



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISC. CIVIL APPLICATION NO. 303 OF 2017**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PRINCIPAL SECRETARY,**

**MINISTRY OF DEFENCE.....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY,**

**NATIONAL TREASURY.....2<sup>ND</sup> RESPONDENT**

**EX PARTE DAVID GITAU NJAU & 9 OTHERS**

**JUDGEMENT**

1. The applicants in this application moved this Court seeking an order of mandamus compelling the respondents to pay hem the judgement debt in the sum of Kshs 80,014,031.70 with interest accrued thereon at the rate of 12% per annum arising from the judgement delivered in Petition 340 of 2012. They also sought that the same order of mandamus be deemed as a notice to the respondents to show cause why contempt of court proceedings should not be commenced against them upon the expiry of 30 days from the date of service of the same.
2. The applicants' case is that they were victims of arbitrary arrest and unlawful detention without trial, torture, cruel, inhuman and degrading treatment and punishment between 1<sup>st</sup> August, 1982 and March, 1983.
3. As a result they sued the Attorney General for the violations of their rights in Petition No. 340 of 2012 and after full hearing judgement was delivered in their favour in the total sum of Kshs 55,000,00/- with interest and court rates from the date of judgement on 1<sup>st</sup> November, 2013 and costs thereon.
4. The applicants averred that they duly served the Attorney General with the decree arising therefrom whose receipt was acknowledged. According to them the party and party costs was taxed in the total sum of Kshs 1,235,951.70 and a certificate of costs duly issued on 6<sup>th</sup> April, 2016. On 4<sup>th</sup> May, 2016 the Court issued a certificate of order against the Government in the said Petition in the total sum of Kshs 72,455,677.70 which was inclusive of the principal sum, the interests and costs.
5. It was averred that the certified decree, certificate of taxation and certificate of order against the

Government in the said Petition and request for settlement thereof were served on the 1<sup>st</sup> Respondent and the Attorney General who duly acknowledged receipt thereof.

6. According to the applicants despite their b numerous attempts to have the said sum settled, the Respondents have not done so yet no appeal has been file against the said judgement whose execution has not been stayed.

7. The applicants averred that based on section 21(3) of the **Government Proceedings Act**, it is the statutory duty of the Respondents to pay the judgement debt herein which now stands in the sum of Kshs 80,014,031.70.

8. It was the applicants' case that unless this Court intervenes by an order of mandamus, they are unlikely to receive the fruits of their judgement.

9. In response to the application the Respondents averred that they had not refused, neglected to obey or comply with the judgement of the court but rather, that the failure to pay has been occasioned by circumstances that are beyond their control.

10. It was their case that payments y Government departments rely on yearly budgetary allocations which allocations are normally approved by the National Assembly, which is an independent arm of the Government, who have the ultimate control and oversight over public expenditure.

11. It was disclosed that the decretal amount was in the budgetary proposal but the same was not approved by the National Assembly hence the reason the Ministry was unable to satisfy the judgement. It was however the 1<sup>st</sup> Respondent's case that since he had showed willingness to settle the decretal sum by factoring the same in the budgetary proposal, there is nothing to be compelled to do as he is already in the process of doing so which depends on other processes by an independent arm of the Government.

12. According to the Respondents given the bureaucratic obstacles highlighted above, at most what the applicant if facing is merely a delay in settlement as opposed to a refusal hence it does not warrant issuance of an order of *mandamus*.

13. It was disclosed that whereas a consideration could have been made for payment from the Ministry's contingency fund, taking into account the fact that the amount involved is colossal, that option was not available to the 1<sup>st</sup> Respondent.

14. The Respondents therefor urged the Court that since the remedies sought are discretionary the same ought not to issue in the circumstances of this case and the application ought to be disallowed.

### **Determination**

15. I have considered the issues raised in this application.

16. Section 21(1) of the **Government Proceedings 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.*

17. Section 21 (3) of the said Act on the other hand 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.*

18. The only reason advanced for not settling the decree is that though the 1<sup>st</sup> Respondent, who is the accounting officer in the ministry concerned, had made a payment proposal, the same was not factored in the budgetary allocation hence could not be settled. The answer to this position was however given by **Githua, J** in **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR** where she expressed herself 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. *This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.*” [Emphasis mine].**

19. I associate with the said decision and it is therefore my view that settlement of decretal sum by the Government and its agencies does not necessarily depend on the availability of funds. This position was appreciated by this Court in **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012** in which this Court pronounced itself as follows:

**“I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of**

**the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein.”**

20. In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations. In other words financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle a sum decreed by the Court to be due from it.

21. In my view it is the obligation of the government department concerned in conjunction with the Treasury to ensure that funds are allocated towards the settlement of the liabilities owed by the Government. The failure to do so amounts to failure to perform a statutory obligation hence warrants the grant of an order of *mandamus*. Whereas difficulties in the settlement of decretal sum may be a basis for seeking accommodation with respect to settlement, such difficulties cannot be a basis for seeking that an otherwise merited application for *mandamus* ought not to be granted.

22. The next issue is whether the orders sought herein can issue against both the Respondents herein. As rightly held in **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza** (supra):

**“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.”**

23. In **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** expressed himself, *inter alia*, as follows:

**“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...The foregoing may also be thought to be much in point in relation to the applicant’s unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary**

to add that the applicant has very much of an interest in the fulfilment of that duty...Since *mandamus* originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law...English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting "simply in his capacity of servant". There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a *mandamus* would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of *mandamus* will lie for the enforcement of the duties...With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile... *It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose.* There is nothing in the said Act itself to suggest that this duty is owed solely to the Government...Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go... In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of *mandamus* must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament... In the court's view the granting of *mandamus* against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". *The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament.* The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata*, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty

is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few...*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designate* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of *mandamus* will issue as prayed with costs."

24. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the Republic vs. The Attorney General & Another ex parte James Alfred Koroso, I expressed myself as hereunder:

"...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....The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the

performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. 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. Such contempt proceedings are no longer execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."

25. It is therefore clear that orders of *mandamus* can only issue against the accounting officer of the ministry or the government department concerned. In this case it is clear that the concerned accounting officer is the 1<sup>st</sup> Respondent.

26. It is however important to remember that the failure to settle decretal debts promptly and expeditiously invariably leads to escalation of interest payable thereon. This position means that the public is subjected to pay more money than it ought to have paid. In my view to fail to take adequate steps in order to minimise the amount of public expenditures cannot be termed as prudent and responsible way of using public funds in order to meet the requirements of Article 201 of the Constitution.

27. The circumstances under which judicial review order of *mandamus* are issued were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** *inter alia* as follows:

**"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 or 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."**

28. This position is now underpinned in section 7(2)(j) of the *Fair Administrative Action Act* under which the Court is empowered to issue orders of judicial review where there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law. In those circumstances section 11(1) of the said Act empowers the Court to issue an order compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right.

29. As stated hereinabove, once the certificate of order against the Government is served on the Hon. Attorney General, the consequences of section 21(3) of the *Government Proceedings Act* kick in and a statutory duty is thereby imposed on the relevant accounting officer to pay the sums specified in the said order to the person entitled to or to his advocate together with any interest lawfully accruing thereon. In this case the said certificate was duly issued and served. Therefore as was appreciated in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) there is a specific legal right but no specific legal remedy available for enforcing that right as execution cannot issue against the Government in the ordinary way. In such circumstances it is clear that an order of *mandamus* may go forth in order to remedy the defects of justice.

30. To disallow this application would mean that that the applicants will forever be locked out from

realising their fruits of judgement.

31. Therefore there is a duty imposed on the accounting officer in the Ministry of Defence, who is the Principal Secretary therein to settle the decretal sum herein. I however exonerate the 2<sup>nd</sup> Respondent from culpability as it is not the accounting officer in the subject ministry.

**Order**

32. In the premises I find merit in the Motion dated 27<sup>th</sup> June, 2017 and I issue an order of *mandamus* compelling the 1<sup>st</sup> respondent to pay the applicants the judgement debt in the sum of Kshs 80,014,031.70 with interest accrued thereon at the rate of 12% per annum arising from the judgement delivered in Petition 340 of 2012. As the 1<sup>st</sup> Respondent has evinced some attempts made towards the settlement of the decretal sum and as the application was not seriously opposed, I award half the costs of these proceedings to be borne by the 1<sup>st</sup> Respondent.

33. It is so ordered.

**Dated at Nairobi this 16<sup>th</sup> day of March, 2018**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Gikonyo for Mr Mbugua Mureithi for the applicants**

**Miss Ayuma for the Respondents**

**CA Ooko**