REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO.439 OF 2014

ESTATE OF HARUN THUNGU WAKABA.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

DR. MONICA JUMA,

THE PS MINISTRY OF INTERIOR & COORDINATION

OF NATIONAL GOVERNMENT…….....…….2ND RESPONDENT

RULING

1. By a Notice of Motion dated 20th November, 2014 the *ex parte* applicant herein, **Estate Of Harun Thungu Wakaba**, seeks the following orders:

> **a. That an order of Mandamus be granted against the Respondents compelling the Respondents to deposit the decretal sum of Kshs 2,808,098.32 in court inclusive of 12% interest per annum since 7th December 2009 up to the date of ruling within thirty (30) days from the date of ruling of this court.**
>
> **b. That the Respondents be condemned to pay interest at 12% per annum on the original decretal sum of Kshs 1,947,386 from 7th December 2009 to date of ruling hereof**
>
> **c. That in default of prayer (a) and (b) above, the 1st Respondent's Prof. Githu Muigai and the 2nd 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 paid in to court by the Accountant at the Attorney General's Office be released to the Applicant's advocates Gitau J.H. Mwara & Co. Advocates.**
>
> **e. That the Respondents be condemned to bear the cost of this application plus 12% interest on the original decretal sum of Kshs 1,700,000 from 7th December 2009 to date of ruling hereof.**

2. The application was based on the following grounds:

1. **The Applicant is the Decree Holder in Nairobi HCCC No. 6031/91 Harun Thungu Wakaba – vs- AG whereby he was awarded compensation in Torts for illegal arrest, illegal detention, assault and malicious prosecution by Justice Ali Aroni on 7th December 2009 for Kshs 1,700,000 plus taxed costs of Kshs 247,386 after an inter parties hearing which lasted for 18 years.**
2. **That no Appeal was filed against the original judgment and the Court dismissed application to set aside judgment delivered on 8th February 2013 there are no orders of stay of execution of the decree in this mater whatsoever.**
3. **After the Decree and Certificate of Order Against the Government with Penal Notice were served on the Attorney General and the Predecessor to the Principal Secretary, Ministry of Interior and Coordination of National Government on 3rd August 2010 and again on 21st October 2011, the Attorney General, the Solicitor General, and the Predecessor of the Principal Secretary, Ministry of Interior and Coordination of National Government have continually refused to comply with the court order.**
4. **Meanwhile in August 2012, the Attorney General, Prof. Githu Muigai made a Public Order/Direction to the Permanent Secretaries to comply with all Court Decrees and Certificates of Order against the Government served on them which the then Permanent Secretary, Provincial Administration and Internal Security verbally said he was ready to comply with the court decree by setting aside money for releasing to the Hon. Attorney General provided the 1st Respondent gives such clear instructions.**
5. **Despite personal follow-up by the Applicant's Advocate and a Beneficiary who is the Deceased's father, Obadiah Wakaba Njore with the Attorney General, Prof. Githu Muigai, the Solicitor General Njee Muturi, and the Principal Secretary, Ministry of Interior and Coordination of National Government Ambassord Monicah Juma and written reminders, the trio have refused to comply thus necessitating the remedy of order of Mandamus (Annexed and marked JHG5 is a written plea by the Deceased's father Mzee Obadiah Wakaba Njore dated 3rd October 2011).**
6. **It is trite Law and Rule of Practice that a court decree must be complied without any action when there is no stay of execution and where stay of execution has been refused, specifically Order 22 Rule (1) (a) provides the decretal sum shall be paid into the court whose duty is to execute the decree. Hence the Respondents should be ordered to deposit into the court the accumulated decretal sum of Kshs 2,808,098.32 inclusive of 12% interest since 7th December 2009 up to the date of Ruling hereof.**
7. **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 Orders and decree or be compelled by an order of Mandamus.**
8. **Due to the disregard of the Court Decree by the 2 Highest State Law Officers and the Principal Secretary, Ministry of Interior and Coordination of National Government without any order of stay from this court, the Applicant prays that the Decretal sum of Kshs 2,808,098.32 be deposited in court immediately and then released to Gitau J.H. Mwara Co. Advocates.**
9. **It is an embarrassment to the Decree Holder and his Advocate (who is an Officer of the Court) that the Court Decree herein is being disregarded with impunity by the Highest State Law Officers, the Attorney General, The Solicitor General, and the Principal Secretary, Ministry of Interior and Coordination of National Government.**

3. The application was supported by a verifying affidavit which was however thin on the facts as it was a four paragraph affidavit which was limited to verifying the contents of the statement. It was very thin on the facts and had no documents exhibited thereto. I shall however come back to this issue later in this judgement.

4. In a supplementary affidavit sworn by the applicant's advocate on 9th June, 2015, it was deposed that the Respondent is repeating and recycling the same arguments which were rejected by **Justice Waweru** in the Ruling dated 8th February 2013.

5. To the applicant, the Respondents have dishonestly and unethically tried to justify contempt of Court Orders in HCCC 6031/1991 and to disregard 2 separate causes of actions, 2 different judgments and 2 decrees obtained with different remedies and outcomes to justify disobedience of a valid court judgment and valid court decree with penal consequences in HCCC 6031 of 1991,

6. The applicant's advocate agreed with **Waweru, J's** ruling that so long as the High Court Judgment delivered on 7th December 2009 and the Decree therefore are on record in HCCC 6031 of 1991, the Decree must be complied with.

7. It was reiterated that there is no pending appeal pr orders of stay of execution against the judgment and court decree in HCCC 6031 of 1991 and even HCCC 1411 of 2004 hence no matter how many times the Respondent keep on repeating and recycling the same arguments, the judgment and decree in HCCC 6031 of 1991 will remain enforceable with Penal Consequences by an Order of Mandamus and in default the 2 Respondents will be personally summoned to court and be personally committed to civil jail for contempt of court order forthwith as prayed in prayer (d) herein.

8. To the applicant, the Highest duty of a Public Officer is to obey a court order which he/she has been served with and/or which he has knowledge of without any discretion or arguments. Otherwise no court can fold its hands in helplessness and watch its orders continue to be disobeyed with impunity, left, right and centre especially by Senior Public Officers/Senior Civil Servants. If it did so, the conduct of the court would amount to abdication of its sacrosanct duty bestowed on it by the Constitution of Kenya 2010 in Chapter 10.

9. In the applicant's view, the writ of Mandamus pleaded in prayer (a) together with prayer (c) are the appropriate remedies in order to ensure a litigant gets the fruits of his judgment and also to protect the dignity of court decrees.

10. In opposition to the application, the Respondent filed a replying affidavit sworn by the 2nd Respondent in which it was deposed that the Applicant herein had sued the Government in Nairobi HCCC No. 6031 of 1991 and Nairobi HCCC 1411 of 2004 all premised on the same facts and same happenings.

11. It was disclosed that in Nairobi HCCC No. 6031 of 1991, the Applicant herein claimed for general damages for illegal arrest, detention, assault, torture and malicious prosecution, the facts being that on 29th October, 1990 the Applicant while coming from Café Dalla, off River Road at about 2pm was arrested by Special Branch Officers who loaded him into the boot of a white vehicle with private registration number and took him to Kileleshwa Police Station for 2-3 hours after which he was taken to Nyayo House where he was put in a dark room about 6*6 feet with water up to the knee. He was interrogated, tortured, and accused of having worked with **Kiogi Wamwere**. He remained without food for 5 days in the dark cell filled with water, after which he was taken to a brightly lit room where he remained for 12 days without and beddings or a seat.

12. It was deposed that in Nairobi HCCC 1411 of 2004 on the other hand, the facts were that the Applicant herein was arrested on 29th October, 1990 by plainclothes policeman. He was taken to Kileleshwa Police Station where he was held for about 4 hours, and then taken to Nyayo House Basement, where he was held in a dark cell. The next day Wakaba was taken to the 24th floor of the Nyayo House where he was stripped naked and assaulted by being beaten with rubber whips, metal bars, broken chair parts, slaps, kicks and blows, whilst being subjected to interrogation by a panel of interrogators. At the end of heavy interrogation, he was returned back to the dark cell where pressurized water, hot and cold air alternatively were sprayed on him for several hours. He was kept without food and other necessary facilities for a period of 21 days.

13. It was disclosed that in Nairobi HCCC No. 1411 of 2004 judgment was delivered on 21st July 202 by **Justice H.M. Okwengu** and the Applicant was awarded Kshs 3 million an amount that was fully settled on 16th May, 2011 and is not in contention. However, the Applicant herein instituted Nairobi HCC No.

1411 of 2011 without full disclosure to the honourable court that there was an ongoing case Nairobi HCCC No. 6031 of 1991 on the same facts, same happening where he was still the Applicant and judgment was delivered by Justice Ali-Roni on 7th December, 2009 awarding the Applicant a sum of Kshs 1,700,000/= the judgment the Applicant seeks settlement in this judicial review application.

14. The deponent therefore deposed that both Nairobi HCCC 1411 of 2011 and Nairobi HCCC No. 6031 of 1991 are premised on the same set of facts, same happening, same Applicant and it is trite law that a litigant must not be compensated more than once on the same set of facts and happenings as this would amounts to unjust enrichment. It was averred that the Applicant was duty bound to disclose to the honourable court of the existence of the earlier case Nairobi HCCC No. 6031 of 1991 by the time Nairobi HCCC No. 1411 of 2004 was being filed. As such the Applicant misrepresented and failed to disclose material facts which if were brought to the attention of the court the latter case would not have seen the light of day.

15. It was contended that allowing this application will be equivalent to compensating the Applicant twice on the same set of facts which will amount to wasting the tax payers monies and judicial review orders are discretionary in nature and are granted on case to case basis.

16. To the deponent, the *ex parte* applicant herein is devoid of *locus standi* to institute this application having not supplied the court with Letters of Administration an the instant application is frivolous, vexatious and an abuse of court process and should be struck out with costs.

Determination

17. I have considered the application herein, the various facts relied upon and the submissions on record.

18. The first issue for determination is the competency of the application. The applicant in these proceedings is indicated as **The Estate of Harun Thungu Wakaba**. However, in judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**

19. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

> **"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".**

20. 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 intituled 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: -**

"REPUBLIC……..……..……..APPLICANT

V

THE ELECTORAL COMMISSION OF KENYA……RESPONDENT.

EX PARTE

JOTHAM MULATI WELAMONDI"

21. It is clear from the title of the proceedings herein that the Motion herein is not an epitome of impeccable, elegant or paragon drafting. However in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

> **"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".**

22. Therefore whereas, the application is not properly intituled, that failure is not fatal to the application as it does not go to the jurisdiction and it has not been alleged that the mistake has prejudiced the Respondent in any material aspect. I however must state that the failure by a party to properly intitule the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs.

23. 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 nolonger 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."

24. I adopt my findings therein in the instant application.

15. The Applicant also sought for interest at the rate of 16% per annum. However, in **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR** it was held by the Court of Appeal that:

"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."

25. I also associate myself with the views expressed by **Githua, J** in **Republic vs. Permanent Secretary Ministry of State for Provincial Administration and Internal Security & Another ex parte Fredrick Manoah Egungza** that:

"The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issues against the Government is found in section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon. Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgement. Once the certificate of order against the Government is served on the Hon. Attorney General, Section 21(3) imposes a statutory duty on the accounting officer to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues. The Respondent's claim that the Applicant should have waited until the start of the next financial year to enforce payment of the decree issued in his favour cannot be sustained firstly because it has no legal basis and secondly because it is the responsibility of the Government to make contingency provisions for its liabilities in tort in each financial year so that successful litigants who obtain decrees against the Government are not left without remedy at any time of the year."

26. In this case, the Respondent contends that to grant the orders sought herein would amount to unjust enrichment since the applicant herein instituted two suits in respect of the same cause of action. It ought

to be remembered that this application is neither an application for setting aside a judgement or review and nor is it an appeal against a judgement. This application is mean to enforce the satisfaction of a judgement. The fact that a judgment may have been irregularly obtained does not bar this Court from enforcing its satisfaction as long as the same remains undisturbed. The Respondent has not alleged that there is a pending appeal and even if there was one, that would not ipso facto preclude this Court from granting the orders sought herein without a stay thereof having been sought and obtained. An irregularly obtained judgement, which in my view is what the Respondent is alleging herein, as opposed to a judgement which is null and void, remains valid until set aside either by review or on appeal.

27. It is therefore my view and I so hold that the issues raised by the Respondent herein with respect to the irregularity of the judgement the subject of these proceedings are misconceived and with due respect baseless.

28. It is however contended that the applicant before this Court has no *locus standi* to institute these proceedings. In these proceedings, the applicant is indicated as "*The Estate of Harun Thungu Wakaba*". The verifying affidavit is sworn by **James H. Gitau Mwara**, counsel for the applicant. According to him, his grievance is with respect to his fees in the decretal sum. There is no averment by the applicant that the decretal sum has not been settled. In fact from a perusal of these proceedings one cannot be able to pin point who the applicant is. An order of *mandamus,* it must be remembered, 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. Therefore the failure to perform the public duty must be shown to have been detrimental to a person who has a legal right to expect the duty in question to be performed, who ought to be the applicant in such proceedings.

29. In these proceedings it is not clear who the administrator of the estate of the deceased is. As was held in **Trouistik Union International and Anor. vs. Mrs. Jane Mbeyu And Anor Civil Appeal No. 145 of 1990 [1993] KLR 230:**

> **"To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82(a) of the Law of Succession Act, which confers that power on personal representatives and on them alone. As to who are the personal representatives within the contemplation of the Act, Section 3, the interpretative section provides an all inclusive answer. It says "personal representative means executor or administrator of a deceased person". It is common ground that the deceased in this case did not die intestate and therefore, the only person who can answer the description of a personal representative is the administrator of the estate of the deceased. The next inquiry must answer the question, who is an administrator within the true meaning and intendment of the Act? Section 3 says "administrator means a person to whom grant of letters of administration has been made under this Act"…It is not in doubt that the two respondents who invoked the aid of the court to agitate the cause of action which survived the deceased, were not persons to "whom a grant of letters of administration have been made under the Act" i.e. the Law of Succession Act and they did not even pretend to be such. The only capacity, in which they sought to enforce the deceased's chose in action, was as dependants. As the professed widows and dependants of the deceased, it was within their legal competence to claim damages for loss of dependency under the Fatal Accidents Act."**

30. In absence of any indication as to whether there is a person with the capacity to sustain these proceedings, I agree with the Respondent that these proceedings are incompetent. An advocate cannot sustain legal proceedings on his own under the guise that the same are commenced on behalf of his client and the mere fact that he may have a stake in the decretal sum does not entitle him to institute legal proceedings in respect thereof. In my view "*The Estate of Harun Thungu Wakaba*" without an administrator thereof cannot sustain these proceedings.

31. In the premises I hold that these proceedings are incompetent and are hereby struck out but with no order as to costs as I have not dealt with the merits of the issues raised herein.

Dated at Nairobi this 17th day of September, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Gitau for the Applicant

Mr Munene for the Respondent

Cc Patricia