



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISC APPLICATION NO. 174 OF 2014

REPUBLIC..... APPLICANT

AND

PRINCIPAL SECRETARY, MINISTRY

OF TRANSPORT & INFRASTRUCTURE.....RESPONDENT

EX PARTE: TOTEM SERVICE STATION LIMITED

JUDGEMENT

1. By a Notice of Motion dated 5th August, 2014, *the ex parte* applicant herein, **Totem Service Station Limited**, seeks an order of *mandamus* compelling the Respondent herein to make payment of the sum of the sum of Kshs 29,173,511.00 with further interest at 12% p.a. on Kshs 25,762,539.00 from 16th April, 2014 till payment in full. The Applicant also sought the costs of the proceedings.
2. According to the Applicant, on 28th July, 2006 it filed a suit in the High Court Civil Case No. 417 of 2006 – Totem Service Station Limited vs. the Attorney General - in which it was claiming Kshs 19,387,106.40 being the amount due for fuel and petroleum products supplied by the applicant to the Provincial Works Officer and District Works Officer Nakuru, Kshs 57,726,601.50 interest accrued as at 30th June 2006, interest and costs.
3. According to the Applicant following the hearing of the said suit, the Court on 30th May, 2013, entered judgement in its favour against the Attorney General for the sum of Kshs 9,201,213.00 with interest at the rate of 12% p.a. from 28th July 2006 until payment in full, interest on Kshs 19,387,106.40 at 6% from 2000 to 2006 and costs.
4. Subsequently, a Certificate of Order was issued against the Government on 19th February, 2014. To the Applicant, the Respondent as the Accounting Officer in the Ministry is by law required to satisfy such judgement.
5. It was averred that both the said Certificate and the decree were served on the Attorney General and he Respondent and they were notified of the intention to institute these proceedings in default of payment thereof but no payment was received by the applicant.
6. According to the Applicant the sum due to it from the Respondent was Kshs 29,173,511.0 with further

interest at the rate of 12% per annum on Kshs 25,762,539.00 from 16th April, 2014 till payment.

7. Despite service the respondent did not respond to the application.

8. This Court in High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**, expressed itself as follows:

“...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.”

9. Based on the said decision, there is no reason why the respondent should not be compelled to perform his statutory duty by settling the sums due from him to the applicant.

10. In the result I allow Notice of Motion, and issue an order of *mandamus* compelling the Respondent herein to pay the applicant Kshs 29,173,511.0 with further interest at the rate of 12% per annum on Kshs 25,762,539.00 from 16th April, 2014 till payment in full with costs of that suit.

11. The Applicant will also have the costs of these proceedings.

12. Orders accordingly.

Dated at Nairobi this 21st day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mwiti for the Applicant

Mr Kiarie for the Respondent

Cc Mwangi