



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC.CIVIL APPLICATION NO.12 OF 2013

**IN THE MATTER OF: APPLICATION BY MARGARET NANGURANI PAULO FOR
JUDICIAL REVIEW (MANDAMUS)**

AND

IN THE MATTER OF: KILGORIS PMCC NO.3 OF 2010

AND

IN THE MATTER OF: JUDGMENT AND DECREE DATED 22ND JUNE 2012

AND

IN THE MATTER OF: FAILURE/NEGLECT TO PAY DECRETAL SUM

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE INSPECTOR GENERAL)

THE PRINCIPAL SECRETARY,)

THE INTERIOR MINISTRY) RESPONDENTS

THE CABINET SECRETARY,)

THE INTERIOR MINISTRY)

THE HON. ATTORNEY GENERAL)

AND

EX-PARTE

MARGARET NANGURANI PAULO

RULING

1. By the Notice of Motion dated 30th October 2013, the ex-parte applicant herein Margaret Nangurani Paulo seeks the following orders:-

1.
2. *That the Honourable Court be pleased to grant an order of judicial review in the nature of mandamus to issue against the respondents herein, to compel the respondents to satisfy and/or settle the decree issued by the Honourable Court on the 22nd day of June 2012, vide Kilgoris PMCC No.3 of 2010 in favour of the applicant, currently standing in the sum of Kshs.626,677/= only, inclusive of costs and interests.*
3. *Compliance with the order for Mandamus be carried out and/or undertaken within 30 days from the date of issuance and service of the writ of mandamus upon the respondents and/or such time line as the Honourable Court may deem fit and expedient.*
4. *Costs of this application be borne by the respondents jointly and severally.*
5. *Such further and/or other orders be made as the court may deem fit and expedient.*

1. The application was supported by a verifying affidavit sworn by Margaret Nangurani Paulo, the applicant herein on 28th October 2013.
2. According to the applicant, on 17th February 2009, she had hired a taxi together with four (4) others, to take her and the said 4 others to a traditional Maasai wedding at a place known as Rusanki area. Upon completion of the traditional Maasai wedding, all the 5 of them boarded the same taxi and commenced their journey back.
3. While on their way and upon reaching Esoit area, two police officers whose identities she later came to know as PC Franckline Tsuma and PC John Njuguna sprayed bullets onto the taxi and occasioned various injuries onto herself and others. Subsequently, she was assisted and taken to Transmara Level 4 Hospital where she was admitted and received medical treatment for the injuries she had sustained as a result of the unlawful attack occasioned to her by the said police officers.
4. Upon being discharged from hospital, she consulted and thereafter instructed her advocates on record to commence civil proceedings against the respondents. Subsequently, civil proceedings vide Kilgoris PMCC NO.3 of 2010 were mounted, heard and determined vide judgment and decree rendered on 22nd June 2012. On issuance of decree and certificate of costs, it was incumbent upon the 3rd respondent, through the Accounting Officer in the office of the President, Ministry of Internal Security and Provincial Administration (Interior Ministry) to prepare and issue a settlement cheque in respect of the decretal sum and in satisfaction of the decree.
5. However, the 3rd respondent together with the relevant accounting officer that is the 2nd respondent have failed, neglected and/or refused to pay and/or settle the decretal sum. However, the 4th respondent herein participated in the proceedings before the subordinate court and duly represented the interests of the police officers, who were officers in the employment of the Government of the Republic of Kenya.
6. Subsequently, upon delivery of the judgment and attendant decree, the exparte applicant's advocates on record, duly extracted the decree and forwarded a copy of the said decree and certificate of costs to the 4th respondent to facilitate preparation of the statement of cheque. That notwithstanding, the terms of the judgment and decree, the 2nd and 3rd respondents have persisted/insisted on refusing to honour and/or settle the judgment of the Honourable Court vide Kilgoris PMCC NO.3 of 2010 without any reasonable and/or lawful cause whatsoever.
7. The applicant finally depones that the conduct and/or actions of the respondents amount to and/or constitute abdication or dereliction of public duty and that unless respondents are compelled to comply with/or perform public duty there exists a high likelihood of the abdication/dereliction of duty continuing.
8. The respondents specifically the 4th respondent entered appearance on 15th November 2013 on behalf of all the respondents in this suit.
9. When the matter came before court on 10th March 2014, Mr. Nyauma for the respondents submitted that they were not ready to proceed because they never participated in the original case at Kilgoris. He submitted that he was seeking for the file from Kilgoris and that he was also awaiting instructions from the officers concerned. He therefore prayed that the court grants him

adjournment for one month to enable him file their responses to the motion.
10. Mr. Oguttu for the applicant opposed the application on 3 points:-

- *That all respondents are officers/departments in the Government of the Republic of Kenya. They are therefore bound by **Article 47 of the Constitution** on the necessity to undertake their work efficiently, expeditiously, diligently and that in this case they had not done so;*
 - *That no explanation was given by his learned colleague as to the failure to obtain documents or instructions as no letter was placed before this court to show that the 4th respondent wrote to the other respondents.*
1. Mr. Oguttu also submitted that the current Government is a digital government which should have all its information/documents digitalized. He submitted that even though court has discretion, such discretion should be exercised in respondents' favour.
 2. Mr. Nyauma in reply submitted by reiterating his earlier submissions and told the court that the action of filing a memorandum of appearance is an indication that he is intent to defend this matter. Regarding instructions, he submitted that though they are continuously in touch with respondents they were not able to respond to an application when they have no instructions.
 3. After evaluating the above submissions by both counsels, I gave the respondents one more chance to file replies/objections to the application on or before 30th April 2014 and set the matter for inter party hearing on 13th May 2014.
 4. When the matter came before me again on 13th May 2014 the respondents had neither filed any replying affidavit nor did they attend court to explain why the said replying affidavit had not been filed. On the other hand, Mr. Ochwangi, learned counsel for the applicant submitted that their application dated 30th October 2013 was unopposed, and prayed for an order of judicial review in the nature mandamus in terms of prayer 2 for satisfaction of decree issued by Kilgoris PM's court for a sum of Kshs.626,677/= inclusive of costs and interests. He also prayed that once the order is issued as prayed, the same be executed within 30 days. He also prayed for costs.
 5. I have now considered the application, the verifying affidavit as well as the submissions on behalf of the applicant.
 6. In High Court Judicial Miscellaneous Application No.44 of 2012 [2014] e KLR – Republic - vs- AG & another Ex-parte James Alfred Kosono, Odunga J observed:-

“..... In the present case the ex-parte applicant has no other option of realizing the fruits of his judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that he has been awarded is realized. 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 judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed in their paths by actions or nonaction of public officers. 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 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 necessary mean that he cannot owe a duty to a subject as well as to the Government which he served. 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 recognized that when statutory duty is cast upon a public officer in his official capacity and the 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 infact 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 as 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 entirely agree with the above observation by Odunga J. and would reiterate them here as if they fell from my own lips. I also must add that in this age of constitutional freedoms, each arm of the Government is expected to do its work diligently, honestly and without fear or favour. Failure to do so can only mean one thing: a return to the dark days when justice would often times be dispensed at the whim of the executive. Those were dark days that are fit to be tossed into the sea of forgetfulness and left there, to rest forever and be remembered no more.
8. For the reasons above, an order of mandamus in accordance with prayer 2 is hereby issued compelling the respondents to pay Kshs.626,677/= only inclusive of costs and interests within 30 days from the date of issuing this order.
9. Orders accordingly

Dated, signed and delivered at Kisii this 29th day of October, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Ochwangi (present) for Applicant

M/s Chepkurui for Respondents

Mr. Bibu - Court Assistant