REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW DIVISION

JR. MISC. APPLICATION NO. 13 OF 2015

IN THE MATTER OF HIGH COURT CIVIL CASE NUMBER 76 OF 1998

WILLIAM WAIRAGU MUIGAI VS THE TEACHERS SERVICE COMMISSION

AND

IN THE MATTER OF THE DECREE OF THE OF THE HIGH COURT IN CIVIL CASE NUMBER 76 OF 1998 WILLIAM

WAIRAGU MUIGAI VS THE TEACHERS SERVICE COMMISSION ISSUED ON THE 11TH DAY OF JUNE 1996

AND

IN THE MATTER OF THE ONE MILLION NINE HUNDRED AND THIRTY TWO THOUSAND EIGHT HUNDRED AND

NINETY ONE AND FORTY THREE CENTS OWING TO THE EX-PARTE APPLICANT AS AT 13TH FEBRUARY 2013

AND

IN THE MATTER OF AN APPLICATION ON BEHALF OF WILLIAM WAIRAGU MUIGAI FOR

AN ORDER OF MANDAMUS TO COMPEL THE SECRETARY TO THE TEACHERS SERVICE

COMMISSION TO PAY ONE MILLION NINE HUNDRED AND THIRTY TWO THOUSAND

EIGHT HUNDRED AND NINETY ONE AND FORTY THREE CENTS TO THE

EX-PARTE APPLICANT TOGETHER WITH INTEREST TO DATE

REPUBLIC.....APPLICANT

VERSUS

THE TEACHERS SERVICE COMMISSION.....……. 1ST RESPONDENT

THE SECRETARY, TEACHERS SERVICE COMMISSION.....2ND RESPONDENT

EX-PARTE.....WILLIAM WAIRAGU MUIGAI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 9th February, 2015, the *ex parte* applicant herein, **William Wairagu Muigai**, seeks the following orders:

> a. **This honourable Court issues an order of mandamus to compel the Secretary to the Teachers Service Commission and the Teachers Service Commission to pay to the ex-parte applicant a sum of one million nine hundred and thirty two thousand eight hundred and ninety one and forty three cents (Kshs.1,932,891.43) as per the notice to show cause issued on the 13th February 2013 together with interest to date.**
>
> b. **That the Respondents pay the cost of the application.**

Ex Parte Applicant's Case

2. The *ex parte* applicant's case was that he filed High Court Civil Suit Number 76 of 1996 against the 1st Respondent and obtained a decree against the said Respondent on the 11th June 1996. After extracting the decree, he commenced the process of execution against the 2nd Respondent leading to the honourable court issuing a warrant of arrest against the 2nd Respondent on the 29th June 2000 in Misc. Case 391 of 2998.

3. However the said warrant of arrest was only lifted when the 1st Respondent consented to deposit the whole decretal amount together with interest owing then in court pending the hearing and determination of High Court Civil Suit Number 2101 of 2000 which the 1st Respondent filed against him. However following the failure by the said Respondent to prosecute the said suit, the same was dismissed by the honourable court and on 13th February 2013 the Court issued a Notice to show cause against the 1st Respondent for a total sum of Kshs.1,932,891.43/= being the balance and interest that had accumulated on the said decree which the Respondents have refused and/or neglected to pay hence the necessity of the application herein.

4. It was the applicant's case that the Respondents having refused and neglected to satisfy the said amounts owing can only do so with an order of this honourable court compelling them to do so hence it is in the interest of justice that the honourable court issues an order directing them to pay to him the said amounts owing as per the Notice to show cause issued on 13th February 2014 together with interest accumulated on the said amount to date in order to bring this long standing dispute to the end.

Respondents' Case

5. The Respondent's case in response to the application was that by a plaint dated 15th January 1996 the Applicant filed a civil suit against the Teachers Service Commission (hereinafter referred to as 'the Commission) in Nairobi HCCC No. 7 of 1996 claiming unpaid salary and allowances amounting to Kshs.694,155.20/=, General damages and costs of the suit. Subsequently on 16th February 1996, Judgment was entered in his favour in default of appearance wherein the Applicant was awarded Kshs.694,155.20/= as prayed in the Plaint with costs and interest. On 18th June 1998, the Applicant

obtained orders of mandamus in Nairobi Misc. Civil Appl. No. 391 of 1998 compelling the Commission to pay the decretal sum of Kshs.752,436/= being the entire decretal sum, interests at 12% and costs of the suit and on 6th August 1998, the Commission paid vide cheque number 266832 dated 6th August 1998 the decrial sum of Kshs.752,436/- and deposited the said cheque in the High Court for onward transmission to the decree holder in full and final settlement of the matter.

6. Consequently the Commission paid the Applicant the decretal amount of Kshs.752,436/- though his former advocate Ng'ang'a Thiong'o & Co. Advocates vide a Consent dated 9th February 1999. In the said consent, the Commission agreed under Clause (b) and (c) of the consent to pay the interest of Kshs.285,854/= and costs of Judicial Review proceedings of Kshs.120,000/= making a total of Kshs.405,854/= within 30 days from the date of the consent. Parties further consented that contempt proceedings in HCCC No. 391 of 1998 between the same parties be terminated.

7. However, on 15th December 2000 the commission through the Attorney General filed a fresh suit being Nairobi HCCC No. 2101 of 2000 against the Applicant contesting the validity of the above consent on the grounds that the Commission's Counsel had no authority and/or instructions to enter into the said contents in terms of Clause (b) and (c). Subsequently, on 29th January 2001, the Commission pursuant to the aforesaid consent deposited in court Kshs.405,854/= vide cheque number 385613 and obtained receipt number 142255.

8. It was contended that upon depositing the above amount in court, all matters/disputes between the Commission and the Applicant were concluded save for the Nairobi HCCC No. 2101 of 2000 which was still pending in court. Thereafter on 8th December r2008 the commission withdrew Nairobi HCCC No. 2101 of 2000 marking the conclusion of all the disputes between the Applicant and the Commission. It was further averred that on 17th February 2011 the Applicant made an application under Certificate of Urgency dated 17th February 2011 seeking orders from the court to release Kshs.405,854/- which was deposited in court on 29th January 2001 which application was not opposed by the Commission and as a result, the court directed that the deposited amount of Kshs.405,854/= be released to the Applicant.

9. To the Respondent, as a result of the said order and subsequently orders relating to this matter the Respondent has paid to the Applicant a total of Kshs.1,158,290/= made up as follows:

a. Decretal sum of Nairobi HCCC No. 2101 of 2000, interest at 12% per annum from 15th January 1996 to 19th February 1996 and cost of the suit – 752,436/=

b. Interests in (a) above in respect of the period of 20th February 1996 to 16th August 1998 - 285,854/=

c. Costs in JR No. 391 of 198 – 120,000/=

10. The said sum, according to the Respondent was released to the Applicant in the following manner:-

a. Kshs.752,4367 deposited by the Commission on 6th August 1998 in court was released vide a consent recorded on 9th February 1999 between Ng'ang'a Thiong'o & Co. Advocates for the Applicant and Mr. K. N. Githinji for the Attorney General.

b. Kshs.405,854 deposited by the Office of Attorney General in court on 29th January 2001 was released vide an order made by Lady Justice Rawal on 5th July 2011.

11. The Respondent averred that prior to the release of Kshs.405,854 to the Applicant, counsel on record for the Applicant intimated through a letter addressed to the commission that there was no pending monies following the release of the said monies. It was the Respondent's case that Kshs.752,436/= and Kshs.405,854/= having been deposited by the Commission with the court could have in no way attracted interest thereafter. However, despite the Applicant receiving the full decretal sum and costs of this suit

totalling to Kshs.1,158,290/=, the commission was shocked to receive a Notice to show Cause dated 13the February 2013 demanding a further payment of Kshs.1,932,891.43/= which was calculated by loading yearly interest on the old decretal sum of Kshs.752,436/= which the commission had paid to the Applicant 15 years ago on 6th August 1998. Further on 10th September 2013 upon perusal of the court file, the Commission was shocked to find out that the said Notice to show cause had been allowed by the court in the absence of the commission's advocate, the A.G. who were in conduct of the matter from its inception. Upon verifying the above, fact, the Commission through its own counsel M/s Juliet Busienei Advocate filed an application seeking orders to set aside the Notice of Show Cause on the ground that the Commission had conclusively settled the entire decretal sum in Nairobi HCCC No. 76 of 1996 and the Notice of Show Cause dated 13th February 2013 was irregular, invalid, illegal and unlawful to which application, the Applicant duly responded and parties filed and exchanged submissions on the application confirming that the validity of the "New Decretal Sum" was in dispute.

12. It was disclosed that the Commission's said application to set aside the said notice to show cause was still pending and the same was scheduled for directions on 7th May 2015. To the Respondent, this application is premature as the validity, propriety and legitimacy of the alleged decree which the Applicant seeks to enforce is under active contest before this Court. It was therefore contended that the impugned decree is unenforceable by the orders of mandamus as the same has not crystallized to the Applicant as of right to attract the prerogative orders of this court. Further the Respondent contended that this application is brought in bad faith with the sole intention to embarrass the Commission and circumvent outcome of the proceedings that are ongoing before the civil division of this court.

13. To the Respondent, the action by the Applicant to commence Judicial Review proceedings in a suit which is still active and pending determination in a separate division of this curt amounts to an abuse of the court process and ought to be declined. In its view, should the Court grant the prayers sought in the application, the commission stands to suffer irreparable loss, damage and injustice since the ruling on its application in Nairobi HCCC No. 76 of 1996 will be rendered otiose.

14. It was further contended that the orders of mandamus are not available to the Applicant since he has failed to annex a copy of the alleged unsatisfied decree of the court while to the contrary, the Respondent demonstrated that the decretal sum due to the Applicant has been fully paid.

Determination

15. I have considered the issues raised by the parties in this application. 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."***

16. As submitted by the applicant, by virtue of section 21 of the ***Teachers Service Commission Act*** No. 20 of 2012 as read with section 21(4) of the ***Government Proceedings Act***, Cap 40 Laws of Kenya, the applicant has no other appropriate remedy except *mandamus*. That was the position in the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 All E.R. 741, at 743, Lord Goddard C. J.** said -

> ***"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to***

issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges. "

17. In **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441,** it was held:

"The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the *mandamus* order using this method. There is only one rider – an officer can only be committed where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...Local Authorities Transfer Fund Act, which provides funds to local authorities, part of which should be used to pay debts does not provide for their attachment since section 263A of the Local Government Act prohibits it. It just enables the Local Authorities to honour their debt obligations including those covered by a mandamus order. The Local Authorities have to pay as a matter of statutory duty or in the case of mandamus in obedience to the order from the state or the Republic. There is no provision in the LATF Act for attachment or execution".

18. This procedure was dealt with extensively in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** eloquently, in my view, 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 designate* 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."

19. **What comes out clearly from the foregoing is that the Court only compels the satisfaction of a duty that has become due. In other words where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass. Therefore where there is a genuine dispute as to the exact sums payable, the Court will not by an order of mandamus compel the Respondent to exercise that duty until the dispute is sorted out. As was appreciated in Newton Gikaru Githiomi & Anor vs AG/Public Trustee Nairobi HC JR 472 of 2014**:

"It must be remembered that judicial review orders are discretionary. Since they are not guaranteed, a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. Further, as the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised."

20. **Whereas the Court may compel the performance of the general duty where such duty exists, it will however not compel its performance in a particular manner for example by compelling the respondent to pay a particular amount unless that amount has been ascertained. This position was appreciated by the Court of Appeal in** the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

"*The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way*...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. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed

according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done..." [Emphasis added].

21. **However, as this Court appreciated in** High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso:**

> **"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."**

22. **In this case it is clear that following the Judgement in Nairobi HCCC No. 76 of 1996, the applicant instituted High Court Miscellaneous Civil Case No. 391 of 1998 in which the High Court granted an order of *mandamus* compelling the Respondent to settle the decretal sum in High Court Civil Case No. 76 of 1996. According to the Respondent the said sum has since been settled. In these proceedings, the applicant seeks an order of *mandamus* compelling the same Respondent to settle the sum as per the Notice to Show Cause which Notice itself resulted from the said judgement.**

23. **The question however, is if the Respondent has not settled the decretal sum in the said case and the applicant sought and obtained an order of mandamus which the Respondent has no settled, why would the applicant institute proceedings whose intention is to compel the settlement of the judgement? In my view once the Court issues an order of *mandamus* which is not satisfied, the option to the applicant is not to seek an order compelling the satisfaction of the Notice to Show Cause but to institute contempt of Court proceedings. To institute several legal proceedings seeking to achieve the same result, in my view amounts to an abuse of the Court process.**

24. As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**:

> **"The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in *bona fides* and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -**
>
> *i. **Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action**.*
>
> ii. **Instituting different actions between the same parties simultaneously in different courts even though on different grounds.**
>
> iii. **Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.**
>
> iv. **Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.**

25. **As to the issue whether the decree has been settled or not** Order 22 rule 1(1) of the ***Civil***

Procedure Rules provides:

> ***All money payable under a decree or order shall be paid as follows—***
>
> *a.* ***into the court whose duty it is to execute the decree;***
>
> *b.* ***direct to the decree-holder; or***
>
> *c.* ***otherwise as the court which made the decree directs.***

26. It would follow that by virtue of the said provision payment into court would ordinarily be deemed to be payment of the decree. Therefore if the Respondent paid the sum into court unconditionally, an order of *mandamus* would not be issued as the decree would have been settled thereby and the Applicant would have been at liberty to apply for the release thereof. However the determination of that issue ought to be made pursuant to the **provisions of section 34(1) of the *Civil Procedure Act* which provide as follows:**

> ***All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.***

27. **In this case, it is clear that there are pending proceedings in which the Court is likely to determine the issue of whether there are any monies due and owing to the ex parte applicant and if so the amount thereof. That is an issue which ought to be determined as it is my view that considering the issues raised herein, those proceedings cannot be said to be frivolous.**

28. **It follows that the application is misconceived.**

Order

29. **In the premises, the Notice of Motion dated 9th February, 2015 fails and is hereby struck out but with no order as to costs.**

30. **Orders accordingly.**

Dated at Nairobi this 24th day of February, 2016

G V ODUNGA

JUDGE

Delivered in the presence of

Mr Nakhone for Mr Webale for the applicant

Miss Naeku for the Respondent

Cc Patricia