REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW MISC. APPLICATION NO. 256 OF 2013

IN THE MATTER OF AN APPLICATION BY PATRICK MUTUA MBITHI FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF THE PERMANENT SECRETARY, OFFICE OF THE PRESIDENT

AND

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

BETWEEN

REPUBLIC ..... APPLICANT

VERSUS

PERMANENT SECRETARY, OFFICE OF THE PRESIDENT……RESPONDENT

EX-PARTE.....PATRICK MUTUAL MBITHI

JUDGEMENT

1. By a Notice of Motion dated 31st October, 2013 the *ex parte* applicant herein, **Patrick Mutua Mbithi**, seeks the following orders:

    1. THAT an order of Mandamus be issued directed to the Respondent, the Permanent Secretary to the Office of the President, to pay to the Applicant the Sum of Kshs. 122,000.00 being the Decretal amount in Chief Magistrate's Court at Nairobi Civil Case No. 213 of 2008 together with Kshs. 43,065.00 being the certified costs thereon together with interest thereon at 12% per annum from 7th July, 2010 until payment in full.

    2. THAT the costs of this application be in the cause.

2. The application was supported by a supporting affidavit sworn by the Applicant herein on 17th May, 2013.
3. According to the applicant, he is the Decree holder in Chief Magistrate's Civil Case No. 213 of 2008.

4. In his affidavit he confirmed that he had read the Statement including its annextures filed with the Application in this matter and stated that all the facts set out herein relating to the Proceedings in CMCC No. 213 of 2008, the Judgment, Decree and Certificate under the ***Government Proceedings Act***, demands for payment made and correspondence from his advocates on record and the failure to pay the Decretal sum together with interest thereon, were true.
5. The application was not opposed by the Respondents.
6. As clearly shown by the affidavit, the same was very scanty. Although to the said affidavit were annexed copies of documents, the same were not identified in the body of the affidavit at all. To the contrary, the Statement seems to be the one in which the facts were outlined.
7. Once again I wish to remind parties of the decision by the Court of Appeal in **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000,** in which the Court expressed itself as follows:

   "We are certain that the issue of the procedure used does not arise inasmuch as the applicant has not ruled out the possibility of the bulk of the products containing the chemical used only in the products meant for export. That much is clear from some of the matters in the Statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters. We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:

   > **'The application for leave "By a statement" – The facts relied on should be stated in the affidavit (see R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.'**

   At page 283 of the report of the case of R v. Wandsworth Justices, Viscount Caldecote CJ said:

   > **'The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.' "**

8. In the interest of justice I will, nevertheless consider the statement of facts though I will revisit this issue later in this judgement.
9. I have considered the application, the verifying affidavit as well as the Statements and the documents on record.
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 nolonger 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 absence of any replying affidavit, this court finds merit in the Notice of Motion 31st October, 2013. Accordingly, an order of mandamus is hereby issued directed to the Respondent, the Permanent Secretary to the Office of the President, to pay to the Applicant the Sum of Kshs. 122,000.00 being the Decretal amount in Chief Magistrate's Court at Nairobi Civil Case No. 213 of 2008 together with Kshs. 43,065.00 being the certified costs thereon together with interest thereon at 12% per annum from 7th July, 2010 until payment in full.
13. However as the applicant's verifying affidavit did not comply with the law with respect to the facts of the case, there will be no order as to costs.

Dated at Nairobi this 17th day of June 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Amwayi for the Applicant

Cc Kevin