



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION 438 OF 2012**

**IN THE MATTER OF**

**AN APPLICATION BY MWIKALI MUINDI KATUNGA, BENJAMIN KOMU (THE ADMINISTRATORS OF THE ESTATE OF THE LATE PETER M. KATUNGA (DECEASED)) FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AGAINST THE ATTORNEY 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**

**IN THE MATTER OF**

**THE GOVERNMENT PROCEEDINGS ACT CHAPTER 40 OF THE LAWS OF KENYA**

**AND**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**VERSUS**

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

**MINISTRY OF HOME AFFAIRS**

**PRISONS DEPARTMENT.....2<sup>ND</sup> RESPONDENT**

**MWIKALI KATUNGA .....1<sup>ST</sup> EXPARTE APPLICANT**

**BENJAMIN KOMU .....2<sup>ND</sup> EXPARTE APPLICANT**

**JUDGEMENT**

1. By a Notice of Motion dated 20<sup>th</sup> December, 2012 the *ex parte* applicants herein, **Mwikali Katunga** and **Benjamin Komu**, seek the following orders:
  1. **That an order of mandamus do hereby issue directed at the Respondent compelling him to pay the Ex parte Applicants Kshs 470,301.80/= together with costs and interests being the taxed costs in High Court Miscellaneous Application No.592 of 2004 Nairobi.**
  2. **That the costs of this Judicial Review application be awarded to the Ex-Parte Applicants.**
2. The application was supported by a verifying affidavit sworn by **Mwikali Muindi Katunga**, the 1<sup>st</sup> Applicant herein on 10<sup>th</sup> December, 2012.
3. According to the deponent, the 1<sup>st</sup> and 2<sup>nd</sup> Applicant through a Plaint dated 7<sup>th</sup> May 2009 instituted a civil claim against The Attorney General, The Ministry of Home Affairs Prisons Department and Tom Felix Logonjo in High Court Civil Case No.592 of 2004 Milimani. Pursuant thereto, the Court entered judgment on 26<sup>th</sup> September 2011 in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants in the sum of Kenya Shillings One Million, Three Hundred and Ninety one thousand, two hundred and twenty four shillings (Kshs.1,391,224/=). Thereafter the Applicants filed their Party to Party Bill of Costs dated 27<sup>th</sup> April 2012 which Bill of Costs was taxed on 31<sup>st</sup> October 2012 at Kenya Shillings Four Hundred and Seventy Thousand Three Hundred and One and Eighty cents (Kshs.470,301.80) and a Certificate of Costs dated 13<sup>th</sup> November 2012 was issued.
4. Pursuant to the Certificate of Costs issued on the 13<sup>th</sup> November 2012 the applicant's Advocate's on record wrote to the Respondents a letter dated 20<sup>th</sup> November 2012 demanding payment of the taxed costs and issued them with Notice of Intention to Commence Proceedings against them in the event of failure to do so.
5. According to the applicants' the Respondents have failed to pay the taxed costs of Kshs.470,301.80 despite being issued with demand and notice of intention to sue and in their view, the Respondents have no justifiable reason for failing to 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 filed 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 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.”

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 20<sup>th</sup> December, 2012 save for the fact that the costs are in respect of High Court Civil Suit No. 592 of 2004 as clearly indicated in the certificate of costs and not High Court Miscellaneous Application No.592 of 2004 as indicated in the prayers herein.

11. Accordingly, an order of mandamus is hereby issued directed at the Respondents compelling them to pay the ex parte Applicants Kshs 470,301.80/= being the taxed costs in High Court Civil Suit No. 592 of 2004 Nairobi. The applicants will have the costs of this application.

**Dated at Nairobi this day 13<sup>th</sup> day of March 2014**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of Ms Makovu for the applicant.***