



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 100 OF 2010

IN THE MATTER OF: THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: MILIMANI CMCC NO 5177 OF 2003

BETWEEN

JOSHUA MUTUA PAULPLAINTIFF

AND

THE HONOURABLE ATTORNEY GENERAL.....1ST DEFENDANT

DANSON MWANIKI MBOGO.....2ND DEFENDANT

AND

IN THE MATTER OF: AN APPLICATION BY JOSHUA MUTUA PAUL FOR JUDICIAL REVIEW ORDERS

OF MANDAMUS

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE PERMANENT SECRETARY IN CHARGE OF INTERNAL SECURITY – OFFICE OF THE PRESIDENT.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL..... 2ND RESPONDENT

Ex-PARTE

JOSHUA MUTUA PAUL

JUDGEMENT

1. By a Notice of Motion dated 21st November, 2012 filed in this Court the same day, the ex parte applicant herein, **Joshua Mutua Paul**, seeks the following orders:

1. **That an order of Mandamus directed to the Permanent Secretary in charge of internal security, Office of the President and/or the honourable Attorney General do issue compelling them to honour and satisfy the judgement made in Milimani CMCC No. 5177 of 2003 in the sum of Kshs 338,022.40 being the decretal sum thereof plus costs and interest up to 2nd July 2009.**
2. **That this Honourable court be pleased to give further orders and/or directions as it may deem fit and just to grant.**
3. **Costs of this application be provided for.**

2. The Motion is based on the grounds set out in the statutory statement and verifying affidavit filed herein on 20th April 2010.

3. According to the said documents, on or about 29/3/2003 the ex parte applicant filed suit against the respondent in the latter's capacity as the Chief Government legal adviser and on behalf of the Ministry of Internal Security and one **Mwaniki Mbogo** in Milimani CMCC No 5177 of 2003 seeking general damages for false imprisonment and malicious prosecution, Costs and interests at court rates. After hearing the said suit the Court awarded the ex parte applicant Kshs 250,000.00 general damages costs and interests at court rates.

4. Pursuant thereto a decree was issued in favour of the ex parte applicant in the sum of Kshs 338,022.30 and the ex parte applicant also applied and a certificate of order against the defendant was subsequently issued on or about 2/7/2009. Copies of the judgement, certificate or order against the Government and the decree were served upon the 1st respondent on 31/7/2009 and on 28/9/2009.

5. However, notwithstanding the foregoing the respondents have without just cause or at all failed, refused, declined and/or neglected to honour and satisfy the judgement made in Milimani CMCC No. 5177 of 2003 in the sum of Kshs 338,022.40 being the decretal sum plus costs and interests up to 2nd July 2009 despite the respondents having statutory mandate to honour valid court decrees.

6. Based on the advice received from his legal counsel the ex parte applicant believes that the acts of the respondents are *vires* ultra and inconsistent with their statutory powers and/or mandate to honour and satisfy valid court decrees in accordance with the law.

7. In opposition to the application the Respondents filed an affidavit sworn by **Ephantus N Njuguna**, a Litigation Counsel in the Attorney General's Chambers on 9th May 2011.

8. According to the Respondents, the said civil suit Milimani CMCC 5177 of 2003 was against two defendants: **Danson Mwaniki Mbogo** as the first Defendant and the Attorney General as the 2nd Defendant and that judgement was entered against both defendants jointly and severally. On receipt of the applicant's demand letter (His exhibit "JMP6") the respondents duly processed the payment in line with the judgement entered and 1st respondent deposited with the 2nd respondent Kshs. 176,877.50 being its share of the claim for payment to the applicant herein. Thereafter the 2nd respondent called for payment instructions from the applicants' advocate vide a letter dated 6th September 2010. The 2nd respondent then raised a payment voucher in the name of the applicants' Advocate and applicant signed a discharge voucher accepting full and final settlement of any claim against the Government (Respondents) in connection with Milimani CMCC 5177 of 2003.

9. It is therefore the Respondents' position that applicant is not coming to this court with clean hands for non disclosure of material facts. The applicant having taken possession of the Kshs. 176,877.50 electronically transferred to his account and executed the discharge voucher, he is stopped from raising any other claim against the Respondents. It is the Respondents' position that the applicant in the interest of natural justice ought to follow the 1st defendant for the satisfaction of the balance of the decretal sum

since Respondents have a duty of care to safeguard and protect public funds. According to the Respondents the application is misconceived, lacks merit and is an abuse of the court process and should be dismissed with costs to the respondents.

10. Confronted with the foregoing the ex parte applicant was jolted into filing a supplementary affidavit sworn on 20th June 2011 in which he deposed that that the said replying affidavit is bad in law, full of falsehoods, vague and highly misleading. According to him the amount of Kshs 176,877.50 was not in line with the judgement and decree in Milimani CMCC No. 5177 of 2003 which was joint and several as against the 2nd respondent and one **Danson Mwaniki Mbogo**. According to legal advice received from his legal counsel the said judgement having been entered jointly and severally as against the 2nd respondent and the said **Danson Mwaniki Mbogo**, the applicant had a right to demand payment from either the 2nd Respondent or the said **Danson Mwaniki Mbogo** or even both of them and that the judgement aforesaid having been joint and several, the decretal sum was not payable at the whims of the respondents. In his view although in the letter dated 6/9/2010, the respondents demanded his execution of the discharge voucher before it could process payment of the decretal sum in his favour, he neither executed a discharge voucher for Kshs 176,877.50 nor did he accept the sum of Kshs 176,877.50 in full and final settlement of the suit in Milimani CMCC No. 5177 of 2003 but executed a discharge voucher for the full decretal sum of Kshs 338,022.40 as awarded in Milimani CMCC No. 5177 of 2003. However, the foregoing notwithstanding the respondents did not pay him the said sum of Kshs 338,022.40 but paid him a paltry sum of Kshs 176,877.50. In view of the foregoing the applicant contends that he could not have discharged the government and/or the respondents from the payment of the decretal sum of Kshs 338,022.40 as alleged and the respondents are stopped from relying on the said discharge voucher having misled him in believing that they were to pay him the full decretal sum of Kshs 338,022.40 as awarded in Milimani CMCC No. 5177 of 2003 and this honourable court should not allow the respondents' to benefit from their own mischief. His position is that he disclosed all the particulars that were material and relevant at the time of filing the proceedings herein since the payments alluded to by respondents herein were made after the filing of the proceedings

11. The application was prosecuted by way of written submissions.

12. On behalf of the applicant, it was submitted, while reiterating the contents of the supporting affidavit that it is trite law that where liability is joint and several, the plaintiff can follow the defendants either individually or collectively. Since the judgement was admittedly joint and several and the applicant has elected to exercise his right under the judgement and pursue the respondents herein, the only instance the applicant can be impugned is if he recovers more than the judgement sum. In support of his submissions, the ex parte applicant relies on **Mohamed & Muigai Advocates vs. Samuel Kamau Macharia & Another Nairobi (Milimani) HCCC No. 1158 of 2002** and further cites **Doge vs. Kenya Cannery Ltd [1989] KLR 127** for the proposition that when a man by his words or conduct has led another to believe that he may safely act on the faith of them and the other does not act on them, he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him. To allow the respondents to go back on their promise of paying the applicant the sum of Kshs 338,002.40 will be unjust and inequitable.

13. The respondent, on the other hand, neither filed submissions nor submitted orally.

14. The only issue for determination in this application is whether the respondents were released from paying the whole of the decretal sum by the payment of Kshs 176,877.50 instead of Kshs 338,002.40.

15. It is Not Disputed That Judgement Was Entered Jointly And Severally Against The Defendants In The Suit Whose Decree Gave Rise To These Proceedings. It is Therefore Important To Understand The Meaning And Effect Of A "Joint And Several" Judgement Or Liability. In Dubai Electronics Vs. Total Kenya And 2 Others High Court (Milimani Commercial And Admiralty Division) Civil Case No. 870 Of 1998 After Considering Past Decisions On The Issue I Stated:

"Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to

settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them. That is my understanding of joint and several liability. In the case of Kenya Airways Limited vs. Mwaniki Gichohi (supra) Ringera, J (as he then was) stated as follows:

‘The concept of joint and several liability comprehends one judgement and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however double compensation is not allowed and accordingly whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendant(s).’”

16. Therefore unless subsequent to the judgement there existed circumstances which amounted to accord and satisfaction, the defendants in the said case were liable to settle the judgement as joint and several judgement debtors. In a layman’s language an accord and satisfaction is a compromise with something in it for both sides; it is the purchase of a release from an obligation whether under contract or tort by means of any valuable consideration not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration, which makes the agreement operative. In a defence of accord and satisfaction there must be something given or done by the defendant to or for the plaintiff which the latter adopts as a discharge of the cause of action. But before such a defence can succeed, it must be shown that the agreement (accord) was valid in law. The agreement cannot be valid unless it is supported by consideration. There must be some benefit that the plaintiff is getting by promising to forebear from making further claim. It is an essential element of a valid accord and satisfaction that the agreement, which constitutes the accord, should itself be binding in law, and such agreement cannot be so binding unless it is either made under seal or supported by consideration. Satisfaction, viz performance of an agreement of accord, does not provide retroactive validity of accord, but depends for its effect upon the validity of the accord as a binding contract at the time when it is made. See Finerate Forex Bureau Ltd. vs. National Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 1071 of 2000 and Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 Others Civil Application No. Nai. 140 of 1995.

17. Accordingly, in Kimeu vs. Kasese (No. 2) [1990] KLR 35, Githinji, J (as he then was) held that since the defendant lost nothing the agreement has no legal validity and that even if it were valid the court would hesitate to enforce it as perhaps it would be against public policy in the sense that most illiterate accident victims would be denied fair compensation by unscrupulous actions of vehicle owners or insurance companies.

18. According to the payment voucher annexed to the replying affidavit the sum received by the applicant was Kshs 338,022.40. It is however, not contended even by the Respondent that the ex parte applicant has received this sum of money. The discharge voucher itself is dated 13th September 2010. These proceedings were however, instituted on 15th March 2010. To accuse the ex parte applicant of being guilty of non-disclosure is clearly dishonest on the part of the Respondent. Advocates as officers of the Court ought not to deliberately attempt to mislead the Court under the guise of instructions from the client.

19. Nowhere, in the documents annexed to the replying affidavit is there any evidence that there was any consideration involved in the purported arrangement in which the ex parte applicant purportedly released the Respondents from liability.

20. Article 48 of the Constitution 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.

21. In the premises the ex parte applicant deserves the orders of mandamus. Accordingly *Mandamus* is hereby issued directed to the Permanent Secretary in charge of internal security, Office of the President and/or the honourable Attorney General compelling them to honour and satisfy the judgement made in Milimani CMCC No. 5177 of 2003 in the sum of Kshs 338,022.40 less Kshs 176,877.50 being the balance of the decretal sum thereof plus costs and interest up to 2nd July 2009 as prayed in the Motion. The ex parte applicant will also have the costs of this Motion.

Dated at Nairobi this 18th day of March 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Kamwendwa for the ex parte applicant.