



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JR MISC. APPLICATION NO. 431 OF 2014**

**JAMES H. GITAU MWARA.....APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**DR. MONICA JUMA, THE PRINCIPAL SECRETARY, MINISTRY  
OF**

**INTERIOR & COORDINATION OF NATIONAL GOVERNMENT.....2<sup>ND</sup>  
RESPONDENT**

**JUDGEMENT**

1. By a Notice of Motion dated 15<sup>th</sup> May, 2014 the *ex parte* applicants herein, **James H. Gitau Mwara**, seeks the following orders:
  - a. **THAT** an order of mandamus be granted against the Respondents compelling the Respondents to settle the decretal sum of Kshs 4,749,122.80 in terms of the decree in HCCC No. 2892/1993 James H. Gitau Mwara vs. Gichong'i Gichuhi & Co. –Clients A/c No. 6636290023 Commercial Bank of Africa Wabera Branch as per the court decree within thirty (30) days from the date of Ruling of this court.
  - b. **THAT** the 2<sup>nd</sup> Respondent be compelled to pay to the Applicant interest at 12% per annum on the decretal sum of Kshs 4,749,122.80 emanating from the said decree in HCC No. 2892/1993 James H. Gitau Mwara vs. the Attorney General from 21<sup>st</sup> October 2011 when the Respondents defaulted to pay the Applicant's money up to the date of Ruling hereof and total interests due be deposited in bank account G.N. Gichong'i Gichuhi & Co. – Clients A/c No. 6636290023 Commercial Bank of Africa Wabera Branch within thirty (30) days from the date of Ruling hereof.
  - c. **THAT** in default of prayers (a) and (b) above, the 1<sup>st</sup> Respondent's Prof. Githu Muigai and the 2<sup>nd</sup> Respondent's Dr. Monica Juma be personally summoned to court and be personally committed to civil jail for contempt of court order.
  - d. **THAT** the total sum in (a) and (b) hereinabove be paid by the Accountant at the Attorney General's Office to the Applicant's Advocate's bank account G.N. Gichong'i Gichuhi & Co. – Clients A/c No. 6636290023 Commercial Bank of Africa Wabera Branch. e. That the Respondents be condemned to bear the cost of this application.
  - e. **THAT** the Respondents be condemned to bear the Cost of this Application.

2. The application was based on the following grounds:

1. On 21<sup>st</sup> May 2013 at 4.30 pm the Applicant personally served the 1<sup>st</sup> Respondent's Ms Muthoni Kimani at her office reception with a High Court Order with a Penal Notice against any disobedience and the Ruling thereof given on 3<sup>rd</sup> May 2013 by Justice Waweru in NRB HCC 2892/93 James Hosea Gitau Mwara vs. Attorney General which *inter alia* ordered her that the decretal sum of Kshs. 4,749,122.90 already released to the Attorney General by the Permanent Secretary Ministry of Home Affairs in compliance with the decree of this honourable court be deposited in decree holder's advocates bank account which details are Commercial Bank of Africa, Wabera Street Branch G. N. Gichong'i Gichuhi Ngari & Co.-Client A/c No. 6636290023 within 14 days of service of this order upon the defendant.
  2. That the 1<sup>st</sup> Respondent rushed to the Court of Appeal in NRB Civil Application No. 121/2013 UR 83/2013 Hon. Attorney General vs James H. Gitau Mwara with an application to stay execution dated 6<sup>th</sup> June 2013 which was dismissed with costs to the Applicant on 14<sup>th</sup> March 2014 by Judges of Appeal Nambuye, Ouko and Murgor.
  3. That the 1<sup>st</sup> Respondent has never filed an Appeal against the Original Judgment in Nairobi HCCC 2892/93 James H. Gitau Mwara vs Honourable Attorney General but on 20<sup>th</sup> March 2014 the 1<sup>st</sup> Respondent filed Civil Appeal No. 28/2014 in the Court of Appeal against the same Ruling of Justice Waweru which the Court of Appeal had refused to Stay Execution.
  4. It is trite in law that on absence of a stay of execution from the Court of Appeal the Respondents must comply with the High Court order or be compelled by an order of Mandamus Mandatory Injunction.
  5. Meanwhile the initial decretal sum of Kshs 4,008,100 escalated to Kshs 4,749,122.80 as on 13<sup>th</sup> October 2011 then to Kshs. 5,765,093.83 as on 22<sup>nd</sup> October 2013 and had accumulated interest to Kshs 1,484,645 as on 29<sup>th</sup> October 2014 and it now stands at Kshs 6,233,767 by the time of filing this Judicial Review suit which the 2<sup>nd</sup> Respondent is liable to pay as the Accounting Officer of the Parent Ministry of Interior and Coordination of National Government under which the Kenya Prison Service now falls.
  6. The Applicant has also personally and continually served the Attorney General Prof. Githu Muigai and Solicitor General Mr. Njee Muturi with the same High Court Judgment, Decree, Order, the Ruling and the Revised Certificate of Order against the Government with Penal Code Notice date 22<sup>nd</sup> October 2013 and written direct letters dated 22<sup>nd</sup> April 2014. The Applicant however just saw aloofness, nonchalance and unprofessional conduct and professional misconduct of failure to reply to correspondence and open disregard of the High Court Orders.
  7. The Applicant is a Senior Advocate and an Officer of the High Court and he alongside his Advocate Mrs. Grace Ngari feel embarrassed by the grave acts of obstruction of justice and open contempt of subsisting High Court order by the Respondents.
  8. As an officer of the court and a believer in the Rule of Law and Sanctity of Court Orders, the Applicant prays that the decretal sum of Kshs. 4,749,122.90 be deposited in Court immediately and then released to in his advocates clients bank account whose details are G.N. Gichong'i Gichuhi & Co-client's A/c No. 6636290023 Commercial Bank of Africa Wabera Branch. And also the accumulated interest of Kshs. 1,484,645 and further interest as on the date of Ruling hereof be deposited in the said clients bank account stated herein.
3. The application was supported by a verifying affidavit sworn by the applicant herein on 13<sup>th</sup> November, 2014 which affidavit was limited to verifying the matters stated in the statement of facts.
  4. The application was not opposed by the Respondents.
  5. I have considered the application, the verifying affidavit as well as the submissions file on behalf of the applicants.
  6. On 3<sup>rd</sup> May, 2013, **Waweru, J** in Nairobi HCCC No. 2892 of 1993, **James H Gitau Mwara vs. The Attorney General** expressed himself as follows:

**“The long and short is that there is a money decree in place in favour of the Plaintiff against the Defendant. There is no stay of execution of decree sought or granted. Needless to say, Muthoni Kimani, Senior Deputy Solicitor-General cannot appear to decree such stay of execution, no matter how noble her intentions. The Defendant’s client Ministry has released the necessary funds to the Defendant to satisfy the decree for onward transmission to the Plaintiff’s advocates. The Defendant’s duty is to release those funds, unless there is a stay of execution in place, duly sought and granted by this Court or the Court of Appeal. It is not open to the Senior Deputy Solicitor-General to decide whether or not to release the funds. She does not in law have such discretion!”**

7. 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 hereunder:

**“...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.”**

8. I adopt my reasoning in the said case.
9. In the absence of any replying affidavit, this court finds merit in the Notice of Motion dated 15<sup>th</sup> May, 2012.
10. However, the parameters of judicial review order of *mandamus* were set out by 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 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 or 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. 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..... Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

11. It follows that this Court’s jurisdiction to grant an order of *mandamus* is restricted to compelling a person, corporation or inferior tribunal, 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 in cases where there is a specific legal right or no specific legal remedy for enforcing that right. It therefore must command no more than the party against whom the application is legally bound to perform.
12. In this case, the Respondent’s duty stems from the order made in HCCC No 2892 of 1993 in which case the Court granted prayers (b), (c) and (e) therein substantially directing that a cheque be made out in the name of the applicant’s advocates for the decretal sum of Kshs 4,749,122/80 already released to the Attorney General by the Permanent Secretary (now the 2<sup>nd</sup> respondent herein) with costs.
13. Accordingly, an order of *mandamus* is hereby issued directed to the Respondents compelling them to pay the ex parte Applicant through the applicant’s advocates Kshs 4,749,122/80 as directed in the said suit. I also award the costs of these proceedings to the applicant.

**Dated at Nairobi this day 23<sup>rd</sup> day of March, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Miss Gichugi for the Applicant***

*Mr Munene for the Respondent*

*Cc Patricia*