



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CIVIL APPLICATION NO. 13 OF 2015

IN THE MATTER OF AN APPLICATION BY PHILIP CHERUIYOT MALEL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS IN THE NATURE OF MANDAMUS

AND

IN THE MATTER OF KISII CHIEF MAGISTRATE’S COURT CIVIL CASE NO. 262 OF 1997 PHILIP CHERUIYOT MALEL .VS. SOTIK TEA CO. LTD

BETWEEN

REPUBLIC..... APPLICANT

AND

THE CHIEF REGISTRAR JUDICIARY.....RESPONDENT

VERSUS

PHILIP CHERUIYOT MALELEX-PARTE APPLICANT

RULING

1. Vide the Chamber Summons dated 1st October 2015, the ex-parte applicant, **Philip Cheruiyot Malel**, was granted leave to apply for judicial review orders in the nature of **mandamus** to compel the respondent **Chief Registrar of the Judiciary** , to pay to him through his advocate the decretal sum of Ksh. 70,000/= deposited in court in **Kisii CMCC No. 262 of 1997** on the 11th December 2002, vide receipt **No. B001474**.

2. Accordingly, the ex-parte applicant filed a Notice of Motion dated 8th February 2016, seeking orders of mandamus against the respondent.

The application is based on the grounds contained in the motion as supported by the statement of facts dated 8th February 2016 and the ex-parte applicant’s verifying affidavit dated 5th February 2016.

The respondent was duly served with the Notice of Motion on the 9th February 2016 and with the necessary hearing notices on the 11th February 2016, but failed to file any response and/or opposition to the application.

3. The application is therefore unopposed. Nonetheless, the ex-parte applicant had an obligation to satisfy this court that he is indeed entitled to an order of mandamus against the respondent.

The statement of facts and the averments contained in the verifying affidavit reveal that the ex-parte applicant is the decree holder in Kisii CMCC No. 262 of 1997, in which he obtained judgment on the 11th April 2005 and after an appeal the decretal amount was reduced to Ksh. 35,000/=.

4. Thereafter, a consent order dated 8th January 2008, was issued with regard to a sum of Ksh 70,000/= which had been deposited in court as a security for stay of execution pending the hearing and determination of the appeal lodged at the High Court at Kisii vide file No. 243 of 2002.

The consent was between the decree holder (ex-parte applicant) and the judgment debtor (Sotik Tea Co. Ltd) through their respective advocates Messrs Khan & Katiku Advocates and Messrs Nyamweya, Osoro & Nyamweya Advocates.

5. The foregoing facts are clear. A copy of the relevant deposit receipt No. **B001474** is annexed to the verifying affidavit and marked “**EXB PCM 1**”. The necessary consent letter dated 15th August 2006 and consent order are also annexed and marked “**EXB PCM 2(a) & 2(b)**”. What is not clear is whether the consent order was served upon the respondent for necessary compliance.

The ex-parte applicant contends that to date the respondent has failed, refused and/or ignored to release the deposited amount in the sum of Ksh. 70,000/= yet there is no indication whatsoever that the consent order was served for purposes of compliance or that a formal demand was made to the respondent to release the amount.

6. In his submissions the ex-parte applicant contends that several attempts to have the amount released to him were made. However, no attempts have been demonstrated herein by the ex-parte applicant. There is nothing to show that he has on several occasions written to or approached the respondent to have the deposit released to him through his legal representative. It is instructive to note that the deposit receipt (EXB “**PCM 1**”) actually shows that the depositor was Sotik Tea Co. Ltd and not the ex-parte applicant. If any release is to be made then it would be in favour of the said Sotik Tea Co. Ltd. Nonetheless, there is nothing here to show that the said company has ever demanded and/or requested that the amount be released to itself or the ex-parte applicant.

7. 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. (see, **Kenya National Examination Council Vs Republic Ex parte Geoffrey Gathenji & Others NBI C/APPEAL NO. 266 of 1996**).

Indeed as stated in “**HALSBURY’S LAW OF ENGLAND 4th Edition Vol.1 1911**”,

“The order of mandamus is of a 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.”

8. Any person having sufficient legal interest in the performance of a public duty may apply to the court for an order of mandamus to enforce it as it is recognized that when statutory duty is cast upon a public officer in his official capacity, the duty is owed to the public but not the state (see, **Gateway Insurance Co. Ltd Vs Jimmy Kiamba & Others (2015)eKLR**).

9. In this case, a cash deposit was received by the respondent through the Kisii Law Court as security pending the hearing and determination of an appeal lodged in the High Court by Sotik Tea Co. Ltd against the ex-parte applicant.

After the conclusion of the appeal process, the parties agreed and consented that the cash deposit (i.e Ksh. 70,000/=) held by the respondent as the accounting officer of the judiciary be released or paid out to the ex-parte applicant through his advocate on record. A court order was extracted to that effect but at the time this application was filed the deposit had not been released or paid out to the ex-parte applicant or the actual depositor i.e Sotik Tea Co. Ltd.

10. However, the consent letter and order (i.e “Exh PCM 2 a-b”) referred to a deposit made on 9th December 2002, yet the deposit receipt No. B001474 (Exh “PCM 1”) shows that the deposit was made on 11th December 2002. This was repeated in the ex-parte applicant’s verifying affidavit dated 5th February 2016. The error was however undone or corrected in the appropriate notice of motion and statement of facts both dated 8th February 2016.

Suffice to state with certainty that the deposit being sought by the ex-parte applicant has been in the hands of the respondent for a period of about fourteen (14) years.

11. Surely, this is most unfair to the ex-parte applicant. He has been denied the fruits of his judgment for such a long period of time but although the court sympathizes with him, he did not demonstrate herein that he made several attempts to have the deposit made to him but that the respondent failed, refused or neglected to do so.

A public officer cannot be compelled or commanded to do what he has not been asked or requested to do. The ex-parte applicant has not shown by means of appropriate evidence that he had for the last eight (8) or so years since the consent order was issued (i.e 8th January 2008) called upon the respondent to release the money to him or even the actual depositor.

12. The holding of the High Court in the case of **Wamwere Vs Attorney General (2004) 1 KLR 166**, aptly applies to the circumstances of this case. It was therein held that a public officer cannot be compelled to do something when there was no evidence of refusal or at the very least apparent refusal on the part of the public officer to do the thing.

In the upshot, the present application is unsustainable even without any opposition from the respondent. It is accordingly dismissed with no orders to costs.

J.R. KARANJAH

JUDGE

[Read and signed this 17th day of May 2016]