



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 61 OF 2015**

**REPUBLIC .....APPLICANT**

**VERSUS**

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

**PRINCIPAL SECRETARY, MINISTRY**

**OF STATE FOR DEFENCE .....2<sup>ND</sup> RESPONDENT**

**DEFENCE COUNCIL.....3<sup>RD</sup> RESPONDENT**

**CHIEF OF KENYA DEFENCE FORCES.....4<sup>TH</sup> RESPONDENT**

**EX-PARTE**

**MAJOR (RTD) EZRA IMAANA LAIBUTA**

**JUDGEMENT**

1. Through a Notice of Motion application dated 12<sup>th</sup> March, 2015 the ex-parte Applicant, Major (Rtd) Ezra Imaana Laibuta prays for an order of mandamus to compel the 1<sup>st</sup> Respondent, the Attorney General; the 2<sup>nd</sup> Respondent, the Principal Secretary in the Ministry of State for Defence; the 3<sup>rd</sup> Respondent, the Defence Council; and the 4<sup>th</sup> Respondent, the Chief of Kenya Defence Forces to pay him the sum of Kshs.8,270,000/= and issue him with a certificate preserving his honour as a retired officer of the military as per the decree issued in **Nairobi Industrial Court Petition No. 13 of 2013, Major (Rtd) Ezra Imaana Laibuta v Attorney General and 4 others**. The application is not defended.
2. In brief the Applicant’s case is that on 29<sup>th</sup> November, 2013 a judgment was issued in his favour by the Employment and Labour Relations Court in **Petition No. 13 of 2013**. Although the respondents indicated that they had filed a notice of appeal, there is no evidence that an actual appeal was filed.
3. It is the Applicant’s assertion that a certificate of order against the Government was issued by the Deputy Registrar on 2<sup>nd</sup> October, 2014 but despite demand being made through a letter dated 13<sup>th</sup> October, 2014 the respondents have failed to comply with the judgment.
4. I have looked at the annextures to the verifying affidavit of Moses K Chelanga sworn on 25<sup>th</sup> February, 2015 and there is indeed a certificate of order against the Government and a demand

notice.

5. In **Kenya National Examinations Council v Republic exparte Geoffrey Gathenji Njoroge & 9 others, Civil Appeal No. 266 of 1996** the Court of Appeal stated the purpose of an order of mandamus as follows:

**“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-**

**“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.”**

**At paragraph 90 headed “the mandate” it is stated:**

**“The order must command no more than the party against whom the application is made 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.”**

**What do these principles mean? They mean that an order of mandamus will compel 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.”**

6. The importance of an order of mandamus in the enforcement of a judgement against the Government was stated by Odunga, J in **Republic v Attorney General & another exparte James Alfred Karoso [2013] eKLR** as follows:

**“19. It follows therefore that 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.”**

7. Once a certificate of order against the Government is issued, Section 21 of the Government Proceedings Act, Cap 40 requires the accounting officer of the concerned department to make payment without undue delay. There is therefore a duty imposed by the law to make payment once a certificate of order is issued.

8. In the circumstances of this case, I find that the Applicant has met the threshold for the issuance of an order of mandamus. An order of mandamus is hereby issued directed at the respondents compelling them to pay the Applicant the sum of Kshs.8,270,000/= as per the certificate of order issued against the Government on 2<sup>nd</sup> October, 2014. The respondents will meet the Applicant's costs for these proceedings.

**Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of July, 2015**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**