



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

JUDICIAL REVIEW MISC. APPLICATION NO. 4 OF 2016

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW FOR ORDER OF MANDAMUS

IN THE MATTER OF: EMBU CONSTITUTIONAL PETITION NO. 56 OF 2009

MUSA MOHAMMED DAGANE

& 25 OTHERS.....EX-PARTE APPLICANTS/PLAINTIFFS

VERSUS

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

THE DISTRICT COMMISSIONER

GARISSA DISTRICT.....2ND RESPONDENT

(DECREE ISSUED ON 27TH MARCH 2013)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL...1ST DEFENDANT/RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF INTERIOR & COORDINATION

OF NATIONAL GOVERNMENT.....2ND DEFENDANT/RESPONDENT

EX-PARTE:

MUSA MOHAMMED DAGANE & 25 OTHERS.....SUBJECTS

J U D G M E N T

A. Introduction

1. The *ex parte* applicant filed the application dated 7th October 2016 in which the following orders were sought: -

a) That an order of mandamus be issued and the same be directed to the Attorney General and the Principal Secretary, Ministry of Interior and Coordination of National Government (the Respondents herein)

b) That the said Respondents do comply by paying to the Applicants a sum of Kshs. 21,647,680 being the decretal sum, and accrued interest up to 7th October 2016 in respect of the Decree dated 27th March 2013 in Embu Constitutional Petition No. 56 of

2009 together with costs.

c) That the said Respondents be compelled to pay to the Applicants the accruing interest on the said sum stated in paragraph 2 above at 14% until payment in full.

d) That the respondents do comply by satisfying the said Decree, costs and interests within fourteen (14) days of service of the Order.

e) That in default, the Notice to Show Cause do issue against the said Respondents for them to show cause why they should not be held in contempt of court.

f) The costs of the Application be provided for.

2. The application is supported by the grounds on the face of the application as well as those in the supporting affidavit of Ibrahim Mohammed Dagane.

3. The Respondents failed to file any response despite service of the application and a hearing notice.

4. The matter was fixed for hearing on the 5th November 2018.

5. The applicants herein will be referred to as the plaintiffs and the respondents as the defendants for the purposes of these proceedings.

B. Ex-parte Applicant's Submissions

6. It was submitted by the ex-parte applicant that they were entitled to enjoy the fruits of their litigation as the Respondents had failed to adhere to the terms of the judgment and decree in Embu Constitutional Petition No. 56 of 2009 which is greatly prejudicing the rights and interests of the Applicants herein.

7. The ex-parte applicant further submitted that only an order from this court could compel the respondents to comply with the judgement and decree issued in Embu Constitutional Petition No. 56 of 2009. He relied on the cases of **Republic v The Attorney General & Another ex parte James Alfred Koroso High Court Judicial Review Miscellaneous Application No. 44 of 2012**, **R v Dudsheath ex parte, Meredith [1950] 2 ALL E.R.** and **Republic v Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996**

C. The Determination

8. In my opinion, in delivering this ruling, this court is tasked with determining whether the ex-parte applicant deserves the grant of the order of mandamus.

9. The circumstances under which judicial review order of *mandamus* are issued were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996**, 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."

10. In these proceedings, the plaintiffs have moved this Court to compel the satisfaction of a judgement already decreed in their favour by a competent Court of law. The Respondents have not given any reason why the decree has not been satisfied, they have not even bothered to respond to the application by the ex parte applicant. If the Court were to decline to grant *mandamus*, it is my opinion that the applicants would be left without an effective remedy despite holding a decree.

11. I associate myself with the position adopted by **Majanja, J** in **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006** that:

"...a decree holder's right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant's right of access to justice protected under Article 48 of the Constitution."

12. I take into consideration that the defendants are the Government of Kenya through the Attorney General and the Principal Secretary Ministry of Interior who depend on budgets and approval by parliament. The 14 days' period for the satisfaction of the decree as prayed may

not be practically possible. The amount involved is also substantial. It is my considered view the main order issues pending the applicant to move the court on other processes.

13. The application is merited and is hereby allowed on the following terms: -

a) An order of mandamus compelling the defendants to pay to the plaintiffs the judgment debt herein in the sum of Kshs. 21,647,680/= being the decretal sum, and accrued interest up to 7th October 2016 in respect of the Decree dated 27th March 2013 in Embu Constitutional Petition No. 56 of 2009.

b) The defendants to meet the costs of this application

14. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF DECEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Lee Maina for Mulecho for Ex-parte Applicants