



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 16 OF 2020**

**FREDERICK OJODE.....EX PARTE APPLICANT**

**VERSUS**

**POSTMASTER GENERAL**

**POSTAL CORPORATION OF KENYA.....1<sup>ST</sup> RESPONDENT**

**POSTAL CORPORATION OF KENYA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The *Ex-parte* Applicant, Frederick Ojode, filed a Notice of Motion Application dated 6<sup>th</sup> July 2020 seeking for orders that an Order of Mandamus be hereby issued compelling the Respondents to pay him the sum of Kshs. 3,301,690.75 being the decretal sum, interest and costs in Nairobi E&LRC Cause No. 1014 of 2014 - Fredrick Ojode -vs- Postal Corporation of Kenya. He further seeks for costs of this application to be awarded to him. The Application is supported by the *Ex-parte* Applicant's Statutory Statement and Verifying Affidavit both dated 8<sup>th</sup> June 2020. The Application is based on the grounds that Judgment in the said Nairobi E&LRC Cause No. 1014 of 2014 was entered in favour of the *Ex-parte* Applicant on 1<sup>st</sup> April 2016 to the effect that his dismissal was wrongful. That decree was then issued on 10<sup>th</sup> November 2016 subsequent to which the Bill of Costs was taxed and allowed as against the 2<sup>nd</sup> Respondent on 28<sup>th</sup> September 2017 at Kshs. 215,058/-. That despite the 2<sup>nd</sup> Respondent numerously indicating its commitment to comply with the judgement of this court, it is yet to pay him and or even challenge the judgement of the court. That the *Ex-parte* Applicant is elderly, unwell, unemployed and urgently in need of funds for purposes of treatment and that unless this Court determines the substantive motion expeditiously, the Applicant will not be able to access treatment in time which would thus subject him to irreparable injury. Further, that the Respondents' blatant refusal to comply with the judgement of the court is unreasonable, manifestly illegal, *ultra vires*, in breach of the Applicant's legitimate expectation and in excess of jurisdiction conferred upon them by law. That it is therefore in the interests of justice that the orders sought herein are granted with costs of the suit awarded to the Applicant.

2. The Respondents filed a Replying Affidavit sworn on 16<sup>th</sup> November 2020 by Mr. Simon Gachara the Assistant Manager/Board Affairs & Administration of the Respondent. He avers that the Kenya Posts and Tele-Communications Corporation was declared defunct and dissolved in 1999 into three new organizations namely Telkom Kenya, Postal Corporation of Kenya and the Communication Commission of Kenya. That though the *Ex-parte* Applicant was granted leave in the said Industrial Cause No. 1014 of 2014 to substitute the Respondent from Kenya Posts and Tele-Communications Corporation to Postal Corporation of Kenya, he never served Postal Corporation of Kenya with any pleadings in the Cause. That Judgment was subsequently delivered by Honourable Justice Mathews N. Nduma as against Kenya Posts and Telecommunications Corporation and not Postal Corporation of Kenya. Further, that the Decree and Certificate of Taxation were also sought to be enforced against Kenya Posts and Telecommunication Corporations. He avers that the Respondents have not been aware of the said Industrial Cause noting that they entered appearance for the first time upon receipt of the Chamber Summons dated 8<sup>th</sup> June 2020 in the Judicial Review Application. That since the Respondents never defended the suit in the Industrial Cause, allowing the application herein will amount to condemning them unheard contrary to the express provisions of Article 50 of the Constitution of Kenya, 2010 and rules of natural justice. That in any event, the Industrial Cause was not among the liabilities transferred to the Respondents upon dissolution of the Kenya Posts and Tele-Communications Corporation and therefore the Respondents would be prejudiced if obligated to pay the said decretal sum, interests and costs. He further avers that the Application herein is mischievous, lacks merit, a clear abuse of the Court process and ought to be dismissed with costs to the Respondents.

3. The *Ex-parte* Applicant filed a Further Affidavit dated 14<sup>th</sup> January 2021 denying the Respondents' averments as made in the Replying Affidavit. He annexed in his affidavit a copy of the Notice of Appointment filed in court on 14<sup>th</sup> March 2005 on behalf of the 2<sup>nd</sup> Respondent by its advocates. He also annexed documents showing that the 2<sup>nd</sup> Respondent's advocates were served on 16<sup>th</sup> September 2009 with the Further Amended Plaintiff substituting Kenya Posts & Telecommunication Corporation with the 2<sup>nd</sup> Respondent. It is his averment that the 2<sup>nd</sup> Respondent was therefore well aware of the Industrial Cause as it participated in the hearing and judgment thereof and that it even further

lodged a Notice of Appeal against the said judgment on 14<sup>th</sup> April 2016. That the 2<sup>nd</sup> Respondent also filed an Application for stay of execution of the judgement on 22<sup>nd</sup> September 2016 and avers that it is evident the 2<sup>nd</sup> Respondent is lying to the Court. He further avers that since the 2<sup>nd</sup> Respondent did not appeal against the Ruling delivered on 3<sup>rd</sup> August 2009 which allowed him to substitute Kenya Posts & Telecommunication Corporation with the 2<sup>nd</sup> Respondent, the substitution was final. That all pleadings lodged by the parties following the substitution were also served on the 2<sup>nd</sup> Respondent. That the judgement and decree which show Kenya Posts & Telecommunication Corporation as the Respondent is an incidental error or omission which the court may *suo motu* in accordance with Rule 34 of the Employment & Labour Relations Court (Procedure) Rules, 2016 rectify on its own and compel the 2<sup>nd</sup> Respondent to honour the judgement.

4. The *Ex-parte* Applicant submits that the allegation that these proceedings are condemning the 2<sup>nd</sup> Respondent unheard is baseless and without merit and orchestrated by the 2<sup>nd</sup> Respondent to defeat the ends of justice and to deny him the fruits of the judgement. That he cannot realise the fruits of the judgement unless the Court grants the orders sought herein as Section 25(1)(a) and (b) of the Postal Corporation of Kenya Act Cap 411 prohibit execution or attachment of the 2<sup>nd</sup> Respondent's property in execution of judgement. That the provisions of Article 48 of the Constitution on the other hand enjoin the 2<sup>nd</sup> Respondent being a state corporation to ensure access to justice for all persons. He relies on the case of **Republic v Principal Secretary State Department of Interior, Ministry of Interior & Coordination of National Government & Principal Secretary ex parte Salim Awadh Salim & 12 others [2018] eKLR** where the court cited with approval Judicial Review Miscellaneous Application No. 44 of 2012 – **Republic v The Attorney General & Another ex parte James Alfred Koroso [2013] eKLR** where the court expressed itself that:

*“...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...”*

5. He submits that if the Court were to decline to grant the order of *mandamus* sought, he would be left without an effective remedy despite holding a valid decree of this court and that the same would be contrary to the Constitution of Kenya. The Applicant submits that Rule 34 of the Employment & Labour Relations Court (Procedure) Rules, 2016 provides that: *“The Court shall, either at the request of the parties or on its own motion, cause any clerical mistake, incidental error or omission to be rectified and shall notify the parties of such rectification”*. That in this case, it is evident the substitution of the 2<sup>nd</sup> Respondent with the Kenya Post & Telecommunication Corporation in the judgement was an incidental error which he urges the court to rectify on its own motion.

6. The Respondents submit that the instant Judicial Review Application has been brought against the wrong parties. That in the case of **Mbenge Matilu Kioko & Mutunga Matilu v Telkom Kenya Limited, Postal Corporation of Kenya & Communication Commission of Kenya [2008] eKLR**, the plaintiff filed a suit against all the three organisations pursuant to Order 1 rule 7 of the Civil Procedure Rules and left it to the court to decide which of them was liable. That it was therefore the Applicant's obligation to perform due diligence and find out which organization took up the legal proceedings in the Industrial Cause as opposed to imposing the liability upon them. That moreover, the pleadings were served upon the advocates representing Kenya Posts and Telecommunication Corporations and not the 2<sup>nd</sup> Respondent and that this suit ought to therefore not be sustained against them. The Respondents further submit that since the Decree and the Certificate of Taxation were also sought to be enforced against Kenya Posts and Telecommunication Corporations and not the 2<sup>nd</sup> Respondent, it is improper for judgement to be enforced against a party who is not the judgement debtor. They rely on the case of **Tawakal Airbus Limited v Irene Muthoni Njirati & Another [2020] eKLR** where the objector/applicant sought an order of stay of execution pending appeal on grounds that the decree holder sought to enforce judgement against the objector/applicant instead of the 2<sup>nd</sup> respondent who was the judgement debtor. That the court in **Tawakal Airbus Limited (supra)** set aside the warrants of proclamation and attachment after noting that the applicant/objector was a stranger to the original suit.

7. In **Republic v Principal Secretary State Department of Interior, Ministry of Interior & Coordination of National Government & Principal Secretary ex parte Salim Awadh Salim & 12 others** (supra) the Court observed that the circumstances under which judicial review order of *mandamus* are issued were set out by the Court of Appeal in **Republic v Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996**; the Court of Appeal cited, with approval, **Halsbury's Law of England, 4th Edn. Vol. 7 p. 111** para 89 thus:

*"The order of mandamus is of 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 and 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."*

8. I am in agreement with the *Ex-parte* Applicant's submission that Article 48 of the Constitution 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 judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment. This Court in line with this provision and the rules of natural justice may

invoke Rule 34 of the Employment & Labour Relations Court (Procedure) Rules, 2016 and rectify the *Ex-parte* Applicant's error of not substituting the Kenya Post & Telecommunication Corporation with the 2<sup>nd</sup> Respondent in the Judgment. The Claimant herein commenced the suit by way of a plaint in 1997 and sued the correct party. It was only later that the Respondent was split into three entities which entities remained liable in tort and contract for the actions and trespasses of the predecessor corporation the mother of Postal Corporation of Kenya, Telkom Kenya and the Communications Authority of Kenya. The Court is emboldened in its finding further because the *Ex-parte* Applicant has demonstrated that he was indeed granted leave to effect a substitution of parties after the split and even served the 2<sup>nd</sup> Respondent the pleadings before Judgment was rendered in the said Cause by proceeding to serve the advocates on record and these advocates never disclosed they had no instructions from the 2<sup>nd</sup> Respondent. The final reason why this finding must be in favour of the decree holder is because the 2<sup>nd</sup> Respondent sought appeal and even at one point committed to paying the decretal sum together with the interest ordered by the Court. In the final analysis, an Order of Mandamus do and is hereby issued compelling the Respondents to pay the Claimant the sum of Kshs. 3,301,690.75 being the decretal sum, interest and costs in Nairobi E&LRC Cause No. 1014 of 2014 - Fredrick Ojode -vs- Postal Corporation of Kenya. He will also have costs of this present application.

It is so ordered.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of February 2021**

**Nzioki wa Makau**

**JUDGE**