



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA SAT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO.7 OF 2016

REPUBLIC APPLICANT

VERSUS

THE ATTORNEY GENERAL 1ST RESPONDENT

THE PRINCIPAL SECRETARY

**OF THE MINISTRY OF DEFENCE..... 2ND
RESPONDENT**

EX PARTE

1. EST. CPT KARIUKI KINGARI MUREBU (DC) SVC NO.020788

2. WOI GEORGE NGUGI GITAU SVC NO.020725/101825

**3. FLAVIAN KABUTHI [suing as the Administrator of the estate of
WOI PHILIP NGUI KABUTHI) SVC NO.020750**

**4. ALICE MUOKI [suing as the Administrator of the estate of
SSGT GEORGE MUOKI) SVC NO.020733**

5. SGT JORAM GATHU BORO SVC NO. 020989/101853

6. SGT LEONARD REPHO NGURE SVC NO.021555/101889

7. SPL FRANCIS MBERERE NJIHIA SVC NO.021233

8. CPL JOHNSON MAKUNGU MUVEA SVC NO.022271

**9. ESTATE OF SSGT GEORGE MBURU SVC NO.020739
PETITIONERS/APPLICANTS**

AND

ATTORNEY GENERAL RESPONDENT

RULING

1.The *ex parte* petitioners and applicants by Notice of Motion filed on 19th July 2016 are seeking for orders that;

1. An order of *MANDAMUS* to compel the Principal Secretary of the ministry of Defence to pay the *ex parte* applicants kshs.72,820,868.00 together with costs and interest being the decretal sum arising out of Constitutional Petition [ELRC) No. 49/2013 [Estate of Capt. Kingaru & 8 Others versus the AG];

2. Costs of and incidental to the application be borne by the respondents;

3. Such further and other reliefs that the court may deem fit, just and expedient to grant.

2.The petitioners, application is based on the Statutory Statement filed together with the Motion and Verifying Affidavit of the *ex parte* applicants, through **Anne Wanjiru Kingaru**, the Administrator and personal representative of the Estate of Capt. Kariuki Kingaru. According to the *ex parte* applicants, judgement was entered in their favour against the respondent for the sum of Kshs.8, 000,000.00 to each of the petitioner and the Bill of Costs taxed and certified by the Deputy Registrar at a sum of kshs.820, 868.00.

3.The motion is on the grounds that the applicants served upon the respondent the Decree, Certificate of Taxation and Certificate of Order against the government with a penal Notice and followed up with correspondences dated 1st July 2015, 5th August 2015 and 18th February 2016. The respondent has refused, neglected and or failed to settle the decretal sum of kshs.72, 820,868.00 and such amounts remained unpaid for a period of 2 years and will so remain unless the court grants the applicants an order compelling the respondent to settle the decretal sum. That it is in the interests of justice the Principal Secretary of the Ministry of Defence should be compelled to settle the decretal sum of Kshs.72, 820,868.00

4. In reply, the respondent filed Replying Affidavit sworn by Yvonne Kerubo Kirui and avers that as the legal officer in the Ministry of Defence has authority to respond herein. That the applicants filed High Court Petition No.228 of 2008 seeking damages and on 8th November 2010 the matter was transferred to this court. Upon such transfer the respondent never participated in there proceedings and the same proceeded *ex parte*. The respondent was never served with any notice for hearing until judgement delivered on 22nd October 2014.

5. On 8th July 2015 the *ex parte* applicant's advocates forwarded to the Solicitor General Certificate of Taxation and Certificate of Order against the government requesting remittance of kshs.72, 820,868.00 within 14 days and which communication brought to the attention of the respondent that judgement had been entered *ex parte*. The respondent proceeded to file Civil Appeal and Application No.105 of 2015 seeking to file appeal out of time and due for ruling on 4th November 2016. On this basis, the respondent has not allocated money for the settlement of the judgement amount. The application should not be allowed or should be stayed pending ruling by the court of appeal.

6.Both parties also made oral submission before court. Such submissions only gave emphasis to the filed application and affidavits in support.

Determination

7. I have considered the matter in view of the motion and affidavits before court and the submissions of the parties. Judgement herein was entered on 22nd October 2014 and pursuant to the same, on 8th July 2015, the Certificate of Taxation were and Certificate of order against the Government issued by the court. Pursuant to these proceedings, the *ex parte* applicant's advocates wrote to the respondent office with regard to the judgement, certificates of taxation of order against Government to pay kshs.72,

820,868.00 which letter was received on 29th July 2015.

8. There is no stay of the judgement of the court or the proceedings herein as the matter set out by the respondent in submissions related to Civil Application No.105 of 2015 before the Court of Appeal, seeking to extension of time to serve Notice of Appeal out of time in an intended appeal from the judgement of this court in Petition No.49 of 2012 and delivered on 22nd October 2014. There is therefore no stay of judgement or proceedings herein. The *ex parte* applicants have moved and obtained all the necessary decree, certificate of taxation and order against government to pay the judgement amount. There exists therefore a valid judgement of the court and the *ex parte* applicants have gone out of their way to write to the respondent to pay but refused, neglected and or failed to oblige.

9. There is no order stopping execution against the government. Section 21(4) of the **Government Proceedings Act** prohibits execution against the Government. However Section 21 (1) of the 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.

10. I find the *ex parte* applicants have dully complied. Section 21 (3) of the said Act also provides:

If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

11. The *ex parte* applicants have complied as above and no appeal is pending stopping the payments due from the Government. The High Court while consideration the implications of section 21(1) and (3) of the Government Proceedings Act even with the new amendments vide Act No. 35 of 2015 held in **Republic v Permanent Secretary Office Of The President Ministry Of Internal Security & another Ex-Parte Nassir Mwandihhi [2014] eKLR** that;

The effect of these provisions [section 21(1) and (3) of the Government Proceedings Act] is that whereas execution proceedings as are known to law are not available against the Government, the accounting officer for the Government department concerned is nevertheless under a statutory duty to satisfy a judgement made by the Court against that department. ... The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court.

12. I find the applicants have taken all the necessary legal steps and procedures required of them, such procedures are extensive and elaborate and to arrive at this point and with notice to the respondent for

government and letter received on 29th July 2015 and no payments in satisfaction of the judgement amount being made, the respondents are not keen to pay unless orders sought herein are issued. The responses given do not in any way negate the proceedings so far gone into by the applicants to defeat the essence of the orders sought.

13. Accordingly I do not agree with the submissions made by the Respondent that the motion herein should be stayed pending the ruling of the Court of Appeal to extend time to issue Notice of Appeal. To take that route would be anticipatory of the grant of orders that are futuristic yet since 22nd October 2014 when judgement was delivered and since 29th July 2015 when the Solicitor General was served with the Certificate of Taxation and order against Government has not moved to set aside judgment herein. The judgement of the court is valid and legitimate for execution.

14. Accordingly, no compelling reason has been advanced by the Respondent why this application which is otherwise merited ought not to be granted.

Accordingly, an order of mandamus is hereby issued directed at the Respondents compelling them to pay the ex parte Applicants Kshs.82,820,868.00 together with costs and interests and incidental to the applicant being the decretal sum arising out of Employment and labour Relations Court [ELRC] Petition No.49 of 2012, between Estate of Capt. Kingaru & 8 Others versus the Attorney General.

Delivered in open court at Nairobi this 13th day of October 2016.

M. MBARU

JUDGE

In the presence of

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