



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 10 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

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

AND

IN THE MATTER OF: SECTION 21(3) OF THE GOVERNMENT

PROCEEDINGS ACT CAP 40 LAWS OF KENYA

AND

IN THE MATTER OF: ORDER 29 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF: APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF: ENFORCEMENT OF DECREE PASSED BY THE

MAGISTRATES COURT SITTING AT NAIROBI ON 7TH MAY, 2020 IN

CIVIL SUIT NO. CMEL NO 117 OF 2019 BETWEEN MILLICENT WAIRIMU

MAINGI -V- THE BOARD OF MANAGEMENT TREESIDE SPECIAL SCHOOL)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE BOARD OF MANAGEMENT, TREESIDE SPECIAL SCHOOL.....RESPONDENT

EX PARTE: MILLICENT WAIRIMU MAINGI

JUDGMENT

1. The Ex Parte Applicant instituted proceedings for unlawful/unfair redundancy and successfully got a judgment in CMEL No. 117 of 2019 between MILLICENT WAIRIMU MAINGI VERSUS THE BOARD OF TRUSTEES TREESIDE SPECIAL SCHOOL wherein the Applicant was awarded damages for unlawful and unfair loss of employment, salary arrears, severance pay, interest and costs totalling to Kshs.451,512.79.

2. The Applicant is apprehensive that despite serving the Respondent with a certificate of order on the 3rd of March 2021 as required under Section 21(1) of the Government Proceedings Act the Respondent has failed and/or refused to pay the decretal sum necessitating the commencement of these judicial review proceedings with a view to compel the Respondent to obey lawful orders of the Court.

3. The Applicant seeks the following orders against the Respondent:

(1) Leave be granted to the Applicant to institute Judicial Review proceedings against the Respondent herein seeking an order Mandamus compelling the Respondent to pay the Applicant;

a) A sum of Kshs.451,512.79 being the decretal sum due and consequent upon the judgment delivered on 7th May 2020 in CMEL No. 117 of 2019 between MILLICENT WAIRIMU MAINGI V THE BOARD OF MANAGEMENT TREESIDE SPECIAL SCHOOL

b) Interest on Kshs.451,512.79 above at 12% per annum until payment in full

4. The grounds in support of the application are that: -

a) The Respondent is the accounting officer of Tree Side Special School and is mandated by Section 21(3) of the Government Proceedings Act Cap 400 to satisfy the decretal sum of Kshs.451,512.79 passed by the Court with interests of 12% per annum.

5. The Application is further supported by the Statutory Statement and Verifying Affidavit sworn by **Millicent Wairimu Mwangi** both dated 7th April, 2021 in which she reiterates the grounds on the face of the motion.

Respondent's Case

6. In response to the application, the Respondent filed a replying Affidavit sworn on 21st July 2021 by **SALOME EYANG'AN**, the head teacher and the secretary to the Treeside Special School Board of Management in which she avers that there was a judgment awarded to the Applicant for unlawful and unfair loss totalling to Kshs.434,646.03.

7. The affiant avers that the Respondent has not refused to pay the decretal sum and states that vide a letter dated 9th February 2021 she wrote to the Applicant attaching a cheque of Kshs.10,000/- to be paid every term as the first instalment. She further states that the Applicant through her advocates rejected the offer and when the Respondent reviewed the same to Kshs.50,000/- per term, the Applicant through its Advocate stated she was only willing to take Kshs.100,000/- per term.

8. The affiant states that the school is a public school that relies on government allocation which is only released twice a year in March and October and it may not be possible to get Kshs.100,000/- every term but are open to further negotiations.

9. The affiant urges the Court not to issue orders as prayed as the same would allow the Applicant to attach vulnerable children's properties.

Ex-parte Applicant's submissions

10. The Ex-parte Applicant submits that the conditions to be satisfied prior to the issuance of an order of mandamus is set out in Section 21 of the Government Proceedings Act.

11. It relied in the holding in **Republic v Permanent Secretary, Ministry of State for Provisional Administration and Internal Security Ex-parte Fredrick Manaoh Eguza [2012] eKLR** which was quoted with approval in **JA v Principal Secretary Ministry of Education [2019] eKLR** the Court held that;

"The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the government is found in section 21(1) of the Government Proceedings Act which provides that payment will be based on a certificate of Order obtained by the successful litigant from the Court issuing the decree which should be served on the Hon. Attorney General.....once the certificate of Order against the government is served section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sum satisfied in the said order to the person entitled or his advocate together with any interest lawfully accruing thereon. "

12. The Applicant submits that the judgment was delivered on 7th May 2020 and immediately a decree was extracted and served upon the Attorney General and the same was acknowledged by stamping.

13. The Ex Parte Applicant states that she has complied with all legal provisions and the Respondent has no factual or legal basis for denying the Applicant what is legally hers.

14. The Applicant further relies on the holding in **Republic v The Attorney General & Another Ex parte James Alfred Koroso (JR Misc No. 44 of 2012)** which was quoted in **Republic v Attorney General & 2 others Ex-Parte Lucy Muthoni Gatari [2016] eKLR**.

15. The Applicant submits that unless the Court compels the Respondent to obey the final orders of the Court by immediately settling the judgment debt the Respondent will continue to disobey the said orders and thus corrode and erode the dignity of this Court.

16. The Applicant submits that though the Respondent is a Public Government institution it also gets funds through donations and school fees paid by the pupils.

17. She also submits that the neglect and refusal by the Respondent to pay has been inordinate and prejudicial to the Applicant's right to realize the fruits of her judgment.

18. The Applicant thus submits she is only looking for fair treatment and seeking that the Respondent pays the said sums as withholding the same amounts to injustice against the Applicant as its the only option available to her since execution cannot issue against the government.

Respondent's Submissions

19. The Respondent submits that the allegations by the Applicant against the Respondent of failure to perform its statutory duty is denied as the decretal sum places inordinate financial burden upon the school which may risk failing to meet its financial obligations with regard to special needs children.

20. The Respondent submits that its efforts at negotiation have demonstrated its willingness to settle the matter making the application premature.

21. The Respondent submits that the judicial review orders of mandamus lie where a public official has a statutory duty to act and the official expressly or implicitly through unreasonable delay refuses to perform such duty.

22. The Respondent relied in the holding in **Republic v Principal Secretary, Ministry of Internal Security & another Ex Parte Schon Noorani & another [2020] eKLR** that an order of *mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays.

23. The Respondent submits that the delay was not unreasonable and as such the application is pre-mature as the Respondent is willing to settle the amount in instalments.

24. The Respondent relied in the holding in **Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR**:

"In my view a party facing financial constraints is at liberty to move to Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however is not a reason for one to evade its responsibility to settle such obligations. In other words, financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is also a basis for declining to compel Respondent to settle the sum decreed by the Court to be due from it."

25. The Respondent further submits that the Ex Parte Applicant's application is defective for want of compliance with the obtaining law under Section 21(1) and (2) of the Government Proceedings Act.

26. The Respondent submit that the above provisions require the Respondent to be supplied with a signed, sealed decree from the Court that delivered the judgment and a certificate of order against the government issued within 21 days from the date of the judgment.

27. The Respondent submits the said procedure was never adhered to by the Applicant as was stated in **Republic v Permanent Secretary Office of The President Ministry of Internal Security & another Ex-Parte Nassir Mwandishi [2014] eKLR**.

28. The Respondent submits the instant application is incompetent and has not complied with the legal provisions and the same is fatally defective.

29. The Respondent submits that the Applicant has failed to demonstrate the school principal wilfully and deliberately disobeyed Court orders and as such she cannot be said to have deliberately disobeyed Court orders.

Determination

30. It is not contested that the Ex Parte Applicant (the Applicant), has a valid judgment obtained from a court of competent jurisdiction which has not been appealed. It is further not in dispute that the Respondent has acknowledged the debt and offered to pay by instalments which are not acceptable to the Applicant.

31. There is no doubt that the Applicant meets the factors that must be present for a Court to issue an order of mandamus as set out by Mativo J. in **Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another [2018] eKLR** as follows –

(i) *There must be a public legal duty to act;*

(ii) *The duty must be owed to the Applicants;*

(iii) *There must be a clear right to the performance of that duty, meaning that:*

a. The Applicants have satisfied all conditions precedent; and

b. There must have been:

I. A prior demand for performance;

II. A reasonable time to comply with the demand,

unless there was outright refusal; and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv) No other adequate remedy is available to the Applicants;

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.”

32. As in the above case, the Respondent has cited grounds that are not helpful in both its replying affidavit and submissions.

33. The Applicant has attached a decree, a certificate of costs and certificate or order against the government. The Respondent even paid a cheque of Kshs.10,000/- which was rejected as the Respondent’s proposal to settle the claim by instalments of Kshs.10,000/- per term was unreasonable and so was the revised prepay to pay by instalments of Kshs.50,000/- per term.

34. I find the application is merited and enter judgment for the Ex Parte Applicant against the Respondent in the following terms: -

(i) An order of mandamus be and is hereby issued compelling the Respondent to pay the Applicant –

a) A sum of Kshs.451,512.79 being the decretal sum due and consequent upon the judgment delivered on 7th May 2020 in CMEL No. 117 of 2019 between MILLICENT WAIRIMU MAINGI V THE BOARD OF MANAGEMENT TREESIDE SPECIAL SCHOOL

b) Interest on Kshs.451,512.79 above at 12% per annum until payment in full

35. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF MARCH 2022

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st 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 Civil 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.

MAUREEN ONYANGO

JUDGE