



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 366 OF 2013**

**IN THE MATTER OF A DECREE IN MILIMANI CMCC NO. 10372 OF 2003**

**AND**

**IN THE MATTER OF ORDER 53 RULE (3) OF THE CIVIL PROCEDURE RULES**

**REPUBLIC.....APPLICANT**

**VERSUS**

**HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY,**

**MINISTRY OF EDUCATION.....2<sup>ND</sup> RESPONDENT**

**EX PARTE: SAMUEL NDUNGU WAINAINA**

**RULING**

1. On 18<sup>th</sup> February, 2014, **Majanja, J** issued an order of *mandamus* compelling the Respondent to settle the decree dated 2<sup>nd</sup> November, 20014 arising from Milimani CMCC No. 10372 of 2003 in favour of the ex parte applicant with costs and interests. The learned Judge also awarded the applicant the costs of the application.
2. Apparently the said judgement was not complied with and on 2<sup>nd</sup> March, 2016, issued summons to the respondent to appear in court and show cause why appropriate action cannot be taken against him.
3. Following the enactment of the Contempt of Court Act, 2015, the ex parte applicant vide an application dated 26<sup>th</sup> January, 2017 made a formal application seeking that this Court be pleased to cite one **Dr Richard Belio Kipsang** for contempt of the order dated 25<sup>th</sup> February, 2014 and to sentence him accordingly. The said application was based on the fact that the said **Dr Richard Belio Kipsang** is the accounting officer in the relevant Ministry. It is worth noting that the ex parte applicant averred that the original case in which the decree was issued was commenced against the Board of Governors Kiarutana Secondary School and the judgement was awarded against the Attorney General
4. In response to the application, the 1<sup>st</sup> Respondent herein has explained that the judgement in the

original suit was issued against the 2<sup>nd</sup> Defendant therein, the Attorney General. It was however averred that the facts therein assumed that the culprit was the police. It was disclosed that the judgement exonerated the 1<sup>st</sup> Defendant which the Board of Governors of the School.

5. It was averred that due to non-distinction of the Defendants the Ministry has declined to honour the judgement since the School was exonerated from the same. Accordingly mandamus cannot issue against a party who was not blameworthy.

6. The Respondent therefore averred that the application is unmerited and ought to be dismissed.

7. It is true that in its judgement the subordinate court only entered judgement against the 2<sup>nd</sup> Defendant herein, the Attorney General. Accordingly the 2<sup>nd</sup> Respondent herein cannot be cited for contempt on behalf of the School which was exonerated from blame.

8. That however leaves the Attorney General. It is trite that judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** Goudie, J expressed himself, *inter alia*, as follows:

**“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...The foregoing may also be thought to be much in point in relation to the applicant’s unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty...Since *mandamus* originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law...English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting “simply in his capacity of servant”. There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a *mandamus* would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of *mandamus* will lie for the enforcement of the duties...With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile... It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty**

specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government...Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go...In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of *mandamus* must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament...In the court's view the granting of *mandamus* against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata*, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few...*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designata* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be

granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of *mandamus* will issue as prayed with costs."

9. On this same issue, Githua, J in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR expressed herself as follows:

"The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (*hereinafter referred to as the Act*) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon."

10. In this case since judgement was expressly given against the Attorney General, the prayers sought herein ought to have been directed to the accounting officer in the Attorney General's Chambers who is the Solicitor General. Though the 1<sup>st</sup> Respondent herein, the Attorney General contends that the culprit was the police, that is an issue that ought to have been dealt with when the Court was dealing with the application for mandamus. As the judgement now stands and without a review being sought and granted the office of the Attorney General is under a legal obligation to settle the decree in question.

11. It follows that to the extent that the application for contempt is brought against the 2<sup>nd</sup> Respondent herein who is not the Solicitor General, the instant application is incompetent.

12. Consequently the application dated 26<sup>th</sup> January, 2017 is struck out but with no order as to costs.

13. It is so ordered.

**Dated at Nairobi this 28<sup>th</sup> day of June, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Waititu for Mr Wanjohi for the applicant**

**CA Mwangi**