



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISCELLANEOUS CIVIL APPLICATION NO. 85 OF 2014

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT, CAP 40 LAWS OF KENYA

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

EX PARTE DAVID KIRURI MUMIRA

JUDGEMENT

1. By a Notice of Motion dated 3rd April, 2014 the *ex parte* applicant herein, **David Kiruri Mumira**, seeks an order an order of Mandamus do issue against the Attorney General compelling the said Office to pay to the *ex parte* applicant the sum of Kshs 295,068/= being the decretal amount in Kikuyu SRMCC No. 153 of 2005 at Kikuyu (hereinafter referred to as the said suit) together with Kshs 63,715/= being the certified costs thereon together with interest thereon at Court rates from 25th July, 2008 until payment in full. The applicant also seeks an order that the costs of this application be borne by the Respondent.
2. The applicant's case as can be deduced from the Statement and the affidavit in support of his case is that he is the decree holder in the said suit which he filed against the Respondent herein for malicious prosecution and in which he was awarded a judgement in the sum of Kshs 250,000/= together with costs in the sum of Kshs 63,715/= on 25th July, 2008.
3. Despite demands made and being served with the Decree, Certificate of Costs and Certified copies of the pleadings, the applicant avers that the said judgement has not been settled hence this application.
4. The application was not opposed by the Respondents.
5. I have considered the application, the verifying affidavit as well as the Statements and the documents on record and the submissions filed.
6. 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.”

7. I adopt the reasoning in the said case here as well.
8. A look at the copy of the decree exhibited to these pleadings show that judgement was entered in the sum of Kshs 250,000.00 with costs and interest on the principal sum at the rate of 8% per annum from 4th August 2008. The manner in which the prayers are sought in this application seem to indicate that the applicant is seeking interests not only on the principal sum but also on costs and interests.
9. Whereas under section 27(2) of the *Civil Procedure Act*, the Court may award interest on costs not exceeding fourteen per cent, that is an exercise of the Court’s discretion.
10. Accordingly the order which commends itself to me is that an order of *mandamus* is hereby issued compelling the Defendant to pay the ex parte applicant Kshs 250,000.000 with interest at the rate of 8% per annum from 4th August 2008 till payment in full together with costs in the said sum of Kshs 63,715.00. The costs to be borne by the Respondent. **Dated at Nairobi this 26th day of June 2014**

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Gachugi for the Applicant

Cc Kevin