



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION NO. 1284 OF 2003
APPLICATION BY S AMUEL WANJOHI NDONGA FOR LEAVE TO
APPLY FOR AN ORDER OF MANDAMUS

REPUBLIC

VERSUS

1. COMMISSIONER OF POLICE

2. PERMANENT SECRETARY IN CHARGE

OF INTERNAL SECURITY

3. ATTORNEY-GENERALRESPONDENTS

EX PARTE:

SAMUEL WANJOHI NDONGA.....
APPLICANT

RULING

This is an *ex parte* application by Chamber Summons, dated 24th October, 2003. It was brought under Order LII Rule 1(1) and (2) of the Civil Procedure Rules. The Applicant was seeking Orders that –

(a) leave be granted for an application for an Order of Mandamus against the Respondents to compel them to satisfy the decree issued in the Case SAMUEL WANJOHI NDONGA V. ATTORNEY GENERAL (R.M.C.C. No. 4615 of 2001, Milimani Commercial Courts), by paying the Applicant Kshs.301,182/90 with interest accrued thereon from 22nd July 2003 at 12% per annum until the decree is satisfied in full;

(b) the costs of the application be provided for.

The factual basis of the Application is in the form of the verifying affidavit of Samuel Wanjohi Ndonga, dated 24th October 2003 and filed with the Application on 27th October 2003, and the Statement of Facts filed pursuant to Order LIII rule 1(1) and (2) of the Civil Procedure Rules.

The following elements in the fact statement may be set out. On 15th September 1999 the Applicant was arrested by the police, allegedly because he was suspected to be selling the strong alcoholic beverage known generally as *chang'aa*. The police did a search at his factory at the Kariobangi Light Industries zone, and seized 1500 litres of industrial alcohol which was alleged to be *chang'a a*. The Applicant was thereafter charged with possession of 1500 litres of *chang'aa* (Kibera Criminal Case No.1047/99); but the case was later withdrawn, for lack of witnesses. The Applicant was later re-arrested and charged again

with the same offence (Makadara Criminal Case No. 4250 of 2000). While the trial was in progress, the charge was changed to possession of industrial alcohol without permit contrary to Section 5(b) of the Industrial Alcohol (Possession) Act (Cap. 119, Laws of Kenya). After the Applicant conducted his defence the court dismissed the case and he was acquitted under Section 215 of the Criminal Procedure Code, on 7th July 2000.

It is stated that the Applicant was licensed to deal with Industrial alcohol, and that both cases conducted at Kibera and Makadara had no legal basis. The police arrested, imprisoned and prosecuted the Applicant without cause, even after he showed them his licences. It is asserted that the arrest, imprisonment and prosecution were motivated by malice and a desire to ruin the Applicant's business.

The Applicant saw it fit to commence Civil Suit, RMCC 4615 of 2001 - SAMUEL WANJOHI NDONGA VS ATTORNEY GENERAL, at the Milimani Commercial Courts, seeking damages for false imprisonment and malicious prosecution. The Court heard the case and decided in favour of the Applicant, awarding him Kshs.301,182/90 and an Order was duly made against the Government. The court decided that the decretal sum and costs should bear interest at 12% p.a. from the date of judgment until full satisfaction. It is stated that whereas the Applicant is entitled to enjoy the fruit of his litigation, his demands for the satisfaction of the judgment have received no response from the Government. Consequently the Applicant is now seeking an Order of Mandamus to enable him to enforce his decree.

On 22nd August, 2003 the Applicant served notice on the Attorney- General, as required under the Government Proceedings Act (Cap.40, Laws of Kenya), of his intention to sue for the purpose of obtaining satisfaction of the court's decree in the case R.M.C.C No. 4615 of 2001. The Attorney-General duly filed a Statement of Defence at the Chief Magistrate's Court, Milimani Commercial Courts on 31st August, 2001, in response to the Plaint which had been filed on 6th July 2001.

This case turned against the Attorney-General, and the Court's Judgment and decree placed a binding duty of satisfaction in favour of the Applicant. Non-satisfaction of the decree to-date represents a breach of the public duty of the Office of the Attorney-General, and it is right in law for the Applicant to seek the assistance of this Court in ensuring that the Attorney-General performs a public duty required of him.

Consequently, I find the Applicant's case entirely unanswerable and find in favour of the Applicant. I make the following Orders:

1. Leave be and is hereby granted to Samuel Wanjohi Ndonga to apply for an Order of Mandamus against the Respondents to compel them to satisfy the decree in the case, SAMUEL WANJOHI NDONGA V ATTORNEY-GENERAL, R.M.C.C No.4615 of 2001, Milimani Commercial Courts, by paying Kshs.301,182/90 with interest accrued thereon from 22nd July 2003 at 12% per annum until the decree is satisfied in full.

2. The costs of this Application shall be in the cause.

DATED and DELIVERED at Nairobi this 2nd February 2004.

J.B. OJWANG

Ag. JUDGE

Coram: Ojwang Ag J

Court Clerk – Mutea

For the Applicant: Mr. Mwangi, Instructed by J.K Mwangi & Co. Advocates

Respondents – not represented