



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**JUDICIAL REVIEW NO. 13 OF 2014.**

**REPUBLIC**

**(EX-PARTE CHARLES M. TAMBA).....APPLICANT.**

**VERSUS**

**THE ATTORNEY GENERAL,**

**REPUBLIC OF KENYA..... 1<sup>ST</sup> RESPONDENT.**

**THE PRINCIPAL SECRETARY,**

**MINISTRY OF ENVIRONMENT,**

**WATER AND NATURAL RESOURCES.....2<sup>ND</sup> RESPONDENT.**

**R U L I N G.**

**The application**

1. The exparte applicant, Charles M. Tamba filed an application by way of Notice of Motion dated 2<sup>nd</sup> March, 2015, under the provisions of Order 53 rule 3 of the Civil Procedure Rules and section 8 of the Law Reform Act.
2. He seeks an order of Mandamus to compel the 1<sup>st</sup> and 2<sup>nd</sup> respondents to settle the decree in Kakamega Chief Magistrate's Court Civil Suit No. 635 of 2000. He also seeks interest on the decretal amount of Ksh. 1,316,363.00 as from 29<sup>th</sup> June, 2010, until payment in full.
3. The application is accompanied by a statement of facts dated 1<sup>st</sup> July, 2014 and the affidavit of the exparte applicant, dated 7<sup>th</sup> August, 2014.
4. At the hearing of the application, Mr. Momanyi Learned Counsel for the exparte applicant submitted that the respondents were served with the application and annexures thereto but they had not filed a response. He also submitted that the Attorney General's office, Litigation Department, Kakamega, was served with the hearing notice for 20<sup>th</sup> January, 2016. He filed an affidavit of service dated 17<sup>th</sup> December, 2015, to that effect. Mr. Momanyi prayed that the application dated 2<sup>nd</sup> March, 2015, be granted.

**Determination of the application**

The issue for determination is if the ex parte applicant has made out a case for grant of the orders of Mandamus.

5. The ex parte applicant deposes in paragraph 7 of his affidavit that judgment was entered against the respondents on 24<sup>th</sup> August, 2005. He avers that the respondents did not act on the decree which prompted his Advocate to follow up the claim until the 23<sup>rd</sup> of April, 2010 when the 1<sup>st</sup> respondent wrote to his Advocate seeking more particulars about the case.
6. The ex parte applicant deposes in paragraph 14 of his affidavit that on 13<sup>th</sup> October, 2010, his Advocate served the 2<sup>nd</sup> respondent with a demand notice which has not elicited a response to date. The ex parte applicant attached several copies of correspondence between his Advocate and the office of the Hon. Attorney General depicting the efforts that he has made to obtain the fruits of his judgment. Out of frustration, the ex parte applicant moves this court for the orders of Mandamus to compel the 1<sup>st</sup> and 2<sup>nd</sup> respondents to pay the sum of Ksh. 1,316,363.00 plus interest from 29<sup>th</sup> June, 2010, which this court notes is the date a certificate of costs and judgment was issued against the Government, until payment in full.
7. In **Republic vs. Kenya National Examinations Council ex parte Gathenji Njoroge & 9 Others [1997] eKLR**, the Court of Appeal cited the following passage with approval, from Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 1 at page 111 from paragraph 89 –

*“The order of mandamus is of a 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.”*

8. In the present case, the ex parte applicant has moved to this court for all the right reasons, the only remedy available to him is that of Mandamus to compel the Government of Kenya to settle the decretal amount and interest accruing as from 29<sup>th</sup> June, 2010. In so stating, I cite with approval the decision of Odunga, J, in the case of **Republic vs. Attorney General & Another Ex parte James Alfred Koroso [2013] eKLR**, where the Hon. Judge stated thus:-

*“...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 realised. Unless something is done he will forever be left babysitting 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 recognised 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.”*

9. In the instant case, the certificate of costs and judgment against the Government was sent to the Hon. Attorney General’s office, Kakamega, on 13<sup>th</sup> October, 2010, by the exparte applicant’s Advocates. I am alive to the provisions of Section 21 (3) of the Government Proceedings Act, Cap 40, Laws of Kenya which in this case, impose a statutory duty on the Accounting Officer of the 2<sup>nd</sup> respondent to pay the amount of money specified in the said order to the person so specified or his Advocate, together with any interest that may have accrued. The Hon. Attorney was enjoined in the suit in the lower court as the legal representative of the Government of Kenya. I am satisfied that in the circumstances of this case, that the exparte applicant is entitled to the orders sought.

10. I therefore make the following orders:-

1. *An order of Mandamus is hereby issued to the 1<sup>st</sup> and 2<sup>nd</sup> respondents compelling them to pay the exparte applicant the decretal sum of Ksh. 1,316,363.00 awarded to him in Kakamega Chief Magistrate’s Court Civil Case No. 635 of 2000 contained in the certificate of order against the Government issued on 29<sup>th</sup> June, 2010;*
2. *Interest at court rates as from 29<sup>th</sup> June, 2010, until payment of the decretal amount in full; and*
3. *Costs of this application.*

**DELIVERED, DATED and SIGNED** in open court at **KAKAMEGA** on this **10<sup>TH</sup>** day of **MARCH** , 2016.

**NJOKI MWANGI.**

**JUDGE.**

**In the presence of:-**

..... **for the exparte Applicant**

..... **for the Respondent**

