



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO 312 OF 2012

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
MANDAMUS**

REPUBLICAPPLICANT

VERSUS

THE PERMANENT SECRETARY

MINISTRY OF PROVINCIAL ADMINISTRATION

& INTERNAL SECURITY.....RESPONDENT

EXPARTE: Lawrence Kamau P. Mwangi

JUDGEMENT

1. By a Notice of Motion dated 16th August, 2012, the applicant herein, **Lawrence Kamau P. Mwangi**, seeks the following orders:
1. **THAT this Honourable Court do issue an order of mandamus against the Respondent to the effect that he pays the exparte applicant the sum of Kshs.52,825/= within 14 days of service of this order and in default he be committed to civil jail for a period not exceeding 6 months.**
2. **THAT costs of this application be provided.**

EX PARTE APPLICANT'S CASE

2. The Motion is supported by an affidavit sworn by the applicant on 16th August, 2012.
3. According to the applicant, on or about 8th December, 2005 **Nelson T. Muriithi**, a Senior Assistant Chief of Kahuro Sub-location, Murang'a County, trespassed on his Land Reference Number Loc. 8/Loc.8/Kandegenye/616 and confiscated one (1) twenty litre jerrican of sugarcane juice worth kshs.1,000/=. He filed Murang'a Principal Magistrate's court Case No.459 of 2006 for compensation against the Attorney General and the said **Nelson T. Muriithi** for illegal trespass and confiscation of the sugarcane juice and was awarded the sum of Shillings 52,825/= inclusive of costs and interest upto 25th August, 2011 which sum has not been settled despite having served the Attorney General with a Certificate of Order against the Government.
4. According to the applicant, the amount owed to him by the Respondent as at 23rd August, 2011 was Kshs.52,825/= and the amount now outstanding is Kshs.58,084/= inclusive of interest of Kshs.5,259/= from 23rd November, 2011 to 23rd August, 2012 hence his claim herein.

5. The application was however not opposed by the respondent.
6. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Kosoro**, I expressed myself as hereunder:

“...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 the said reasoning in the present case
8. Having considered the material on record the order which commends itself to me and which I hereby grant is an order of *mandamus* compelling the respondent to pay the *ex parte* applicant the sum of Kshs.52,825/=.
9. I however decline to grant an order for committal as sought since the decision whether or not to commit a person to civil jail in my view can only be made where there is proof that the respondent has disobeyed the Court order duly served on him together with the penal notice. In effect the said prayer is at this stage premature.
10. The applicant will have the costs of this application.

Dated at Nairobi this 21st January, 2014

G V ODUNGA

JUDGE

Delivered in the presence of Mr Wandaka for the applicant