



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR. MISCELLANEOUS CIVIL APPLICATION 187 OF 2012

IN THE MATTER OF

AN APPLICATION BY MWIKALI MUINDI KATUNGA AND BENJAMIN KOMU (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE PETER M. KATUNGA) FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AGAINST THE ATTORNEY GENERAL, THE SOLICITOR GENERAL AND THE PERMANENT SECRETARY OFFICE OF THE VICE PRESIDENT AND MINISTRY OF HOME AFFAIRS

AND

IN THE MATTER OF

SECTION 8 AND 9 OF THE LAW REFORM ACT AND ARTICLE 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF

THE GOVERNMENT PROCEEDINGS ACT CHAPTER 40 OF THE LAWS OF KENYA

AND

IN THE MATTER OF

ORDER 53 CIVIL PROCEDURE RULES AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES OF LAW

REPUBLICAPPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE SOLICITOR GENERAL2ND RESPONDENT

THE PERMANENT SECRETARY OFFICE OF THE VICE PRESIDENT AND MINISTRY OF

HOME AFFAIRS.....3RD RESPONDENT

EXPARTE

MWIKALI MUINDI KATUNGA.....1ST EXPARTE APPLICANT

BENJAMIN KOMU.....2ND EXPARTE APPLICANT

(SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE PETER M. KATUNGA)

JUDGEMENT

1. By a Notice of Motion dated 15th May, 2012 the *ex parte* applicants herein, **Mwikali Muindi Katunga** and **Benjamin Komu**, seek the following orders:

1) **That an order of mandamus do hereby issue directed at the 1st, 2nd and 3rd Respondents to compel the 1st, 2nd and 3rd Respondents to pay the 1st and 2nd Ex parte Applicants Kshs.1,447,171.25 together with costs and interests being the decretal sum arising out of High Court Civil Case No.592 of 2004 Milimani. Mwikali Muindi Katunga and Benjamin Komu (suing as legal representatives of the Estate of the late Peter M. Katunga) VS The Attorney General, The Ministry of Home Affairs Prisons Department and Tom Felix Logonjo.**

2) **That the costs of Judicial Review be awarded to the 1st and 2nd Ex-Parte Applicants.**

2. The application was supported by a verifying affidavit sworn by **Mwikali Muindi Katunga**, the 1st Applicant herein on 8th May, 2012.

3. According to the deponent, the application seeks the enforcement of a judgement and a decree issued in favour of the 2nd Applicant and the deponent for Kshs.1,447,171.25 against the 1st, 2nd and 3rd Respondents on 26th September 2011 and 16th January 2012 respectively which decree the 1st, 2nd and 3rd Respondents have failed to settle despite demand issued to them.

4. The deponent deposed that the applicants herein obtained Limited Letters of Administration of the Estate of the late **Peter Muindi Katunga**. To him, the applicants herein instituted a civil claim High Court Civil Case No.592 of 2004 Milimani, **Mwikali Muindi Katunga and Benjamin Komu (suing as legal representatives of the Estate of the late Peter M. Katunga) VS The Attorney General, The Ministry of Home Affairs Prisons Department and Tom Felix Logonjo** in which judgment for Kshs.1,447,171.25 was entered in their favour on 26th September 2011 and a decree issued on the 16th January 2012. Pursuant to the said decree the applicants' Advocates on record wrote to the 1st, 2nd and 3rd Respondents a letter dated 14th February 2012 demanding payment of the decretal sum and issued them with Notice of Intention to Commence Proceedings against them in the event of failure to do so.

5. However, the 1st, 2nd and 3rd Respondent have not paid the decretal sum and it is the deponent's view that the 1st, 2nd and 3rd Respondents have no justifiable reason for failing to meet the Decree and pay the decretal sum.

6. The application was not opposed by the Respondents.

7. I have considered the application, the verifying affidavit as well as the submissions file on behalf of the applicants.

8. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs.**

The Attorney General & Another ex parte James Alfred Kosoro, 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 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 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.”

9. I adopt my reasoning in the said case.

10. In the absence of any replying affidavit, this court finds merit in the Notice of Motion dated 15th May, 2012.

11. Accordingly, an order of mandamus is hereby issued directed at the Respondents compelling them to pay the ex parte Applicants Kshs.1,447,171.25 together with costs and interests being the decretal sum arising out of High Court Civil Case No.592 of 2004 Milimani - **Mwikali Muindi Katunga and Benjamin Komu (suing as legal Attorney General, The Mwikali Muindi Katunga and Benjamin Komu (suing as legal representatives of the Estate of the late Peter M. Katunga) vs. The Attorney General, The Ministry of Home Affairs Prisons Department and Tom Felix Logonjo.** However in

Miscellaneous Application No. 438 of 2012 this Court suit awarded the same applicants the costs of the judicial review application and the Court does not see the reason why these proceedings could not have been brought together with the said proceedings, there will no order as to costs.

Dated at Nairobi this day 13th day of March 2014

G V ODUNGA

JUDGE

Delivered in the presence of Ms Makovu for the Applicant.