement should contain the name and description of the applicant, the relief sought and the grounds upon which the relief is sought. It is the respondents’ argument that the statutory statement does not contain the grounds upon which the reliefs are sought but facts relied upon. The respondents argue that the facts are supposed to be found in the verifying affidavit(s). The respondents are correct in their submissions. The contents of a statutory statement are as they have stated. The facts to be relied upon are supposed to be found in the verifying affidavit(s).”

4. I will revisit this issue later in this judgement.

5. According to the grounds upon which the Chamber Summons for leave was based, the applicant is the administratrix of the Estate of Harun **Thungu Wakaba** who is the decree holder in Nairobi HCCC No. 6031/91 - Harun Thungu Wakaba vs A.G - whereby he was awarded compensation in tort for illegal arrest, illegal detention, assault and malicious prosecution by **Justice Ali Aroni** on 7th December, 2009 for Kshs 1,700,000 plus taxed costs of Kshs 247,386 which totaled to Kshs 1,947,386 as per the Certificate of Order Against the Government issued on 2nd August, 2010 and duly served with Penal Notice on the respondents on 21st October, 2011 after an *inter partes* hearing which lasted for 18 years.

6. It was stated that no appeal was filed against the original judgment and the respondent’s application to set aside judgment was dismissed on 8th February, 2013 by the High Court and there are no orders of stay of execution of the decree issued in the matter. After the issuance of the decree, a certificate of order against the government with penal notice were served on the Attorney General and the predecessor to the Principal Secretary, Ministry of Interior and Coordination of National Government on 3rd August, 2010 and again on 21st October, 2011, the Attorney General, the Solicitor General, and now the Principal Secretary, Ministry of Interior and Coordination of National Government have continually refused to comply with the decree and certificate of order against the government.

7. It was contended that despite personal follow-up by the Applicant’s advocate with the Attorney General, the Solicitor General and the Principal Secretary, Ministry of Interior and Coordination of National Government and written reminders, the trio have refused to comply thus necessitating the remedy of order of *mandamus*.

8. It was therefore prayed that an order of *mandamus* do issue that the decretal sum of Kshs 1,946,386 plus interest at 6% from 7/12/2009 until payment in full be paid to Gitau J.H. Mwara Co. Advocates within (thirty) 30 days after the date of judgment.

Determinations

9. I have considered the issues raised in this application. This application was not opposed by the Respondents.

10. 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.

11. 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.

12. 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.

13. The procedure in such matters was dealt with extensively in Shah vs. Attorney General (No. 3) Kampala HCC 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..."

14. 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 designata* 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."

15. 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.

16. The nature of judicial review proceedings seeking relief for an order of *mandamus* compelling the settlement of a decree was explained by this Court in **Republic vs. Attorney General & Another Ex parte James Alfred Koroso [2013] eKLR** as hereunder:

"...in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit...The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought 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 Accounting Officer 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 Public Officer in his official capacity and the duty is owed not to the State 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. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."

17. What has however caused me concern is that whereas the ex parte applicant herein is **Ruth Wangari Thungu**, the order sought herein in the body of the motion is an order compelling the Respondents to pay

the sum due to the ex parte applicant to **Gitau J. H. Mwara & Co. Advocates**. Whereas the said firm may well be the legal representatives of the ex parte applicant, it is in law not a party to the suit and hence the Respondent cannot be compelled to pay to it the sum due to the ex parte applicant. Whereas the said sum may well be paid through the said firm, this Court cannot direct that the said sum be paid to the firm in its own right as if the firm was a party to these proceedings.

18. Apart from that the application seeks payment of interest at 6%. I have perused the judgement and there is no mention of interest. None of the documents exhibited provide for the payment of interest including the certificate of order against the Government. With respect a claim for mandamus against the Government to settle decretal sum, the position was correctly stated by **Githua, J** in **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR** as follows:

“The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issues 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 judgement. 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 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. The Respondent’s claim that the Applicant should have waited until the start of the next financial year to enforce payment of the decree issued in his favour cannot be sustained firstly because it has no legal basis and secondly because it is the responsibility of the Government to make contingency provisions for its liabilities in tort in each financial year so that successful litigants who obtain decrees against the Government are not left without remedy at any time of the year.”

19. The position that under section 21 of the *Government Proceedings Act*, the respondents are only under an obligation to pay the amount for the time being contained on the face of the certificate was also adopted by **Wendoh, J** in **Arthur Kinuthia Albert vs. Permanent Secretary, Ministry of Health [2008] eKLR** in which the learned Judge expressed herself inter alia as follows:

“The question I pose is whether it is this court to determine what sum is payable in terms of interest. Judicial review merely deals with the decision making process but not the merits of the decision. In my view, the applicant’s Counsel is calling upon this court to determine whether or not interest was payable to them and I am of the view that that is not the purview of this court’s jurisdiction. The figure of interest included in the decree is foreign to the judgement in CMCC 773/03. Interest may vary according to what the Plaintiff has pleaded in the plaint. It is outside this court’s jurisdiction to assume and to determine whether or not interest was payable or how much is payable. Since the court in CMCC 773/03 had not specifically ordered for payment of interest it was upon the Applicant to move the court which gave the judgement for a review of its orders on account of there being an error on the face of the record. This court’s jurisdiction is limited to compelling the Respondent to pay based on the judgement, decree and certificate of order but it is not to determine what is due to the Applicant and this court would decline to grant the order prayed.”

20. It follows that an order of *mandamus* can only issue in respect of the sum certified in the said order as due.

Order

21. In the premises an order of *mandamus* is hereby issued compelling the 2nd respondent to pay the

decretal sum of Kshs 1,947,386.00 to the applicant **Ruth Wangari Thungu**, by herself or through her legal representative. I however decline to direct the Respondents as to the period within which to pay the said sum as to do so is premature at this stage.

24. As the verifying affidavit was worthless and as the substantive motion was wrongly intitled by expressing that the same is brought in the names of the ex parte applicant rather than the Republic there will be no order as to costs. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779**; **Mohamed Ahmed vs. R [1957] EA 523**; and **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**.

23. Orders accordingly.

Dated at Nairobi this 15th day of March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Gitau for the ex parte applicant

CA Mwangi