



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**MISC CIVIL APPL NO. 23 OF 2013**

**IN THE MATTER OF ORDER 53 RULES 1& 2 OF THE CIVIL PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF THE EXECUTION OF THE DECREE IN ISIOLO PMCC NO. 23 OF 2011**

**AND**

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND**

**REPUBLIC.....EX-PARTE APPLICANT**

**VS**

**THE PRINCIPAL SECRETARY MINISTRY OF**

**INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT.....1ST  
RESPONDENT**

**HON ATTORNEY GENERAL.....2<sup>ND</sup>  
RESPONDENT**

**EX-PARTE MOHAMED ABDI.....EX-PARTE  
APPLICANT**

**JUDGEMENT**

1. By a Notice of Motion Application dated 22<sup>nd</sup> August 2013, and brought pursuant to Order 53 Rule 3 (1) of the Civil Procedure Rules, Section 8 and 9 of the Law Reform Act, CAP 26 of the Laws of Kenya, and all other enabling provisions of the Law, the ex-parte Applicant has sought the following orders:

- i. An order of Mandamus directed to the Principal Secretary, Ministry of Interior and Coordination of National Government to pay in full the decretal sum in Isiolo PMCC No. 23 of 2011 together with costs and interests accrued within a specified time frame and in default the 1<sup>st</sup> Respondent be committed to civil jail until payment in full.**

**ii. Costs of this application and any/or further incidentals thereto be borne by the 1<sup>st</sup> Respondent**

**iii. Such further or any other relief be granted to the ex-parte Applicant as this Honourable Court may deem fit to grant**

2. The application is supported by grounds set out in the Statutory Statement attached to the application and facts in the affidavit of the ex-parte Applicant. The ex-parte Applicant's case is that he was the plaintiff in Isiolo PMCC NO.23 of 2011 where he had sued two Police Constables and the Attorney General for damages for unlawful arrest, illegal confinement, and malicious prosecution. Judgment was delivered in his favour on 29<sup>th</sup> June 2012 where the ex-parte Applicant was awarded Kshs 600000/ in general damages and Kshs 100000/ in special damages. Costs were assessed on 25<sup>th</sup> July 2012 and a Certificate of satisfaction of orders against the government issued on 27<sup>th</sup> August 2012.

3. The ex-parte Applicant contends that his advocates have written numerous letters to the 2<sup>nd</sup> respondent seeking satisfaction of the decree which has not elicited any response to date.

4. The application is opposed. The Respondents have filed grounds of opposition on the following grounds:

**I. That the application is fatally defective, misconceived, incompetent and an abuse of court process.**

**II. The application seeks to enforce private rights.**

**III. The application seeks to execute against a government officer contrary to the express provisions of Section 21 (4) of the Government Proceedings Act CAP 40.**

**IV. Judicial review orders are discretionary in nature and are not guaranteed.**

5. Mr. Riungu for the Applicant urged that the original suit originated from a criminal case in which the Applicant sued the State after acquittal. He urged that the Applicant was awarded compensation which the State had failed to satisfy prompting the instant Judicial Review case.

6. Litigation Counsel, Mr. Kieti for the Respondents challenged the competence of the case and urged that the application is fatally defective, misconceived, and incompetent and an abuse of court process for want of compliance with provisions of Order 53 Rule 4 (1) and (2) of the Civil Procedure Rules. Mr. Kieti urged that the dispute falls squarely within the realms of private rights and as such not within the remit of this court to enforce the same in exercise of its Judicial Review jurisdiction. Finally it has been contended for the Respondents that judicial review orders are discretionary in nature and are not guaranteed. Consequently the Respondents urged the court to disallow the application with no orders as to costs.

7. I have carefully considered the application; written and oral submissions by both counsels and the authorities relied upon by the parties. I will begin with the first legal point raised by the Respondents that the application is fatally defective for want of compliance with Order 53 Rule 4(1) and (2) of the Civil Procedure rules. Mr. Kieti urged that the Applicant had filed an affidavit dated 13<sup>th</sup> August, 2013 at the leave stage and another of same date filed with the Notice of Motion. Learned Litigation Counsel urged that the two affidavits were different in content and that the latter one offended Order 53 Rule 4(1) and (2) of the CPR. For that proposition counsel relied on **Sanghani Investment Ltd Vs Officer in charge Nairobi Remand and Allocation Prison (2007) eKLR.**

8. Mr. Riungu for the Applicant did not respond to this submission.

9. I agree with the holding in the cited case of **Sanghani**, supra, to the effect that an Applicant must seek leave to file any further affidavit(s) after leave to apply for judicial review orders is granted. That is also the position as set out under Order 53 R. 4(1) & (2). Order 53 Rule 4(1) and (2) of the CPR provides as follows:

***“4 (1) copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.”***

Sub rule 2 thereof further provides as follows;

***“the high court may on the hearing of the motion allow the said statement to be amended, and allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the application intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement and shall supply on demand copies of any such further affidavits.”***

10. I have scrutinized the affidavit filed at the leave stage and the one filed with the Notice of Motion both which are dated 13<sup>th</sup> August 2013. Both affidavits are one and the same document. The content in each paragraph in both are very much the same including the annexures. Litigation Counsel’s submission that the two affidavits were different was incorrect. Even if the two were different, the application would still be competent as the affidavit filed at the stage of seeking leave contained the evidence required to support the application. Nothing turns on this point.

11. The second ground of opposition raised by the Respondents is that the ex-parte Applicant is seeking to enforce private rights by way of judicial review. The Respondents rely on the case of **KADAMAS V MUNICIPALITY OF KISUMU CIVIL APPEAL NO. 109 OF 1984** which held as follows:

***“The remedy of judicial review is only available where an issue of a public law nature is involved. Judicial review remedy is available where issue is on an ‘Ordinary’ relationship of master and servant with no element of ‘public law’ in it. ”***

12. With respect to the Learned Litigation Counsel, the Court of Appeal in the **Kadamas** case, went further to hold that indeed the judicial review remedy may be applied even in such relationship if the employee Applicant holds an office of great public service in which case the public would be interested. The case does not assist the Respondents case, not just because the subject matter is totally different but because the court itself held that the general rule of public interest being the basis of testing applicability of judicial review was itself qualified by the court in the same case. Nothing turns on this point.

13. The third ground raised by the Respondents is that the application seeks to execute against a government officer contrary to the express provisions of section 21(4) of the Government Proceedings Act. Mr. Kieti urged that the orders sought were tantamount to making the 1<sup>st</sup> Respondent individually responsible for payment of a debt in satisfaction thereof of the decretal sum.

14. Mr. Riungu for the Applicant submitted that the Applicant had complied with the requirements of Order 29 Rule 3 as read with section 21 of the Government Proceedings Act. I have considered the provisions cited. The Applicant has a duly issued judgment against the government that still stands as it has not been appealed against. The necessary taxation for costs has been done and a certificate in that regard issued. It has also been demonstrated that the certificate has been served upon the Attorney General and remains unsatisfied. The relevant Government Department concerned with the claim is the one enjoined in these proceedings. The Applicant has therefore complied with the provisions of section 21 of the Government Proceedings Act and Order 29 Rule 3 of the Civil Procedure Rules.

15. It is trite law that judicial review orders are discretionary in nature. I agree with Mr. Kieti in his last ground of opposition. In **The Supreme Court Practice 1997 VOL53/1-14/14**, it is stated as follows:

***“Even if a case falls into one of the categories where judicial review will lie the court is not bound to grant it; the jurisdiction to make any of the various orders available in judicial review is discretionary. What orders the court will make depends on the circumstances of the particular case”***

16. The issue to determine is whether the order sought of Mandamus should issue in this case? Judicial Review is a special jurisdiction of the Court. It does not concern itself with the merits of the case but with the process of decision making. In **COMMISSIONER OF LAND VERSUS KUSTE HOTEL NAKURU CA NO. 234 OF 1995** the Court of Appeal cited with approval an English case, **Chief Constable of the North Wales Police Vs Evans [1982] 1WLR 1155** thus:

**“The purpose of Judicial Review is to ensure that the individual receives fair treatment and not to ensure that the authority, after according a fair treatment, reaches on a matter which is authorized by law to decide for itself a conclusion which is correct.”**

17. In order to have an order in Judicial review, an Applicant must satisfy the court that either the Tribunal or decision making body exceeded its powers, or the Applicant was not given an opportunity to be heard, or they acted illegally or unreasonable or that there was procedural impropriety. See **COUNCIL OF CIVIL SERVICE UNIONS VS MINISTER FOR THE CIVIL SERVICE (1985)AC 374.**

18. The ex-parte Applicant relies on **REPUBLIC Vs PERMANENT SECRETARY MINISTRY OF WATER RESOURCES MANAGMENT & DEVELOPMENT EX-PARTE AKAMBA TIMBER & HARDWARE LTD (2006) eKLR.** In this case the learned judge was faced with a Judicial Review application for an order of Mandamus to issue compelling the Permanent Secretary in the Ministry named to pay the decretal sum in a judgment entered against the government. The learned judge while granting the order observed:

**“...there is no doubt that the respondents are public bodies or officers. I am also satisfied that they have a public duty to settle a decree which is an order of the court. They have not raised any ground why they should not settle the decree. The applicant has no alternative mode having his judgment satisfied so that he can enjoy it. Under these circumstances it is my view and finding proper to compel the respondents to settle the decree by the issue of a mandamus order as prayed.”**

19. The same position was taken in the second case cited of **REPUBLIC V PS INTERNAL SECURITY & 2 OTHERS ELDORET MISC CIVIL APPL NO.278 OF 2003.** I agree with the propositions in both cited cases. In this case the ex-parte Applicant was given judgment for damages against the Respondents for illegal acts, and was also awarded special damages for expenses incurred in the process of the acts complained of in the suit before the lower court. It has been proved, as I stated earlier that the Respondents now in court have a public duty to settle the decree which is an order of the court. They have not raised any ground why they should not settle the decree. The Applicant has no alternative mode having his judgment satisfied so that he can enjoy it. I therefore find that they should satisfy the decree as prayed for in these proceedings.

20. Having come to the conclusion I make orders as follows:

a). **An order of Mandamus as prayed for be and is hereby issued directed at the Principal Secretary, Ministry of Interior and Coordination of National Government to pay in full the decretal sum in Isiolo PMCC No. 23 of 2011, together with costs and interests accrued.**

b). **The ex-parte Applicant will also get the costs of this case.**

**DATED AND DELIVERED AT MERU THIS 20<sup>TH</sup> DAY OF MARCH, 2014**

**LESIIT, J.**

**JUDGE**