



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**JUDICIAL REVIEW MISC. APPLICATION NO. 115 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE PROCEEDINGS FOR ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF THE ELECTION PETITION 1 OF 2013: RICHARD KALEMBE NDILE VERSUS PATRICK MWEU MUSIMBA, GEDI ARALE NOOR AND THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**

**AND**

**IN THE MATTER OF THE PARLIAMENTARY ELECTIONS FOR THE NATIONAL ASSEMBLY ELECTIONS FOR KIBWEZI WEST CONSTITUENCY HELD ON 4<sup>TH</sup> MARCH 2013**

**THE REPUBLIC .....APPLICANT**

**VERSUS**

**THE CHIEF EXECUTIVE OFFICER, INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....RESPONDENT**

**AND**

**RICHARD KALEMBE NDILE .....EX-PARTE APPLICANT**

**JUDGMENT**

**Introduction**

The *ex parte* Applicant (hereinafter referred to as “the Applicant”) was the Petitioner in **Machakos High Court Election Petition No. 1 of 2013 - Richard Kalembe Ndile vs Patrick Mweu Musimba, Gedi Arale Noor and The Independent Electoral and Boundaries Commission**, in which judgment was issued in his favour on 15<sup>th</sup> August 2013. The Applicant was also awarded costs which this Court capped at Kshs 1,500,000/= all inclusive. The Deputy Registrar of this Court taxed the Applicant’s costs at Kshs 1,500,000/= on 4<sup>th</sup> April 2014 and a certificate to that effect was issued on 17<sup>th</sup> April 2014.

The Applicant has now filed an application by way of a Notice of Motion dated 3<sup>rd</sup> July 2017, seeking an order of Mandamus to compel the Chief Executive Officer of the Independent Electoral and Boundaries Commission to pay the Applicant Kshs. 2,130,000.00 as costs and interest as ordered and taxed in Machakos High Court Election Petition Number 1 of 2013.

The Applicant states that since the judgment was delivered and the decree and certificate of costs extracted, the Respondent herein has failed, ignored and/or neglected to satisfy the decree. Further, that enforcement of a decree against the Respondent falls within the auspices of Government Proceedings Act and any execution of a decree against the same ought to be done as hereunder. The Applicant attached a copy of the said judgment and certificate of costs.

The Applicant’s claim as stated in the foregoing is set out in a statement of facts and verifying affidavit sworn by the Applicant, both dated 8<sup>th</sup> June 2016, and filed in Court on the same date. The Applicant’s also filed written submissions in Court dated 15<sup>th</sup> January 2017.

The Respondent did not file any replying affidavit or submissions in response to the application, after being directed to do so by this Court.

## The Issues and Determination

I have considered the pleadings and submissions made by the Applicant. The order sought by the Applicant of mandamus is defined in the **Halsburys Laws of England, 4th Edition, Vol 1** at page 111 as follows:

**“The order of mandamus is of most extensive remedial nature and is in the form of a command issuing from the High Court of Justice directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is of the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue to the end that justice may be done, in all cases where there is a specific legal right, and it may issue in cases where although there is an alternative remedy, yet the mode of redress is not convenient, beneficial and effectual.”**

The issues that require to be determined therefore are firstly, whether the Respondent are under a public duty to pay the Applicant the awarded costs, and secondly, if so whether the Applicant is entitled to the relief he seeks. The Applicant has in this respect brought evidence of the judgment and costs awarded in his favour arising from claims against the Respondent.

Execution proceedings against a government or public authority can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body. This was the holding in **Republic vs Permanent Secretary Office of the President Ministry of Internal Security, Misc. Civil Application JR 132 of 2012** and **Town Clerk vs City Council of Nairobi, Misc. Civil Application No. 224 of 2012**. Section 10(1) of the Independent Electoral and Boundaries Commission Act establishes the office of Secretary of the Commission, and under section 10(7) of the functions are set out as follows:

**“7. The secretary shall be—**

- (a) the chief executive officer of the Commission;**
- (b) head of the secretariat;**
- (c) the accounting officer of the Commission;**
- (d) custodian of all commission’s records;**
- (e) responsible for—**
  - (i) executing decisions of the Commission;**
  - (ii) assignment of duties and supervision of all employees of the Commission;**
  - (iii) facilitating, co-ordinating and ensuring execution of Commission’s mandate;**
  - (iv) ensuring staff compliance with public ethics and values; and**
  - (v) the performance of such other duties as may be assigned by the law and Commission.”**

The finding of this Court therefore is that the Respondent as the Chief Executive Officer of the Independent Electoral and Boundaries Commission is under a legal obligation to implement the judgment in favour of the Applicant.

Lastly, as to whether the Applicant is entitled to the relief sought, he has shown his interest and *locus standi* in terms of the judgment he secured in his favour as against the Respondent, and this Court has found that the Respondent is under a legal duty to satisfy the said judgment.

The Applicant’s Notice of Motion dated 3<sup>rd</sup> July 2017 is accordingly found to have merit, and an order of mandamus is hereby issued compelling the Respondent to pay to the Applicant the sum of Kshs 1,500,000/= together with interest thereon at 14% per annum from the date of this judgment until payment in full.

Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 6<sup>th</sup> DAY OF MARCH 2018**

**P. NYAMWEYA**

**JUDGE**