



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO. 243 OF 2013

IN THE MATTER OF AN APPLICATION BY JAMES MWANGI NYAMBURA FOR JUDICIAL REVIEW FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF HIGH COURT OF KENYA AT NAIROBI CIVIL SUIT NO.710 OF 2004

BETWEEN

JAMES MWANGI NYAMBURA AND SARAH NUNGARI

(suing on behalf and legal Representation to the estate of the late Josephine Wambui Nyambura)

VERSUS

THE HONOURABLE ATTORNEY GENERAL

RAYMOND MANYAJI NYAASI

AND

REPUBLICAPPLICANT

-VERSUS-

THE PRINCIPAL SECRETARY INCHARGE OF

INTERNAL SECURITY OFFICE OF THE PRESIDENT.....RESPONDENT

EXPARTE

JAMES MWANGI NYAMBURA

JUDGEMENT

1. By a Notice of Motion dated 15th July, 2013 the *ex parte* applicant herein, **James Mwangi Nyambura**, seeks the following orders:

1. **An order of Mandamus compelling the Respondent to satisfy the decree arising from High Court Civil suit Number 710 of 2004 as indicated in the Certificate of Order against the**

Government.

2. THAT costs of this application be provided for.

2. The application was supported by a verifying affidavit sworn by the applicant on 3rd July, 2013.
3. According to the applicant, he instituted proceedings in the High Court of Kenya being suit No.710 of 2004 (hereinafter referred to as the suit) seeking damages against the office of the president through the office of the Attorney General for fatal injuries sustained by her late sister **Josephine Wambui Nyambura**. Prior to the filing of the suit, the applicant averred that he duly served the mandatory statutory statement on the Attorney General.
4. It was deposed that the aforesaid suit did proceed for trial where the applicant testified together with the other witnesses and judgement was entered against the Attorney General and a decree and Certificate of Order against Government duly obtained. According to the applicant there was no appeal against the said judgement although the defendant's advocates requested for a copy of the judgement which was furnished by the applicant's advocates.
5. It was deposed that the Hon. Attorney General communicated that there were arrangements to pay the decretal sum from the concerned Ministry but no time was been given. According to the applicant, the deceased pursuant to which these proceedings were instituted was survived by a son who need to go to college but has no school fees and is at risk of being declared a vagabond as there is no one to take care of him.
6. However, despite demands and notices given the Respondent as the agent of the Government of Kenya has failed, refused and/or ignored to obey he Court judgment hence causing the estate of the deceased great inconvenience and hardship and exposing the son of the deceased to untold financial suffering and loss hence the orders sought herein.
7. This application was however not opposed.
8. I have considered the application, the supporting affidavit as well as the exhibited documents together with written submissions
9. 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:

“...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."

10. I adopt my reasoning in the said case.

11. The Court has however noted that the suit in which the original judgement was given was instituted by two administrators, the applicant herein and one Sarah Nungani.

12. In Willis Ochieng Odhiambo vs. Kenya Tourist Development Corporation & Another Kisumu HCCC No. 51 of 2007, the Court expressed itself while citing *Lewin on Trusts 16th Ed at 181*, *Williams & Mortimer: Executors, Administrators & Probate; Bullen & Leake & Jacobs: Precedents of Pleadings, 13th Ed at 373* and Werdrman vs. Societe Generale D'electricite (1881) 19 Ch. D 246 as follows:

"In the case of co-trustees of a private trust, the office is a joint one. Where the administration of the trust is vested in co-trustees they all form as it were one collective trust and therefore must execute the duties of their offices in their joint capacity..... Although a strict definition of "trustee" does not apply to personal representatives who hold property upon trust for the estate, the legal responsibilities and liabilities of executors and administrators of estates are the same and are treated similarly where matters of procedure are in issue. The legal position as to the filing of the suits is that where there are more than one executor or administrator, then they must be joined as parties to the action..... Non-joinder should not be a reason to defeat an action and a court can on its own motion or on application order the names of parties who ought to have been joined to be added..... The only course open to a defendant who objects to the non-joinder of an executor (or administrator for that matter) is to take out summons to have him joined as a plaintiff..... Although the suit as it stands is defective since the joinder of the co-administrator in the suit is necessary, the defect is curable and the suit ought not be struck out."

13. These proceedings therefore ought to have been instituted by both the beneficiaries of the judgement in the earlier suit. However the non-joinder of the co-administrator does not render these proceedings fatally incompetent more so as the application is not opposed in the light of the provisions of Article 159(2)(d) of the Constitution. However any sum payable must be paid to both the decree holders.

14. Accordingly, an order of *mandamus* is hereby issued directed at the Respondent to satisfy the decree arising from High Court Civil Suit Number 710 of 2004 as indicated in the Certificate of Order against the Government. The applicant will have half the costs of this application.

Dated at Nairobi this day 24th day of March 2014

G V ODUNGA

JUDGE

Delivered in the presence of Mr Bett for Mr Kabiru for the Applicant