



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

FAMILY DIVISION

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 4 OF 2013 (JR)

**IN THE MATTER OF THE OF: AN
APPLICATION BY WYCLIFFE SAYIA**

**OKUNGU FOR LEAVE TO ISSUE OF
ORDERS OF MANDAMUS**

AND

**IN THE MATTER OF: EXECUTIVE
PROCEEDINGS IN THE COURT OF**

**APPEAL OF KENYA AT
KISUMU**

AND

**IN THE MATTER OF: 1. PERMANENT
SECRETARY OFFICE OF THE**

**PRESIDENT PROVINCIAL
ADMINISTRATION AND
INTERNAL.**

SECURITY

**2. ATTORNEY
GENERAL**

BETWEEN

1. WYCLIFFE SAYIA OKUNGU..... APPLICANT

=VERSUS=

1. JOEL KAYERI RISAMIRA
2. NELSON RAVAZA KINYANGI
3. DISTRICT LAND SURVEYOR - VIHIGA
4. THE ATTORNEY GENERAL RESPONDENTS

RULING

By way of a Notice of Motion dated 18th February, 2013 the Ex-parte Applicant **WYCLIFFE SAYIA OKUNGU** sought the following orders:

“(A) **THAT** an order of mandamus be issued to

compel the Permanent Secretary in the Office of the President to effect payment of the decretal sum together with costs and interest made pursuant to the judgment delivered on 14th June,2012 by the Court of Appeal at Kisumu in C.A. No. 25 of 2006 WYCLIFFE SAYIA OKUNGU VS. JOEL KAYERI RISAMIRA and 3 OTHERS.

(B) **THAT** the costs of this application e provided

for.”

This application arises from the judgment dated 14th June, 2012 delivered by a three-bench Court of Appeal sitting in Kisumu. The court delivered judgment in favour of the Ex-parte Applicant and awarded him the sum of Kshs. 515,840.00 against all three defendants jointly and severally. It is this award that the Ex-parte Applicant now wants the respondents to be compelled to pay by way of an order of mandamus. The application was heard by way of written submissions. I have carefully perused the submissions filed by both counsel in this matter. **MR. NGARI** for the Hon. Attorney General opposed the application on two main grounds.

1. Lack of jurisdiction by this court to entertain the claim.
2. The orders sought are prejudicial to the respondent.

On the first ground of opposition the Hon. Attorney General submits that the High Court in Mombasa lacks jurisdiction to hear and determine this matter. There is no doubt at all that the Court of Appeal case being **Civil Appeal No. 25 of 2006** which gave rise to this Misc. Application was heard and determined in Kisumu. Does that therefore mean that any application for Judicial Review arising from that decision can only be filed, heard and determined in Kisumu and nowhere else. I think not. Mr. Ngari has cited section 12(e) of the Civil Procedure Act which provides that any suit for compensation for wrong to immovable property “*shall be instituted in the court within the local limits of whose jurisdiction the property is situate*” [my emphasis]. The words used in section 12(e) is ‘*instituted*’ which refers to the institution of the original suit. In this case the original claim was for an injunction restraining the defendants from trespassing onto the Ex-parte Applicant’s plot of land which land was situated in Western Kenya. The Ex-parte Applicant did fully comply with section 12(e) by **instituting** his suit at the Kisumu High Court which is the court within the local limits of whose jurisdiction the property was situated. Indeed even the appeal was heard by the Court of Appeal sitting in Kisumu. The Ex-parte Applicant obtained judgment in his favour. He is now seeking to realize or enforce that judgment. Thus this Miscellaneous Application is no longer about a claim for compensation – it is about enforcing a judgment which has already been awarded. He is seeking orders to compel the Government to effect payment of the award made in his favour. The ‘*Government*’ cannot be said to be located only in Kisumu. The Government and more specifically the Office of the Hon. Attorney General is to be found in each and every location in this country. Order 53 of the Civil Procedure Rules provides for the procedure to be followed in making applications for Judicial Review. Nowhere in Order 53 is any limit

placed on the **location** where such an application can be made. Order 53 rule 3(1) only provides that application for Judicial Review shall be made in the High Court. The High Court has jurisdiction throughout the country.

In the case of **Owners of the Motor Vessel ‘Lillian S’ vs. Caltex Oil (Kenya) Limited [1989] KLR** the Court of Appeal in discussing the question of jurisdiction held that

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statutes, charter, or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited.” [my emphasis]

Article 165(3)(a) of the Constitution provides that the High Court shall have

“Unlimited original jurisdiction in criminal and civil matters.”

I therefore find that this court has proper jurisdiction to hear and determine this matter. Section 12(e) of the Civil Procedure Act refers only to the place where a suit is to be instituted and not where actions to enforce awards must be filed. The rules regarding in which High Court a matter is to be filed do not limit any High Court’s jurisdiction but are purely **administrative** rules put in place for the convenience of the parties. The Ex-parte Applicant has indicated that he resides in Mombasa. There is nothing to prevent the High Court in Mombasa from determining this matter and I would not decline to entertain this application on that ground alone. I therefore dismiss the first limit of the Grounds of Opposition.

The second limit of opposition which has been raised by Mr. Ngari in his submissions but which did not appear in the Grounds of Opposition filed on 10th April, 2013 is that of prejudice. It is argued that to allow orders of mandamus against the Hon. Attorney General and to leave out the other respondents would be prejudicial. The original suit filed in Kisumu named four (4) defendants of which the Hon. Attorney General was the 4th defendant. In its judgment the Court of Appeal at page 14 paragraph 25 held as follows:

“25. We believe we have said enough to demonstrate that the judgment of the trial Judge cannot stand. We set aside the judgment of the trial Judge together with all consequential orders and substitute thereof judgment for the appellant against the respondents jointly and severally in the sum OF Kshs. 315,840/= as special damages and Kshs. 200,000/= as general damages together with costs and interest from the date of this judgment. We further award costs of the appeal to the appellant. Those shall be the orders of this court.” [my emphasis]

The court clearly entered judgment as against the respondents jointly and severally. This means that the Ex-parte Applicant is at liberty to proceed against either all four respondents or against any one of them. There is no law obliging the Ex-parte Applicant to seek to execute against all the four respondents. This ground of opposition has no basis and is hereby dismissed. I therefore allow this application for orders of mandamus and I do allow the present application in terms of prayer (A). Each party to meet its own costs.

Dated and delivered in Mombasa this 25th day of April, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Miyalla h/b Mr. Asige

No Appearance for Respondent

Court Clerk Mutisya