



**REPUBLIC OF KENYA**

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

**Miscellaneous Civil Application No. 131 Of 2013**

**Republic.....Applicant**

**Versus**

**The Attorney General..... Respondent**

**Kirinyaga Construction Co. Ltd – Ex-Parte Applicant**

**JUDGEMENT**

1. By a Notice of Motion dated 6<sup>th</sup> May, 2013 the *ex parte* applicant herein, **Kirinyaga Construction Co. Ltd**, seeks the following orders:

**1. THAT Orders of Mandamus to compel the Principal Secretary of the Ministry of Finance and/or the Principal Secretary of the Ministry of Roads and Public Works, jointly and severally, to pay the sum of Kshs. 321,986,586.94 as well as interest thereon.**

**2. THAT in the event of failure to pay the sum of Kshs. 321,986,586.94 as well as interest thereon, the persons occupying the position of Principal Secretary of the ministry of Finance and/or Principal Secretary of the Ministry of Toads and Public works, be committed to jail in contempt of the orders issued herein.**

**3. THAT all necessary and consequential orders or directions be given.**

2. The application was supported by a supporting affidavit sworn by **Peter Musango**, the Applicant’s Managing Director on 22<sup>nd</sup> April, 2013.

3. According to the deponent, he is familiar with the facts and circumstances surrounding HCCC NO. 885 of 2009 **Kirinyaga Construction (K) Limited v AG** (hereinafter referred to as the said suit) filed by the Applicant herein which suit was filed by the Applicant against the Respondent, for and on behalf of the ministry of Roads and Public Works of the Government of Kenya (hereinafter referred to as “the Ministry”).

4. The said suit, it was deposed, was filed as a result of breach by the Ministry, of contract No. RN0401 for the rehabilitation of the Muranga-Sagana-Karatina-Marua Roads (C73/A2), which had been awarded to the Applicant.

5. To the said suit, the Respondent failed to file its Defence on time, and as a result the Applicant instructed its advocates to file an application for leave for judgment to be entered against the Respondent. Based on information obtained from **Mr. Fred N. Ojiambo**, MBS, SC a partner in the firm of Kaplan & Stratton Advocates, who are on record for the Applicant, it was averred that on or about 22<sup>nd</sup> October, 2010, the Respondent indicated that it was agreeable to entering into a consent on the matter, and forwarded the consent letter dated 22<sup>nd</sup> October, 2010 for signature to

- the Applicant, which consent letter was duly signed on behalf of the Applicant, and forwarded back to the Respondent, for filing in court.
6. However, on 8<sup>th</sup> November 2010 when the aforementioned application was meant to come up for hearing, the Respondent had not filed the consent dated 22<sup>nd</sup> October 2010, but agreed to record the same terms of the consent in court, before the **Honourable Mr. Justice Muga Apondi**, whereby the Respondent agreed to pay the total sum of Kshs. 321,986,586.94 to the Applicant, and that the remaining claim by the Applicant proceed for hearing, with the Respondent being at liberty to defend.
  7. Thereafter, the advocates for the judgment creditor extracted the consent order, as well as a Certificate of Order Against the Government in respect of the total sum of Kshs. 321,986,586.94, and served the Certificate of Order upon the Respondent on 20<sup>th</sup> December, 2010. However, although the Applicant has since then sought payment of the said amount from the debtor, the debtor has failed, refused and/or neglected to formally respond thereto.
  8. The deponent, however averred that from his interactions with the ministries seeking settlement of the debt, he has become aware that the intention and/or agreement by the Ministry of Road and Public roads to settle the debt has been thwarted consistently by the ministry of Finance which has not furnished any or any plausible reason for such recalcitrant action and attitude regarding the court order.
  9. As a result of the failure to honour the said consent more than three years ago, the Applicant contended that its cash flow is has been significantly affected by this debt continuing to remain outstanding, and as such the Applicant is struggling to service its liabilities and/or to finance the cost of its construction projects, which are capital intensive.
  10. To the deponent, the two ministries as represented by the Respondent have had adequate time to pay the debt owed to the Applicant, and it is manifest that the ministries will continue with their intransigency if no firm action is taken by this Honourable Court, failing which, the fundamental rights of the judgment creditor to have the benefit of the consent, against which consent no appeals has been proffered, will be eroded all together.
  11. Although the Respondent was served with the application no response was filed in respect thereto.
  12. It was submitted on behalf of the Applicant that by failing to respond to the application the respondent ought to be deemed to have admitted the facts in the affidavit in support of the application. This line of submission was supported by the decisions in **Geolpoy vs. Bhal T/A Krishan Bilal & Sons [2002] 2 KLR 447** and **National Bank vs. Mitey [2004] eKLR**.
  13. It was submitted that in light of the foregoing the Respondent has a legal duty to pay the Applicant the debt. Further there is not other civil and/or lawful means by which the Applicant can obtain this sum of money from the Respondent as direct execution against the Government is prohibited under Order 29 Rule 2 of the ***Civil Procedure Rules***, 2010 hence the Court has jurisdiction to issue an order of mandamus. In support of this submission the Applicant relied on **Shah vs. AG [1970] EA 543**, **R vs. Permanent Secretary Office of the President ex parte David Njagi Wambua & Another [2005] eKLR**, **R vs. Dudsheath ex parte Meredith [1905] 2 All ER 741**, **R vs. Ministry of Water Resources & Development ex parte Akamba Timber Hardware [2006] eKLR** and **O'Reilly vs. Mackman [1982] 3 All ER 1129 at 1131**.
  14. Based on **Harbutt vs. Wayne Tank [1970] 1 QB 457 at 468**, it was submitted that an award of interest is discretionary and is based on the fact that a party has been kept out of his money while the other party has had the use of it himself. In support of the submission on interest the applicant relied on section 26 of the ***Civil Procedure Act***, Cap 21 where the decree is silent on the interest. In support of this contention the Applicant cited **Mukisa Ltd vs. West End [1970] EA 469** and averred that the Applicant is entitled to interest at the rate of 16% per annum from 16<sup>th</sup> November, 2010 when the consent was entered into till payment in full as well as the costs.
  15. I have considered the application, the verifying affidavit as well as the Statements and the documents on record.
  16. I have noted that the Application is brought against the Attorney General rather than the Permanent Secretary though the orders are sought against the latter. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound comply with the orders sought therein. In this case the Respondent ought to have been the Principal Secretary who is, pursuant to Article 155(2) of the Constitution, the administrator of the State Department for which he/she is responsible.

However, as this is mere misjoinder the same ought not to be fatal to the application more so as the body of the application seeks orders against the Principal Secretary and not the respondent.

17. 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.”**

18. I adopt my findings therein in the instant application.

15. The Applicant also sought for interest at the rate of 16% per annum. However, in **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR** it was held by the Court of Appeal that:

**“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. The order must command no more than 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.” [Emphasis mine]

19. Therefore for an order of mandamus to issue the Applicant must show that the Respondent is legally bound to perform the action whose performance the Applicant seeks to compel. It does not therefore issue in respect of an exercise of discretion unless (1) there is an abuse of discretion; or (2) the decision-maker exercises discretion for an improper purpose; or (3) the decision-maker is in breach of the duty to act fairly; or (4) the decision-maker has failed to exercise statutory discretion reasonably; or (5) the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; or (6) the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; or (8) the decision-maker is irrational and unreasonable. See the decision of Nyamu, J (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.** Even then, 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.
20. In the instant case, it is clear from the order issued on 17<sup>th</sup> December, 2010 that there was no element of interest therein. In applications for mandamus compelling the Government to satisfy a decree the court only compels the performance of a duty arising from the judgement or order and possibly an order for costs of the application. To award anything outside the judgement in my view is outside the jurisdiction of the judicial review Court.
21. In the absence of any replying affidavit, I find merit in the Notice of Motion dated 6<sup>th</sup> May, 2013. Accordingly, an order of mandamus is hereby issued compelling the Principal Secretary of the Ministry of Finance and/or the Principal Secretary of the Ministry of Roads and Public Works, jointly and severally, to pay the sum of Kshs. 321,986,586.94.
22. I however decline to grant an order for committal as sought in the prayer 2 of the said Motion since the decision whether or not to commit a respondent to civil jail in my view can only be made where there is proof that the respondent has disobeyed the Court order duly served on him together with the penal notice. In effect the said prayer is at this stage premature.
23. The applicant will have the costs of this application to be borne by the said Principal Secretaries.

**Dated at Nairobi this 8<sup>th</sup> day of July 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Fred Ojiambo and Miss Mutisya for the Applicant***

***Mr Odhiambo for the Respondent***

***Cc Kevin***