



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 107 OF 2013**

**IN THE MATTER OF:**

**AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF THE CIVIL CASE NO. 4143 OF 2009**

**AND**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE HONOURABLE ATTORNEY GENERAL..... 1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE..... 2<sup>ND</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY PROVINCIAL**

**ADMINISTRATION & INTERNAL SECURITY..... 3<sup>RD</sup> RESPONDENT**

**JOSEPH OMBASO MASESE..... EX-PARTE APPLICANT**

**JUDGEMENT**

1. By a Notice of Motion dated 3<sup>rd</sup> July, 2013 the *ex parte* applicant herein, **Joseph Ombaso Masese**, seeks the following orders:
  1. **That this Honourable Court be pleased to issue an order of mandamus compelling the 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein forthwith pay the ex parte Applicant the sum of Kshs. 261,364.40 being the decretal sum in NAIROBI CMCC NO. 4143 OF 2009 together with interest thereon at 12% p.a from 13<sup>th</sup> May, 2011 till payment in full.**
  2. **THAT the costs of this application be provided for.**
2. The application was supported by a supporting affidavit sworn by the Applicant herein.
3. According to the applicant, on the 7<sup>th</sup> July 2008 he was travelling in motor vehicle KAU 938 P

- along Race Course Road when police men on patrol fired on the said *matatu* whereupon he was severely injured. He then filed a suit in respect of the said incident being Nairobi CMCC No. 4143 of 2009 against the Honourable Attorney General in which he was awarded a sum of Kshs. 189,310/=.
4. Pursuant to the said judgement a decree was issued as well as a certificate of order against the Government. However despite severally demands for payment thereof no response was forthcoming from the 1<sup>st</sup> Respondent.
  5. However, upon service of the application for leave to institute judicial review proceedings, the 1<sup>st</sup> respondent vide its letter dated 19<sup>th</sup> April 2013 and 30<sup>th</sup> April 2013, requested for information and documents which information and documents were provided by his advocates.
  6. As the Respondents have failed to satisfy the said judgement, the applicant prayed that they be compelled to remit the decretal sum of Kshs. 126,367.40 together with interest from the 13<sup>th</sup> May 2011 with payment in full.
  7. The application was not opposed by the Respondents.
  8. I have considered the application, the verifying affidavit as well as the submissions file on behalf of the applicants.
  9. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**, 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 have no reason to depart from my findings therein.

11. In the absence of any replying affidavit, this court finds merit in the Notice of Motion dated 3<sup>rd</sup> July, 2013. Accordingly, an order of mandamus is hereby issued directed to the 2<sup>nd</sup> and 3<sup>d</sup> Respondents compelling them to pay the ex parte Applicant the sum of Kshs.261,364.40 with interest thereon at 12% p.a. from 13<sup>th</sup> May, 2011 till payment in full. The applicant will have the costs of this application.

**Dated at Nairobi this day 28<sup>th</sup> of May 2014**

**G V ODUNGA**

**JUDGE**

***Delivered in the absence of the parties***