



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISC APPLICATIO NO. 412 OF 2014

REPUBLIC..... APPLICANT

AND

PRINCIPAL SECRETARY, MINISTRY OF AGRICULTURE....RESPONDENT

EX PARTE: ROSE KAMWETHUA MUIA

JUDGEMENT

1. By a Notice of Motion dated 10th December, 2014, *the ex parte* applicant herein, **Rose Kamwethua Muia**, seeks an order of *mandamus* compelling the Respondent herein to honour and satisfy the Court Decree and Judgement in Milimani CMCC No. 7952 of 2003 in the sum of Kshs 1,867,714 being the decretal sum, costs and interests at 14% p.a. from the date f the decree till payment in full. The Applicant also sought the costs of the proceedings.
2. According to the Applicant, on 7th August, 2003 she filed in the Chief Magistrate’s Court-Milimani Courts Civil Suit No. 7952 of 2003 against the Attorney General on behalf of the Respondent for damages arising out of a road accident which case was heard and determined on 8th June, 2004.
3. Despite the said judgement, the applicant contended that the respondent had declined to satisfy the said decree notwithstanding numerous requests for the same. According to the Applicant under the provisions of the Government Proceedings Act, execution cannot issue against the government in normal manner hence these proceedings.
4. Despite having been served and the respondent having been directed to respond to the application, the respondents did not oppose the instant application.
5. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**, I expressed myself as follows:

“In 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 no longer 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.”

6. The said decision, in my view is still good law.

7. Having considered the material on record and in the absence of any impediment, I do not see why the respondent should not be compelled to perform his statutory duty by settling the sums due from him to the applicant.

8. In the result I allow Notice of Motion, and issue an order of *mandamus* compelling the Respondent herein to forthwith pay the applicant Kshs 1867,714.00 plus interests thereon at 14% per annum from 8th June, 2004 till payment in full with costs of that suit.

9. I note that this application contrary to the procedure in judicial review applications was not brought in the name of the Republic. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486** Ringera, J (as he then was) expressed himself as follows:

“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intitled and accordingly, the orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -

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V

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EX PARTE JOTHAM MULATI WELAMONDI”

10. In the result, there will be no order as to costs.

11. Orders accordingly.

Dated at Nairobi this 30th day of August, 2016

G V ODUNGA

JUDGE

Delivered in the absence of the parties

Cc Mwangi