



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**MISC. CIVIL APPLICATION NO.7 OF 2014**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**THE PRINCIPAL SECRETARY MINISTRY OF**  
**INTERIOR & COORDINATION OF GOVERNMENT.....RESPONDENT**  
**AND**  
**ATTORNEY GENERAL.....INTERESTED PARTY**  
**AND**  
**EX-PARTE APPLICANT.....SELFA CHALENGA**

**RULING**

**Introduction**

1. By a Notice of Motion dated the 5<sup>th</sup> June 2014 brought pursuant to Section 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya and Order 53 rule 3(1) of the Civil Procedure Rules 2010 the Applicant seeks for orders:-

- a. THAT an order of Mandamus be issued to compel the Respondent to pay kshs.1,273,770.66/= plus interest accrued thereon as at 31/1/2014 arising from the Decree in Kakamega H.CCC No.56 of 2003 delivered on 29/6/2010 till payment in full.
- b. THAT costs of this application be provided for.

**Applicants Case**

2. The application is based on the grounds that judgment in H.C.C.C No.56 of 2003 was delivered on 29/6/2010 in favour of the ex parte applicant and the Respondent together with the Interested Party were duly notified of the decree. That the said decree has not been settled todate by the Respondent and the Interested Party who are not keen on settling the same. It is claimed that the ex-parte applicant will not enjoy the fruits of the judgment unless the orders sought herein are granted.

3. The application is supported by the affidavit of SELPHA CHALENGA duly sworn on the same date. She explains that judgment was delivered in her favour in Kakamega H.C.C.C. No.56/2003 on 29/6/2010 wherein she was awarded kshs.770,100/= plus costs assessed at kshs.147,209 with interest thereon as compensation for a claim which arose out of an accident in which her husband PATRICK LISIOLO PETER lost his life. See annexure “SC 1 (a) and (b)” being copies of the Decree and Certificate for costs dated 29/1/2013. Interest on the said sums has continued to accrue amounting to kshs.1,273,770.66 as at 31/1/2014 which remains unsettled while the ex-parte applicant continues to incur debts see annexure “SC 2” a copy of a receipt dated 12/6/2013. A copy of the judgment is annexed and marked “SC 3”.

4. The ex parte applicant has referred to letters by his advocates namely annexures “SC 4 (a), (b) and (c) “notifying the Respondents of the judgment” but they have remained unmoved. The ex parte applicant is a widow and is financially incapacitated without any meaningful source of income, hence the application.

5. The application is not opposed. Mr. Osango for the ex parte applicant confirms that there has been no response from the Respondent and the Interested Party and prays for the orders sought. Mr. Tarus for the Respondent and the Interested party told the Court that they have not responded because payment is being processed.

### **Determination**

6. This Court has considered the application, the supporting affidavit as well as the Notice to the Registrar and ex parte Chamber Summons with the Statutory Statement dated 26<sup>th</sup> March 2014. In **High Court Judicial Misc. Application NO.44 of 2012 [2014] e KLR Republic –vs- AG & Another Ex parte James Alfred Kosono**, Odunga J observed:-

**“In the present case the ex parte applicant has no other option of realizing the fruits of his judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that he has been awarded is realized. 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 judgments have been decreed by Courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed in their paths by actions or non-actions of public officers. It must be remembered .....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 so 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 the 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.....In Mandamus cases it is recognized that when statutory duty is cast upon a public officer in his official capacity and the 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, a Mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by 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 as such. Such contempt proceedings are no longer execution proceedings but are meant to show the Courts 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. This Court entirely agrees with the observations made by Odunga J. and affirms the proposition that in this age of Constitutional freedoms and reforms each arm of the Government is expected to do its work diligently, honestly and without favour. The applicant herein filed suit way back in the year 2003 and judgment entered in 2010 in her favour. Four years after the judgment the ex parte applicant has not received any shilling from the Respondents. It cannot be gainsaid that the actions of the Respondent are causing unnecessary suffering to a widow who had so many expectations especially after judgment was entered in her favour. The respondent's failure to make good what is owed to the applicant is clearly increasing the burden on the taxpayer whose shoulders are already sagging under the tax burden without any clear indications that his income is going to improve. The Courts cannot sit by and wait for the respondents to do what they are duty bound to do when they want to do so. The Courts must interfere.

8. For the reasons above stated, I allow the application and order that an order of Mandamus directed to the Principal Secretary Ministry of Interior and Co-ordination of National Government do hereby issue compelling him to pay the sum of kshs.1,273,770.66 plus interest accruing thereon till payment in full.

9. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this

25<sup>th</sup> day of November, 2015.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Mr. Osango (present) for Applicant

Mr. Tarus (absent) for Respondents

Mr. Okoiti - Court Assistant