



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS APPLICATION NO. 105 OF 2011

CELESTINE NYAGA APPLICANT

VERSUS

THE MINISTER FOR FINANCE RESPONDENT

COMMUNICATIONS COMMISSION OF KENYA. 1ST INTERESTED PARTY

TELCOM KENYA LIMITED 2ND INTERESTED PARTY

POSTAL CORPORATION OF KENYA 3RD INTERESTED PARTY

RULING

1. In her Notice of Motion dated 15th February, 2012, Celestine Nyanga (hereinafter “the Applicant”) applied for an order of mandamus to compel the Respondent to transfer and/or vest MERU CMCC No. 34 of 1991 to either the Communications Commission of Kenya, Telkom Kenya Limited or the Postal Corporation of Kenya (hereinafter collectively “the Interested Parties”) . The Motion was brought under Order 53 of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act.

2. The Motion was supported by the Applicant’s Supporting and Further Affidavits sworn on 15th February, 2012 and 25th June, 2012, respectively. It was the Applicant’s case that she was unlawfully dismissed from employment by the defunct Kenya Posts and Telecommunication Corporation (“KPTC”) on 21st November, 1998 (sic); that ON 24th January, 1991 she lodged Meru CMCC No. 34 of 1991 (hereinafter “the said case”). She contended that judgment for KShs.50,000/= was entered in her favour on 15th November, 1995. Following subsequent proceedings, the decretal amount increased to KShs.1,731,436/= for which, part of it was paid and a sum of KShs.646,382/05 remained unpaid.

3. The Applicant further contended that vide the Kenya Communications Act 1998 (hereinafter “that Act”), KPTC was split into the three Interested Parties. That under that Act, the Respondent was empowered to transfer and vest assets and liabilities of the defunct KPTC to either of the three (3) Interested Parties. **That Meru CMCC No. 34 of 1991** was not vested in any of the said entities despite reminders to the Respondent. That although the Respondent was under a statutory duty to vest the said **Meru CMCC No. 34 of 1991**, the Respondent was acting unlawfully and in excess of his powers in refusing to vest the said case as aforesaid. The Applicant defended her delay in instituting the present application on the efforts she had made between 1999 and 2003 in getting paid by the 2nd Interested Party.

4. The Respondent did not appear or oppose the Motion. The same was however strenuously opposed by

the Interested Parties. The 2nd Interested Party filed Grounds of Opposition in which it contended that; the powers of the Respondent under the law were discretionary and that he was therefore not amenable to an order of mandamus; that the suit sought to be enforced had abated vide Section 5 (4) of the 3rd Schedule of the Kenya Information and Communication Act, Cap 411 of the Laws of Kenya, that in any event, the decree sought to be enforced was time barred by virtue of Section 4 (4) of the Limitation of Actions Act.

5. The 1st and 3rd Interested Party opposed the Motion vide the Replying Affidavit of Samuel M. Mburu sworn on 24th May, 2012. They contended that since the powers of the Respondent under the Kenya Communications Act are discretionary, he was not amenable to an order of mandamus; that the application was being lodged 16 years since the date of judgment making the delay inordinate. The Limitation Act against the judgment was also invoked by the said Interested Parties against the Motion.

6. The Counsels for the respective parties filed submissions on the Motion. It was submitted for the Applicant that the suit was a liability that had to be vested by the Respondent under Section 5 (1) of the 3rd Schedule to the Kenya Communication Act, 1998. That the duty imposed under Section 5 (1) aforesaid was a specific and not a general duty. That there had been no inordinate delay in bringing the application. That time under the Limitation of Actions Act will start running after the suit has vested to either of the three (3) Interested Parties. The Applicant concluded that, under Section 5 (4) of the Kenya Communications Act, the suit had not abated. The Advocates for the interested parties submitted along the lines set out in the Grounds of Opposition and Replying Affidavits which have been analysed above.

7. I have considered the Affidavits on record, the respective parties submissions and the authorities relied on. The issues in this matter that arise for determination are two; whether this Court has the jurisdiction to grant the order sought of mandamus in the circumstances of this case and whether the matter is caught up by the provisions of the Limitation of Actions Act, Cap. 22, Laws of Kenya. It was the contention of the Interested Parties that the duty imposed on the Respondent by Section 5 of the Kenya Information and Communication Act is a general duty and of a discretionary nature which is not amenable to an order of mandamus. The cases of *John Peter Mureithi & 2 Others v Attorney General & 4 Others (2006) e KLR and Kenya National Examinations Council & Republic Ex-parte Gathenji & Others CACA 266 of 1996* were relied on in support of that contention. The Interested parties further submitted that since Section 5 of the aforesaid Kenya Information and Communication Act was only permissive by the use of the term may, the power conferred therein was only permissive and not subject to an order of mandamus.

8. Section 5 (1) and (6) of the third 3rd Schedule to the Kenya Information and Communication Act provides:-

“5. (1) The Minister for Finance may by notice in the Gazette, specify the date or dates and the manner in which the assets and liabilities of the former Corporation shall be transferred to and vested in –

(a) the Commission, in respect of assets and liabilities relating to regulatory services;

(b) the Company, in respect of assets and liabilities relating to telecommunication services; and

(c) the Corporation, in respect of assets and liabilities relating to postal services;

6. Any assets and liabilities of the former Corporation which are not to be vested either in the Commission, the Company or the Corporation as the case may be, shall be disposed of in such manner as the Minister for Finance shall determine.” (underlining mine).

9. It is true from the foregoing that the powers given to the Respondent in Section 5 (1) above appear to be permissive by the use of the term “may”. Those powers are only permissive to the extent that the Respondent has to elect which of the three Interested Parties, the Commission, the Company or the Corporation, is to benefit from the assets or suffer the liabilities of the defunct KPTC. However, the Respondent is not given the discretion not to vest the assets or the liabilities of KPTC. The only discretion

given to him is to decide who between the three Interested Parties is to shoulder the benefit or liability or how the assets or liabilities are to be disposed off. I say so because, Section 5 (6) uses the term shall. The Respondent is directed to decide how the assets and liabilities not vested are to be disposed of. That subsection provides to the effect, inter alia, that;

“... shall be disposed of in such a manner as the Minister for Finance shall determine.”

10. In this regard, while Section 5 (1) gives the discretion to the Respondent on how to vest the assets and liabilities of KPTC, Section 5 (6) makes it clear that no asset or liability of KPTC shall remain unvested or undisposed of. That is why there is the use of the term “**shall**” twice in that sub-section. To that extent, the argument by the Interested Parties that the Respondent is not amenable to mandamus is flawed. In my understanding, what the Court of Appeal held in both the **James Peter Mureithi and The Kenya National Examinations Council Cases (Supra)** was that, an order of mandamus cannot be used to direct an authority or public officer to act in a particular manner or exercise its discretion in a particular manner.

11. If an authority or public officer is given power to act for the benefit of the citizen, it or he cannot fail to act to the detriment of a citizen. As regards the order of mandamus, Gondie J. expressed himself as follows in the case of **Shah v Attorney General (No. 3) Kampala HCC No. 31 of 1969 [1970] EA 543:-**

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. THE DICTIONARY OF ENGLISH LAW by Earl Jowitt tells us that mandamus “is a prerogative order issued in certain cases to compel the performance of a duty” and that it was substituted for the writ of mandamus by the Administration of Justice (Miscellaneous Provisions) Act, 1938. 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... it is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual.”
(underlining provided)

12. The Court of Appeal in **Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge & Others [1977] eKLR** held:-

“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 or 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 that the party against whom the application 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”.

13. In the present case, the Applicant is not seeking any order that the Respondent be compelled to exercise his discretion in any particular manner, but that he exercises the power or duty given to him by statute. A public body which or officer who has been given a power or duty by the law to act or perform cannot choose not to act. More so, where refusal to act in one way or the other will subject a citizen to some hardship, loss or prejudice. In the present case, the Refusal by the Respondent to exercise the power given under Section 5 of the Kenya Information and Communication Act, will deny any decree holder or anyone with a claim against KPTC an opportunity to execute the decree or recover the claim to his/her prejudice. Accordingly, this Court has the jurisdiction to compel the Respondent to exercise the duty directed under Section 5 of the Kenya Information and Communications Act to the extent that it will not direct him how to exercise it. He is the one to choose how to exercise it but cannot refuse to exercise that duty. The Applicant is right, the Respondent is under a statutory duty to vest assets and or liabilities of KPTC in either of the Interested Parties or state how they are to be disposed off.

14. The next issue is that of limitation. The Interested Parties contend that the decree being sought to be enforced was passed over 16 years from the date when the present Motion was filed. That the decree had been caught up by the provisions of Section 4 (4) of the Limitation of Actions Act. The Applicant contended otherwise. She contended that time will start to run after the Respondent has exercised his duty under Section 5 of the Kenya Information and Communications Act.

15. Section 4 (4) of the Limitation of Actions Act, Cap 22 Laws of Kenya provides:-

“4 (4). An action may not be brought upon a judgment after the end of twelve years from the date of which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

From the foregoing, it is crystal clear that one cannot seek to enforce a judgment after twelve years from the date on which it was passed.

16. In the case of Willis Onditi Odhiambo v Gateway Insurance Co. Ltd [(2014) eKLR], the Court of Appeal held:-

“Given the record of this matter which record we summarized at the beginning of this judgment, we do not see how the learned Judge’s decision can be faulted. For the avoidance of doubt, we state that the appellant was not seeking to file suit out of time for damages in negligence. The suit which the appellant filed against Mr. and Mrs. Aoko, i.e. Kisumu CMCC No. 55 of 1994, did not contravene the provisions of the Limitation of Actions Act. The appellant therefore required no leave to extend time to file the same. The leave he sought was to file the declaratory suit out of time to compel the respondent to satisfy the decree he had obtained on 26th August, 1996 in Kisumu CMCC No. 55 of 1994. In Other words, the appellant wanted to execute the said decree against the respondent out of time. Execution of judgments and/or decrees is governed by Section 4 (4) of the `Limitation of Actions Act which is in the following terms:-

“4 (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered.”

The judgment which the appellant sought to execute was passed on 26th August, 1996. The judgment should therefore have been executed on or before 27th August, 2008. The suit which was first filed by the appellant i.e. Kisumu CMCC No. 12 of 2009 and the second one, being Winam Principal Magistrate’s Court Civil Case No. 53 of 2012, were both plainly filed out of time.”

17. My understanding of the foregoing is that, the law has given a time from within which the rights that enure as a result of a judgment or order have to be enforced.

18. In the present case, judgment in **Meru CMCC No. 34 of 1991** was passed on 29th May, 1996 as can be seen from the Warrant of Attachment produced as “CN4” to the Further Supporting Affidavit sworn on 25th June, 2012. The Court decided to use that document as the basis of ascertaining the date of judgment because no copy of the judgment or decree was ever produced in any of the Applicant’s Affidavits. Twelve years from that date ended on the 28th May, 2008. The present Motion was filed on 15th February, 2012. Clearly, that was about sixteen (16) years from the date of judgment.

19. Looking at the Limitation Act, there is no room that is given for extension of time for execution or enforcement of a judgment or decree of a Court. The provisions that give extension of time in Sections 27 and 28 of that Act, in my view, will not apply to a decree or judgment which has been issued in one’s favour. To my mind, there are various avenues and ways as well as procedures in our law in which a victorious litigant is allowed to enjoy or realize the fruits of his/her judgment. It is upon a successful litigant to avail himself/herself those avenues to conclude a judgment. Going to slumber and then springing up at the last hour will not help. Time will not stop running because of negotiations, unless it is expressed as such by the Parties to the dispute. Of course, if there is a stay or an appeal, that is a completely different scenario from the one obtaining in this case. The contention that the Applicant was being promised payment by one of the Interested Parties does not help. It is not an exception to the provisions of Section 4 (4) of the Limitation of Action Act. An order of mandamus is one of the ways or methods of enforcing the decree issued on 29th May, 1996. To my mind, that decree is stale. It abated on 28th May, 2008. By February, 2012, it was dead as a dodo. It could not be revived.

20. In this regard, I hold that the decree issued on 29th May, 1996 is caught up by the Provisions of Section 4 (4) of the Limitations Act. It cannot be enforced. To the extent that the Motion dated 15th February, 2012 is sought to enforce that decree, that application is misconceived and lacks merit. The same is hereby dismissed.

21. Since it was contended that the Interested Parties had encouraged the Applicant that they would pay the amounts decreed but failed to and for the reason that the Respondent has acted in the most callous manner unexpected of a Public Servant, I will order each party to pay own costs.

It is so ordered.

DATED and DELIVERED at Meru this 12TH day of JUNE, 2017.

A. MABEYA

JUDGE

12/06/2017