



**Mathu v Principal Secretary, Ministry of Interior and Coordination
of National Government & another (Judicial Review E133 of 2022)
[2023] KEHC 22804 (KLR) (Judicial Review) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22804 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E133 OF 2022
JM CHIGITI, J
SEPTEMBER 29, 2023**

BETWEEN

JUSTUS MUGO MATHU APPLICANT

AND

**PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND COORDINATION
OF NATIONAL GOVERNMENT 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The Application before this court is dated 14th September 2022.
2. The Applicants seeks the following orders:
 - a. An order of Mandamus is hereby issued compelling the Respondents to pay to the Ex-parte Applicant, the decretal sum in Milimani CMCC No. 6784 of 2014: Justus Mugo Mathu v The Hon. Attorney General of KShs. 500,000.00 together with taxed costs of KShs. 108,800 plus interest thereon at the rate of 12% p.a. from 23rd November 2016 until payment in full.
 - b. The costs of and incidental to this Application shall be borne by the Respondents.
3. The Application is predicated on the Statutory Statement dated 30th August 2022, the Verifying Affidavit of Justus Mugo Mathu sworn on 30th August 2022.
4. The Application is not opposed. I have satisfied myself that the Respondent have been served with this Application and they have elected not to file any responses to the Application.
5. Brief background:



- a. On 30th October 2010, the Ex parte Applicant was arrested on the basis of an alleged complaint and falsely imprisoned for a period of 2 days at the Kabete Police Station without proper investigations being conducted.
 - b. Subsequently, the Ex parte Applicant was charged and prosecuted for the offences of:
 - i. Robbery with violence contrary to Section 296 (2) of the Penal Code;
 - ii. Arson contrary to Section 332 of the Penal Code; and
 - iii. Malicious damage to property contrary to Section 339(1) of the Penal Code.
 - c. During the criminal trial that ensued, the prosecution failed to present any reasonable and/or satisfactory evidence linking the Ex parte Applicant to the above-stated offences.
 - d. Consequently, by a judgement delivered on 13th June 2014 in Kibera Criminal Case No.4872 of 2010: Republic v Ephraim Irungu & 7 Others, the criminal court acquitted the Ex parte Applicant under Section 215 of the Criminal Procedure Code and set him free.
 - e. At the time of his acquittal and subsequent release, the Ex parte Applicant had been illegally detained and remanded for 3 years 8 months.
 - f. Following his acquittal and release, the Ex parte Applicant instituted a civil claim for malicious prosecution being Milimani CMCC No. 6784 of 2014: Justus Mugo Mathu v The Hon. Attorney General.
 - g. The Ex parte Applicant's claim for malicious prosecution was allowed by the Honourable Court.
 - h. As such, the Ex parte Applicant is a holder of a valid Judgment, Decree and Certificate of Order against the Government arising from Milimani CMCC No. 6784 of 2014.
 - i. The Respondents have, more than 5 years and 9 months since delivery of judgment, failed, declined, neglected and/or refused to settle the decretal sum of KShs.500,000, together with interest thereon at the rate of 12% from 23rd November 2016 until payment in full and together with costs of KShs.108,800, despite numerous requests by the Ex-parte Applicant.
 - j. The Respondents have contravened the statutory duty imposed upon them under Section 21 (3) of the Government Proceedings Act, to settle valid payments specified in a Certificate of Order against the Government.
 - k. The Respondents have neither appealed nor applied for review of the judgment giving rise to the Decree and Certificate of Order against the Government held by the Ex-parte Applicant.
6. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It lies where an injured party has a right to have something done, but has no alternative means of compelling its performance, especially in scenarios where the obligation arises out of the official status of the respondent [c.f. Shah v Attorney General (No.3) Kampala HCCM no. 31 of 1969 (1970) EA 543].
 7. Differently put, an order of Mandamus is used to compel public officers to perform duties imposed upon them by common law or by statute [c.f. Shah v Attorney General (supra)].
 8. Given that traditional execution proceedings are not available against the Government, a holder of a valid decree against the government can only realize the fruits of their judgment by applying for an



- order of Mandamus compelling the relevant Accounting Officer to settle the decretal sum due from the government.
9. To succeed in an application seeking an order of Mandamus, the applicant must, in addition to proving the existence of a valid decree against the government, comply with the provisions of Section 21 of the [Government Proceedings Act](#) by:
 - a. obtaining a Certificate of Order Against the Government;
 - b. effecting service of the Certificate of Order upon the Hon. Attorney General.
 10. Section 21 (3) of the [Government Proceedings Act](#) imposes a statutory duty on the Accounting Officer for the concerned government department to pay the sums contained in the Certificate of Order once said Order is duly served upon the Hon. Attorney General.
 11. From a holistic reading of the [Government Proceedings Act](#), it is evident that the statutory duty of the Accounting Officer under Section 21 (3) is not conditional upon budgetary allocation and/or parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues [See R v Permanent Secretary Ministry of State for Provincial Administration and Internal Security Ex-parte Fredrick Manoah Igunda [2012] eKLR available at pp. 7 – 11 of these Submissions]
 12. The Ex parte Applicant has exhibited a valid decree and certificate of costs against the Respondents.
 13. The Ex parte Applicant has also furnished a Certificate of Order Against the Government issued on 4th November 2021 and proof of service of the Order upon the Hon. Attorney General.
 14. The Respondents have not disputed that they were served with the Certificate of Order or that they have not settled the decretal sum indicated therein. As it stands, the Respondents are in breach of their statutory obligation under Section 21 (3) of the [Government Proceedings Act](#).
 15. The Respondents have neither lodged an appeal against the judgment of the lower court nor sought a stay of execution of the decree sought to be enforced by the Ex parte Applicant.
 16. Given that the Ex parte Applicant has no other way of realizing the decretal sum and costs awarded to him, the Honourable Court should allow the decree and certificate of costs to be enforced through the issuance of an order of Mandamus.
 17. An order of Mandamus is hereby issued compelling the Respondents to pay to the Ex-parte Applicant, the decretal sum in Milimani CMCC No. 6784 of 2014: Justus Mugo Mathu v The Hon. Attorney General of KShs.500,000.00.

Analysis and Determination:

18. I have considered the arguments advanced by the Applicant herein and the and the issue for determination is whether the Respondents have a legal duty to satisfy the decree subject of these proceedings and whether the Applicants have satisfied the conditions precedent to warrant the orders of this court.
19. It is settled law that before an order of mandamus is issued, an Applicant must abide by the procedure in Section 21 of [Government Proceedings Act](#) which provides:
 - “(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.”

20. 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.”

21. Githua, J in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* [2012] eKLR while dealing with the said provisions 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.”

22. The effect of these provisions 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 judgment made by the Court against that department.
23. Odunga, J in Republic v The Attorney General & Another ex parte James Alfred Koroso (2013) eKLR, cited with approval the case of Shah v 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 designata 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." [Emphasis added].

24. It is therefore clear that in applications for mandamus seeking to compel the satisfaction of a decree, it is the accounting officer of the relevant government department that is obliged to satisfy the decree notwithstanding the fact that the said officer was not a party to the trial proceedings and that in fact the only defendant therein was the Attorney General.
25. The court in *Republic v The Attorney General & Another ex parte James Alfred Koroso* (supra) further held as hereunder:

"...in the present case the ex parte applicant has no other option of realizing 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 realized. 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."

26. The circumstances under which judicial review order of mandamus are issued were set out in Republic v Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996, where the Court of Appeal cited with approval, Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89 thus:

"The order of mandamus is of 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."...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."

27. In this case, the Applicant has moved this Court to compel the satisfaction of a judgment already decreed in their favour by a competent Court of law.
28. The Respondents have not given any satisfactory reason why the decree has not been fulfilled almost 10 years down the line.

Disposition:

29. The Applicant has complied with the requisite procedure under Section 21 of the [Government Proceedings Act](#).
30. The Court were to decline to grant mandamus, the Applicants would be left without an effective remedy despite holding a decree.

Order:

The Application dated 14th September 2022 is allowed with costs.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF SEPTEMBER 2023.

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J. CHIGITI (SC)



JUDGE

