



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Law Courts)

Miscellaneous Civil Application 371 of 2012

IN THE MATTER OF AN APPLICATION BY JOHN NGANGA GATHERU FOR LEAVE TO
APPLY FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF THIKA CMCC NO. 841 OF 1997

AND

IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT

REPUBLIC.....APPLICANT

VERSUS

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

THE PERMANENT SECRETARY

MINISTRY OF DEFENCE.....2ND RESPONDENT

EX PARTE

JOHN NGANGA GATHERU

JUDGEMENT

1. By a Notice of Motion dated 8th November 2012, the *ex parte* applicant herein, **John Nganga Gatheru**, seeks the following orders:

(a) That the Honourable Court be pleased to grant an order of mandamus compelling the Attorney General and the Permanent Secretary Ministry of Defence to pay the whole decretal amount in Thika CMCC No. 841.

(b) That the 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 10th October 2012.

3. According to the said documents, in 1997 the *ex parte* applicant filed a Civil suit against the respondents at Thika Law Courts CMCC No. 941 of 1997 seeking inter alia (a) General damages for pain suffering and loss of amenities; (b) Special damages Kshs. 1,100/=; (c) Cost of the suit; and (d) Interest on (a) (b) and (c) above at court rates. The said case, it is deposed, was heard and determined on 26th March, 2008 where the respondents were ordered to pay decretal amount in the sum of Kshs. 150,000/= plus costs and interest.

4. It is contended by the *ex parte* applicant that on 29th July, 2008 his advocates on record served certificate of order against the Government upon the 1st respondent who failed, neglected and or refused to act on the same. On 25th March, 2010 the same advocates wrote to the 1st respondent demanding payment of the decretal amount which letter the 1st respondent has failed to reply. Another letter was on 27th May, 2012 served by the said advocates upon the 1st respondent but likewise no settlement was made.

5. It is therefore contended by the *ex parte* applicant that unless the respondents are compelled through an order of Mandamus to liquidate the decretal amount he will continue to suffer greatly and fail to enjoy the fruits of my hard earned judgement hence it is only fair and just and expedient that this Honourable Court do issue the order of mandamus against the respondents.

6. On 5th December 2012, **Ms Sirai**, learned counsel for the respondent applied for and was given 21 days within which to respond to the application and the matters was stood over to 12th February 2013 for highlighting submissions. When the matter came before me on 20th March 2013, although there was no appearance for the Respondent, I directed that the matter be fixed for further orders on 29th April 2013 and that the Respondent be notified. Although the Respondent was served on 22nd April 2013 there was neither appearance for him nor was there any response filed on his behalf.

7. On behalf of the applicant, it is submitted, while reiterating the contents of the verifying affidavit that despite being served with Certificate of Order and several reminders by the applicant the Respondents have neglected, refused and or ignored to satisfy the decretal amount therein hence the orders sought herein.

8. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Kosoro**, I expressed myself as hereunder:

“...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 see no reason to depart from the said reasoning which I adopt in this case.

10. Having considered the material on record which include the proceedings which led to these proceedings, judgement, the decree and certificate of cost, the certificate of order against the government duly received by the Respondent as well as the correspondents copies of which are exhibited and in the absence of any legal impediment, I do not see why the respondent should not be compelled to perform its statutory duty by settling the sums due from it to the applicant.

11. In the result I allow the application the Notice of Motion dated 8th November 2012 and issue an order of *mandamus* compelling the Attorney General and the Permanent Secretary Ministry of Defence to pay the whole decretal amount in Thika CMCC No. 841. The *ex parte* applicant will also have the costs of this application.

Dated at Nairobi this 17th day of May 2013

**G V ODUNGA
JUDGE**

Delivered in the absence of the parties duly notified.