



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. 49 OF 2020**

**BETWEEN**

**VIVO ENERGY LIMITED**

**(Formerly Known as KENYA SHELL LIMITED).....APPLICANT**

**VERSUS**

**THE NATIONAL LAND COMMISSION.....RESPONDENT**

**JUDGMENT**

**The Application**

1. The *ex parte* Applicant herein, Vivo Energy Kenya Limited, is the decree holder in **Republic of Kenya vs National Land Commission & 2 others ex parte Vivo Energy Kenya Limited, Judicial Review No. 383 of 2014**, wherein judgment was given in its favour against the Respondent herein on 18<sup>th</sup> February, 2015 and costs of the suit awarded to it. The Party to Party Costs were subsequently taxed on 28<sup>th</sup> March, 2018 at Kenya Shillings Seven Hundred and Twenty Four Thousand, Seven Hundred and Eighty One Shillings and Sixty Cents (Kshs.724,781.60) and the Certificate of Taxation dated 12<sup>th</sup> April 2018 and a Certificate of Order against the Government dated 17<sup>th</sup> July 2019 issued to the *ex parte* Applicant

2. The *ex parte* Applicant has now filed the instant judicial review proceedings by way of a Notice of Motion application dated 4<sup>th</sup> June, 2020, in which it is seeking the following orders:-

**a) An order of Mandamus directed to the Secretary of the National Land Commission (Respondent) as its Accounting Officer compelling him to pay to the Applicant the party and party costs in Nairobi Judicial Review No. 383 of 2014 (Republic vs The National Land Commission & 2 Others ex-parte Vivo Energy Kenya Limited) which were taxed at Kenya Shillings Seven Hundred and Twenty-Four Thousand, Seven Hundred and Eighty-One and Sixty Cents (Kshs. 724,781.60) only.**

**b) THAT the costs of this application be awarded to the ex-parte Applicant.**

**c) THAT the Court be at liberty to make such further and other orders as it deems fit to meet the ends of justice.**

3. The application is supported by a statutory statement dated 29<sup>th</sup> January, 2020 and a verifying affidavit sworn on the same date by Naomi Assumani, the *ex parte* Applicant's Company Secretary.

4. The *ex parte* Applicant's case is that the Respondent has ignored failed, and/ or refused to settle the decretal sum despite several requests made to it, and it annexed copies of letters from the *ex parte* Applicant's Advocates addressed to the Respondent requesting settlement of the decretal sum. The *ex parte* Applicant also annexed a copy of the judgment, Certificate of Taxation and Certificate of Order against Government issued to it in **Republic of Kenya vs National Land Commission & 2 others ex parte Vivo Energy Kenya Limited, Judicial Review No. 383 of 2014**.

5. The *ex parte* Applicant further asserted that the Respondent is a State Commission and the appropriate mode of execution against it is by way of an order of Mandamus, and that unless the Court intervenes, it will be deprived of the fruits of its judgment. Further, that no prejudice shall be suffered by the Respondent or any other person should the Orders herein be granted as prayed.

6. The Respondent did not file any response to the application, despite being given the opportunity to do so.

## The Determination

7. The application was canvassed by way of the *ex parte* Applicant's written submissions dated 4<sup>th</sup> June, 2020, wherein it reiterated the facts and grounds for his application. The *ex parte* Applicant submitted that the Respondent is established under Article 67 of the Constitution of Kenya 2010 as an independent state commission to *inter alia* manage public land on behalf of the national and county governments. Further, that Section 21 of the Government Proceedings Act, Cap 40 provides for the satisfaction of orders against the government.

8. Therefore, that by a letter dated 6<sup>th</sup> August, 2018 to the Respondent, the *ex parte* Applicant demanded settlement of the taxed party & party costs and forwarded for their benefit copies of the pleadings in **Republic of Kenya vs National Land Commission & 2 others ex parte Vivo Energy Kenya Limited, Judicial Review No. 383 of 2014**, the judgment delivered therein, the Bill of Costs, the Ruling on the Bill of Costs and the Certificate of Taxation. Further, that through its letters dated 30<sup>th</sup> August, 2018 and 22<sup>nd</sup> October, 2018, the *ex parte* Applicant followed up on the payment which was not forthcoming, and thereafter, on 7<sup>th</sup> August, 2019, forwarded to the Attorney General copies of the judgment, ruling on the Bill of Costs, the Certificate of Taxation, and the Certificate of Order and sought settlement of the decretal sum. The *ex parte* Applicant averred that having received no response, it wrote once more to the Attorney General on 30<sup>th</sup> October, 2019 seeking settlement of the sums due, and that by a letter of an even date, it wrote to the Respondent demanding payment and enclosed copies of the Judgment, Certificate of Taxation and Certificate of Order against Government.

9. The *ex parte* Applicant contended that it has followed the statutory procedure laid out in Section 21 of the Government Proceedings Act and that having done so, a statutory duty was placed upon the Respondent to pay through its accounting officer, the decretal sum rightfully due to the it, and the Respondent has failed to do so. It was further submitted that the office of Secretary to the National Land Commission is established under Article 250(12) of the Constitution and Section 20(4) of the National Land Commission Act, 2012 provides that the Secretary shall be the accounting officer of the Respondent. Counsel contended that once the Certificate of Order was served upon the Attorney General, a duty was placed upon the Secretary to the Respondent as the Accounting Officer to pay the sums due to the *ex parte* Applicant.

10. Further, that since the Respondent is a state organ, no execution can issue against it under Section 21 (4) of the Government Proceedings Act, and that the only recourse available to the *ex-parte* Applicant is an order of mandamus compelling the Respondent to satisfy the Decree. Lastly, the *ex parte* Applicant submitted that He averred that the Decree herein was issued by a court of competent jurisdiction and the Respondent has not filed an Appeal against the same nor has it filed an application to stay its execution.

11. Reliance was placed on the decision in **Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza, (2012) e KLR** for the submissions made. The *ex parte* Applicant also cited the decision in **Republic vs Attorney General & Another Exparte James Alfred Koroso (2013) eKLR**, and **Republic vs Town Clerk of Webuye County Council & another (2014) eKLR** for the submission that in order to enjoy the fruits of its judgment, the *ex parte* Applicant has no other option but to compel the Respondent to perform his obligations.

## The Determination

12. I have considered the *ex parte* Applicant's pleadings and submissions, and in arriving at a determination, I have also considered the holding by the Court of Appeal on the nature of the remedy of mandamus in its decision in **Republic vs Kenya National Examinations Council exparte 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..... .”**

13. It is not disputed in the present application that judgments as to costs were entered in favour of the *ex parte* Applicant in **Republic of Kenya vs National Land Commission & 2 others ex parte Vivo Energy Kenya Limited, Judicial Review No. 383 of 2014**. The issues therefore that require to be determined are firstly, whether the Chief Executive Officer of the Independent Electoral and Boundaries Commission is under a public duty and obligation to satisfy the orders as to costs issued in favour of the Applicant in the said judgments, and

secondly, if so, whether the Applicant is entitled to the relief he seeks.

14. The first question to be answered therefore, is whether the Respondent is under a public duty and obligation to satisfy orders as to costs issued in favour of the Applicant in the said judgments. Article 67 of the Constitution establishes the National Land Commission as a Constitutional Commission, and Article 253 provides as follows in this respect as regards constitutional commissions:

**“ Each commission and each independent office—**

**(a) is a body corporate with perpetual succession and a seal; and**

**(b) is capable of suing and being sued in its corporate name.”**

15. In addition, constitutional commissions are one of the state organs under Article 260 of the Constitution. Section 21 of the Government Proceedings Act 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.”**

16. Execution proceedings against a government or public authority can thus 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 J. Githua 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.”**

17. The provisions of section 21 of the Government Proceedings Act must be read with the necessary changes in relation to the Respondent's Commission. In this regard, the Respondent's Commission being a corporate body, the service of the certificate of costs that is required by

the said section on the Attorney General must read as requiring service on the appropriate officer in the Respondent Commission.

18. Article 250 (12) of the Constitution and section 20 of the National Land Commission Act in this regard provides for a Secretary to the Respondent's Commission, and section 20(3) & (4) of the Act provides for the following functions of the Secretary to the Commission:

**“(3) The secretary shall—**

**(a) be the chief executive officer of the Commission and head of the secretariat and shall be responsible to the Commission;**

**(b) serve on such terms and conditions as the Commission may determine; and**

**(c) before, assuming office, take and subscribe to the oath or affirmation of office set out in the Second Schedule.**

**(4) The secretary, shall be the accounting officer of the Commission and shall be responsible to the Commission for—**

**(a) all income and expenditure of the Commission;**

**(b) all assets and the discharge of all liabilities of the Commission; and**

**(c) the proper and diligent implementation of Part IV of this Act”**

19. The Respondent therefore has an accounting officer for purposes of section 21 of the Government Proceedings Act, and who is also the officer responsible for the liabilities and secretariat of the Commission. The *ex parte* Applicant in this respect annexed letters sent to the officers of the Respondent dated 6<sup>th</sup> August 2018, 30<sup>th</sup> August 2018, 22<sup>nd</sup> October 2018 and 30<sup>th</sup> October 2019 seeking payment of the costs, and forwarding the subject judgment, Certificate of Costs and Certificate of order against Government. In addition, the *ex parte* Applicant also annexed copies of letters to the Attorney General dated 6<sup>th</sup> August 2018 and 30<sup>th</sup> October 2019, similarly forwarding the said documents.

20. As to the actual amount of costs due from the Respondent, the Certificate of Taxation dated 12<sup>th</sup> April 2018 and the Certificate of Order against the Government dated 17<sup>th</sup> July 2019 that were annexed by the *ex parte* Applicant were for taxed costs of Kenya Shillings Seven Hundred and Twenty Four Thousand, Seven Hundred and Eighty One Shillings and Sixty Cents (Kshs.724,781.60), which are not contested.

#### **The Disposition**

21. In the premises, I find that the *ex parte* Applicant's Notice of Motion dated 4<sup>th</sup> June 2020 is merited. I accordingly grant the following orders:

**I. An order of mandamus directed to the directed to the Secretary of the National Land Commission as its Accounting Officer compelling him to pay to the *ex parte* Applicant Kenya Shillings Seven Hundred and Twenty-Four Thousand, Seven Hundred and Eighty-One and Sixty Cents (Kshs. 724,781.60), being the Party and Party costs taxed in Republic vs The National Land Commission & 2 Others ex-parte Vivo Energy Kenya Limited, Nairobi Judicial Review No. 383 of 2014 , with interest at court rates from the date of this judgment until payment in full.**

**II. The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 4<sup>th</sup> June 2018 of Kshs 30,000/=.**

22. Orders accordingly.

**DATED, AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF DECEMBER 2020**

**P. NYAMWEYA**

**JUDGE**

#### **FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT**

**In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondent's Advocates on record.**

**P. NYAMWEYA**

**JUDGE**