



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO.173 OF 2011

HON. PROF. PETER ANYANG' NYONGO
ABRAHAM KIBET CHEPKONGA
FIDELIS MUEKE NGULI
HON. JOSEPH KAMOTHO
Ms MUMBI NG'ARU
HON. GEORGE NYAMWEYA
HON. JOHN MUNYES
DR. PAUL SAOKE
HON. GILBERT OCHIENG MBEO
YVONNE KHAMATI
HON. ROSE WARUHIU.....APPLICANTS

VERSUS
THE SOLICITOR GENERALRESPONDENT

RULING

In the Notice of Motion dated 3rd August 2011, the applicants seek two orders namely;

(1) An order of mandamus be and is hereby issued against the solicitor general of the Republic of Kenya compelling him to forthwith pay the applicants a principal sum of US\$2531280.42 together with accrued interest thereon at the rate of 14% per annum with effect from 23rd September 2010 till debt of full satisfaction thereof.

(2) The solicitor General of the Republic of Kenya to pay costs of these proceedings.

The applicants were successful litigants against the Attorney General of the Republic of Kenya in Ref. No.1 of 2006 before the East African Court of Justice. An originating Motion dated 30th August 2010 came up for hearing before **Lady Justice Rawal** on 23rd September 2010 where regular judgement was entered in court by consent of both parties and a final decree issued. They subsequently obtained a certificate of costs against the Attorney General pursuant to section 21 of Government Proceedings Act Cap 40 Laws of Kenya which was served and received. It is the contention of the applicants that despite written demands, reminders and oral presentations, the Solicitor General has failed, ignored and/or refused to pay the decree as decreed by the court.

The application was opposed by and **Mr. Ombwayo** learned counsel for the respondent submitted that the application is misconceived against the Solicitor General. He contended that the Attorney General was sued in his representative capacity on behalf of the National Assembly. The Attorney General was sued for acts done by the National Assembly that infringed the East African treaty. According to **Mr. Ombwayo** the reference before the East African Court was not a claim against the Attorney General but it

was against the Government of Kenya. **Mr. Kajwang** learned counsel for the applicants submitted that the Solicitor General is the accounting officer in AG's office and that it is not the role of applicants to know the internal arrangements between different Government organs.

It is the case of the respondent that Attorney General was acting on behalf of the National Assembly in Ref. No.1 of 2006. What the respondent is saying is that the applicants should seek mandamus against the Clerk of the National Assembly and not the accounting officer in the Office of Attorney General. It is important to understand that the AG was sued on behalf of the National Assembly because the national Assembly committed acts or omissions which infringed the East African treaty. The claim before the East African court was not against the Attorney General in his personal capacity or against acts done by officers and agents working within his office.

The Attorney General was sued because he is the principal legal advisor and representative of the Government of Kenya in all matters concerning litigations in Kenyan jurisdiction and outside. In so far as his representation before the East African court, the Attorney General was protecting and preserving the rights and interests of the Kenyan people. If any party commences proceedings against any of the three organs outside Kenya's jurisdiction, the Attorney General is obligated to give adequate representation and legal advice. In such circumstances it does not matter whether the Attorney General was acting for the Executive, Parliament and/or Judiciary. The bottom line is that he was exercising a Constitutional function on behalf of the Government of Kenya.

As was rightly pointed out by **Mr. Ombwayo**, the Attorney General of the Republic of Kenya was sued in representative capacity, primarily on behalf of the Government of Kenya and secondarily on behalf of the National Assembly. It has been contended by **Mr. Ombwayo** that the proper party to pay the costs of the applicants is the Clerk to the National Assembly. And that after the conclusion of the proceedings in Arusha there was a demand made to the clerk of the National Assembly. According to **Mr. Ombwayo** it would be against the law to order an advocate to pay on behalf of his client. It is not the law that an Advocate cannot be required or condemned to pay costs on behalf of his client. The circumstances will dictate whether such an order can be granted. No doubt the decree is against the Attorney General but in his representative capacity. As stated earlier the Attorney General was representing one arm of the Government and if any costs or liability accrues from his representation, he is obliged to pay the costs. It is for the Attorney General to advise his clients to pay the costs which attracted his representation on behalf of the said client.

Being a constitutional representative and being the principal legal advisor to the three arms of the Government, he is required to direct any arm of Government he represented to pay the costs of any suit which he acted on its behalf. Clearly, it is the duty and the function of the Attorney General to advise his client and if a particular organ refuse to pay he will be responsible on behalf of his agent. In that regard, the Solicitor General being the accounting officer of the Attorney General was rightly sued by applicants. In my mind the applicants clearly and correctly sued the Solicitor General and are entitled to the orders sought.

Consequently, I grant an order of mandamus against the Solicitor General of the Republic of Kenya compelling him to forthwith pay the applicants a principal sum of US\$2531280.42 together with interests at court rate with effect from the date of this ruling till date of full satisfaction. Each party shall bear his or her own costs. Orders accordingly.

Dated, signed and delivered at Nairobi this 15th day of December 2011.

M. WARSAME
JUDGE