



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 173 OF 2015

IN THE MATTER OF AN APPLICATION BY SIMON LEKIMAIN

AND

**IN THE MATTER OF ORDERS EMANATING FROM A DECREE ISSUED IN MILIMANI
CHIEF MAGISTRATE'S COURT IN CIVIL SUIT NO. 1001 OF 2004**

BETWEEN

SIMON LEKIMAIN..... APPLICANT

-VERSUS-

THE HONOURABLE ATTORNEY GENERAL..... RESPONDENT

JUDGEMENT

1. By a Notice of Motion dated 2nd June, 2015, the applicant herein who is wrongly described as the Plaintiff, **Simon Lekimain**, seeks the following orders:

1. THAT an order of Mandamus by way of judicial review do issue directed to Hon. Attorney General compelling them (sic) to pay the Applicant a sum of Kshs 5,027,391/- being the decretal sum plus costs and interests awarded by the Court by a judgement delivered on 25th November 2014 in Nairobi Chief Magistrate's Court Civil Suit No. 1001 of 2004 – SIMON LEKIMAIN VS. THE ATTORNEY GENERAL.

2. The costs of this application be provided for.

2. According to the applicant he filed CMCC No. 1001 of 2004 (hereinafter referred to as "the Suit") at Milimani Commercial Courts Nairobi wherein a judgement was entered against the Defendants' (sic) on the 25th November, 2014 and a Decree was given on 17th December, 2014. He exhibited a copy of the decree and certificate of costs.

3. According to him despite a demand having made therefor, the Defendant failed to make good the claim which failure according to him was not only contrary to the law but was also in breach of the Defendant's legal duty towards the applicant.

4. Unless the orders sought herein are granted the applicant was of the view that he would not enjoy the fruits of the said decree and would continue to suffer irreparable harm hence it is in the interest of justice that the orders sought herein be granted.

5. Suffice it to say that the application was not opposed.
6. In support of the application the applicant filed submissions which I have considered.
7. As already indicate hereinabove the applicant is indicated as **Simon Lekimain** and to make matters worse he is indicated as the Plaintiff. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486** the court expressed itself on the issue as follows:

“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari, Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -

“REPUBLIC.....APPLICANT

V

THE ELECTORAL COMMISSION OF KENYA.....RESPONDENT

EX PARTE

JOTHAM MULATI WELAMONDI”

8. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellant’s advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter”.

9. Nevertheless, in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.

10. This Court has time and again warned the litigants and their counsel that the failure by a party to properly intitule the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs since it must be remembered that judicial review proceedings are special proceedings which are neither criminal nor civil. Proper intitulement of applications both for leave and the substantive Motion not only helps in minimizing confusion at the appellate level, but is a reflection of the fact that judicial review proceedings are in substance commenced so as to enable parties seek and obtain orders which are not ordinarily available in the usual civil proceedings.

11. I must say with due respect that these proceedings were instituted in a rather causal manner. In fact this glaring error was repeated even in the submissions.

12. 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 hereunder:

“...in 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.”

13. I also associate myself with the views expressed by Githua, J in Republic vs. Permanent Secretary Ministry of State for Provincial Administration and Internal Security & Another ex parte Fredrick Manoah Egungza that:

“The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issues 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 judgement. 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 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. The Respondent's claim that the Applicant should have waited until the start of the next financial year to enforce payment of the decree issued in his favour cannot be sustained firstly because it has no legal basis and secondly because it is the responsibility of the Government to make contingency provisions for its liabilities in tort in each financial year so that successful litigants who obtain decrees against the Government are not left without remedy at any time of the year."

14. I adopt the reasoning in the said cases.

15. The circumstances under which judicial review order of *mandamus* are issued were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** *inter alia* as follows:

"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 or 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...These principles mean that 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."

16. As stated hereinabove, 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 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 Examinations Council ex parte Gathenji & Others** (supra) there is a specific legal right but no specific legal 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.

17. Therefore there is a duty imposed on the accounting officer in the Office of the Attorney General to pay the decretal sum. Although ideally, the application ought to have been brought against the Solicitor General who is the accounting officer therein, the failure to do so in the circumstances of this case is not fatal to this otherwise merited application.

18. Accordingly, an order of *mandamus* is hereby issued directed to the Respondent compelling him to pay the Applicant a sum of Kshs 5,027,391/- being the decretal sum plus costs and interests awarded by the Court by a judgement delivered on 25th November 2014 in Nairobi Chief Magistrate's Court Civil Suit No. 1001 of 2004 – SIMON LEKIMAIN VS. THE ATTORNEY GENERAL.

19. As there were a number of errors committed by the applicant in the intitulement of these proceedings, there will be no order as to costs.

Dated at Nairobi this 14th day of July, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nyamogo for Mrs Wambugu for the Applicant

Mr Siro for the Respondent

Cc Miron