



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW NUMBER 1 OF 2020**

**BETWEEN**

**MUSA TAPEM .....APPLICANT**

**AND**

**SAMSON KEDIKOU ..... 1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**RULING**

**The Application**

1. What is before me for determination is the Notice of Motion dated 9<sup>th</sup> June 2020. The same is expressed to be brought under **Order 53 Rules 3 and 4 of the Civil Procedure Rules** and **Sections 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya** and all other enabling provisions of the law. The exparte applicant, Musa Tapem seeks ORDERS:-

*i. THAT this honourable court be pleased to issue an order of mandamus directed at the Honourable Attorney [General] to pay the applicant herein the sum of Kshs.740,134/- (Kenya shillings seven hundred forty thousand one hundred thirty four only) being the decretal amount, accrued interest and costs as at 14<sup>th</sup> day of December 2018 as per the decree issued by the court in KAPENGURIA PMCC NO. 29 of 2016 – MUSA TAPEM VERSUS SAMSON KADIKOU and the Honourable ATTORNEY GENERAL.*

*ii. THAT the respondent be condemned to pay costs of this application.*

2. The APPLICATION is based on six grounds set out on the face thereof and is supported by the exparte applicant's sworn affidavit sworn on 9<sup>th</sup> June 2020. Annexed to the said affidavit are copies of statement of facts and particulars and verifying affidavit.

**Facts of the Case**

3. The applicant herein filed a suit against Samson Kedikou the respondent herein vide **KAPENGURIA PMCC No. 29 of 2016** in which the applicant obtained judgment in his favour as against the respondent for the sum of Kshs.575,000/- plus interest of Kshs.41,309 as at 14<sup>th</sup> December 2018 and costs assessed as Kshs.123,825/- making a total of Kshs.740,134/-. Though the respondent was duly served with the decree and notices of payment for the decretal sum, interest and costs, to date the respondent has remained in breach of the decree and has failed, ignored and/or refused to pay the said sum to the applicant. On 26<sup>th</sup> May 2020, the applicant was granted leave to apply for an order of Mandamus, hence this application by which the applicant seeks to have the respondent compelled to pay the decretal sum.

4. On 16<sup>th</sup> June 2020, the parties were ordered to appear in court for taking of directions. The applicant was ordered to serve a hearing notice which was done on the same day 16<sup>th</sup> June 2020 by Courier Service. There is an Affidavit of Service to that effect.

5. When the matter came up for directions on 23.6.2020, there was no appearance for the respondent. The applicant was accordingly ordered to extract the order of that day and serve it upon the respondent by close of business on Friday 26<sup>th</sup> June 2020. By that order, the parties were directed to canvass the Notice of Motion by way of written submissions which were to be filed and served on or before 14<sup>th</sup> July 2020. The order of 23<sup>rd</sup> June 2020 was duly served upon the respondent on 25<sup>th</sup> June 2020.

## The Submissions

6. The applicant's submissions are dated 6<sup>th</sup> July 2020 and filed in court on the same day. In the submissions, the applicant reiterates the contents of the statement of facts, the verifying affidavit, the prayers sought in the Notice of Motion as well as the averments in the supporting affidavit to the Notice of Motion. The applicant submits that the respondent's failure and/or refusal to pay the decretal sum as directed by the court is unreasonable, without basis and extremely prejudicial to the applicant who has been and continues to be denied the enjoyment of the fruits of his judgment. The applicant further submits that such refusal and/or failure to pay the decretal sum by the respondent is an embarrassment to the court which appears to be issuing orders in vain. Finally, the applicant submits that since the respondent has not justified the refusal and/or failure to comply with the decree, the only remedy now available to the applicant is the order of mandamus as set out in the Notice of Motion dated 9<sup>th</sup> June 2020.

7. The respondent's submissions are dated 20<sup>th</sup> July 2020 and filed on 21<sup>st</sup> July 2020. The respondent also seems to rely on grounds of objection purportedly filed on 13<sup>th</sup> July 2020. The court record does not, however, contain such grounds. Nonetheless the respondent's submissions are premised on the law and in particular, **section 21(3) of the Government Proceedings Act**. The section prohibits execution proceedings against the Government, though the said provisions place a statutory duty on the accounting officer of the relevant Ministry to satisfy any judgment that is made or given against such accounting officer. **Subsection 3** thereof provides as follows:-

***“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.***

8. In opposing the application and particularly in saying that the applicant's application is incompetent, the respondent places reliance on the case of **Republic versus Permanent Secretary Office of the President Ministry of Internal Security and Another Ex-parte Nassir Mwandishi [2014] eKLR**. The respondent submits that the Hon. Attorney General who has been sued in this case only provides legal representation to the national government as provided under **Article 156 of the Constitution 2010** and cannot therefore be assumed or purported to be the accounting officer for purposes of satisfying the decretal sum to the applicant.

9. The respondent also relies on the case of **June Seventeenth Enterprises Limited versus Cabinet Secretary for Ministry of Interior and Co-ordination of National Government & 2 others [2017] eKLR** in which the court held that mandamus will not be granted in situations where the duty of the government official is not defined or is advisory.

10. In addition to the above, the respondent submits that the orders sought are untenable since even if they were issued, they would not be enforceable as there is no accounting officer to be held accountable for compliance. In this regard, reliance was placed on the case of **Kenya National Examination Council – versus Republic [1997] eKLR**, in which the Court of Appeal observed, *inter alia*, that:-

***“The order of mandamus is of a most extensive remedial nature, and it 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.”***

11. The above is indeed the legal position in matters of this nature.

## Analysis and Determination

12. Applying the law as above stated and applied in the various authorities cited by the respondent, I am satisfied beyond doubt that the application herein lacks merit and ought to be dismissed. The major reason for this conclusion is that the applicant failed to name, and to make a party to these proceedings, the accounting officer who would be held accountable for compliance with the order of mandamus, if granted. The office of the Attorney General, who is named as the respondent herein was established under **Article 156(1) of the Constitution, 2010**. The functions of the Attorney General are set out under **Article 156(4)**, that is to say that he/she

***a. is the principal legal adviser to the Government;***

***b. shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and***

***c. shall perform any other functions conferred on the office by an Act of Parliament or by the President.***

13. It is thus clear from the above provisions that the duty of the office of the Attorney General is that of legal adviser to the Government and to appear on behalf of the national government in civil litigation. The Attorney General does not therefore take the place of his clients whom he represents in court. An advocate does not thus become a party to the suit in which he appears as counsel.

## Conclusion

14. For the reasons given above, the Notice of Motion dated 9<sup>th</sup> June 2020 is incompetent. The order sought cannot therefore be granted as

the applicant failed to name an accounting officer who could be held accountable for compliance with the court order. The application is accordingly struck out but with no order as to costs.

15. It is so ordered.

Ruling delivered, dated and signed in open court at Kapenguria on this 29<sup>th</sup> day of July 2020

**RUTH N. SITATI**

**JUDGE**

**In the presence of**

N/A for applicant

N/A for respondent

Mr. W. Juma - Court assistant