REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 100 OF 2010

IN THE MATTER OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: MILIMANI CMCC NO 5177 OF 2003

BETWEEN

JOSHUA MUTUA PAUL .....PLAINTIFF

AND

THE HONOURABLE ATTORNEY GENERAL.....1ST DEFENDANT

DANSON MWANIKI MBOGO.....2ND DEFENDANT

AND

IN THE MATTER OF AN APPLICATION BY JOSHUA MUTUA PAUL

FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

BETWEEN

REPUBLIC .....APPLICANT

VERSUS

THE PERMANENT SECRETARY IN CHARGE OF INTERNAL

SECURITY – OFFICE OF THE PRESIDENT.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL... 2ND RESPONDENT

Ex-PARTE JOSHUA MUTUA PAUL

RULING

Applicant's Case

1. By a Notice of Motion dated 6th March, 2015, the ex parte applicant herein, **Joshua Mutua Paul**, substantially seeks an order that the Principal Secretary, Ministry of Interior and Coordination of National Government one **Dr. Monica Kathina Juma** and/or any other person holding such position in the said Ministry at the time of the hearing and determination of this application be committed to civil jail for a term of six (6) months and/or for such a term as the court may determine for disobedience of the this Honourable court's made on 18th March, 2013.

2. According to the applicant, on or about 29th March, 2003, he filed suit against the 2nd Respondent in his capacity as the Chief Government legal adviser and on behalf of the then Ministry of Internal Security and one **Mwaniki Mbogo** in Milimani CMCC No. 5177 of 2003 seeking General damages for false imprisonment and malicious prosecution, Costs and interest at court rates which suit was heard and judgment entered in his favour in the sum of Kshs 250,000.00 general damages, Costs and Interests.

3. The applicant averred that he applied for and a decree was issued in his favour in the sum of Kshs.338,022.30 and thereafter applied for a certificate of order which was subsequently issued to him on or about 2nd July, 2009. He averred that copies of the said were served upon the 1st Respondent and upon filling of the proceedings herein, the Respondents herein expressed their willingness to have Milimani CMCC No. 5177 of 2003 settled amicably. Consequently by a letter dated 6th September, 2010 the 2nd Respondent called for payment instructions from the applicant's advocate to facilitate the processing of the payment of the decretal sum in Milimani CMCC No. 5177 of 2003 and demanded that the applicant executes the discharge voucher before it could process payment. Pursuant thereto, the 2nd Respondent raised a payment voucher for the decretal sum in Milimani CMCC No. 5177 of 2003 in the sum of Kshs.338,022.40, which the applicant duly executed for the full decretal sum of Kshs.338,022.40 as awarded in Milimani CMCC No. 5177 of 2003 but was only paid a sum of Kshs.176,877.50.

4. According to the applicant, upon seeking explanation, the 2nd Respondent informed him that it was unable to pay the decretal sum of Kshs.338,022.40 since liability in Milimani CMCC No. 5177 of 2003 was joint and several to the two Defendants thereof.

5. This turn of events provoked the applicant into commencing these proceedings in which he sought orders compelling the Permanent Secretary in charge of internal security, office of president and/or the Hon. A.G. to honour and satisfy the judgment and in Milimani CMCCC No. 5177 of 2003 in the sum of Kshs.338,022.40 being the decrial sum thereof plus costs and interest up to 2nd July 2009 and pursuant thereto, judgment was entered in his favour on 18th March, 2013 in respect thereof less Kshs 176,877.50 being the balance of decretal sum thereof plus costs and interests up to 2nd July 20009 as prayed.

6. The applicant averred that the said judgement was served upon the 2nd respondent on 22nd March, 2013 and his costs taxed in the sum of Kshs.108,682.00. He also extracted a decree which was duly issued 18th March, 2013 and by a letter dated 2nd December, 2013, forwarded a copy of the decree to the Respondents herein and was also personally served upon the Respondent on 20th February, 2014.

7. It was asserted despite the foregoing, the Principal Secretary, Ministry of Interior and Coordination of National Government one **Dr. Monica Kathina Juma** as the chief accounting officer in the said Ministry has failed, refused and/or declined to pay the said balance of the decretal amount in Milimani CMCC No. 5177 of 2003 as ordered by this Court.

8. In the applicant's view, the foregoing acts of the 1st Respondent are a deliberate disobedience and/or defiance of this Court's orders and averred that for the maintenance of the rule of law and good order, the authority and dignity of the courts should be upheld and court orders obeyed at all times by all and sundry including Principal Secretary, Ministry of Interior and Coordination of National Government.

9. The applicant therefore urged this Court not to shy away from upholding its dignity and authority and/or condone deliberate disobedience and/or defiance of its orders.

Respondents' Case

10. The Respondent did not file any response to the application but informed the Court through its learned Counsel, **Miss Gathigi**, that the Respondent had not refused to settle the said sum but that the delay to do so was occasioned by the necessary procedure to be followed before the said sum can be released. According to her the payment was delayed by the reshuffles in the Ministry and that the same was being addressed.

Determinations

11. I have considered the issues raised herein.

12. It is trite that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828** **Ibrahim, J** (as he then was) stated:

> **"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void".**

13. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990**. In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

> **"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it…It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed…If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course…In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt…The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is**

required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice…Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt…An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court… Where a party considers an *ex parte* **order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made** *ex parte* **and this argument will not avail either the first or the second defendant".**

14. With respect to the orders of *mandamus* and the consequences arising therefrom, in High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Kosoro**, I expressed myself as hereunder:

"…the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit…The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought 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 Accounting Officer 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 Public Officer in his official capacity and the duty is owed not to the State 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. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he

undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are nolonger execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."

15. Accordingly, the Court having granted an order of mandamus it is nolonger merely one of settlement of a decretal sum, but that of compelling a public officer to carry out his/her statutory duty. Therefore the issue of the officer's personal liability for the debts from a public body nolonger arise. What then is in issue is the failure by the concerned officer to carry out a duty imposed on him/her by the law.

16. Whereas this Court appreciates that the Government bureaucracy sometimes leads to delay in effecting payments to those who deserve the same, the Respondents must be reminded of the holding in **Resley vs. The City Council of Nairobi [2006] 2 EA 311** to the effect that:

"If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place."

17. In my view, it does not augur well for the Respondents to say that due to bureaucracy, they have not been able to fully settle a judgement decreed by this Court since 2009 even after lulling the applicant into a false sense of security that the decree would be settled by making him execute the discharge voucher for the full amount. In the circumstances of this case I am not prepared to buy the excuse advanced by the Respondents for the delay in settling this long pending matter.

18. Article 201(d) of the Constitution provides that one of the principles that guide all aspects of public finance in the Republic is that public money shall be used in a prudent and responsible way. It cannot be convincingly argued that that principle is being adhered to when unnecessary delay is occasioned in settlement of decrees with the consequence that interests are accumulated thereon thereby burdening the public with unnecessary expenses. In my view, the Respondents wanted to buy time, and they have managed to buy some time, though at the expense of the public. Yet, they have made little progress towards reduction of the debt. The plain truth is that the Respondents who have been dilly dallying in the payment of the sum due herein have used the legal machinery to postpone, what to them, must be the day of reckoning. That day has now come and the court has the duty to tell them so in plain terms.

19. Having considered the issues raised herein, it is my view and I hold that there are no justifiable reasons why the application cannot succeed.

20. Accordingly, I direct the Principal Secretary, Ministry of Interior and Coordination of National Government one **Dr. Monica Kathina Juma** and/or any other person holding such position in the said Ministry do appear before this Court to show cause why he/she should not be committed for contempt of Court.

21. The applicant will have the costs of this these proceedings.

Dated at Nairobi this 25th January, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ayisi for Mr Kamwendwa for the Applicant

Cc Patricia