



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISCELLEANOUS APPLICATION NO. 252 OF 2011

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

EX PARTE: EVELYNE KHAMASI AMBOYI

JUDGEMENT

1. By a Notice of Motion dated 9th March, 2012 the *ex parte* applicant herein, **Evelyne Khamasi Amboyi**, substantially seeks an order of mandamus compelling the Commissioner of Police (Inspector-General of the National Police Service) to pay the applicant the decretal amount of Kshs 742,891/= as at 22nd March, 2011 and costs of Kshs 98,311/= as at the same date together with interest at court rate thereon till payment in full. The applicant also sought the costs of these proceedings.
2. According to the applicant on 3rd August 2012, she bought motor vehicle registration no. KBJ 539A, Toyota NZE from **Eunice Njeri Wachira** (hereinafter referred to as the Vendor) and took possession thereof. However subsequently CID Police from Nairobi CID Headquarters purporting to be acting on behalf of the said Vendor seized the said vehicle from the applicant.
3. As a result thereof the applicant instituted CMCC No. 7945 of 2009 against the said Vendor but later discovered that the said Vendor had sued the Attorney General and 2 Others in CMCC No. 7341 of 2001 as a result of which the two suits were consolidated. However the said Vendor did not defend the said suit and similarly the Attorney General did not defend the Vendor's suit against it.
4. Thereafter the consolidated suit was set down for formal proof and judgement entered in favour of the applicant on 22nd March, 2011. In support of her case the applicant exhibited copies of the decree and certificate of costs.
5. It was deposed that despite the Respondent having been sent a copy of the decree and the certificate of costs as well as a certificate of order against the Government receipt of which were duly acknowledged, the Respondent refused, neglected and or declined to satisfy the decree hence these proceedings.
6. The application was however not opposed by the Respondent.

7. I have considered the foregoing.

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. I have noted that the Application is brought against the Attorney General rather than the Permanent Secretary though the orders are sought against the Commissioner of Police or the Inspector General of Police Service. 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 or Principal Secretary in the concerned Ministry and not the Attorney General and the orders similarly should have been sought against the said officer rather than the Commissioner of Police or Inspector General since that is not the accounting officer. However, as this is mere

misjoinder or non-joinder 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.

10. In the absence of any replying affidavit, I find merit in the Notice of Motion 30th September, 2013 and grant the following orders:

1. An order of mandamus compelling the accounting officer responsible for the National Police Service to pay the applicant the decretal amount of Kshs 742,891/= as at 22nd March, 2011 and costs of Kshs 98,311/= as at the same date together with interest at court rate thereon till payment in full.

2. Due to misjoinder or non-joinder of parties there will be no order as to costs.

Dated at Nairobi this 9th day of December, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mureithi for Mr L M Ombete for the Applicant

Cc Richard