



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION)

MISCELLANEOUS CIVIL APPLICATION NO. 136 OF 2014

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

IN THE MATTER OF: THE CIVIL PROCEDURE ACT, RULES 2010, CAP 21 LAWS OF KENYA, ORDER 53 RULE (1) (2)

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

BETWEEN

BEN NJOROGE MITHAMO.....1ST APPLICANT

JOHN CHEGE GATETE.....2ND RESPONDENT

AND

THE HON. SOLICITOR GENERAL.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

1. By a Notice of Motion dated 7th July, 2014 the *ex parte* applicants herein, **Ben Njoroge Mithamo** and **John Chege Gatete**, seek the following orders:
 1. **THAT this Honourable court do issue an order of mandamus compelling the solicitor general the 1st Respondent who is the chief accounting officer/principal secretary at the state law office and on behalf of the attorney general the 2nd respondent herein to settle the decretal amount in Kiambu SPMCC No. 148 of 2004 in the sum of Kshs 352,305/= plus costs and further interests accrued thereon.**
 2. **That the costs of this application be provided for.**
2. The application was supported by a supporting affidavit sworn by **Ben Njoroge Mithamo** sworn on 16th January, 2014.
3. According to the applicants, judgement was delivered in their favour against the 2nd Respondent herein in Kiambu SPMCC No. 148 of 2004 (hereinafter referred to as the civil suit) on 15th February, 2007 by which they were awarded Kshs 201,000/= as general damages for unlawful arrest and illegal confinement.

4. As no appeal was lodged against the said judgement, a decree, certificate of costs and notice of entry thereof we served upon the Attorney General, the 2nd Respondent herein on 19th May, 2009. Similarly a certificate of order against the Government dated 6th October, 2009 was served on the same Respondent on 9th October, 2009.
5. It was further contended that a fresh decree and certificate of order against the Government dated 26th November, 2013 was served upon the same Respondent on 29th November, 2013 and as per the said certificate the decretal amount now stands at Kshs 352,305/= inclusive of further interests.
6. However despite the foregoing no effort has been made to clear the decretal sum which failure according to the applicants is hindering them from enjoying the fruits of their validly obtained judgement hence the orders sought herein.
7. In their submissions, the applicants reiterated the foregoing.
8. The Respondent however did not oppose the application.
9. I have considered the application, the verifying affidavit as well as the Statements and the documents on record together with the submissions filed and the authorities cited therein.
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**, this Court expressed itself 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. The said holdings apply with equal force to the instant application.

12. In the absence of any opposition to the application and having considered the material on record, I find merit in the amended Notice of Motion dated 7th July, 2014. Accordingly, an order of mandamus is hereby issued the solicitor general the 1st Respondent who is the chief accounting officer/principal secretary at the state law office and on behalf of the Attorney General the 2nd respondent herein to settle the decretal amount in Kiambu SPMCC No. 148 of 2004 in the sum of Kshs 352,305/= and further interests accrued on the principal sum, if any.

13. The applicants will have the costs of this application.

Dated at Nairobi this 31st day of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kimathi for the Applicant

Cc Kevin