



IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 31 OF 2013

IN THE MATTER OF AN APPLICATION BY LEPAPA OLE KISOTU FOR THE JUDICIAL REVIEW ORDER OF MANDAMUS

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA AND THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF ENFORCEMENT OF THE AWARD OF COSTS IN FAVOUR OF LEPAPA OLE KISOTU MADE IN NAIROBI HIGH COURT MISC. APPLICATION NO. 690 OF 1997 LEPAPA OLE KISOTU VS. NTULELE GROUP RANCH & ANOTHER

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE DISTRICT COMMISSIONER -NAROK1ST RESPONDENT

THE PERMANENT SECRETARY, OFFICE OF THE PRESIDENT AND INTERNAL SECURITY.....2ND RESPONDENT

EX-PARTE:

LEPAPA OLE KISOTU

JUDGEMENT

1. By a Notice of Motion dated 17th March, 2014 the *ex parte* applicant herein, **Lepapa Ole Kisotu**, seeks an order for mandamus compelling the 2nd Respondent to pay to him the sum of Kshs 1,000,000.00 being the applicant's costs in Nairobi High Court Miscellaneous Application No. 690 of 1997 (hereinafter referred to as the said Cause) and in default thereof for the committing of the 2nd Respondent to civil jail. The applicant also seeks the costs of the Motion.
2. The grounds upon which the Motion is based are that the applicant had in the said Cause instituted proceedings against the District Commissioner Narok and Another seeking orders which were granted together with costs. The said costs were taxed in the sum of Kshs 1,496,310.00 against the said District Commissioner.

3. However the parties negotiated the said figure downwards and agreed vide a consent letter dated 10th November 2011 to reduce the same to Kshs 1,000,000.00 all inclusive which consent was filed in Court on 16th November, 2011 and was recorded in court on 2nd October, 2013 in the presence of both counsel.
4. However, despite correspondences and follow ups the said sum remains unpaid despite being statutorily bound to do so.
5. It is the failure to settle the said sum that has provoked the instant proceedings as the applicant is of the view that the Respondent's actions are indefeasible and unreasonable thus warrants the Court's intervention.
6. The application was supported by the applicant's verifying affidavit sworn on 30th January, 2013 and a further affidavit sworn on 28th November, 2013. In the said affidavit the applicant expounded on his position as enumerated hereinabove and exhibited documents in support of his case.
7. I have considered the same as well as the submissions filed on behalf of the applicant herein.
8. 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."

9. In the absence of any replying affidavit, I find merit in the Notice of Motion dated 17th March, 2014. Accordingly, an order of mandamus is hereby issued compelling the 2nd Respondent to pay to the applicant the sum of Kshs 1,000,000.00 being the applicant's costs in Nairobi High Court Miscellaneous Application No. 690 of 1997. I further grant the costs of the application to the applicant.
10. With regard to the prayer for committal of the 2nd Respondent, the decision whether or not to commit a respondent to civil jail in my view can only be made where there is proof that the respondent has disobeyed the Court order duly served on him together with the penal notice. In effect the said prayer is at this stage premature.

Dated at Nairobi this 24th day of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Arusei for the Applicant

Cc Kevin