



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1113 OF 2015**

***(Before Hon. Lady Justice Anna Ngibuini Mwaure)***

**SAMMY EKATOROT NAWOI.....CLAIMANT**

**VERSUS**

**HON. ATTORNEY GENERAL.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Claimant/Decree holder by way of a Notice of Motion on dated 23<sup>rd</sup> September, 2001 seeks for the following orders:-

a) That the Honourable court do hereby issue an order compelling the Principal Secretary Ministry of Interior and Coordination of National Government (as the accounting officer) to pay the ex-parte applicant the sum of Kshs.914,471/= in fulfilment of the court order issued in **ELRC CAUSE NO.1113 OF 2015** from the date of filing suit until payment in full as ordered in Judgment delivered on 6<sup>th</sup> December, 2019.

b) That the amount of Kshs.914,471/= is due and payable as confirmed by the certificate of order against the Government dated 23<sup>rd</sup> April, 2021 and the Principal Secretary in the Ministry of Interior and Coordination of National Government be and is hereby ordered to pay the same.

c) That the Respondent pays the costs of this application.

**FACTS**

2 The Claimant was an employee of the Ministry of State for Immigration and Registration of Persons at the office of the Vice President. In the year 2008 he was arrested and charged with the offence of procuring registration by false pretense. The charges were then withdrawn but he was dismissed from civil service.

3 The Claimant/Decree holder filed a suit and after about 5 years judgment was rendered on 6<sup>th</sup> December, 2019 in favour of the Claimant/Decree holder.

The Respondent was given a grace period of 90 days to settle the claim.

4 That the 90 days lapsed and on 28<sup>th</sup> January, 2020 the Claimant/Decree holder wrote to the Respondent to settle the amount but has refused or neglected to pay the same.

5 That on 23<sup>rd</sup> April, 2021 the Honourable court issued a certificate of Judgment against the Government dated 23<sup>rd</sup> April, 2021 confirming the amount now payable was Kshs.914,457/= and certificate was presented to the Judgment debtor but same was never honoured hence the necessity of this application.

6 That the law as provided in Section 21(4) of the Government Proceedings Act prohibits attachment of government properties the only remedy available to the Claimant/Decree holder is to obtain an order for Mandamus to enforce the Claimant/Decree holder's right to property.

7 That the Claimant/Decree holder's advocates on record have made subsequent follow ups for settlement of the Judgment debt but have been met with resolute muteness by the Respondents and yet there is no orders for stay of execution.

8 The Claimant/Decree holder states it is just and proper that this application be allowed with costs.

9 The Respondent put in a response dated 25<sup>th</sup> October, 2021. The averment of the Respondent is that Judgment hereto was delivered on 6<sup>th</sup> December, 2019 but certificate of order against the Government was furnished on 23<sup>rd</sup> April, 2021.

10 Dr. Engineer Karanja Kibicho the Principal Secretary in the Ministry of Interior and Coordination of National Government depones that he received a letter dated 1<sup>st</sup> September 2021 instructing the Ministry of Interior and Coordination of National Government to remit the funds to the office of the Attorney General.

11 He says he is aware funds are being awaited from the National Treasury in order to transfer to the state law office for onward transmission to the applicant.

He says there is a letter to the office of the Attorney General confirming legal liability has been entered in the data base for purposes of budgetary funding and settlement.

12 He says that the Respondent has shown good faith to comply in settlement of the Judgment debt.

13 I have considered the issues raised in the application and the respective submissions by the respective parties.

14 Section 21C(1) of the Government proceedings Act provides that where civil proceedings by or against the government proceedings in connection with arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government or against a Government Department or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of the person at any time after the expiration of twenty one days from the date of the order, or in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later issue to that person a certificate in the prescribed form containing particulars of the order.

15 Once judgment is entered in a civil suit the successful litigant is entitled to execute for the decretal amount.

The same applies where the Respondent is the Government where judgment is entered against the Government and a monetary decree is issued against it. It was held in the case of **REPUBLIC VS THE PRINCIPAL SECRETARY STATE DEPARTMENT OF INTERIOR MINISTRY OF INTERIOR & COORDINATION OF THE NATIONAL GOVERNMENT AND MINISTRY OF THE NATIONAL TREASURY CAUSE NO.268 OF 2017** where the learned judge observed that when judgment has been entered against the Government and a monetary decree is issued against it it does not enjoy any special privileges with regards to its liability except to pay when it comes to the mode of execution of decree”.

16. “The court further pointed out that where decree for payment of money or costs has been issued against the Government in favour of a litigant the said decree can only be enforced by way of an order of Mandamus compelling the accounting officer in the relevant Ministry to pay the decretal amount as Government is given immunity from execution and attachment of its property under 21(4) of the Government Proceedings Act”.

17. “The only condition attached to the above” the court continued “is for the Decree-holder to furnish a certificate of costs obtained from the court and served on the Attorney General 21 days after entry of judgment.”

“Once the certificate of order is served on the Attorney General Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order. The provision does not condition payment to allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues”.

18. The effect of grant of order of Mandamus as well considered in **SHAH VS ATTORNEY GENERAL (NO.3) KAMPALA HCMC NO.31 OF 1969 (1970) EA 543** and is a prerogative order issued in certain cases to compel performance of duty. It is more so where duty arises out of official duties of a Respondent.

19. The court in the above case observed that Mandamus is neither a writ nor a right but will be granted if the duty is in the nature of a public duty and affects the individual provided there is no more appropriate remedy”. The court continued to further observe that the person or authority to whom it is issued must either be under a statutory or legal duty to do or not do something; the duty itself being of an imperative nature.

20. In the case before me the Claimant/Decree holder was dismissed in 2008 and he pursued a case against the Respondent and he got judgment in 2019.

He got the certificate of order dated 23<sup>rd</sup> April, 2021. To date he has not realized the fruits of his judgment.

21. The Respondent defence is that they have not refused to settle the judgment debt but have been waiting for funds from the National Treasurer. The Respondent in its submissions says that Mandamus is a discretionary remedy and the court ought to consider the economic state of the Respondent and the Covid 19 Pandemic.

They also urge the court to note that the court should not invade into the field of policy entrusted to the administrative and specialized organs and further there is no wisdom in granting an order that cannot be practically enforced.

22. They have quoted several case laws mostly to emphasize that the order of Mandamus is a discretionary order and even if court finds a public body has acted wrongly it does not have to grant any remedy.

23. I find this argument is very dangerous because if the same is applied court's judgments and decrees and orders will be an exercise of futility. That cannot be accepted.

24. In this present case I am convinced if Mandamus is refused there will be no other legal remedy open to the applicant/decreed holder and he will continue to suffer.

25. I identify with the observation of the court in the Judicial Review Application **No.44 OF 2012. REPUBLIC VS THE ATTORNEY GENERAL AND ANOTHER EX PARTE JAMES ALFRED KOROSO** that the applicant has no option of realizing the fruits of his judgment since he is barred from executing against the Government.

Apart from Mandamus, he has no option of ensuring that the judgment he has been awarded is realized. Unless something is done he will be forever be left babysitting his barren decree”.

26. I also agree totally with the observation of judge in **REPUBLIC VS PERMANENT SECRETARY, MINISTRY OF STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY EX PARTE FREDRICK MANOAH EQUNZA (2012) eKLR** where court observed that “that Provision (of Mandamus) does not condition payment to budgetary allocation and Parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.

27. Finally I associate myself with position adopted in **MASANGA J. N. REPUBLIC VS TOWN CLERK OF WEBUYE COUNCIL AND ANOTHER HCCC NO.448 OF 2006** “A decree holder's right to enjoy fruits of his judgment must not be terminated. When faced with such a scenario the court should adopt the interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the constitution particularized in article 10, the obligation of the court to do justice to the parties and to do so without delay under article 159(2) (a) and (b) and the Applicant's right to access to justice protected under Article 48 of the Constitution.

28. In this case the Claimant/Decreed holder has moved court to compel the satisfaction of a judgment that was decreed in their favour way in December, 2019 by a competent court of law.

The Respondents only reason for not satisfying the Decree is that they are waiting for funds from the National Treasury. How long if Kshs.914,471/= has not been paid within 2 years?

If the court were to decline to grant the Mandamus, the applicant would be left without an effective remedy despite holding a decree for an indefinite period.

### **ORDER**

1. I therefore order that the Principal Secretary in the Ministry of Interior and Coordination of National Government to pay the ex-parte applicant the sum of Kshs.914,471/= in fulfilment of the court order issued in ELRC NO. 1113 OF 2015 from the date of filing suit until payment in full as ordered in Judgment delivered on 6<sup>th</sup> December, 2019.

2. That the amount of Kshs.914,471/= is due and payable as confirmed by the certificate of order against the Government dated 23<sup>rd</sup> April, 2021 and the Principal Secretary in Ministry of Interior and Coordination of National Government be and is hereby ordered to pay the same.

3. Costs of this application be paid by the Respondent.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 10TH DAY OF FEBRUARY 2022.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**