



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISC. APPLICATION NO. 216 OF 2019**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

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

**EX PARTE:**

**1.MIRIAM WAIRIMU WAMBUGU**

**2.ANNE WANJIRA GITHENYA**

**JUDGMENT**

1. Miriam Wairimu Wambugu and Anne Wanjira Githenya, the *ex parte* Applicants herein, have moved this Court in an application brought by way of a Notice of Motion application dated 24th June 2020, wherein they are seeking the following orders

**1. An Order of *mandamus* be issued to compel the Respondent to pay the *ex parte* Applicants, the decretal sum together with interest thereon of Kshs. 41,453,299.13 which is due to date on account of Judgement entered on 14<sup>th</sup> January, 2013 against the Respondent herein in HCCC No. 661 of 2007.**

**2. An Order of *mandamus* be issued to compel the Respondent to pay the *ex parte* Applicants, the taxed costs together with interest thereon of Kshs. 1,503,819.65 which is due to date on account of the Certificate of Taxation dated 17th July, 2013 in HCCC No. 661 of 2007.**

**3. The Respondent be and is hereby ordered to comply by satisfying the Decree, Costs and Interest in HCCC No. 661 of 2007 within fourteen (14) days from the date of service of the order of *mandamus*.**

**4. In default, Notice to Show Cause do issue against the Respondent to show cause why he should not be cited for contempt of court.**

**5. The costs of this application be borne by the Respondent**

2. The said application is supported by a statutory statement dated 4th July 2019, and a verifying affidavit sworn on the same date by the 1st Applicant. The *ex parte* Applicants stated that on 29th November, 2016, they were issued with a Limited Grant of Letters of Administration Pendente Lite by the High Court in **Succession Cause No 1103 of 2016**, to be the personal representative of Jacob Juma (deceased), and to represent the estate in pending suits including **HCCC No. 661 of 2007**. Further, that on 14th

January, 2013, judgment was entered in **HCCC No. 661 of 2007** against the Respondent for the sum of Kshs . 24,466,270.00, which remains unpaid and continues to accrue interest to date at the rate of 12% per annum, thus the total decretal sum outstanding to date with interest thereon is Kshs. 40,613,835.20.

3. The *ex parte* Applicants further averred that on 17th July, 2013 costs against the Respondent were taxed at Kshs. 957,720.00 and the same remains unpaid. The total outstanding costs against the Respondent to date is thus Kshs. 957,720.00 . that the Respondent was on 29th July, 2013 duly notified of and served with copies of the Decree and Certificate of Taxation and has had sufficient time since 2013 to satisfy the decretal sum and taxed costs but has still failed to satisfy the sums outstanding. Further, that on 21st May, 2019, the Respondent was also duly notified of and served with copies of the Certificate of Order against the Government in that regard and has had sufficient time since then to satisfy the decretal sum and taxed costs, but has failed to satisfy the sums outstanding.

4. The *ex parte* Applicants' case therefore is that since 2013, they have been denied the right to enjoy the fruits of the Judgement in **HCCC No. 661 of 2007** due to the inaction of the Respondent and the same amounts to a violation of the right of access to justice guaranteed under Article 48 of the Constitution. In addition, that the deliberate refusal by the Respondent to satisfy the decree and costs in **HCCC No. 661 of 2007** amounts to an abuse of power , is unreasonable and unjustifiable.

5. The *ex parte* Applicants annexed copies of the of the limited grant issued on 29th November 2016 in **Succession Cause No 1103 of 2016**, the Judgement dated 14th January 2013 and Decree issued on 6th February 2013 in **HCCC No. 661 of 2007**, as well as the Certificate of Taxation dated 17th July 2013 and Certificate of Order Against the Government issued therein on 17th May 2019. The *ex parte* Applicants also annexed copies of a letter to the Attorney General dated 29th July, 2013, requesting for payment of the decretal sum, and enclosing the said judgment and Certificate of Taxation.

6. During the hearing of the application, the *ex parte* Applicants' counsel indicated that he would wholly rely on the pleadings filed. There was no response filed by the Respondent despite being given the opportunity to do so.

### **The Determination**

7. I have considered the *ex parte* Applicants' pleadings, and I am also guided by the holding of the Court of Appeal on the nature of the remedy of mandamus in its decision in **Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others, [1997] e KLR**. The said Court held as follows in this regard:

**"The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS"** Once again we turn to **HALSBURY'S LAW OF ENGLAND, 4<sup>th</sup> Edition Volume 1 at page 111 FROM PARAGRAPH 89**. That learned treatise says:-

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

At paragraph 90 headed "the mandate" it is stated:

**"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."**

**What do these principles mean" They mean that an order of mandamus will compel 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. The requirements for an order of mandamus to issue were further explained by Mativo J. in **Republic vs Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another [2018] eKLR** as follows:

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in *Apotex Inc. vs. Canada (Attorney General)*, [23] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*.<sup>[24]</sup> The eight factors that must be present for the writ to issue 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:
    - i. A prior demand for performance;
    - ii. A reasonable time to comply with the demand, unless there was outright refusal; and
    - iii. An express refusal, or an implied refusal through unreasonable delay;
    - iv. No other adequate remedy is available to the Applicants;
    - 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, mandamus should lie

9. The issues therefore that require to be determined are firstly, whether the Respondents are under a public duty and obligation to satisfy the orders issued in favour of the *ex parte* Applicants, and secondly, if so, whether the *ex parte* Applicants are entitled to the relief they seek.

10. Section 21 of the Government Proceedings Act in this regard provides as follows as regards the requirements to be met in the enforcement of orders as against Government organs in civil proceedings:

“(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.”

11. Execution proceedings against a government or public authority under the Government Proceedings Act can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body. This was also the holding in Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) where Githua J. held as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one 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. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (*hereinafter referred to as the Act*) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”

12. As to whether the Respondent herein is under a duty to pay the subject decretal sums, an order of mandamus is normally issued when an officer or an authority by compulsion of law or statute is required to perform a duty, and that duty, despite demand in writing, has not been performed. It is not disputed in the present application that judgment was entered in favour of the *ex parte* Applicants in HCCC No. 661 of 2007 as against the Respondent. The *ex parte* Applicant in this respect annexed copies of the Certificates of Order Against the Government issued in her favour against the 1<sup>st</sup> Respondent, for the decretal sum of Kshs 40,613,835.20= inclusive of interest awarded until 16<sup>th</sup> May 2019, and costs taxed at Kshs 957,720= . The *ex parte* Applicants also brought evidence to show that they made demands and requests for payment which have not been heeded to by the Respondent.

13. There is thus an implied refusal on the part of the Respondent to pay the demanded sums. However, it is notable in this respect as regards the prayer for issue of a Notice to Show Cause against the Respondent to show cause why he should not be cited for contempt of court, the same is premature as the *ex parte* Applicants have not shown evidence of service and disobedience of this court’s order, and resultant contempt of court proceedings.

### **The Disposition**

14. In the premises, I find that the *ex parte* Applicant’s Notice of Motion dated 24th June 2020 is merited to the extent of the following orders:

**I. An order of mandamus be and is hereby issued to compel the Respondent to pay the *ex parte* Applicants the sum of Kshs 40,613,835.20=, being the decretal sum awarded to the *ex parte* Applicant in Nairobi HCCC No. 661 of 2007 together with interest thereon at the rate of 12% p.a. from 16<sup>th</sup> May 2019 until payment in full, and to also pay the *ex parte* Applicants the taxed costs of Kshs 957,720=.**

**II. The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 24th June 2020 of Kshs 30,000/=.**

15. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 18<sup>TH</sup> DAY OF NOVEMBER 2021**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF NOVEMBER 2021**

**A. NDUNG’U**

**JUDGE**



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