



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 25 OF 2014

CORAM: D.S.MAJANJA J.

BETWEEN

REPUBLICAPPLICANT

AND

ATTORNEY GENERAL.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS3RD RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF INTERIOR4TH RESPONDENT

EX PARTE PETER MAKORI

RULING

1. The *ex-parte* applicant, Peter Makori, moved this court by a Notice of Motion dated 26th February 2015 for an order of mandamus on the following terms;

THAT an order of mandamus be issued directing the Respondents herein to pay to the Applicant the sum of Kshs. 8,451,119.35 being the decretal amount in High Court Miscellaneous Cause No. 943 of 2007 at Nairobi together with interest thereon at the rate of 12% per annum from 7th June 2012 until payment in full.

2. Although the application was opposed, the facts leading up to this application are not in dispute as they are matters of record and they are as follows. By a decision dated 6th September 2006, the Kenya National Commission on Human Rights (“KNCHR”) Complaints Panel in *Complaint No. KNHCR/1/2006* made the following orders;

a. That the Attorney General, jointly and severally with Chief Inspector Benjamin Mak’Adwar pay the *ex-parte* applicant Kshs. 1 million as compensation for malicious prosecution and Kshs. 500,000/- as exemplary damages.

b. That the Commissioner of Police pays the *ex-parte* applicant Kshs. 1.5 million as compensation for torture and Kshs. 1.5 million as exemplary damages.

c. That the Attorney General, the Police Commissioner and Chief Inspector Benjamin Mak’Adwar pay Kshs. 553, 671 as special damages to cover legal fees and medical expenses.

d. That interest at court rates be paid on the total sum of Kshs. 5,053,671/- calculated from the date of the decision until payment in full.

3. The decision of the KNCHR Complaints Panel was adopted by the High Court on 24th October 2011 in *Nairobi HC Misc. 943 of 2007*. A decree was issued by the court on 6th June 2012 and the same was followed by a Certificate of Order against the Government dated 7th June 2012. The *ex-parte* applicant’s position is that the respondents have an unconditional obligation to satisfy the judgment.

4. The application is opposed through the affidavit of Charles Mutinda, a Principal Litigation Counsel in the office of Attorney General,

sworn on 5th June 2015 together with written submissions. The thrust of the affidavit and submissions is that KNCHR did not have jurisdiction to adjudicate on matter relating to human rights violations and award damages. The respondents complain that KNHCR did not notify them of the claim by the *ex-parte* applicant and nothing has been shown before these proceedings to show that they were aware of the claim. The respondents therefore submit that this court should not enforce an award by a body that did not have jurisdiction to deal with the matter.

5. The question before the court is whether, I should enforce a lawful order of a court of competent jurisdiction. The fact that High Court adopted a decision of KNCHR is and issued a decree is not in dispute. What the respondent has raised are issues that concern the validity of the proceedings before the KNCHR Complaints Panel that gave the *ex-parte* applicant relief for human rights violations. It is a well-established principle of law that an application for judicial review is not a substitute for an appellate court (see ***Kamani v Kenya Anti-Corruption Commission [2007] 1 EA 112***). The issues raised by the respondents are matters which ought to have been raised in appropriate proceedings to challenge, set aside or quash the KNCHR decision. Short of that, this court cannot intervene in the manner suggested by the respondents, at least in these proceedings.

6. I note, however, that in the replying affidavit, Mr Charles Mutinda deponed that the Attorney General filed an application, being ***NRB HCCC No. 87 of 2008 (OS)***, seeking to set aside the decision by KNCHR Complaints Panel but the application was dismissed for want of prosecution on 1st March 2012. Mr Mutinda deponed that an application was prepared to reinstate the matter but 6 years later, this court has not been informed whether the application was successful and whether in fact the KNCHR decision was finally set aside.

7. I agree with the decision in ***Republic v Attorney General and Another ex-parte James Alfred Koroso NRB JR Misc. App. No. 44 of 2012 [2013]eKLR*** that;

[9]In an application for mandamus the Court can only compel the Respondent to undertake the duty imposed by the judgement and not anything else. It is not upon the Court determining an application for an order of mandamus to determine the intention of the Judge who granted the decree being enforced. Any such determination ought to be sought in the original suit and not in the application for enforcement thereof.

8. I find and hold that there is no reason why I should deny the *ex-parte* applicant the fruits of his judgment and decree. I therefore allow the Notice of Motion dated 26th February 2015 with costs which I hereby assess at Kshs. 30,000/-.

DATED and DELIVERED at KISII this 26th day of June 2018.

D.S. MAJANJA

JUDGE

Mr Gichana instructed by Bosire Gichana and Company Advocates for the *ex-parte* applicant.

Ms Chepkurui, Litigation Counsel, instructed by the Office of the Attorney General for the respondents.