



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JR MISC APPLICATION NO. 252 OF 2015**

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

**ORDERS FOR MANDAMUS**

**AND**

**IN THE MATTER OF THE CHIEF MAGISTRATES COURT AT NAIROBI MILIMANI  
COMMERCIAL COURT CMCC NO. 8847 OF 2003**

**LUCY MUTHONI GATHARI –VS- THE HON. ATTORNEY GENERAL**

**AND**

**IN THE MATTER OF ARTICLE 48 AND 129 OF THE CONSTITUTION OF KENYA 2010 AND  
THE GOVERNMENT PROCEEDINGS ACT CAP 40.**

**BETWEEN**

**REPUBLIC..... APPLICANT**

**AND**

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

**MINISTRY OF EDUCATION SCIENCE AND TECHNOLOGY.....2<sup>ND</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY.....3<sup>RD</sup> RESPONDENT.**

**EX PARTE: LUCY MUTHONI GATHARI**

**JUDGEMENT**

1. By a Notice of Motion dated 6<sup>th</sup> August, 2015, the applicant herein, **Lucy Muthoni Gathari**, seeks the following orders:

**1. That this honourable court be pleased to issue an order of mandamus compelling the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein forthwith pay the applicant Kshs 455,086 being the decretal sum together with costs of Kshs 70,505/= awarded in Chief Magistrate's Court Milimani Commercial Court Nairobi Civil Case Number 8847 of 2003 together with interest thereon at**

**the rate of 12% P.A. on both from 29<sup>th</sup> March 2011 till payment in full.**

**2. That costs of this application be provided for.**

**Ex Parte Applicant's Case**

2. According to the applicant, on 2<sup>nd</sup> day of October he was lawfully pedestrian standing at Waki Stage along Thika Nairobi Highway when a motor vehicle registration number GKA 106F which was driven carelessly by one **Chrisantose Otieno Oyugi**, a driver assigned the said vehicle by the 2<sup>nd</sup> Respondent, and knocked me down. According to the applicant, the said accident was caused by negligence of the 2<sup>nd</sup> Respondent driver.
3. As a result, on the 27<sup>th</sup> August, 2003 the applicant filed Civil Suit No. 8847 of 2003 against the 2<sup>nd</sup> Respondent, the driver **Chrisantose Otieno Oyugi** and 1<sup>st</sup> Respondent, and in a judgment read on 29<sup>th</sup> March, 2011, the court awarded him Kshs 455,086.00 being the principal amount, Interest and cost of the suit of Kshs 70,505/=.
4. The applicant averred that a decree therefrom was extracted and served upon the Attorney General, the 1<sup>st</sup> Respondent herein together with a Certificate of Order against the Government.
5. It was contended by the applicant that despite demand for payment made by his advocates, no payment had been made.
6. From the record the respondents was duly served with the Motion on 21<sup>st</sup> August 2015, but despite that the respondents did not oppose the instant application.
7. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**, I expressed myself as follows:

**“...the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. 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 judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement 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."

8. I am still of the same view.

9. Having considered the material on record and in the absence of any impediment, I do not see why the 2<sup>nd</sup> and 3<sup>rd</sup> respondents should not be compelled to perform their statutory duty by settling the sums due from them to the applicant.

10. In the result I allow Notice of Motion dated 6<sup>th</sup> August, 2015, and issue an order of *mandamus* compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein to forthwith pay the applicant Kshs 455,086 being the decretal sum with interest at the rate of 12% p.a. from the date of judgement till payment in full with costs of Kshs 70,505/=.

11. I also award the applicant the costs of these proceedings.

**Dated at Nairobi this 18<sup>th</sup> day of July, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Wachira for Miss Muigai for the applicant**

**Cc Patricia**