



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW NO. 24 OF 2017**

**REPUBLIC ..... PLAINTIFF**

**VERSUS**

**THE HONOURABLE ATTORNEY GENERAL ..... RESPONDENT**

**JAMES MACHARIA MWANGI ..... SUBJECT**

**JUDGMENT**

1. In *Nakuru ELC Misc. Civil App. No. 79 of 2012 (JR)* (“Earlier Suit”), the *Ex Parte* Applicant, James Macharia Mwangi (“Applicant”) took out Judicial Review Applicant to quash a gazette notice by the Registrar of Titles which purported to cancel the Applicant’s title to land (Parcel No. Molo Township 533/678 also described as Molo Township Block 2/460). The Application also sought orders compelling the Registrar of Titles to reinstate the land records of the cancelled title to the land as well as prohibition against any future action by the Registrar of Titles from interfering with the Applicant’s title to the parcel of land in question.

2. The Registrar of Titles was defended by the Honourable Attorney General in that Earlier Suit. Judgment was delivered on 23/04/2014 (Munyao J.) in which the Application was allowed in its entirety with costs.

3. Thereafter, costs were taxed at Kshs. 87,994/- on 20/01/2017. The Applicant, through his advocates, proceeded to extract the Certificate of Costs. The Honourable Attorney General has not paid the amount. This prompted the Applicant to bring the present Application. The Notice of Motion is dated 03/10/2017. It bears the following prayers:

*a. That this Honourable Court be pleased to issue an order of Mandamus compelling and/or commanding the Respondent to pay the subject Kshs. 87,994/- being the costs of the suit in Nakuru Misc. Civil App. No. 79 of 2012 (JR): James Macharia Mwangi versus Registrar of Titles and the Honourable Attorney General.*

*b. The costs of this application be provided for.*

4. The Honourable Attorney General entered appearance but did not file any Grounds of Objection or Replying Affidavit to the Application. When the parties appeared before me on 19/06/2018, Mr. Ondieki, Learned State Counsel, indicated that the Honourable Attorney General was interested in settling the matter. He asked for a mention date in a few months to confirm settlement. However, when the matter came up on 30/07/2018, Mr. Ondieki informed the Court that the Honourable Attorney General had not yet paid. He indicated to the Court that the Honourable Attorney General was not going to file any more documents in the case and requested for a judgment date.

5. Consequently, the Application is un-opposed. Still, I am required to satisfy myself that it is appropriate to issue the orders sought.

6. It is not in doubt that section 21(4) of the Government Proceedings Act prohibits execution against the Government. The said provision states:

*Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such, of any money or costs.*

7. However section 21 (1) of the Act provides:

*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 twenty-one 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.

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

*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.*

9. As many decisions in our jurisdiction have pointed out, 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 judgement made by the Court against that department. That Accounting Officer can be compelled by an order for mandamus to do so. This is what the Applicant seeks here.

10. As the Court of Appeal said in **Republic vs. Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996** while citing with approval **Halsbury's Law of England, 4<sup>th</sup> Edn. Vol. 7 p. 111 para 89:**

*The order of mandamus is of most extensive remedial nature and is in form, 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 in 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 no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.*

11. In the present case, the Applicant has obtained a Certificate of Costs against the Government as required by the Statute. They have served it on the Attorney General as required by the Statute. Yet, no payment has been made. The Honourable Attorney General is under a duty to make the payment and no lawful justification for non-payment has been proffered.

**12. In the circumstances, the orders prayed for by the Applicant are eminently merited. They are hereby granted as prayed in the Notice of Motion dated 03/10/2017.**

13. Orders accordingly.

**Dated and delivered at Nakuru this 18<sup>th</sup> day of October, 2018**

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**JOEL NGUGI**

**JUDGE**