



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

**IN THE MATTER OF AN APPLICATION BY MAJOR KAHUGU KAREBE TO APPLY FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF AN ORDER OF MANDAMUS
AGAINST THE ATTORNEY GENERAL**

AND

IN THE MATTER OF THE ATTORNEY GENERAL

AND

**IN THE MATTER OF THE RESIDENT MAGISTRATE'S CIVIL SUIT NO.6263 OF 1999
MAJOR KAHUGU KAREBE VS THE ATTORNEY GENERAL**

AND

**IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT CAP 40 OF THE LAWS OF
KENYA**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

EX-PARTE:

MAJOR KAHUGU KAREBE

J U D G M E N T

By a notice of motion dated 15th May 2008 and filed in court on 27th May 2008, the Exparte Applicant seeks orders of mandamus to compel the Respondent, the Hon. Attorney General to pay him Kshs.179,725 and any other amount by way of accrued interest at 12% per annum that may be found due in the fulfillment of a decree issued in the Resident Magistrate's **Civil Case No.6263 of 1999** where the Exparte Applicant (*hereinafter referred to as the Applicant*) was the plaintiff and the Hon. Attorney General was the defendant.

This is the only prayer made in the Applicant's Notice of Motion though looking at the face of the application, it would appear like two prayers for orders of mandamus have been made against the Respondent but on close scrutiny, it is evident that Prayer 2 is a duplication of Prayer 1.

The application was filed pursuant to leave granted by J. Nyamu on 6th May 2008. In the application for leave filed on 24th May 2007, the Applicant had sought for leave in Prayer 1 to apply for orders of mandamus to compel the Hon. Attorney General to pay him Kshs.179,725 being the decretal amount in RMCC.6263/99 and interest at 12% per annum while in Prayer 2 leave was sought for order of mandamus to compel the Hon. Attorney General to pay the Applicant Kshs.34,020 being the amount assessed in costs in the aforesaid civil suit as shown in the certificate of stated costs.

Leave was granted as prayed but when the Notice of Motion was subsequently filed, the Applicant only sought orders for an order of mandamus to be issued against the Hon. Attorney General to compel him to pay the decretal amount in RMCC 6263/99 to the Applicant together with interest at 12% which prayer was also duplicated as Prayer No.2.

No prayer was made for issuance of the order of mandamus to compel the Hon. Attorney General to pay the Applicant the amount of Kshs.34,020 being certified cost and interest thereon at 12% in the same suit though as stated earlier, leave had been obtained to apply for the said order.

The omission to include this prayer and the duplication of Prayer 1 in Prayer 2 shows clearly that the mix up may have been as a result of an error in the Applicant's part while drafting the application.

The application was supported by the statutory statement dated 2nd March 2007 and the verifying affidavit sworn in support of the application for leave and annexures thereto.

The application is opposed. The Respondent filed grounds of opposition on 2nd March 2009 raising four grounds of objection which can be summarized into three main grounds namely

- (1) That the application is bad in law, untenable and incompetent as the orders sought cannot be granted against the Hon. Attorney General since the Hon. Attorney General has no statutory mandate or duty to satisfy the decretal sum.
- (2) That the application is incompetent and is fatally defective as it has been brought under the wrong provisions of the law and is improperly titled.
- (3) That the application is frivolous and a blatant abuse of the court process.

From the court records, it is evident that though case was filed in Year 2009, it remained unprosecuted for a long time for reasons that are on record including adjournments caused by the claims by the Respondent's representative that the Respondent was making arrangements to pay the sums due to the Applicant.

Payment was however not forthcoming as promised and eventually parties filed their written submissions which were highlighted before me by their respective counsels on 15th December 2011.

I have carefully considered the submissions filed on behalf of both parties herein and all the authorities cited. I have noted that in her submissions on behalf of the Respondent, M/s Gitahi appears to have abandoned grounds 2 and 3 as stated in the grounds of opposition filed on 2nd March 2009 and concentrated only on ground 1 thereof.

Grounds 2 and 3 were objections taken on form of the application to the effect that the application was defective and incompetent as it was brought under the wrong provision of the law and it was not properly titled.

I will very simply deal with those objections and find that the 2nd ground of objection has no substance since looking at the face of the application it is brought under order 53 III Rule 3 of the Civil Procedure Rules which is the correct provision of the law for filing applications for Judicial Review after leave has been granted.

On the 3rd objection, though it is true that the application is improperly titled as it is brought in the name of the applicant instead of the name of the Republic as has been the practice since 1959 after the holding in the case of **Farmers Bus Service & Others –Vs- The Transport Licensing Appeals Tribunal [1959] EA 779** which was followed in many decisions of the High Court thereafter, it is my view that failure to file the application in the name of the Republic is a matter of form which does not go to the root of the application and in the interest of administering substantive justice, it is a technicality that can be overlooked since no prejudice will be occasioned to the Respondent. In any event under Article 159 2 (d) of the Constitution of Kenya, this court is enjoined to administer justice without undue regard to procedural technicalities. This is one such procedural technicality and in my view, it should not be allowed to defeat the application.

Consequently, I find that the application is not defective or incompetent and it is properly before the court.

Having dealt with the above preliminary issues regarding the validity of the Applicant's Notice of Motion, I find that the only other issue for determination before the court is whether the order of mandamus as prayed can be issued against the Respondent who is the Hon. Attorney General of the Republic of Kenya in view of the provisions of Section 21 (3) of the Government proceedings Act which provides as follows:

“If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the accounting officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon”.

M/s Gitahi submitted on behalf of the Respondent that the order of mandamus cannot be issued against the Respondent in this case since RMCC 6263/99 had been filed against the Hon. Attorney General in his capacity as the Legal Advisor to the Government and that such an order can only be directed against the Permanent Secretary, Office of the President, Provincial Administration and Internal Security. She based this submission on grounds that the decretal amount whose enforcement was being sought by an order of mandamus was obtained in a case where the successful plaintiff had been bitten by a police dog attached to Hardy Police Station and Hardy Police Station is in the department of the Kenya Police within the office of the President, Provincial Administration and Internal Security.

It was further argued on behalf of the Respondent that the Respondent had no statutory duty to pay such a decretal sum as his mandate under the Constitution was to *inter alia* provide legal advise to the Government and in this case he had discharged that duty by advising the Permanent Secretary of the relevant Government Ministry to pay the decretal amount.

On her part, M/s Wambugu for the Applicant argued that orders of mandamus should be issued against the Respondent as the Hon. Attorney General was the defendant in the Civil Suit that gave rise to the decretal amounts being enforced in this suit and that since the Hon. Attorney General had previously through his representative pledged to pay the amount claimed, he cannot be allowed to change his position three years down the road.

Having considered the rival submissions made by the parties in this suit, I find that though the pleadings in RMCC 6263 of 1999 were not availed to the court, it is not contested that the Hon. Attorney General was sued in that case in his representative capacity on behalf of the Commissioner of police. The applicant was the successful litigant in that case. Judgement was entered in his favour on 23rd October 2003 in the sum of Kshs.179,725 together with costs and interest at the rate of 12% per annum.

A final decree was subsequently issued against the Attorney General and a certificate of order against the Government was also issued on 25th September 2004 certifying the total amount then owing to the applicant from the Attorney General to be Kshs.263,040. Both the final decree and certificate of order against the Government were exhibited as annexures MKKI and MKK2. The amount shown in the certificate of order against the Government included the decretal amount, costs as per certificate of stated

costs and interest at 12% per annum from 23rd October, 2001 to 14th September 2006.

There is no claim that any appeal was lodged against the judgement in the subordinate Court and the Respondent is not challenging the validity of the said judgement.

The Hon. Attorney General has not denied having been served with both the final decree in RMCC 6263 of 1999 and the certificate of order against the Government under Section 21 of the Government proceedings Act. It is the Applicant's case that despite numerous demands to the Attorney General to satisfy the amount owed, the Attorney General has refused and/or neglected to perform his duty to pay. Given these undisputed facts the issue that this court must resolve is whether an order of mandamus should issue to compel the Attorney General to satisfy the decretal amounts awarded to the Applicant.

Though it is true that the Attorney General had been sued in RMCC 6263/1999 on behalf of the Commissioner of Police, the important point to note is that the Attorney General was the only defendant named in the suit and after full hearing of the applicant's case on the merits, judgement was entered by a court of competent jurisdiction for the plaintiff (now applicant) against the Attorney General (Respondent).

That Judgement remains valid and enforceable since there is no evidence that it has been overturned on appeal or set aside. If the Attorney General was of the view that he was not the proper party to be held liable for acts of negligence attributed to the police officer whose negligence caused personal injuries to the Applicant, he ought to have had himself struck out from the suit as the defendant so that in his place the proper party would have been brought on board as the defendant in his place.

The fact that this was not done and judgement was eventually entered for the plaintiff against the Attorney General as the defendant means that the final decree was issued against the Attorney General and the Attorney General is duty bound to satisfy that decree.

This courts duty is only to enforce that judgement by an order of mandamus to enable the successful litigant enjoy the fruits of his judgement since in view of the statutory provisions in the Civil Procedure Act that prohibits execution by way of attachment against the Government. No other mode of execution is available to the Applicant to execute his regularly obtained judgement against the Attorney General. The office of the Attorney General is an office in the Public Service and it is amenable to Judicial Review remedies including the order of mandamus since it has the legal and public duty to observe the rule of law and to satisfy decrees issued against it. It has a legal and public duty to obey court orders and decrees issued in civil suits are basically court orders.

I agree entirely with the holding of my brother Warsame J in Hon. Prof. Peter Anyang Nyongo & 10 Others -Vs- Solicitor General, JR. Misc. Appn. No.173 of 2011 when he held that even where the Attorney General was sued on behalf of the Government in his capacity as Principal Legal Advisor to the Government, it is the duty and function of the Attorney General to advise his client (organ of Government responsible) and if that organ refuses to pay, the Attorney General will be responsible to pay on behalf of his client.

It is important to note that the Attorney General had through his representative offered to settle this matter out of court by paying the amounts due to the Applicant but this was not eventually done. The Attorney General cannot now turn around and claim that he is not the proper person to satisfy the decree issued in favour of the applicant in the case in question.

In view of the foregoing, I find that the Applicant has sufficiently demonstrated that he is deserving of the order of mandamus as prayed in the Notice of Motion filed on 27th May 2008.

As noted earlier, the Applicant made a mistake and only sought orders of mandamus to compel the Attorney General to pay Kshs.179,725 plus interest at the rate of 12% per annum and omitted sums assessed as costs in the suit which the Applicant was also entitled to.

The Law is that the court cannot grant orders which are not prayed for in the pleadings since parties are bound by their pleadings.

In the circumstances, I allow the application and grant an order of mandamus directed at the Solicitor General who is the Accounting Officer at the Attorney General's office compelling him to forthwith pay the Applicant the sum of Kshs.179,725 together with interest at the rate of 12% per annum with effect from the date of this judgement until payment in full.

Each party shall bear its own costs. Orders accordingly.

Dated, Signed and Delivered by me at Nairobi this 8th day of March 2012

C. W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk

M/s Nyawira for Applicant

Mr. Marete holding brief for M/s Wandia for Respondent