



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW 1 OF 2019**

**REPUBLIC.....APPLICANT**

**AND**

**THE DISTRICT COMMISSION, NAROK NORTH DISTRICT.....RESPONDENT**

**AND**

**TOBIKO OLE MUTUIYA .....INTERESTED PARTY**

**VERSUS**

**CABINET SECRETARY, OFFICE OF THE PRESIDENT, PROVINCIAL**

**ADMINISTRATION & INTERNAL SECURITY..... RESPONDENT**

**AND**

**TOBIKO OLE MUTUIYA .....SUBJECT/APPLICANT**

**JUDGMENT**

1. The Application for consideration is the one dated 13/03/2019. It has a single substantive prayer:
2. The factual predicate of the Judicial Review Application is that on 16/04/2017, judgment in Nakuru ELC Judicial Review No. 133 of 2011 was entered against the Respondents. The Learned Judge in the matter ordered the District Commissioner, Narok North District to pay the costs of the Application both to the Subject and to the Interested Party.
3. The costs were subsequently taxed and a Certificate of Orders for costs against the Government was issued on 22/08/2018. The Certificate was served upon the Attorney General’s Office but he has refused and or neglected to pay the amount.
4. The Honourable Attorney General did not entered appearance but did not file any replies. State counsels who have appeared before the Court in the past four occasions indicated to the Court that they were making arrangements for the payment to be made.
5. It is not in doubt that section 21(4) of the Government Proceedings Act prohibits execution against the Government. The said provision states:

*Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, 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.*

6. However section 21 (1) of the 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.*

7. 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.*

8. As many decisions in our jurisdiction have pointed out, 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 judgement made by the Court against that department. That Accounting Officer can be compelled by an order for mandamus to do so. This is what the Applicant seeks here.

9. As the Court of Appeal said in **Republic vs. Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996** while citing with approval **Halsbury's Law of England, 4<sup>th</sup> Edn. Vol. 7 p. 111 para 89:**

*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.*

10. In the present case, the Applicant has obtained a Certificate of Costs against the Government as required by the Statute. They have served it on the Attorney General as required by the Statute. The Attorney General has failed to make the payments. The Honourable Attorney General is under a duty to make the payment and no lawful justification for non-payment has been proffered.

**11. In the circumstances, the order prayed for by the Applicants is merited. It is hereby granted as prayed in the Notice of Motion dated 13/03/2019.**

12. Orders accordingly.

**Dated and delivered at Nakuru this 25<sup>th</sup> day of July, 2019.**

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**JOEL NGUGI**

**JUDGE**