



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 290 OF 2010

IN THE MATTER OF AN APPLICATION BY:-

REPUBLIC.....APPLICANT

VERSUS

THE COMMISSIONER OF POLICE.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL

OF THE REPUBLIC OF KENYA.....2ND RESPONDENT

JAMES NJOGU MAINA.....3RD RESPONDENT

THE SENIOR PRINCIPAL MAGISTRATE'S

COURT AT MACHAKOS.....4TH RESPONDENT

PAUL MAKAU.....Exparte APPLICANT

RULING OF THE COURT

The Application

1. By a Notice of Motion dated 27/03/2011 and amended on 7th July, 2014 brought pursuant to Order 53 Rule 3(1) of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act and all enabling provisions of the law, the Ex-parte Applicant seeks the following prayers:

1. THAT an order of Mandamus directed to the Commissioner of Police in the Republic of Kenya compelling him to pay to the Applicant the sum of Kshs.887,823/= as at the date of this Application plus further accrued interest thereon at 12% per annum till payment in full.

2. THAT the costs of this Application are provided for.

The Application is supported by an annexed Affidavit of **PAUL MAKAU** sworn on even date and further on the following grounds namely:

a. The Applicant obtained judgment in his favour in CMCC. No. 371 of 2006 on 22nd June, 2010 in the sum of Kshs. 800,000/= plus costs and interest.

b. That the Respondents are fully aware of the judgment issued against them yet they have ignored and/or refused to settle the same.

c. That the Honourable Attorney General was served with a demand letter dated 21/09/2010 with regard to release a cheque in the sum of Kshs.887,823/=.

d. That the Respondent is enjoined in law to pay the sum claimed to the Applicant and further delay is to the prejudice of the Applicant.

2. The Exparte Applicant case is that he had sued the Respondents in **Machakos CMCC. 371 of 2006** for general and special damages

arising from a road traffic accident involving motor vehicle registration No, GK Z 225 Nissan Lorry then driven by the 3rd Respondent as authorized driver or servant of the Respondents and which rammmed onto motor vehicle KAL 233 U thereby causing severe and extensive bodily injuries to the Applicant. The Ex-parte Applicant duly obtained judgement in his favour against the Respondents in the sum of **Kshs.800,000/=** plus costs and interest. The Ex-parte Applicant thereafter obtained all the requisite court decrees culminating in a certificate of Order against the Government dated 22/10/2010 which were duly forwarded to the Honourable Attorney General who has neglected to satisfy the same. The Exparte Applicant thereafter sought leave to commence Judicial Review proceedings vide an Application dated 23/12/2010 which was duly granted as it was not opposed. The Applicant now prays for an order of Mandamus to be issued to compel the Respondents to satisfy the judgment in **Machakos CMCC. No. 371 of 2006** and that the Applicant be paid decretal sums plus accrued interest due.

3. The Application for the Judicial Review orders was opposed by the Respondents who filed the following grounds of opposition:

- 1. THAT the orders sought by the Ex-parte applicant are not enforceable as the office of the Commissioner of Police ceased to exist upon promulgation of the Constitution of Kenya, 2010.**
- 2. THAT the Attorney General has no statutory mandate/responsibility to settle decretal sums n behalf of other government offices.**
- 3. THAT the attorney General is not the accounting officer for the National Police Service.**
- 4. THAT the instant application is defective and should be dismissed forthwith with costs to the 1st, 2nd and 4th Respondents.**

4. Counsels for the parties filed written submissions;

Applicant' submissions:

It was submitted for the Exparte Applicant that all the procedures had been complied with by the Exparte Applicant vide **Machakos CMCC No. 371 of 2006** until judgement and decree and upon receipt of a certificate of order against the government he sought payment to no avail forcing him to file the present Application for Judicial Review order of mandamus. It was further submitted that in view of the clear provisions of Section 21 (4) of the Government proceedings Act, the Exparte Applicant could not execute against the government but to come by way of Judicial Review Application as herein. It was finally a submitted that the Ex Parte Applicant obtained leave to commence these proceedings which stood unopposed and therefore the orders sought be granted as prayed. The following cases were relied upon:-

- i. Republic =Vs= Principal Secretary Ministry of Health and Susan Wamaitha Kamau – NBI HCC JR 173 of 2016.**
- ii. Republic =Vs= Principal Secrete Ministry of Agriculture Livestock and Fisheries and Winnie Wandai Muniu – NBI HCC JR No. 196 of 2014**
- iii. Republic =Vs= Attorney General & Another and Ongata Works limited – NBI HCC JR No. 193 of 2015.**

Respondents Submissions:

It was submitted for the Respondents that the orders sought are not enforceable as the office of the Commissioner of police ceased to exist after the proclamation of the Constitution of Kenya 2010. It was further submitted that the Attorney General has no statutory mandate to settle decretal sums on behalf of other government offices as the Attorney General is not the accounting officer for the National Police Service as he does not receive any budgetary allocation from the National Treasury to settle claims on behalf of other Government ministries. It was finally submitted that the Application lacks merit and should be dismissed with costs to the Respondents. The case of **James Samuel Mburu =Vs= Attorney General & Another [2017] eKLR - NBI HCC JR No. 362 of 2016** was relied upon.

5. I have considered the Judicial Review Application dated 27/03/2011 and amended on 29/11/2011. I have also considered the submission of the learned Counsels as well as the cited authorities. It is not in dispute that a judgement and decree as well as a certificate of order against the Government in **Machakos CMCC No. 371 of 2006** has been granted in favour of the Ex-parte Applicants against the Respondents herein which decree has neither been settled nor the judgement appealed against to date. It is also not in dispute that the Ex-parte Applicant duly followed the requisite procedures by first seeking for leave to commence these judicial review proceedings against the Respondents after they failed to heed to several demand notices to settle the decree. It is also not in dispute that the Attorney General who is the second Respondent and the Principal legal advisor to the Government had been sued in these proceedings on account of that capacity to defend the Government institutions that had been sued. It is also not in dispute that the first Respondent had properly been sued in the primary suit namely **Machakos CMCC No. 371 of 2006** but that the same subsequently ceased to exist following the promulgation of the Constitution of Kenya 2010 and its place taken up by the Inspector General of Police as well as the National Police Service.

6. The issue for determination therefore is whether the order of mandamus is available to the Applicant against the Respondents jointly and severally to settle the decree in **Machakos CMCC No. 371 of 2006**.

Section 21 (3) o the Government Proceedings Act 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 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."

In **Council of Governors & 6 others v. Senate [2015] eKLR** the court held:

"The question we must therefore answer is whether it is mandatory to sue the Attorney General where the conduct of the Senate or its proceedings are in issue...it is clear to us that the Constitution, 2010 allows the Attorney General the right to represent the National Government in Court proceedings but does not stipulate that the Attorney General should be sued in all instances where any organ of the National Government has been sued and to say otherwise would be absurd."

7. I however take note of the deeming provision under section 12 (1) of the Government Proceedings Act applied in **Prof. Peter Anyang' Nyong'o and 10 others v. Attorney General & others EACJ Reference No. 1 of 2006 [2007] 1EA 5; [2007] 2 EA 5; [2008] 3KLR (EP) 397**. Applying that provision, the court held:

"No doubt the decree is against the Attorney General but in his representative capacity. As stated earlier the Attorney General was representing one arm of the Government and if any costs or liability accrues from his representation, he is obliged to pay the costs. It is for the Attorney General to advise his clients to pay the costs which attracted his representation on behalf of the said client. Being a constitutional representative and being the principal legal advisor to the three arms of the Government, he is required to direct any arm of Government he represented to pay the costs of any suit which he acted on its behalf. Clearly, it is the duty and the function of the Attorney General to advise his client and if a particular organ refuse to pay he will be responsible on behalf of his agent. In that regard the Solicitor General being the accounting officer of the Attorney General was rightly sued by applicants. In my mind the applicants clearly and correctly sued the Solicitor General and are entitled to the orders sought...The word "deemed" is commonly used both in principal and subsidiary legislation to create what is referred to as legal or statutory fiction and the legislature uses the word for the purpose of assuming the existence of a fact that in reality does not exist...The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

The provision was also applied in **Republic v. Attorney General ex parte Kahugu Karebe [2012] eKLR** where the court held:

"Though it is true that the Attorney General had been sued in RMCC 6263/1999 on behalf of the Commissioner of Police, the important point to note is that the Attorney General was the only defendant named in the suit and after full hearing of the applicant's case on the merits, judgment was entered by a court of competent jurisdiction for the plaintiff (now applicant) against the Attorney General (Respondent). That Judgment remains valid and enforceable since there is no evidence that it has been overturned on appeal or set aside. If the Attorney General was of the view that he was not the proper party to be held liable for acts of negligence attributed to the police officer whose negligence caused personal injuries to the Applicant, he ought to have had himself struck out from the suit as the defendant so that in his place the proper party would have been brought on board as the defendant in his place. The fact that this was not done and judgment was eventually entered for the plaintiff against the Attorney General as the defendant means that the final decree was issued against the Attorney General and the Attorney General is duty bound to satisfy that decree." (Emphasis mine).

8. It follows therefore that the Attorney General is deemed as a department of the Government concerned and that the judgment is against it. However, taking into account the provisions of Section 21 (3) of the Government Proceedings Act, it is clear that in an application for mandamus such as this, it is the accounting officer for the government department who is under statutory duty to satisfy the decree. The Attorney General is therefore not duty bound to pay the sums but rather he is to advise the department to settle the sums. The Attorney General who had relevant been acting for the Respondents although is estopped from turning around and shifting responsibility to another entity. The deeming provision behoves him to complete the race by advising the relevant department to settle the decree.

9. In the result I hereby grant an Order of Mandamus directed to the Respondents compelling them to pay to the Ex-parte Applicant the sum of **Kshs.887,823/=** together with interest accrued thereon at the rate of 12% from 25th October, 2010 until payment in full.

10. As regards the issue of costs, I order that each party to bear their own costs.

Dated, signed and delivered at Machakos this 22nd day of March, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Nagwere for Wambua -for the Applicant

No appearance for the Respondents

No appearance for the ex-parte Applicant

Kituva - Court Assistant