



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION)
MISC. APPLICATION NO. 232 OF 2014
REPUBLIC.....APPLICANT
VERSUS
NAIROBI CITY COUNTY.....RESPONDENT
EX PARTE ROGERS MONG'ARE OMBACHI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 11th August, 2014 the *ex parte* applicants herein, **Rogers Mong'are Ombachi**, seeks an order of mandamus compelling the Respondent to in effect settle the decree in the judgement delivered on 5th October, 2011 in Milimani Civil Suit No. 405 of 2011. He also sought the costs of the application.

2. The application was supported by a verifying affidavit sworn by the applicant herein on 12th June, 2014.

3. According to the applicant, he filed Civil Suit No. 405 of 2011 at Milimani Commercial Court against the Defendant's predecessor, City Council of Nairobi for General and Special damages for wrongful arrest and malicious prosecution. Pursuant thereto, the Court delivered its judgement on 5th October, 2011 according to which he was awarded Kshs 450,000.00 as general damages with interest at 12% and costs. According to the copy of the decree exhibited, the principal sum was Kshs 481,364.00n while the costs came to Kshs 54,125.00.

4. The Applicant averred that despite serving the Respondent with the decree, the Respondent failed, refused and/or declined to honour the same hence these proceedings.

5. I have considered the application, the verifying affidavit as well as the submissions file on behalf of the applicants. The Respondent did not oppose the application filed herein.

6. 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.”**

7. I adopt my reasoning in the said case.

8. In the absence of any replying affidavit, this court finds merit in the Notice of Motion dated 11th August, 2014.

9. Accordingly, an order of *mandamus* is hereby issued compelling the Respondent to implement the requirements of the decree emanating from the judgement delivered on the 5th October, 2011 in Milimani Civil Suit No. 405 of 2011.

10. I also award the costs of these proceedings to the applicant.

Dated at Nairobi this day 17th of April, 2015

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

Cc Richard