



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 93 OF 2011

FRANCIS MUISYO MUSYOKI.....APPLICANT

VERSUS

THE PERMANENT SECRETARY, OFFICE OF THE PRESIDENT

(PROVINCIAL ADMINISTRATION & INTERNAL SECURITY).....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

On 7th November, 2011 Francis Muisyo Musyoki (the ex-parte applicant) obtained this court's leave to commence judicial review proceedings against the Permanent Secretary, Office of the President (Provincial Administration & Internal Security) being the 1st respondent and the Attorney General as the 2nd respondent. Following the grant of the said leave the ex-parte applicant filed a notice of motion on 25th November, 2011 dated the same date in which he seeks orders as follows:-

1. THAT this Honourable court be pleased to issue an order of mandamus against the 1st respondent directing the 1st respondent to pay to the applicant the decretal amount in CMCC No. 2845 of 2002 NBI Milimani, FRANCIS MUISYO MUSYOKI-VS-THE ATTORNEY GENERAL AND ANOTHER together with all accrued interest from the date of Judgment in case of general damages and from the date of filing suit in case of special damages until payment in full.

2. THAT the costs of this application be provided for.

The application is supported by grounds on its face as follows:-

(i) The applicant was arrested and charged for the offence of failing to prevent the commission of a felony under the instigation of his employer.

(ii) The applicant was held in illegal custody for a period of 65 days yet the charges he faced were not capital offences which in any event provided for a mandatory 14 days in custody.

(iii) The applicant sued the Attorney and obtained a decree and certificate of order against the

Government.

(iv) The decree, certificate of costs and certificate of order against the Government was served in person on the Attorney General in the matter in issue.

(v) The Attorney General never appealed against the Judgment and decree and offered no evidence at the trial in the lower court.

(vi) The Attorney General has further been blamed by the co-respondent who filed an appeal as the one through the police who violated the applicant constitutional rights by holding him in illegal custody, arresting the applicant and prosecuting the applicant acts which the co-respondent contended it had no control over.

(vii) Despite the Attorney General's acts in violation of the applicant's constitutional rights, the Attorney General has further treated with contempt the certificate of order against the Government in the process compounding the applicant's grievances.

(viii) The applicant has a constitutional right to receive the fruits of his judgment and the delay of over 5 years in settling the decretal amount is inordinate and unfair and unjust.

(ix) The Attorney General was equally under a duty to appeal against the Judgment and decree of the Lower Court and seek stay of execution pending appeal.

The application is also supported by a statement dated 12th April, 2011 and a verifying affidavit sworn by the applicant on the same date.

Though the application was served upon the respondents, the same was not opposed. The facts that clearly emerge upon reading the ex-parte applicant's papers show that the ex-parte applicant herein sued Drums & Containers Ltd and the Attorney General in Nairobi Milimani Commercial Courts CMCC No. 2845 of 2002 and obtained judgment. The ex-parte applicant has attached papers relevant to that case and in particular a certificate of order against the Government dated 24th August, 2004. According to the ex-parte applicant the 2nd respondent has refused to pay the decretal amount.

The question is whether an order of mandamus should issue in the circumstances of this case. In the verifying affidavit the ex-parte applicant avers that the 2nd respondent has refused to pay the decretal amount on the ground that Drums & Containers Limited the 1st defendant in the civil case had appealed to the High Court against the magistrate's judgment. The ex-parte applicant further avers that the said company has since closed down and the appeal has now been overtaken by events. The ex-parte applicant did not attach to his application the final order in the appeal so that the court can confirm that the appeal has indeed been concluded.

The ex-parte applicant has averred that the 2nd respondent has refused to pay the decretal amount. There is no evidence that the ex-parte applicant has indeed asked for payment of the decretal amount. For an order of mandamus to issue the applicant ought to demonstrate that the public officer has refused to perform the public duty expected of him. The ex-parte applicant ought to have demonstrated by annexing letters from the 2nd respondent showing that the 2nd respondent has indeed refused to pay the decretal amount.

In summary the ex-parte applicant's case fails because there is an un concluded appeal against the judgement which the ex-parte applicant seeks to enforce and the ex-parte applicant has failed to demonstrate that the 2nd respondent has indeed refused to pay the decretal amount. The ex-parte applicant's application is therefore dismissed. The respondents did not reply to the application and I make no orders as to costs.

Dated and signed at Nairobi this 27th day of March, 2012

W. K KORIR
JUDGE