



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 162 OF 2013

**IN THE MATTER OF AN APPLICATION FOR ORDER OF MANDAMUS DIRECTED TO THE
PERMANENT SECRETARY, OFFICE OF THE PRESIDENT REQUIRING HIM TO
PERFORM HIS PUBLIC DUTY AND TO PAY TO THE APPLICANT DECRETAL DUES
ARISING FROM HCCC NO. 1485 OF 1999**

BETWEEN

PROF. PETER AMOLO ODHIAMBO &1ST RESPONDENT

MRS. PENINAH APIYO OCHOLA ODHIAMBO.....2ND RESPONDENT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGEMENT

1. By a Notice of Motion dated 28th May, 2013 the *ex parte* applicants herein, **Prof. Peter Amolo Odhiambo and Mrs. Peninah Apiyo Ochola Odhiambo**, seek the following orders:

1. THAT this honourable court do issue an order of Mandamus by way of Judicial Review directed to the Permanent Secretary, office of the President to pay ex-parte Applicants the decretal sum in HCCC No. 1485 of 1999 of Kshs. 12 million.

2. THAT interest and costs be provided for.

2. The application was supported by a supporting affidavit sworn by **Betty Laura Rashid**, the Applicants' Advocate on 10th May, 2013.

3. According to the deponent, the Applicants were the Plaintiffs in HCCC NO. 1185 of 1999, for recovery of Kshs 10,017,640.60 being special damages arising from fatal accident whereby the Applicants' son was shot by the police officers attached to the Office of the President. The said suit, it was deposed, was heard and finalized and judgment was entered in favour of the Plaintiffs' for the said sum plus costs and interests.

4. Pursuant thereto, a decree was issued for Kshs. 9,711,560.60 together with interest thereon at the rate of 12% p.a. from 24th May 2012 and costs assessed at Kshs. 270,285.50 making a total of Kshs. 10,601,257.37 which amount continues to accrue interest at Court rates from 24th May 2012 until the date of payment in full.

5. Despite demand made therefor to the Attorney General no payment has been forthcoming.

6. The application was not opposed by the Respondents.
7. I have considered the application, the verifying affidavit as well as the Statements and the documents on record.
8. I have noted that the Application is brought against the Attorney General rather than the Permanent Secretary though the orders are sought against the latter. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In this case the Respondent ought to have been the Permanent Secretary as they were known then and not the Attorney General. However, as this is mere misjoinder the same ought not to be fatal to the application though the Court may in exercise of its discretion deny the applicant even if successful costs of the application.
9. Apart from that the affidavit in support of the application was sworn by the advocate rather than the applicants themselves. It is now trite that advocates ought not to swear affidavits on contested facts or facts which are likely to be contested if their clients are available to swear the same. In this case, however no issue arises as the averments are not contested. However that is an issue which the Court may properly take into account in making a decision on costs.
10. 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."

11. I have no reason to depart from my findings therein.
12. In the judgement which gave rise to the instant application the Court awarded the Applicants Kshs 9,447,547.00 with interests at the rate of 12%. According to the decree the judgement was on 29th February, 2012. The costs were awarded in the sum of Kshs 270,285.50 and the certificate of costs is dated 5th December, 2012. .
13. In this application the applicants however claim Kshs 12,000,000.00 which according to the submissions include what are termed as "miscellaneous and costs". No basis or justification has been laid for the same. From the decree exhibited there is no express award of interests on costs. 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.
14. Accordingly the order which commends itself to me is that an order of mandamus is hereby issued compelling the Permanent Secretary, Office of the President to pay the ex parte applicants Kshs 9,711,560.00 with interest at the rate of 12% p.a. from 29th February, 2012 until payment in full and costs in the sum of Kshs 270,285.50
15. In light of what I have stated hereinabove there will be no order as to the costs of this application.

Dated at Nairobi this 23rd day of June 2014

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

Cc Kevin