**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO. 90 OF 2007**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS DIRECTED TO THE PERMANENT SECRETARY, OFFICE OF THE PRESIDENT REQUIRING HIM TO PERFORM HIS PUBLIC DUTY AND PAY TO THE APPLICANT DECRETAL DUES ARISING FROM CMCC NO. 7274 OF 1998 BETWEEN CHRISTOPHER MUSAU PLAINTIFF VS. THE ATTORNEY GENERAL**

**CHRISTOPHER MUSAU.....PLAINTIFF**

**VERSUS**

**THE HON. ATTORNEY GENERA.....DEFENDANT**

**RULING**

1. By a Notice of Motion dated 5th March 2007 filed in this Court on 6th March 2007, the applicant herein wrongly described as the Plaintiff seeks from the Respondent, similarly wrongly described as the Defendant the following orders:

1. **This Honourable Court do issue an order of mandamus by way of judicial review directed to the Permanent Secretary, Office of the President on behalf of the Commissioner of Police to pay the ex parte applicant the decretal sum in CMCC 7274/1998.**
2. **The costs of this applicant be provided for.**

2. Before dealing with the merits of the case, it is important to deal with the issue of intitulement of the application herein. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**
3. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

**"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".**

4. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J** (as he then was) expressed himself as follows:

**"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari, Mandamus* or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -**

**"REPUBLIC……..……..……..APPLICANT**

**V**

**THE ELECTORAL COMMISSION OF KENYA……RESPONDENT.**

**EX PARTE**

**JOTHAM MULATI WELAMONDI"**

5. It is clear from the title of the proceedings herein that the Motion herein is not an epitome of impeccable, elegant or paragon drafting. Whereas the person named as the defendant is the Hon. Attorney General, the orders being sought are against the Permanent Secretary, Office of the President. Secondly, the parties to these proceedings are indicated as plaintiff and defendant rather than applicant and respondent. While this Court may have been amenable to excuse the latter error, the fact that the person against whom the orders are sought in these proceedings is not a party to the Motion cannot be excused. Although leave to commence these judicial review proceedings was granted against the said Permanent Secretary, it must be remembered that judicial review proceedings are commenced by the Notice of Motion and not the Chamber Summons. The Chamber Summons is simply an application for leave or permission to commence judicial review proceedings and whereas on the filing of the Notice of Motion the Chamber Summons is subsumed or submerged in the Motion, it is the Motion that originates the judicial review application proper. I can do no better than quote the Court of Appeal in **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199** where it expressed itself *inter alia* as follows:

**"The proceedings under Order 53 can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted. It would be somewhat ridiculous to bring the application for leave by way of an originating summons and once the leave is granted, the originating summons is then swallowed up or submerged in the notice of motion."**

6. Similarly, in **Mike J. C. Mills & Another vs. The Posts & Telecommunications Nairobi HCMA No. 1013 of 1996,** it was held *inter alia* that the application for leave does not commence judicial review until such permission is granted to institute appropriate Judicial Review application.
7. It is my view that since the defendant/respondent herein is not the entity against whom the orders are properly sought, this is not the kind of mistake that can be cured under the provisions of Article 159(2)(d) of the Constitution.
8. Accordingly the Notice of Motion dated 5th March 2007 is incompetent and is struck out but with no order as to costs.

**Dated at Nairobi this 22nd day of October 2013**

**G V ODUNGA**

**JUDGE**

**Delivered in the absence of the parties**