



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Miscellaneous Application 1040 of 2007

GACHOKA MWANGI.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

RULING

Before me is a Notice of Motion dated 15th October 2007 filed by N.O. Sumba Advocate for the applicant. The application was brought under Order 53 rules 3 & 4 of the Civil Procedure Rules, and Section 63 of the Police Act (Cap.84), as well as the Law Reform Act (Cap. 26). The orders sought are as follows:-

1. *THAT an order of mandamus do issue directed to the Permanent Secretary, Ministry of Justice and Constitutional Affairs compelling her to pay and/or cause to be paid the decretal sum in Nairobi Chief Magistrate's Civil Case No. 9796 of 2004 together with interest at 12% per annum which sum presently stands at Ksh. 533,426/-*
2. *THAT costs of this application be awarded to the applicant.*

The grounds of the application are firstly, that there is already a Judgment and decree drawn against the Attorney-General which the Permanent Secretary as the person handling such affairs on behalf of the Ministry of Justice and Constitutional Affairs as failed, neglected and/or refused to satisfy. Secondly, that by continuing to withhold the money the Permanent Secretary is obviously denying the applicant a chance to recoup losses incurred in prosecuting Nairobi CMCC No. 9796 of 2004. Thirdly that the Permanent Secretary has not given any good reason why the decretal sum is not being paid. Lastly, that leave to apply for an order of mandamus was granted by the court on the 26th day of September 2007.

The application is also supported by a STATEMENT dated 19th September, 2007 and an affidavit sworn by the applicant GACHOKA MWANGI on 19th September, 2007.

There is an affidavit of service filed, sworn by Joseph Kariuki Wachira on 29th September, 2008 that the Attorney-General was on 25th August, 2008 served with a hearing notice for 30th September, 2008. The applicant's counsel also filed skeleton arguments on 29th September, 2008. The matter came up before me for hearing on 5th December, 2008. A hearing notice indicating that the Attorney-General was served with same on 3rd October, 2008, was filed.

The Attorney-General neither came on record, nor was he represented at the hearing.

At the hearing, Mr. Mutahi for the applicant, submitted that the applicant's prayers were for mandamus orders against the Permanent Secretary, Ministry of Justice & Constitutional Affairs to pay the decretal amount, interest and costs. Counsel argued that though there was a judgment against the Attorney-General, the Permanent Secretary had refused or neglected to satisfy the same, thus denying the applicant the fruits of the judgment or decree. In addition, no reason, or lawful reason had been given for the failure to pay the decretal amount.

This application will fail. The reason is that judicial review orders are aimed at correcting decisions of public authorities or officials who either act beyond their jurisdiction or without jurisdiction or fail to perform their public function. In our present application, the orders requested are orders of mandamus. These are orders requiring a public authority or officer to perform their public or statutory function. Therefore, in my view the public authority or officer against whom an order of mandamus is requested must be joined as a party, to enable service of the documents filed, and also an opportunity to be heard or be properly represented. The Government Proceedings Act (Cap.) where the Attorney-General is the party to be sued on behalf of the Government does not apply.

In the case of REPUBLIC -vs- DIRECTOR OF FISHERIES – ex-parte WANANCHI MARINE PRODUCTS (KENYA LIMITED) [2002] 2 KLR 581, at page 583 Ouna J. held –

“An attempt to serve the Attorney General Chambers in Mombasa failed as they declined to accept service, and rightly so because being an application seeking mandamus orders, it had to be served upon the respondent personally, in this case Mrs. N.K. Gitonga the Director of Fisheries in the Ministry of Agriculture and Rural Development – Fisheries Department”

From the above observation, in my view, the Permanent Secretary should have been made a party and served, even if the Attorney-General is also a party and is served. My view is fortified by the provisions of Order 53 rule 3 (2) which provides-

“3 (2) The notice shall be served on all parties who are directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and all parties to the proceedings.”

In my view, suing the Attorney-General and purporting to serve him as happened in this case was not adequate, and did not satisfy the requirements in judicial review proceedings where the actual office or officer complained of must be made a party to the proceedings and served. For this reason, I will strike out the application.

The other reason why the application will fail is that it is fatally defective in its format. The Notice of Motion in proceedings under Order 53 of the Civil Procedure Rules must be brought in the name of the REPUBLIC – See FARMERS BUS SERVICES AND OTHERS -VS- THE TRANSPORT LICENSING APPEAL TRIBUNAL [1959] E.A. 779, and WELAMONDI -VS- THE CHAIRMAN OF THE EXK [2002] IKLR 486. Failure to do so makes the motion completely muddled in form and incompetent. It cannot be salvaged. In our present case, the Notice of Motion was brought in the name of GACHOKA MWANGI as applicant and ATTORNEY-GENERAL as respondents. It is incurably defective. On this ground also, I will strike it out.

For the above reasons, I strike out the Notice of Motion herein. For the avoidance of doubt, the applicant may file another proper application in accordance with existing laws.

It is so ordered.

Dated and delivered this 9th day of June, 2009.

GEORGE DULU

JUDGE