



**Odera v Attorney General (Sued on behalf of the Ministry of Environment and Mineral Resources)  
(Judicial Review E002 of 2021) [2022] KEELRC 1176 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1176 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
JUDICIAL REVIEW E002 OF 2021**

**AN MWAURE, J  
MAY 26, 2022**

**BETWEEN**

**MICHAEL MAKOKHA ODERA ..... CLAIMANT**

**AND**

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

**SUED ON BEHALF OF THE MINISTRY OF ENVIRONMENT AND MINERAL  
RESOURCES**

**JUDGMENT**

1. The Applicant has made an application vide chamber summons dated January 11, 2021.
2. The Prayer by the Applicant is an order for mandamus to compel the Accounting Officer of the Ministry of Environment and Mineral Resources to satisfy the award; made in favour of the Claimant/Applicant on August 17, 2018 in ELRC 233 of 2013.
3. Costs of the application be met by the Respondent.

**Claimant's Facts**

4. The Claimant is Michael Makokha Odera and the Respondent is the Attorney General sued on behalf of Ministry of Environment and Mineral Resources.
5. The Claimant avers that on August 17, 2018 this Honourable Court delivered Judgment in ELRC 233 of 2013 in favour of the Claimant for a sum of Kshs.1,760,000/= plus costs and interest from the date thereof till full payment.
6. The said judgment has not been reviewed or stayed.



7. That on June 7, 2019 the Respondent wrote to the Claimant's advocate that they were in the process of preparing a payment brief to the Ministry to facilitate payment of the Judgment debt and requested for decree and certificate of order against the government.
8. On November 13, 2019 the Claimant wrote a letter to the Respondent asking for payment of judgment debt having supplied the Respondent with the necessary documents as requested.
9. That despite the Claimant making several follow-ups with the Respondent, the Respondent has not paid the judgment debt as ordered by the Honourable Court.
10. He therefore says he has been prejudiced and his right to enjoyment of the fruits of his judgments has been violated.

### **Respondent's Case**

11. The Respondent in his submissions dated January 10, 2022 says he was awaiting budget allocation and authorization from the National Treasury to settle the award.  
He says throughout the process they have shown efforts to seek funds from the Ministry of National Treasury and Planning for purposes of satisfying the decretal amount.
12. As for the prayer for order of Mandamus to compel the Respondent to satisfy the award they contend that such order lies where a public officer has a statutory duty to act and the officer expressly or implicitly through unreasonable delay refuse to perform such duty.
13. They get support from *Apotex Inc v Canada Attorney General* and also *Dragon v Canada (Minister of Citizenship and Immigration)*. The eight issues for consideration are;-
  - (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:
      1. A prior demand for performance;
      2. A reasonable time to comply with the demand, unless there was outright refusal; and
      3. An express refusal or an implied refusal through unreasonable delay;
  - (iv) No other adequate remedy is available to the Applicant;
  - (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, the mandamus should lie.
14. The Respondent avers the delay occasioned was not unreasonable.  
He says they have made efforts to get the funds and were advised by the National Treasury that the award would be factored in 2021/2022 Financial Year.



15. They also submit that the order for Judicial Review is discretionary in nature and in the case of *Republic v Principal Secretary, Ministry of Internal Security & another Ex parte Schon Noorani & another* [2018] (eKLR) it was held that review orders are discretionary and the court has ultimate discretion either to grant or decline.
16. The Respondent therefore submits that the Respondent's financial situation could not allow for immediate satisfaction of the decretal sum. They pray for the order of Judicial Review to be dismissed.
17. The Replying affidavit deponed by Dr. Chris Kiptoothe Principal Secretary of the Ministry of Environment and Forestry dated 23<sup>rd</sup> February, 2021 basically says the same thing as in the submissions and says they wrote to the National Treasury seeking authority and funds to settle the matter.  
He says the Ministry can only utilise money provided by Parliament and so emphasises that they are awaiting budgetary allocation and authority from the National Treasury.

### Decision

18. In law government assets are protected from being attached.  
The only remedy available is to compel accounting officer to effect payment.  
In the case of *Republic v Attorney General & another Ex parte Joseph Muchira Ndegwa* [2020] eKLR the court observed as follows- "Execution proceedings against a government or public authority can only be as against the Accounting Officer or Chief Officer or Public Authority and can only be as against the Accounting Officer or Chief Officer of the said government authority who is under a statutory duty to satisfy a judgment made by the court against that body."
19. Section 21(1) of *Government Proceedings Act* provides;-  
"where in any civil proceedings by or against the Government, or in proceedings in connection with any 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 that 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;  
Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant."
20. The Claimant's got judgment on August 17, 2018 for payment of Kshs 1,760,000/= plus costs and interest. To date the same has never been paid.  
The Respondent avers that they have good will to pay the same but the same has not been allocated by the National Treasury to pay the same.  
Indeed they claim the same was to be allocated in the budget of 2021/2022 Financial Year. There is no evidence if same is now allocated in this Financial Year.
21. The court observes that once a judgment is delivered and a decree is issued the sum awarded should be paid without unnecessary delay.



This is supported by the observations of my brother Judge in the case of *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza* [2012] eKLR

Where the court observed that in ordinary circumstances once a judgment has been entered in a Civil suit in favour of a party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day.”

22. Justice Odunga in the case of *Republic v Principal Secretary State Department of Interior Ministry of Interior Co-ordinaton of National Government and Principal Secretary Exparte Salim Anadha Salim & 12 others* [2018] eKLR observed “in this case the Applicant herein have moved this court to compel the satisfaction of a judgment already decreed in their favour by a competent court of law. The Respondents have not given any reason why the decree has not been satisfied more than three year down the line. If the court were to decline to grant mandamus, Applicants would be left without any effective remedy despite holding a decree.”
23. Justice Majanja in *Republic v Town Clerk of Webuye County Council and another*. HCCC 448 of 2006 said “.....a decree holder’s right to enjoy fruits of this judgment must not be thwarted.....”
24. The Respondent have stated they are yet to get a budgetary allocation. They stated they were to get the allocation in 2021/2022 Financial Year. We are already there and yet the amount has not been settled. The issue of failure of budget allocation by Government Ministries have been addressed in plethora of cases.
25. In the case of *Republic v Attorney General Exparte Italbuild Imports Limited* [2017] eKLR Justice Odunga pronounced himself on the issues as follows;-

“In my view it is the obligation of the government department concerned in conjunction with the Treasury to ensure that funds are allocated towards the settlement of the liabilities owed by the Government. The failure to do so amounts to failure to perform a statutory obligation hence warrants the grant of an order of mandamus. Whereas difficulties in the settlement of decretal sum may be a basis for seeking accommodation with respect to settlement, such difficulties cannot be a basis for seeking that an otherwise application for mandamus ought not to be granted.”
26. In conclusion I retaliante that a decree holder has a right to enjoy the fruits of his judgment and to decline to grant him a mandamus order is to violate his right.
27. In the circumstances, I issue an order compelling the Accounting Officer of the Ministry of Environment and Mineral Resources to satisfy the award made in the favour of the Claimant/ Applicant on the 17<sup>th</sup> of August, 2018 in ELRC 233 of 2013 for settlement of a debt of Kshs 1,760,000/= plus costs and interest till full payment.
28. The Claimant is awarded costs of the application.
29. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 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 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.

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

**ANNA NGIBUINI MWAURE**

**JUDGE**

