



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. 63 OF 2015

IN THE MATTER OF AN APPLICATION BY SYLVANUS OTIENO ODIAGA FOR ORDER OF MANDAMUS

AND

IN THE MATTER OF ENFORCEMENT OF A DECREE OF THE INDUSTRIAL COURT DATED 3RD OCTOBER 2014 IN INDUSTRIAL CAUSE NO. 891 OF 2012 AND THE CONSEQUENTIAL CERTIFICATE OF ORDER AGAINST THE GOVERNMENT DATED 26TH NOVEMBER 2014

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

THE CS, MINISTRY OF DEFENCE..... RESPONDENT

***EX-PARTE:* SYLVANUS OTIENO ODIAGA**

JUDGEMENT

1. By a Notice of Motion dated 10th March, 2015 the *ex parte* applicants herein, **Sylvanus Otieno Odiaga**, seeks the following orders:

1. That an order of Mandamus compelling the Respondent to pay to the *Ex-parte* Applicant the entire decretal amount of Kshs 5,335,550/- awarded to the *Ex parte* Applicant in High Court Industrial Cause No 891 of 2012 as contained in the Certificate of order against the Government issued by Industrial Court dated 26th November 2014.

2. That an order for costs in favour of the *Ex parte* Applicant.

2. The application was supported by a verifying affidavit sworn by the applicant herein on 24th February, 2015.

3. According to the applicant, the Industrial Court entered award against the Attorney General sued on behalf of the Respondent on 8th July 2014 following a suit instituted by the applicant on grounds of wrongful termination by the Respondent from the applicant's commission as Commanding Officer in the Armed Forces Ordinance Depot.

4. It was deposed that the decree for the award was issued on 3rd October 2014 for *inter alia*, damages of Kshs 5,000,000/= together with costs of the suit and interest on the decretal amount from the date of the award at courts rats. The said costs, it was disclosed were on 21st November 2014 taxed by the Deputy Registrar at Kshs 335,550/-.

5. In was averred that subsequently, the applicant through his advocates on record obtained a certificate of order against the government dated 26th November, 2014 pursuant to the provisions of section 21 of the **Government proceedings Act** and Order 23 Rule 3 of the **Civil Procedure Rules** for a sum of Kshs 5,335,550/= together with interest accruing from 8th July 3014.

6. It was however contended that despite a further communication though the applicant's advocates to the Attorney General and the Respondent advising on the outstanding decretal amount, costs and interest thereof and giving notice for payment thereof, the Respondent declined, ignored, refused and/or neglected to pay the said amounts.

7. The application was not opposed by the Respondents.

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

9. 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.”

10. 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 & Another ex parte Fredrick Manoah Egungza 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. 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.”

11. I adopt reasoning in the said cases.

12. In the absence of any replying affidavit, this court finds merit in the Notice of Motion dated 15th May, 2012.

13. 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.”

14. As stated hereinabove, 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. 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.

15. Therefore there is a duty imposed on the accounting officer in the Ministry of Defence to pay the decretal sum. Although ideally, the application ought to have been brought against the Principal Secretary in the relevant Ministry who is the accounting officer therein, the failure to do so in the circumstances of this case is not fatal to this otherwise merited application.

16. Accordingly, an order of mandamus is hereby issued directed to the Respondents compelling them to pay to the *Ex-parte* Applicant the entire decretal amount of Kshs 5,335,550/- awarded to the *Ex parte* Applicant in High Court Industrial Cause No 891 of 2012 as contained in the Certificate of order against the Government issued by Industrial Court dated 26th November 2014.

17. As the application was not opposed I award half the costs to the applicant.

Dated at Nairobi this 9th day of June, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Odhiambo for the Respondent

Cc Richard