



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**JUDICIAL REVIEW NO.4 OF 2016**

**IN THE MATTER OF ORDER 53 CIVIL PROCEDURE RULES 2010**

**-AND-**

**IN THE MATTER OF MERU CHIEF MAGISTRATE'S CIVIL CASE NO. 10 OF 2006**

**JULIUS GITONGA MUNENE & 9 OTHERS VS ATTORNEY GENERAL**

**-AND-**

**THE PRINCIPAL SECRETARY, MINISTRY OF**

**INTERIOR AND COORDINATION OF NATIONAL**

**GOVERNMENT OF KENYA.....RESPONDENT**

**THE HON ATTORNEY GENERAL.....INTERESTED PARTY**

**-AND-**

**JULIUS GITONGA MUNENE & 9 OTHERS.....EX-PARTE APPLICANTS**

**JUDGMENT**

[1] Before me is a Notice of Motion Application dated 10<sup>th</sup> March 2016. The said application is expressed to be brought pursuant to Order 53 Rule 1 of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act. In the Motion, the following orders were sought:

**1. An order of Mandamus directed at the Principal Secretary of Interior and Coordination of National Government in the Republic of Kenya compelling the payment of Kshs 2,000,000 interest at court rates and costs of Kshs 97,030 as per the Decree and Certificate of costs dated 29<sup>th</sup> November 2013, issued in Meru CMCC NO. 10 of 2006 and in default of such payment, the Principal Secretary to be committed to prison for contempt of court.**

**2. Costs of the application be paid by the Respondents.**

**Brief facts**

[2] In a nutshell, the Applicants' case is that they filed Meru CMCC NO. 10 of 2006 against the Honourable Attorney General, the Commissioner of Police and Chief Inspector of Police one Shem Nyokabi claiming damages for unlawful arrest and malicious prosecution. That judgment was delivered in their favour and each one of them was awarded Kshs 200,000 as general damages. Subsequently, demand for payment through the Attorney General and directly to the Principal Secretary, Ministry of Interior and Coordination of National government- the ministry responsible for police matters- was made but no payment had been made. Now, the Applicants say that they are apprehensive that the money would not be paid unless a compelling order is issued by the court.

[3] The Applicants submitted in support of their case. More specifically, they urged that upon judgment being delivered, a decree, certificate of cost and order were extracted and served upon the defendant. The judgment was not appealed against, yet the decree remains unsatisfied. Thus, failure to pay the judgment sum to the Applicants amounts to injustice especially owing to the fact that the Respondent is a government agency and the Applicant is barred from executing against it by way of attachment of its property. Consequently, the Applicants contended that they had sufficiently demonstrated that they had established a case for an order of mandamus against the Respondent as that was the only way to ensure that the applicants' judgment does not become barren.

### **Sad state of affairs**

[4] Hitherto, the Respondents have not filed a reply or submissions in this case. And the following turn of events are disturbing. When the matter came up for hearing on 28<sup>th</sup> April 2016, Ms Kungu for the Respondents requested the court to give her more time to consult his clients. The court graciously allowed her request and gave her 30 days to consult on the payment. On 29<sup>th</sup> September 2016, Ms Kungu for the Respondents once again requested for more time to consult Treasury and further intimated to court that if nothing will be forthcoming, she would proceed with the matter. Again the court acceded to her request and gave her 30 days to file and serve a Replying Affidavit and to seek for instructions to pay the decretal sum. On 15<sup>th</sup> December 2016, Mr. Kieti for the Respondents intimated to court that Ms Kungu was seized of this matter. He, therefore, made yet a further request. The court reluctantly indulged for the last time and ordered the Respondents to file and serve submissions within 14 days thereof. But, on 16<sup>th</sup> February 2017, Mr. Kariuki for the Applicants informed the court that the Respondents had not been served with any response or submissions by the Respondents as had been ordered by the court. Upon perusal of the record, no reply or submissions has been filed by the Respondents. One wonders how the office of the AG which is the defender of public interest and the law would scorn and disobey the Constitution. Indeed, the persistent and deliberate default by the Respondents broke the camel's back, hence, the case was scheduled for judgment on 8<sup>th</sup> May 2017 notwithstanding absence of reply from the Respondents.

### **DETERMINATION**

[5] Doubtless, the Applicants are holders of a decree arising from judgment delivered on 15<sup>th</sup> March 2013 in which the Respondents were ordered to pay the Applicants a sum of Kshs 200,000 each being damages for malicious prosecution. The said judgment has not been reversed or set aside on by appellate court or by this court. Yet the Respondents have not satisfied the decree thereto despite numerous demands and reminders. As I have already noted, it is also quite disturbing that the Respondents, despite having been given ample time, did not file any response or submissions to this application which is seeking serious orders against a state organ. All promises to pay which were made by the Respondent through its legal counsel came to naught. Nonetheless, I should ask; what does the law say about orders sought herein?

### **Mandamus: no dearth of judicial precedents**

[6] There is no dearth of judicial precedents on the law on mandamus. I do not, however wish to multiply them except, I am content to cite *in extenso* the persuasive decision by Odunga J in the case of **REPUBLIC vs. THE ATTORNEY GENERAL & ANOTHER EX PARTE JAMES ALFRED KOROSO** Judicial Review Miscellaneous Application No. 44 of 2012 that:

...In the present case the *ex parte* applicant has no other option of realising the fruits of his judgment since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgment that he has been awarded is realized. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit....The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognized that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the Court’s displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court.”

Similarly, I find myself citing in extenso the decision by Githua, J in **REPUBLIC VS. PERMANENT SECRETARY, MINISTRY OF STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY EX PARTE FREDRICK MANOAH EGUNZA** [2012] eKLR as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of *mandamus* compelling the accounting officer in the relevant

ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (*hereinafter referred to as the Act*) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.”

[7] The upshot of my analysis above is this. According to the law; an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. See **KENYA NATIONAL EXAMINATION COUNCIL v REPUBLIC, EX PARTE GEOFFREY GATHENJI & 9 OTHERS, NAIROBI CIVIL APPEAL NO. 266 OF 1996**. Needless to state that public duty imposed by statute is called statutory duty. In this case, section 21(3) of the Government Proceedings Act is on point on matters of satisfaction of court decrees by Government as is the case here. The section imposes a statutory duty on the Accounting Officer of the relevant government department (Judgment-debtor) to pay any sums, including costs which are duly certified by court to be due and payable in a decree; and processed in accordance with the procedure provided thereto. The Applicants are holders of a decree of court which certifies the sum payable by the government department herein and has been channeled through the laid down procedure. As such, the Respondent owes the Applicants a public duty to satisfy the decree of the court in **MERU CMCC NO. 10 Of 2006**: to pay the decretal sum and interest awarded by the court. By not paying the decree as required in law, the Respondents have failed to perform their statutory duty imposed under section 21(3) of the Government Proceedings Act. They have also shown great arrogance in not even attempting to give any or reasonable reason as to why they have not paid the decretal sum herein. One other thing; the Applicants cannot execute the decree herein by way of attachment and sale of the properties of the government-judgment-debtor. There is, therefore, an injustice being occasioned upon the Applicants; in all intention, the law will never reduce a successful plaintiff to become mere holder of a barren decree. It is for situations such as these that mandamus becomes most effective and necessary remedy. You may consider the purpose of mandamus as a remedy as enunciated in *HALSBURY'S LAW OF ENGLAND, 4<sup>th</sup> Edition Volume 1 at page 111 FROM PARAGRAPH 89*:

**...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.”**

Consequently, the overall impression from the facts of this case leads to one inescapable conclusion; that an order of mandamus is merited and I hereby issue it. In more specific terms I order:

**1. That an order of Mandamus is hereby issued directed at the Principal Secretary of Interior and Coordination of National Government in the Republic of Kenya compelling the payment of Kshs 2,000,000 interest at court rates and costs of Kshs 97,030 as per the Decree and Certificate of costs dated 29<sup>th</sup> November 2013 issued in Meru CMCC NO. 10 of 2006. The payment should be made within 90 days from today and in default thereof, the Principal Secretary of, who is the Accounting Officer of Interior and Coordination of National Government in the Republic of Kenya (Judgment-debtor) herein- may be cited and punished for contempt of court.**

**2. Costs of the application to be paid by the Respondents.**

**Dated, signed and delivered in open court at Meru this 8<sup>th</sup> day of May 2017**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Murango advocate for ex parte applicants

Non appearance for the Attorney General.

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**F. GIKONYO**

**JUDGE**