



**Republic v Principal Secretary Ministry of Health (Application E164 of 2021)  
[2024] KEHC 2659 (KLR) (Judicial Review) (18 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2659 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
APPLICATION E164 OF 2021  
J NGAAH, J  
MARCH 18, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**PRINCIPAL SECRETARY MINISTRY OF HEALTH ..... RESPONDENT**

**JUDGMENT**

1. The application before court is the applicant’s motion dated 25 November 2021. It is expressed to be brought under Order 53 rule 3 of the Civil Procedure Rules. The application seeks one main prayer which is phrased as follows:

“ a) That an order of mandamus to compel the respondent herein to satisfy the judgment and decree of the High Court at Nairobi given on 31<sup>st</sup> October 2019 by Honourable Lady Justice W.A.Okwany in Nairobi High Court Civil Suit No. 198 of 2016-Rocky Africa Limited versus The Honourable Attorney General and in terms of the consequent certificate of order against the government given on 23<sup>rd</sup> September 2020.”

The applicant has also sought for an order on costs.

2. The application is based on a statutory statement dated 22 November 2021 and a verifying affidavit sworn on even date by Robert Kamau verifying the facts relied upon.

3. Briefly, on 31 October 2019, the applicant obtained a judgment against the Attorney General for the sum of Kshs. 316,891,900/= in High Court Civil Suit No. 198 of 2016. The Attorney General had been sued on behalf of the Ministry of Health. The judgment has neither been appealed against nor set aside.



4. Subsequently, the applicant had his bill of costs taxed. A certificate of taxation dated 17 July 2022 was issued. The applicant also obtained a certificate of order against the Government which was served upon the respondent. However, as at the time this application was filed, the respondent had not satisfied the certificate of order against the Government and paid the applicant.
5. The respondent did not respond to the application. Going by the respondent's learned counsel's remarks in court every time this matter came up, the respondent was not contesting the applicant's application. For instance, on 24 January 2022, Ms. Nyakora, the learned counsel for the applicant stated as follows:

“The application is seeking order of mandamus for payment of over Kshs, 3 Billion. We have written to the Ministry and we await its response. We need a mention in two months' time”.
6. On 28 March 2022, the same counsel submitted as follows:

“We are desirous of having the matter settled out of court. The only concern is on interest. We can negotiate on that. The Ministry is yet to receive a budgetary allocation. It was not catered for in the current financial year.”
7. On 25 July 2022 Mr. Ocheing for the applicant and Ms. Nyakora for the respondent informed the court the payments were being processed. On 16 May 2023, Ms Nyakora informed the court that the Attorney General had written to the Treasury seeking for the funds and on 26 June 2023 she said that the Treasury had responded but was asking for the specific amount required to be paid.

The parties eventually opted for a court decision because a settlement had not been reached.
8. From these background facts, it is apparent that the applicant's claim is not contested. The claim is captured in the certificate of order against government given on 23 September 2020 and issued on 8 October 2020. The total claim including the principal sum, interest and costs as at those dates is stated to be Kshs. 2,779,068, 628.47. This amount remains unsettled to date.
9. Considering that there is no response to the applicant's application, no particular reason has been preferred why the amount has not been settled.
10. Section 21 of the *Government Proceedings Act* generally deals with the manner and procedure on enforcement of orders and decrees against Government. This section reads as follows:
  21. Satisfaction of orders against the Government
    - (1) 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.

- (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.
- (3) 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.

- (4) Save as aforesaid, no execution or attachment or process in the nature thereof 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 the Government as such, of any money or costs.
- (5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.

11. There is sufficient evidence on record, and there is no suggestion to the contrary, that Attorney General was served with the certificate of order against the Government. Service of the certificate upon the Attorney General is consistent with section 21(2) of the *Government Proceedings Act*.
12. Under Article 156 (4) (b) of *the Constitution*, the Attorney General represents the National Government in court or in any other proceedings in which the National Government is a party other than criminal proceedings. The presumption is that it is incumbent upon the Attorney General to liaise with his client and bring to his attention the certificate of order against the government once he has been served with the certificate.
13. There is also evidence that the same certificate was brought to the respondent's attention by the applicant. Indeed, there would be nothing wrong in a decree holder serving the certificate upon the



accounting officer referred to in section 21(1) of the Act but the Act is express that it is the Attorney General who may be served. An application for enforcement of payment would not fail because the accounting officer was not served if it can be proved that his legal representative, the Attorney General, was served.

14. In the absence of any reason or any valid reason why the applicant's decree cannot be settled, there is every reason to compel the respondent, by way of mandatory or mandamus order, to pay.

15. But why a mandatory order?

One of the ways through which decrees or orders are enforced is, of course, execution or attachment. However, the Government is protected from such process of execution or other similar process in enforcement of decrees or orders by section 21(4) of the *Government Proceedings Act*.

16. In the face of this protection from execution or attachment, the only available route open to the applicant is to compel the respondent to perform his statutory duty under section 21(3) of the Act and pay what has been decreed as due and owing to the applicant. In other words, only the order of mandamus would be the appropriate order under the circumstances.

17. According to Halsbury's Laws of England/Judicial Review (volume 61 (2010) 5th Edition)/5. Judicial Remedies/ (1) Introduction paragraph 689:

“A mandatory order is, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal requiring him, or them, to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty (See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL). The breach of duty may be a failure to exercise a discretion, or a failure to exercise it according to proper legal principles.”

18. This is reiterated in paragraph 703 which states:

“A mandatory order is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or it to do some particular thing specified in the order which appertains to his or its office and is in the nature of a public duty... the purpose of a mandatory order is to compel the performance of a public duty, whether of an inferior court or tribunal to exercise its jurisdiction, or that of an administrative body to fulfil its public law obligations. It is a discretionary remedy.”

19. And with particular reference to public officers who, like in the instant case, fail to perform their duty, paragraph 706 is clear that a mandamus order may be issued to compel them to carry out the duty. It reads as follows:

“706. Public duties by government officials.

If public officials or public bodies fail to perform any public duty with which they have been charged, a mandatory (mandamus) order may be made to compel them to carry out the duty (See *R v Metropolitan Police Comr, ex p Blackburn (No 3)* [1973] QB 241, [1973] 1 All ER 324, CA; *R v London Transport Executive, ex p GLC* [1983] QB 484, [1983] 2 All ER 262, DC.)”

20. The applicant has demonstrated, and it is not in dispute, that it duly extracted a certificate of order against government and that the same was duly served not only upon the Attorney General but was also



brought to the respondent's attention. More importantly, there is no suggestion that the applicant has defaulted in any step prescribed under section 21 of the Act as to disentitle it to the order of mandamus.

21. A demand for payment having been made, and the respondent having failed to pay, no other evidence is required to demonstrate that the respondent has failed to perform a public duty with which he is charged under section 21(3) of the [Government Proceedings Act](#). A mandamus order would properly issue in such circumstances.
22. Accordingly, I hereby allow the applicant's motion dated 25 November 2021 in terms of prayer (a). Considering that the application is not opposed, I make no order as to costs. It is so ordered.

**SIGNED, DATED AND UPLOADED ON THE CTS ON 18 MARCH 2024.**

**NGAAH JAIRUS**

**JUDGE**

