



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**JUDICIAL REVIEW APPLICATION NO. 3 OF 2017**

**IN THE MATTER OF: AN APPLICATION FOR ORDERS OF JUDICIAL  
REVIEW IN THE NATURE OF MANDAMUS**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PRINCIPAL SECRETARY,  
MINISTRY OF LANDS, HOUSING  
AND URBAN DEVELOPMENT.....RESPONDENT  
EX PARTE**

**KENNETH K BOIT.....1<sup>ST</sup> APPLICANT**

**JAMES C. BOIT..... 2<sup>ND</sup> APPLICANT**

**EMANATING FROM**

**THE ENVIRONMENT AND LAND COURT AT MALINDI, CASE NO. 119 OF 2011  
(FORMERLY NAIROBI HIGH COURT CIVIL CASE NO. 2577 OF 2011)**

**BETWEEN**

**KENNETH K BOIT.....1<sup>ST</sup> APPLICANT/DECREE HOLDER**

**JAMES C. BOIT.....2<sup>ND</sup> APPLICANT/DECREE HOLDER**

**VERSUS**

**THE COMMISSIONER OF LANDS.....1<sup>ST</sup> DEFENDANT/JUDGMENT DEBTOR**

**THE LAND REGISTRAR, KILIFI.....2<sup>ND</sup> DEFENDANT/JUDGMENT DEBTOR**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT/JUDGMENT DEBTOR**

**KILIFI COUNTY COUNCIL & 9 OTHERS.....4<sup>TH</sup> DEFENDANT**

## JUDGMENT

1. By this Judicial Review application dated and filed herein on 28<sup>th</sup> February 2018, Kenneth K Boit and James C. Boit (the Ex-Parte Applicants) pray that:-

*i. An order of mandamus do issue compelling the Respondent, as the Accounting Officer in the Ministry of Lands, Housing and Urban Development where the 1<sup>st</sup> and 2<sup>nd</sup> Judgment-Debtors are placed in the National Government, to settle the Decree of Court dated 25<sup>th</sup> September 2015 subject of the ELC Malindi Case No. 119 of 2011 (formerly Nairobi HCCC No. 2577 of 1997) within 30 days of the Order failing whereof warrants of arrest be issued against the said Officer;*

*ii. The costs of the application be provided for.*

2. The application is premised on the grounds that:-

*a) The Respondent and the Judgment debtors have refused to settle the decree of this Court dated 25<sup>th</sup> September 2015, despite their being served therewith.*

*b) The refusal to settle the decretal sum is detrimental to the Ex-Parte Applicants and offends the rule of law and fair administration of justice.*

*c) It is meet and just that the Orders sought herein are granted to alleviate the double jeopardy caused to the Applicants of losing both their land and the compensation ordered.*

3. The Honourable the Attorney General appearing for the Respondent is however opposed to the grant of the Orders sought. In Grounds of Opposition dated 7<sup>th</sup> April 2017 and filed herein on 13<sup>th</sup> July 2017, the A-G asserts inter alia as follows:-

*1. That the suit is an abuse of procedure, frivolous and meant to embarrass the Respondent.*

*2. That this Court is not the proper forum for determination and execution of a decree and/or the decretal amount.*

*3. That this Court is not the proper forum of filing this suit. The proper forum should have been the trial Court.*

*4. That this suit as drawn and filed does not comply with Order 53 Rule 1 and 2 (of the Civil Procedure Rules).*

*5. That the suit is premature and the orders sought cannot be enforced.*

*6. That the Respondents are committed to the settlement of any Judgment of this Court and request for time to settle the same.*

4. I have considered the application and the Grounds filed in Opposition thereto. I have equally perused and considered the Written Submissions by the Learned Counsels for the Parties.

5. Section 21(1) of the Government Proceedings Act provides that:-

***“Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any Court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the Court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of 21 days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a Certificate in the prescribed form containing particulars of the order:***

***Provided that, if the Court so directs, a separate Certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.”***

6. Section 21(3) of the said Act on the other hand provides that:

***“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.***

***Provided that the Court by which any such order as aforesaid is made or any Court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the Certificate has not been issued may order any such direction to be inserted therein.”***

7. The effect of these provisions is that whereas execution proceedings as are known to law are not available against the Government, the

accounting officer for the Government Department concerned is nevertheless under a statutory duty to satisfy a Judgment made by the Court against that department.

8. However, Section 21(2) and (2) of the Act provide for a condition precedent which must be fulfilled. This is the requirement that such payment will be based on a Certificate of Costs obtained by the successful litigant from the Court issuing the decree which should be served upon the Honourable the Attorney General. It is only after the service upon the Attorney General that Section 21(3) imposes a duty on the accounting officer to pay the sums specified.

9. In the matter before me, while the Ex-Parte Applicants contend that they have complied with the process and that the Accounting Officer has failed to comply, I did not find any evidence that any such Certificate of Costs as envisaged under Section 21(1) and (2) of the Act was extracted and/or served upon the Honourable the Attorney General.

10. All that is attached to the Ex-Parte Applicants Supporting Affidavit is a Copy of the Decree as extracted by the Applicants and a letter dated 30<sup>th</sup> November 2016 from the Applicants Advocates notifying the Respondent Accounting Officer of the delivery of the Judgment and demanding a settlement thereof.

11. In the circumstances, I am not prepared to accept that there is so far any public duty imposed on the Respondent accounting officer to make any payment to the Ex-Parte Applicants and which duty may be compelled by this Court through an order of mandamus.

12. As things stand, I agree with the Honourable the Attorney General that the application herein is premature. The same is accordingly struck out with no order as to costs.

**Dated, signed and delivered at Malindi this 11<sup>th</sup> day of July, 2019.**

**J.O. OLOLA**

**JUDGE**