



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 37 OF 2012

(Formerly NAIROBI HIGH COURT PETITION NO. 436 OF 2012)

JULIUS O. OGUTU.....CLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

Mr. Onyango for claimant/applicant

M/s Irari for respondent

RULING

1. The applicant seeks to have The Hon. Attorney General and/or the Principal Secretary Defence be held in contempt of court for failure and or continued disregard of the decree issued on 9th March 2015 which was extracted and served on the respondent on 24th May 2016.
2. That a certificate order against the Government dated 8th July 2015 was also served on the respondent on 25th May 2016.
3. By judgment dated 1st October 2014, the court ruled in favour of the applicant and ordered that he be paid compensation in the sum of Kshs.7,175,986/=.
4. The respondent has filed a notice of preliminary objection together with a list of authorities dated 23rd September 2016 on 13th October 2006 and also filed a replying affidavit dated 19th April 2017 on 21st April 2017.
5. The respondent submits that there is no willful disobedience either on the part of the Hon. Attorney General or on the part of the Principal Secretary of Defence with regard to paying the decretal sum.
6. That the decretal sum sought by the applicant is a colossal amount which would need sufficient budgetary allocation in order to defray. The Principal Secretary of Defence states in his replying affidavit no such budgetary allocation has been made as yet.
7. Consequently, the cause of nonpayment of the decretal sum is unavailability of funds and as such, the respondent and/or Principal Secretary of Defence cannot be held to be in contempt of court.

Determination

8. Section 21 (4) of the Government Proceedings Act, (CAP 40) provides: -

“No execution or attachment shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid and no person shall be individually liable under any order for the payment by the government or any Government department or any officer of Government as such, of any money or costs.”

9. Furthermore, Section 30 (6) of the Contempt of Court Act, 2016 provides that: -

“No state officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith.” (emphasis court)

10. In the case of **R. –vs– A. G and another ex parte James Alfred Kiroso [2013] eKLR** and **R. –vs– A. G and another ex parte Stephen Wanyee Roki [2016] eKLR**, Justice Odunga held that owing to the fact that execution under Civil Procedure Rules is barred in so far as the Government is concerned, the option and only remedy available to a party in whose favour judgment has been decreed is to institute judicial review proceedings and seek an order of *mandamus* compelling the Government to settle the decree in question.

11. The Judge further held:-

“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.”

12. From the facts of this case, the applicant has not followed the above procedure by first instituting judicial review proceedings seeking an order of *mandamus* compelling the respondent and Principal Secretary Defence to settle the decree in question.

13. Whereas judgment was delivered on 1st October 2014, the applicant extracted the decree after almost two (2) years in May 2016. The decree and certificate of order against the Government are necessary before the applicant could realize the judgment debt.

14. The judgment sum is substantial and the explanation by the respondent that a budgetary allocation needed to be made in respect thereof is both factual and reasonable.

15. Budgetary allocations have an annual cycle and since no allocation was made in the 2016/2017 budgetary allocation, it would be wrong to fault the respondent and the Principal Secretary Defence in the circumstances of the case.

16. However, the court expects that the allocation has been made or ought to have been made in the 2017/2018 budget since the respondent and Principal Secretary Defence had already been served with all the necessary documents. This excuse will no longer be available to the respondent and the Principal Secretary Defence once a proper application of *mandamus* is made to the court.

17. For the aforesaid reasons, the application lacks merit and is dismissed with no order as to costs.

Dated, Signed and Delivered on this 24th Day of November 2017

MATHEWS NDERI NDUMA

JUDGE