



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 283 OF 2012**

**IN THE MATTER OF: AN APPLICATION BY RICHARD MBUGUA KAHAMA FOR ORDERS OF MANDAMUS AND IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA AND ORDER 53 RULES 1(1) AND (2) OF THE CIVIL PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF: CHIEF MAGISTRATES COURT CIVIL CASE NO. 11206 OF 2005, AT NAIROBI**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PERMANENT SECRETARY MINISTRY OF STATE**

**FOR PROVINCIAL ADMINISTRATION AND**

**INTERNAL SECURITY.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**RICHARD MBUGUA KAHAMA.....EX PARTE APPLICANT**

**JUDGEMENT**

1. By a Notice of Motion dated 25<sup>th</sup> October, 2012 filed in this Court on 26<sup>th</sup> October, 2012, the ex parte applicant herein, **Richard Mbugua Kahama**, seeks the following orders:
1. **That Leave having been granted on 5/10/2012 this court now be pleased to issue an order of mandamus compelling the 1<sup>st</sup> Respondent, being the Accounting officer of the Police Department to pay the sum of Kshs. 892,708/= together with further interest at 14% from 6/01/2011 until payment in full.**

2. **That in default of payment under prayer 1 the 1<sup>st</sup> respondent be committed to civil jail for contempt of Court Orders until he purges the contempt.**
3. **The costs of this Application and that of the Ex-parte Application be provided for.**
4. The Motion is based on the grounds set out in the statutory statement and verifying affidavit filed herein on 16<sup>th</sup> July 2012.
5. According to the said documents, the applicant is the Plaintiff and the Decree holder in the Chief Magistrate's Court civil case No. 11206 of 2005 Nairobi Milimani Commercial Courts which case was heard, determined and the applicant awarded Kshs 813,973/=, costs of Kshs 78,735/= and a Decree given on 5<sup>th</sup> January 2011. After the issuance of the said decree, a certified copy thereof and a Certificate of Order against the Government were sent to the Respondent on 25<sup>th</sup> October 2011 demanding the said sum. However, no payment has been received despite reminders. According to the applicant the Respondent is the Chief Legal Adviser of the Government of Kenya while the Permanent Secretary, Ministry of State for Provincial Administration and Internal Security is the accounting officer in the Ministry of which the Police department forms part. According to the legal advice given to the applicant the Civil Procedure Rules do not provide for a Decree against the Government to be executed by way of attachment and hence the only way is for the Court to issue an order of *Mandamus* to compel the Accounting Officer, at the pain of being committed to civil jail, to pay the decretal sum, costs and interests.
6. There was no opposition to the application.
7. I have considered the foregoing as well as the submissions filed on behalf of the ex parte applicant.
8. Therefore the law as it stands presently is that no execution can be levied against the Government in settlement of a decree in a civil case and hence the only recourse available to a decree holder is to apply for *mandamus* against the Accounting Officer of the Government Department concerned, and upon obtaining such orders, the decree holder will be at liberty to apply for committal of the Chief Officer if the order of *mandamus* is not complied with. In **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441** where it was held:

**“The orders are issued in the name of the Republic and in the case of *mandamus* order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/ and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the *mandamus* order using this method. There is only one rider – an officer can only be committed where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...Local Authorities Transfer Fund Act, which provides funds to local authorities, part of which should be used to pay debts does not provide for their attachment since section 263A of the Local Government Act prohibits it. It just enables the Local Authorities to honour their debt obligations including those covered by a *mandamus* order. The Local Authorities have to pay as a matter of statutory duty or in the case of *mandamus* in obedience to the order from the state or the Republic. There is no provision in the LATF Act for attachment or execution”.**

9. This procedure was dealt with extensively in **Shah vs. Attorney General (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543** where Goudie, J eloquently, in my view, expressed himself, *inter alia*, as follows:

**“*Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything**

done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...The foregoing may also be thought to be much in point in relation to the applicant's unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty...Since *mandamus* originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law...English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting "simply in his capacity of servant". There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a *mandamus* would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of *mandamus* will lie for the enforcement of the duties...With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile... It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government...Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go... In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of *mandamus* must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament... In the court's view the granting of *mandamus* against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and 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 Treasury Officer of Accounts 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 Crown servant in his official capacity and the duty is owed not to the Crown 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. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata*, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few...*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designata* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant’s decree. Therefore an order of *mandamus* will issue as prayed with costs.

10. I fully associate myself with the learned Judge’s views in the said matter.

11. 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.

12. Section 21(4) of the Government Proceedings Act Cap 40 Laws of Kenya provides:

***Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such, of any money or costs.***

13. However the preamble to Cap 40 provides that it is “An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government; and for purposes incidental to and connected with those matters”. It follows that Cap 40 only applies to civil proceedings by and against the Government. It does not apply to proceedings which are not of a civil nature such as criminal proceedings. With respect to judicial review proceedings, it has been held time without a number that such proceedings are neither criminal nor civil. See **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 4.**

14. It follows therefore that 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 Government 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.

15. 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 contempt of court. 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 ensure the authority and dignity of the Court is maintained.

16. I have, however, noted that the decree was silent on the award of interest on the decretal sum. Section 26(2) of the Civil Procedure Act provides:

***Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.***

17. Accordingly subject to the foregoing, I grant the *mandamus* sought in the Notice of Motion dated 25<sup>th</sup> October 2012 with the result that:

- 1) **An order of *mandamus* is hereby issued compelling the 1<sup>st</sup> Respondent, being the Accounting officer of the Police Department to pay within 30 days the sum of Kshs. 892,708/= together with further interest at 6% from 6/01/2011 until payment in full.**

2. **That in default of payment under prayer 1 the applicant be at liberty to take out a Notice to Show Cause why the 1<sup>st</sup> respondent cannot be committed to civil jail for contempt of Court Orders until he purges the contempt.**
3. **The costs of this Application are awarded to the ex parte applicant.**

**Dated at Nairobi this 20<sup>th</sup> day of March 2013**

**G V ODUNGA**

**JUDGE**

Delivered in the presence of Mr Ranja for Mr Mureithi for the ex parte applicant