REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC APPL. NO. 44 OF 2012

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE HIGH COURT OF KENYA AT NAIROBI CIVIL SUIT NUMBER 2966 OF 1966

JAMES ALFRED KOSORO –V- THE ATTORNEY GENERAL

BETWEEN

REPUBLIC…….....……APPLICANT

AND

THE HON ATTORNEY GENERAL…….....…. 1st RESPONDENT

THE PERMANENT SECRETARY, MINISTRY OF STATE FOR PROVINCIAL ADMINISTRATION

AND INTERNAL SECURITY…….....……...2ND RESPONDENT

EXPARTE: JAMES ALFRED KOROSO

JUDGEMENT

1. By a Notice of Motion filed on 20th February, 2012, the *ex parte* applicant herein, **James Alfred Kosoro**, seeks the following orders:

a. **That an Order of Mandamus do issue to compel the Attorney General to pay to the applicant the sum of Kshs. 31,576,584.35 being the decretal amount owed to him in High Court Civil Case No. 2966 of 1996 at Nairobi together with interest accruing thereon at the rate of 12% per annum from the 17th April, 2008 until payment in full, and taxed costs of the suit.**
b. **That the Attorney General shall comply by satisfying the Decree, Costs and Interest in High Court Civil Case Number 2966 of 1996 at Nairobi within fourteen (14) days from the date of service of the order.**
c. **That in default, Notice to show cause do issue against the Attorney General foe them to show cause why they should not be cited for contempt of court.**

d. **That the Costs of this Application be provided for.**

***EX PARTE* APPLICANT'S CASE**

2. The Motion is based on the grounds set out in the amended statutory statement and verifying affidavit filed herein on 20th February 2012. According to the said documents, the *exparte* applicant's case is that by a decree issued by this Honourable Court on 17th April, 2008, the respondent was ordered to pay the applicant a total sum of **Kshs 31,576,584.35** which sum of money remains unpaid todate. The applicant avers that the respondent filed a Notice of Appeal on the 4th of March, 2008 but it served him past the stipulated time; however, the respondent sought leave of the court for extension of time to serve the applicant which application was granted. The applicant states that being dissatisfied with the said decision of the court to extend time of service, he applied to have the decision reversed but his reference was dismissed on 24th March, 2010.The applicant avers that since then the respondent has not taken any step to appeal or stay the judgment. He contends that despite persistent demands for payment the respondent has not yielded. He attaches a copy of a demand letter dated 20th December 2011.The applicant further avers that due to failure by the respondent to satisfy the said decretal amount, he continues to sufferer loss and damage and his family have suffered financial ruin. He attaches copies of a suit filed in Tanzania by his wife seeking to stop the auction of his family house in Tanzania for default of payment of a bank loan owed to Barclays Bank Limite**d (Mrs Constantia Manka James Kasoro –V- James Alfred Kasoro& 2 Others, HC Land Case Number 10 of 2011)**. Further, the applicant attaches copies of school fees invoice statements, email correspondences, return ticket, visa and passport to show that his son dropped out of college in London for lack of school fees and returned home in Tanzania.

RESPONDENT'S CASE

3. In opposition to the application, **Charles Mwanzia Mutinda**, a principal litigation counsel of the respondent swore an affidavit on 23rd March, 2012 in which he deposed that the respondent being dissatisfied with the judgment and decree of the high court in the said civil matter filed a Notice of Appeal against the whole judgment and requested for typed proceedings and judgment of the said case. He further deposed that the notice of appeal was filed out of time however the respondent applied for extension of time and the court allowed the same. He cited the words of **S.E.O. Bosire JA**. in allowing the application for extension of time as follows:

> **"…..the decree is for what appears to me to be high sums on the heads of false imprisonment and malicious prosecution,, as also on the head of violation of Constitutional rights. The sum awarded are Kshs. 10 million on each of those two heads. No decisions were cited to show comparable awards. The applicant's appeal is, prima facie, arguable….."**

4. Pursuant to the foregoing, he stated that the respondent is still pursuing the appeal and is waiting to be supplied with typed proceedings. He also stated that there have been various proceedings and applications in the said matter which have disrupted and delayed the appeal process. According to the deponent, the application herein is not entitled to the discretionary judicial review order of mandamus as the Certificate of Order against the respondent was only issued on 8th December, 2011 and the application herein was filed without regard to the principle of Parliamentary Control over Government expenditure as clearly set out in section 32(1) of the Government Proceedings Act. He contends that section 21(4) of the Government Proceedings Act prohibits execution against the Government and as such it was not necessary for the respondent apply for stay of execution. It is also the deponent's view that the application is bad in law and incompetent for Hon. Attorney General is not the right respondent. Further, the respondent contend that the application offends and is contrary to the mandatory provisions of Order 53 Rule 4(1) of the Civil Procedure Rules as orders sought by the applicant are prejudicial to the respondent and are against public interest. He attached copies of the said notice of appeal and various letters of request for typed proceedings.

SUBMISSIONS IN SUPPORT OF THE *EX PARTE* APPLICANT'S APPLICATION

5. While reiterating the contents of the Motion, the Statement and the affidavits, the *ex parte* applicant submitted that the existing jurisprudence on the subject of order of mandamus demands that where there is a breach of public duty or power, the court must compel the public authority to perform the duty imposed by statute. He submitted that being the principal legal advisor to the three arms of government, the Attorney General is required to direct any arm of government he represent to pay costs of any suit which he acted on its behalf. He contended that despite having been granted extension of time to serve the notice of appeal, the respondent have not filed the appeal to date. Further, the respondents have not applied to stay execution the said judgment. The applicant submitted that he has served all the respondents with the Certificate of Order and the present application. The applicant contends that the Government Proceedings Act bars him from executing the government thus leaving him no other effective remedy but judicial review. In support of the submissions the *ex parte* applicant relies on **Welamondi vs. Chairman, Electoral Commission of Kenya (2002) 1 KLR 486, Hulsbary's Laws of England, 4th Edition, Vol.1(1) at paragraph 119, page 118, Hon. Prof. Peter Anyang' Nyongo & 10 Others –vs- The Solicitor General (2011) eKLR, Kisya Investments Ltd –v- Attorney General & Another [2005] eKLR, Republic –vs-Commissioner of Income Tax Exparte DHL Worldwide Express Kenya Limited (2005) eKLR and Republic –vs- Permanent Secretary, Ministry of Internal Security(2004) eKLR.**

RESPONDENTS' SUBMISSIONS

6. On the part of the respondents, the replying affidavit was reiterated and further submitted that the respondents intend to appeal the judgment from which the decree being enforced was derived as the decretal sum is quite substantial such that it requires budgetary allocation and the certificate of order against government was issued on 8th December, 2011 long after the budget for the 2011/2012 financial year had been presented to parliament. The respondents also view the orders sought by the applicants as against public interest. It is further submitted, albeit without any supporting precedent, that a notice of appeal is itself an appeal and since section 21(4) of the Government Proceedings Act prohibits execution against the government, it was not necessary for the respondents to apply for stay of execution. The 1st respondent reiterates that the application herein is bad in law as the Attorney General is not the right respondent and the application offends and is contrary to the mandatory provisions of Order 53 Rule 4(1) because the relief sought in the notice of motion is at variance with the orders sought in the statutory statement of facts. In support of their submissions the respondent relies on **Lt. Colonel Benjamin Muema & Another –vs- The Defence Council of the Armed Forces of the Republic & Another (2008) eKLR** and **R-v- Permanent Secretary Ministry of Planning, National Development exparte the National Council of Non-Governmental Organisations H.C. Misc 1124 of 2005 (unreported)** and **Kisya Investments Ltd –vs- Attorney General & Another [2005] eKLR.**

DETERMINATION

7. It was submitted on behalf of the respondents that the current application is bad in law as the Attorney General is not the right respondent and the orders sought in the notice of motion are at variance with the orders sought in the statutory statement. First, the application herein is properly brought against the respondents; the Attorney General as the legal representative of the government and the Permanent Secretary, Ministry of State for Provincial Administration and Internal Security as Accounting Officer within the Ministry. Secondly, *the court has discretion and will not automatically strike out proceedings unless they are fatally defective. In exercising the discretion, the most important consideration, in my view, is that of justice and unless the applicant's error is likely to occasion the respondents prejudice, the court, as always, should lean towards sustaining a suit.* An issue as to the effect of misjoinder in judicial review proceedings was the subject of determination in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** in which the Court of Appeal stated:

> **"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney**

General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".

8. With respect to the issue whether or not there is variance between what is sought in these proceedings and the judgement it is important to set out what orders the Court granted. In his judgement, ***J B Ojwang, J*** *(as he then was) granted the following:*

1. ***(i) the torts of false imprisonment and malicious prosecution = Kshs 10,000,000/=***

2. ***Violations of constitutional rights = Kshs 10,000,000/=***
3. ***Exemplary damages = Kshs 1,000,000/=***

2. ***The defendant shall pay the plaintiff's costs of the suit, which shall bear interest at Court rate, as from the date of filing suit.***
3. ***The prayer for special damages is refused.***
4. ***If any matter whatsoever shall arise relating to this Judgement, or to the decree extracted therefrom, the same shall be heard and determined under the direction of a Judge of the Civil Division of the High Court.***

*9. It is clear from the foregoing that there was no order given with respect to interest on the general damages as opposed to costs. Section 26(2) of the Civil Procedure Act provides that w*here 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. It follows that to the extent that the applicant seeks to compel the Attorney General to pay to the applicant the sum of Kshs. 31,576,584.35 being the decretal amount owed to him in High Court Civil Case No. 2966 of 1996 at Nairobi together with interest accruing thereon at the rate of 12% per annum from the 17th April, 2008 until payment in full, and taxed costs of the suit the orders sought herein are not in accordance with the judgement. In an application for mandamus the Court can only compel the Respondent to undertake the duty imposed by the judgement and not anything else. It is not upon the Court determining an application for an order of mandamus to determine the intention of the Judge who granted the decree being enforced. Any such determination ought to be sought in the original suit and not in the application for enforcement thereof. However, this does not deprive the court the jurisdiction to hear and determine an otherwise competent application.

10. With respect to the variance between the Statement and the Notice of Motion Order 53 rule 4(1) of the Civil Procedure Rules provides:

Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

11. It is clear therefore that unless the Statement is amended the applicant is not permitted to seek a relief which is not set out in the Statement. In this case, it is clear that in prayer 2 of the Notice of Motion the ex parte applicant seeks a relief which was not set out in the Statement. Although the said Statement was amended, no such relief was added. It is in any case doubtable whether an applicant can by amendment to a statement seek a relief for which leave to commence the proceedings was neither sought nor granted. Accordingly prayer no. 2 sought in the Motion is, ordinarily, incapable of being granted. I say ordinarily because in this case, what is sought therein is simply a consequential order and not a substantive relief hence even if the same was not sought the Court in the exercise of its inherent jurisdiction and in order to ensure that its order is implemented is perfectly entitled to grant the same.

12. Having said that, I now move to the substantive issues. It is the respondents' public duty to satisfy the applicant's decree and failure to do so attracts the court's discretion to issue an order of *mandamus* commanding them to do so**.** In **Republic vs. Kenya National Examinations Council *ex parte***

Gathengi & 8 Others Civil Appeal No 234 of 1996. The Court of Appeal cited, with approval, ***Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89*** thus:

> ***"The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."***

14. As submitted by the applicant, section 21(4) of the Government Proceedings Act prohibits execution against the Government thus leaving the applicant no other appropriate remedy except *mandamus*. That was the position in the English case of **R (Regina) vs. Dudsheath**, **ex parte, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J.** said -

> ***"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges."***

See also **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441**.

This procedure was dealt with extensively in **Shah vs. Attorney General (No. 3) Kampala HCMC 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 designate* 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."

15. I fully associate myself with the learned Judge's views in the said matter.

16. 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.

17. 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.

18. 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.**

19. 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 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.

20. 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 nolonger 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.

21. The respondents submitted that they intended to appeal against the judgment from which the application emanates, it filed a Notice of Appeal in 2008 but since then it has not taken any step to pursue the appeal. The reason given for inaction is that it has not been able to obtain typed proceedings from the trial court despite sending various letters of request. Order 42 rule 6 of the Civil Procedure Rules provides:

> ***No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

22. It follows that the mere fact that a party intends to appeal or has even appealed does not entitle him to an automatic stay. A party who needs protection from the Court ought to also apply for stay of execution or proceedings. In this case, the Respondent neither applied for nor obtained an order for stay of either execution or proceedings. In fact according to it, it lulled itself into a false sense of security that since it could not be executed against there was no need to apply for stay. The mere fact that a party has filed a Notice of Appeal does not in itself mean that the party will in fact appeal. To allow the Respondent to hide behind its Notice of Appeal to evade its obligation under the decree may occasion a miscarriage of justice since there is no guarantee that the Respondent will in fact lodge the appeal. Apart from that the Respondent's conduct does not evince seriousness on its part to lodge the intended appeal. From the record one letter was received in court on 15th February, 2010 and the last on 21st February, 2012, a day after the current motion was filed. That is not the conduct of a person who is desirous of expediting the appeal process. The Respondent's contention that the decretal sum is excessive may be a ground for granting stay but is not the basis upon which the court would deny a successful litigant the fruits of his judgement in an application for *mandamus* where he does not have an alternative remedy. Accordingly, no compelling reason has been advanced by the Respondent why this application which is otherwise merited ought not to be

granted.

ORDER

23. Therefore taking into account the foregoing the order that commends itself is that an Order of *Mandamus* do and is hereby issued compelling the Attorney General to pay to the applicant the sum of Kshs. 21,000,000.00 with interest at the rate of 6% from the date of judgement till payment in full with costs and interest on costs at the Court rates from the date of filing suit. The said payment to be made within 30 days and in default, unless there is an order to the contrary, a Notice to Show Cause do issue against the Accounting Officer in the Department concerned why he should not be cited for contempt of court. The *ex parte* applicant will also have the costs of this application.

Dated at Nairobi this day 19th day of March 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr. Kayayi for the Applicant and the Applicant.