



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 187 OF 2015

REPUBLIC.....APPLICANT

VERSUS

THE CABINET SECRETARY, MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

EX PARTE: SIMON MBUGUA KIHARA

JUDGEMENT

Introduction

1. By an Amended Notice of Motion dated 7th March, 2016, *the ex parte* applicant herein, **Simon Mbugua Kihara**, substantially seeks an order of *mandamus* compelling the 1st Respondent to pay the applicant the sum of Kshs 694,841.00 being the decretal amount owed to him in Nairobi CMCC No. 4680 of 2009 together with interest accruing thereon at the rate of 12% per annum from the 14th day of November, 2013 until payment in full and taxed costs of the suit.

Applicant's Case

2. According to the Applicant, following a toad traffic accident on 27th November, 2008, he filed the said suit and on 28th December, 2012, judgement was entered in his favour against the defendants in the sum of Kshs 400,000.00 general damages, Kshs 104,920.00 special damages, costs and interests. He was also awarded Kshs 20,000.00 being future medical expenses.

3. Subsequently, on 29th November, 2013 a decree and certificate of costs was issued in the total sum of Kshs 610,354.00 and Kshs 84,460.00 respectively. Thereafter a Certificate of Order Against the Government was issued for a sum of Kshs 694,814.00 with further interest in the sum of Kshs at the rate of 12% per annum from 14th November, 2013 till payment in full.

4. It was averred that despite various correspondences between the applicant's advocates and the Respondents, no payment had been made in satisfaction of the decree hence these proceedings.

5. In support of the application the applicant exhibited copies of the judgement, certificate of costs and Certificate of Order Against the Government.

6. According to the judgement, the applicant was awarded Kshs 400,000.00 general damages, Kshs. 104,920.00 special damages and Kshs 20,000.00 being costs of future medical expenses thus totalling Kshs. 524,920.00. To these were added interests and costs. According to the extracted decree the principal sum and interest as at 28th December, 2012 was Kshs 610,354.00 excluding costs which were assessed at Kshs 84,460.00. Though the Certificate of Order Against the Government indicated that the sum due was Kshs 694,814.00 with interest at the rate of 12%, it is clear that the only sum that could accrue interest was Kshs 524,920.00 since interests and costs do not ordinarily accrue interests unless expressly ordered. In this case there was no such express order. See **Francis Wainaina vs. K F C Company Ltd. Civil Appeal No. 116 of 1987** and **Hassanali vs. City Motor Accessories Ltd. & Others Civil Appeal No. 13 of 1972 [1972] EA 423.**

7. In **Republic vs. Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996**, the Court of Appeal cited, with approval, *Halsbury's Law of England*, 4th Edn. Vol. 7 p. 111 para 89 thus:

"The order of mandamus is of 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 and 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."

8. In the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 All E.R. 741, at 743**, Lord Goddard C. J. said -

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges. "

9. In **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441**, it was held:

"The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the *mandamus* order using this method. There is only one rider – an officer can only be committed where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...Local Authorities Transfer Fund Act, which provides funds to local authorities, part of which should be used to pay debts does not provide for their attachment since section 263A of the Local Government Act prohibits it. It just enables the Local Authorities to honour their debt obligations including those covered by a mandamus order. The Local Authorities have to pay as a matter of statutory duty or in the case of mandamus in

obedience to the order from the state or the Republic. There is no provision in the LATF Act for attachment or execution”.

10. This procedure was dealt with extensively in Shah vs. Attorney General (No. 3) Kampala HCCM No. 31 of 1969 [1970] EA 543 where Goudie, J expressed himself, *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. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature...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...Since *mandamus* originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law...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...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."

11. I have reproduced the aforesaid decisions in order to show the circumstances under which the Court exercises its supervisory or judicial review jurisdiction in granting an order of *mandamus*. What comes out clearly from the foregoing is that the Court only compels the satisfaction of a duty that has become due. In matters where the applicant claims that the Respondent ought to be compelled to pay a certain amount of money it does not suffice to simply aver that the Respondent is under an obligation to settle its liability to the Applicant. The Applicant must go a step further and prove that the sum claimed is actually due. Where therefore liability is admitted or proved, the next stage is to prove the actual quantum payable.

12. 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.”

13. It is therefore clear that in application for *mandamus* it is the accounting officer who is compellable to settle the decretal sum. In cases involving ministries the accounting officer is usually the Principal Secretary. In this case although the applicant had in his intention to amend the Motion indicated that he intended to substitute the Cabinet Secretary with the Permanent (sic) Secretary, when in came to the actual amendment the 1st Respondent was still indicated as the Cabinet Secretary. While this irregularity may not necessarily fatal especially where the application is unopposed as in this case, it may be taken into account when it comes to the issue of costs.

14. 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.”

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

16. 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 follows:

“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. The said decision, in my view is still good law.

18. Having considered the material on record and in the absence of any impediment, I do not see why the 1st respondent should not be compelled to perform his statutory duty by settling the sums due from him to the applicant.

19. In the result the Amended Notice of Motion dated 7th March, 2016 succeeds to the extent that the Principal Secretary, Ministry of Interior and Co-ordination of National Government is hereby compelled to pay the applicant the sum of Kshs 524,920.00 together with interest at the rate of 12% from 28th December, 2012 till payment in full together with costs assessed in the sum of Kshs 84,460.00.

20. As there was misjoinder of the 1st Respondent, there will be no order as to the costs of these proceedings.

21. It is so ordered.

Dated at Nairobi this 2nd day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Thangei for Miss Areri for the applicant

Mr Munene for Miss Chilaka for the Respondent

CA Mwangi