



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW CASE NO. 100 OF 2015**

**IN THE MATTER OF AN APPLICATION BY JUNE SEVENTEENTH ENTERPRISES LIMITED FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS SEEKING AN ORDER FOR MANDAMUS**

**AND**

**IN THE MATTER OF ARTICLE 23 (f) AND 47 OF THE KENYAN CONSTITUTION**

**BETWEEN**

**JUNE SEVENTEENTH ENTERPRISES LIMITED.....APPLICANT**

**VERSUS**

**THE CABINET SECRETARY FOR MINISTRY OF INTERIOR**

**AND COORDINATION OF NATIONAL GOVERNMENT....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY LAND, HOUSING**

**AND URBAN DEVELOPMENT.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 7<sup>th</sup> May, 2015 the *ex parte* applicant herein, **June Seventeenth Enterprises Limited**, seeks the following orders:

1) **THAT** this Honourable Court be pleased to grant an order of *mandamus* directed at the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, jointly and severally, directly or through their officers and /or agents, to pay to the Applicant the sum of Kenya Shillings 34,867,158.00 within 14 days of the issuance of the order.

## **2) THAT the Costs of this Application be provided for.**

2. According to the applicant, on July 9<sup>th</sup> 2013, it filed a Petition *to wit* Nairobi High Court Petition Number 356 of 2013 seeking *inter alia* a declaration that its constitutionally guaranteed rights and freedoms had been infringed upon and by a Judgment and Decree of this Court dated February 24<sup>th</sup> 2014, it was decreed that the Respondents do pay each of the 223 members of the Applicant compensation by way of damages in the sum of Kshs. 150,000.00 each for violating their fundamental rights and freedoms as enshrined under the Constitution, the total sum awarded being Kshs. 33,450,000.00, as well as costs of the suit.

3. It was averred that following the award of costs in the subject proceedings, the Applicant filed its Party and Party Bill of Costs dated October 31<sup>st</sup> 2014 for taxation and which Bill of Costs was duly taxed in the sum of Kshs. 1,417,158.00 and a Certificate of Costs dated February 3<sup>rd</sup> 2015 duly issued.

4. Thereafter the Applicant through its Advocates on record applied for and received from the Deputy Registrar, High Court of Kenya, Constitutional and Human Rights Division, the requisite Certificate of Order against the Government, which certificate was issued on February 11<sup>th</sup> 2015 as proof that the total sum payable by the Respondents to the Applicant is Kshs. 34,867,158.00 being the sum total of the Decretal Sum plus Taxed Costs. By dint of their letter dated February 12<sup>th</sup> 2015, addressed to the 3<sup>rd</sup> Respondent and copied to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, all who duly received and acknowledged the same, the said Advocates properly notified the Respondents of the fact of the Decree, Certificate of Costs and Certificate of Order against the Government and enclosed for each of the Respondents certified copies of the same *whilst* issuing to the Respondents the requisite 30 day notice in tandem with the provisions of the **Government Proceedings Act** (Chapter 40) of the Laws of Kenya demanding settlement of the said sum of Kshs. 34,867,158.00.

5. The *ex parte* applicant however averred that despite the clarity of the foregoing proceedings the Respondents have utterly, failed, refuse and/or neglected to pay the Decretal sum plus costs as demanded by the Applicant and in its view, there is no reasonable justification and/or colour of right for the Respondents to fail, neglect and/or refuse to settle the outstanding Decretal sum plus costs in full compliance with the Judgment and Decree of this Court. The *ex parte* applicant asserted that the failure, neglect and/or refusal as such amounts to further and continued prejudice to the Applicant and all those it represents who have been denied the benefit of their rightful entitlement.

### **Respondents' Case**

6. In response to the application, the Respondents averred that they received a letter dated 17<sup>th</sup> September, 2015 from the office of the Attorney General indicating that judgment had been issued in HCC 356 of 2013 June Seventeenth Enterprises Limited Versus The Attorney General & 2 Others for a decretal sum of Kshs 34,867,158.00 but since it was already September the budget allocation for the year 2015/2016 had already been allocated and the same could not be paid at that time. Accordingly, the respondents projected and requested the National Treasury for the said decretal amount to be allocated in the 2016/2017 budget and the same was included in their budget proposal for the year 2016/2017.

7. It was averred that on 20<sup>th</sup> June, 2016, the respondents received a letter from National Treasury indicating that there was no budget allocation for settlement of legal claims for the Ministry in the budget allocation for the year. It was averred by the Respondents that they proceeded to write a letter to the Attorney General and instructing them of the position from the National Treasury with a list of all the matters affected.

8. It was therefore contended by the Respondents that they were not in a position to settle the decretal amount on this matter as the same was not included in the budgetary allocation for the year 2016/2017.

### **Determinations**

9. I have considered the application, the verifying affidavit as well as the submissions file on behalf of the applicants.

10. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the Republic vs. The Attorney General & Another ex parte James Alfred Koroso, I expressed myself 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.”**

11. I also associate myself with the views expressed by Githua, J in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoh Egunza [2012] eKLR that:

**“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.

12. In this case, the only reason why the application is opposed is that the Treasury did not allocate any funds towards the settlement of the applicant's claim the subject of these proceedings. This, however, is not the first time the Court is being confronted by such excuse. In **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza** (supra) the Court expressed itself as hereunder:

**“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.”**

13. I adopt reasoning in the said cases.

14. It therefore follows that the reason advanced by the respondents for not satisfying the sum due to the applicant in these proceedings cannot be validated by this Court. This Court cannot allow itself to be used by the Respondents as a platform to sanitise the executive's inability to undertake its constitutional and statutory obligations by making provisions for the settlement of debts it owes to third parties. Article 201 of the Constitution provides as hereunder:

***The following principles shall guide all aspects of public finance in the Republic—***

***(a) there shall be openness and accountability, including public participation in financial matters;***

***(b) the public finance system shall promote an equitable society, and in particular—***

***(i) the burden of taxation shall be shared fairly;***

***(ii) revenue raised nationally shall be shared equitably among national and county governments; and***

***(iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;***

***(c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;***

***(d) public money shall be used in a prudent and responsible way; and***

***(e) financial management shall be responsible, and fiscal reporting shall be clear.***

15. It is therefore clear that the said provision requires openness and accountability in financial matters and that public money be used in a prudent and responsible way. The need to ensure that public funds are spent responsibly is entrenched by the fact that execution as in ordinary proceedings is prohibited against the Government and its Officers acting in their official capacities. This immunity was emphasised by

Visram and Ibrahim, JJ (as they were) in Kisya Investments Ltd vs. Attorney General & Another [2005] 1 KLR 74, as follows:

“Order 28, rules 2(1)(a), (2) and (4) of the Civil Procedure Rules subject themselves to the provisions of the Government Proceedings Act which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of justice the courts are bound to apply the law as it exists. Many a times such application may indeed not attain that goal due to the effect of the said laws. On the question of abuse of the process of the court, the application of any written law cannot amount to an abuse of the process of the court however much its effect is harsh or even undesirable.... History and rationale of Government’s immunity from execution arises from the following:- Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i). The raising of revenue- (by taxation or borrowing); (ii). its expenditure; and (iii). The audit of public accounts. The satisfaction of decrees or judgements is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government’s expenditure. It is for this reason that section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorised by statute, and any unauthorised payment may be recovered. SEE HALSBURY’S LAWS OF ENGLAND 4<sup>TH</sup> EDN VOL. 11 PARA 970, 971 AND 1370. As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. SEE AUCKLAND HARBOUR BOARD VS. R (1924) AC 318, 326. The second situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the ministry of Finance, Treasury, Comptroller and Auditor General etc. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their “own” funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer’s hammer. No Government can possibly survive such an onslaught. The Government and therefore the state operations will ground to a halt and paralysed and soon the Government will not only be bankrupt but it’s Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the Law that prohibits execution against and attachment of the Government assets and property.”

16. It must be remembered that the failure to settle decretal debts promptly and expeditiously invariably leads to escalation of interest payable thereon. This position means that the public is subjected to pay more money that it ought to have paid. In my view to fail to take adequate steps in order to minimise the amount of public expenditures cannot be termed as prudent and responsible way of using public funds in order to meet the requirements of Article 201 of the Constitution.

17. The circumstances under which judicial review order of *mandamus* are issued were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** *inter alia* as follows:

**“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...These principles mean that an order of *mandamus* compels 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.”**

18. This position is now underpinned in section 7(2)(j) of the ***Fair Administrative Action Act*** under which the Court is empowered to issue orders of judicial review where there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law. In those circumstances section 11(1) of the said Act empowers the Court to issue an order compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right.

19. As stated hereinabove, once the certificate of order against the Government is served on the Hon. Attorney General, the consequences of section 21(3) of the ***Government Proceedings Act*** kick in and a statutory duty is thereby imposed on the relevant accounting officer to pay the sums specified in the said order to the person entitled to or to his advocate together with any interest lawfully accruing thereon. In this case the said certificate was duly issued and served. Therefore as was appreciated in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (*supra*) there is a specific legal right but no specific legal remedy available for enforcing that right as execution cannot issue against the Government in the ordinary way. In such circumstances it is clear that an order of *mandamus* may go forth in order to remedy the defects of justice.

20. Therefore there is a duty imposed on the accounting officers in the Ministry of Interior and Coordination of National Government and the Ministry of Land Housing and Urban Development, who are the respective Principal Secretaries in the said Ministries.

### **Order**

21. Accordingly, an order of *mandamus* is hereby issued directed to the said accounting officers compelling them jointly and severally to pay to the *Ex-parte* Applicant the sum of Kenya Shillings 34,867,158.00.

22. The applicant will have the costs of these proceedings.

23. Order accordingly.

**Dated at Nairobi this 2<sup>nd</sup> day of December, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Adoli for the Applicants***

***CA Mwangi***