



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO.13'B' OF 2015**

**IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF THE GOVERNMENT PROCEEDINGS ACT, CHAPTER 40 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY MINISTRY OF HEALTH .....2<sup>ND</sup> RESPONDENT**

**AND**

**KIMEU MUSYOKI (SUING AS THE LEGAL ADMINISTRATOR IN THE ESTATE OF**

**KENNEDY MUSYOKI KIMEU (DECEASED) .....EX-PARTE APPLICANT**

**RULING OF THE COURT**

1. The Exparte Applicant has filed a substantive Notice of Motion dated 22/06/2016 seeking for the following prayers namely:-

- 1. An order of mandamus directed to 1<sup>st</sup> and 2<sup>nd</sup> Respondents to compel 1<sup>st</sup> and 2<sup>nd</sup> Respondents to pay the Exparte applicant kshs. 926,856.00 plus costs and accrued interest being the decretal sum arising out of the Machakos CMCC No.1287 of 2009, Kimeu Musyoki (suing as the legal administrator in the estate of Kennedy Musyoki Kimeu – deceased) Vs the Attorney General & another within thirty (30) days from the date of the Ruling.*

**2. A declaration that the Respondents are in breach of their duty under the law in that they have failed to settle the decretal sum though duly notified.**

**3. An order for costs.**

The Application is founded on the grounds set out in the accompanying statement filed on 25/01/2016, a verifying affidavit dated 11/01/2016 with the annexures thereto and the Exparte Chamber Summons dated 11/01/2016. The Applicant's case is that he had filed the requisite ex-parte chamber summons for leave to apply for an order of mandamus against the Respondents which was granted on 15/06/2016. The Applicant's case is that a civil Suit being **Machakos CMCC No. 1287 of 2009** between **Kimeu Musyoki (Suing as the legal administrator in the estate of Kennedy Musyoki Kimeu – deceased) Vs the Attorney General & Another** for himself and on behalf of the deceased's estate seeking compensation for the loss suffered by the estate as a result of the death of the deceased who was hit by motor vehicle registration Number GK A636 M owned by the 1<sup>st</sup> Respondent. The case in which Respondents were represented proceeded until judgment was delivered whereby the 1<sup>st</sup> Respondent was held 100% liable and ordered to pay general damages of Kshs,610,200/= plus costs and interest. The Applicant further avers that the 1<sup>st</sup> Respondent has been severally served with requests to pay including copies of the judgment, decree and certificate of Order against the Government but the Respondents are yet to settle the decretal sum. The Applicant now prays for an order of mandamus directed to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to compel them to pay the Exparte Applicant Kshs.926,856/= plus costs and accrued interest being the decretal sum arising out of **Machakos CMCC No. 1287 of 2009 Kimeu Musyoki (suing as the legal administrator in the estate of Kennedy Musyoki Kimeu – (deceased) Vs the Attorney General & Another** within thirty (30) days from the date of the Ruling. The Applicant also seeks a declaration that the Respondents are in breach of their duty under the law in that they have failed to settle the decretal sum though duly notified. The Applicant also prays for costs. The Applicant has attached the Exparte Chamber Summons statement verifying affidavit, judgment, decree, certificate of order against the Government, Notice pursuant to Section 13A of the Government proceedings Act, correspondences.

2. The Respondents failed to file any replying affidavits or grounds of opposition to the Applicant's Application aforesaid.

**3. Submissions:**

This Court directed that parties file written submissions so as to dispose of the application. It is only the Exparte Applicant's learned counsel who filed submissions. The Exparte Applicant's counsel submitted that the orders in the Notice of Motion should be granted since the Respondents had been aware of the judgement in which they had participated during the trial in **Machakos CMCC No.1287 of 2009**. Counsel further submitted that all the requisite notices have been sent to the Respondents to settle the decretal sums plus costs and interest but that they have refused to satisfy the said judgment which is now running into six years. It is the submission of the Applicants counsel that since the Applicant cannot execute against the Government in the ordinary way, the only remedy available is an order of mandamus to compel the Respondents to settle the decretal sums as awarded by the court. Learned counsel urged this court to allow the application as prayed. The following cases were cited in support of the application:-

1. REPUBLIC Vs KENYA NATIONAL EXAMINATIONS COUNCIL EXPARTE GATHENJI & OTHERS - COURT OF APPEAL C.A NO. 266 OF 1996.

2. REPUBLIC VS PERMANENT SECRETARY MINISTRY OF WATER RESOURCES MANAGEMENT & DEVELOPMENT EXPARTE AKAMBA TIMBER & HARDWARE LTD (2006) eKLR

3. REPUBLIC VS PERMANENT SECRETARY INTERNAL SECURITY & 2 OTHERS - ELDORET MISC, CIVIL APPLICATION NO.278 OF 2003.

4. I have considered the submissions of counsel for the Exparte Applicant. I have also considered the

authorities cited. The main issue for determination herein is whether or not the Exparte Applicant has presented sufficient reasons to justify the orders being sought herein. Indeed it is trite law that the remedy of judicial review is only available where an issue of a public nature is involved and it is also a special jurisdiction of the court which are discretionary in nature. An order of mandamus compels the performance of a public duty which is Imposed on a person or body by a statute and where that person or body has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. The Exparte Applicant has indicated that he duly filed a suit at Machakos Law courts being **Machakos CMCC No.1287 of 2009** and that the Respondents had fully participated throughout the trial until judgment was duly entered in favour of the Applicant. The Applicant has also shown that he followed all the requisite procedures such as obtaining a decree, issuing the requisite notice pursuant to the Government proceedings Act, issuing a certificate of order upon the Respondents who have refused to satisfy the judgment. The Applicant was now compelled to file the present application for an order of mandamus to compel the Respondents who are public bodies or officers to settle the decree issued by the court. The Applicant further contends that he has no alternative mode of having his judgment satisfied so that he can enjoy it unless the Respondents are compelled to make the payment. In the case of **REPUBLIC VS MINISTRY OF DEFENCE EXPARTE SYLVANUS OTIENO ODIAGA [2015] eKLR** Justice Odunga held thus:-

**“As stated hereinabove, once the certificate of order against the Government is served on the Hon Attorney General, Section 21 (3) of the Government Proceedings Act imposes a statutory duty on the accounting officer to pay the sums specified in the said order to the person entitled or to his Advocate together with any interest lawfully accruing thereon. In this case, the said certificate was duly issued and served. Therefore as was appreciated in REPUBLIC VS KENYA NATIONAL EXAMINATION COUNCIL EXPARTE GATHENJI & OTHERS CIVIL APPEAL NO. 266 OF 1996 there is a specific legal right but no specific remedy available for enforcing that right as execution cannot issue against the Government in the ordinary way. In such circumstances it is clear that an order of mandamus may go forth in order to remedy the defects of justice”.**

The above position was also adopted in the case of **REPUBLIC VS PERMANENT SECRETARY MINISTRY OF WATER & RESOURCES MANAGEMENT & DEVELOPMENT EXPARTE AKAMBA TIMBER & HARDWARE LTD [2006] eKLR** where a Judicial Review Application for an order of mandamus was made in order to compel the Permanent Secretary in the Ministry named to pay decretal sums in a judgment entered against the Government. In that case the court held thus:-

**“There is no doubt that the Respondents are public bodies or officers who have a duty to settle a decree which is an order of the court. They have not raised any ground why they should not settle the decree. The Applicant has no alternative mode of having his judgment satisfied so that he can enjoy it. Under these circumstances, it is proper to compel the Respondents to settle the decree by the issue of a mandamus order as prayed”.**

5. All the above cases appear to support the Applicant’s Application for an order of mandamus to compel the Respondents to satisfy the judgment. The Respondents are persons holding state offices whose duty is to comply with the order of the court. The Applicant has exhausted all the requisite processes and what is now remaining is for the Respondents to satisfy the judgment issued in favour of the Applicant. It would be quite unfair to leave the Applicant holding onto a paper judgment without access to the fruits of a successful litigation. The Respondents being state bodies and officers of the Government are under a duty to satisfy the decree herein. Accordingly an order of Mandamus is hereby issued and directed to the Respondents compelling them to pay to the Exparte Applicant the entire decretal sum of **Kshs. 926,856/=** awarded to the Exparte Applicant in **Machakos Chief Magistrate’s Court Civil Case No. 1287 of 2009** as contained in the certificate of order against the Government issued by the said Machakos Cm’s Court dated 16/12/2014. I also order that a declaration that the Respondents are in breach of their duty under the law in that they have failed to settle the decretal sums though duly served.

In the result the Applicant’s Application dated 22/06/2016 succeeds. The same is granted as prayed.

**Dated and Delivered at Machakos this 9<sup>th</sup> day of MARCH, 2017.**

**D. K. KEMEI**

**JUDGE**

In the Presence of:

Kilonzo for Mutuku for Applicant.....

C/A: Muoti.....