



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 300 of 2012

IN THE MATTER OF AN APPLICATION BY NATHAN OKERO MOKORO FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS COMPELLING THE PERMANENT SECRETARY, OFFICE OF THE PRESIDENT AND THE HONOURABLE ATTORNEY GENERAL TO PAY THE SUM OF KSHS 6,594,705/= WHICH IS DUE AND PAYABLE TO THE APPLICANT UNDER THE CIVIL SERVICE REGULATIONS

AND

IN THE MATTER OF MILIMANI CHIEF MAGISTRATE CIVIL SUIT NO. 2473 OF 2001

AND

IN THE MATTER OF CIVIL PROCEDURE ACT CAP 21 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

JUDGEMENT

1. By a Notice of Motion filed on 23rd July 2012, the *ex parte* applicant herein, **Nathan Okero Mokoro**, seeks an order that the Honourable Court be pleased to issue an order of *mandamus* compelling the Respondent to pay Kshs 6,594,705/= being the sum due and payable to the applicant and for an order that the costs of this motion be borne by the Respondent.
2. The Motion is based on the grounds set out in the amended Statutory Statement and verifying affidavit filed herein on 24th July 2012. According to the said documents, Judgement was entered for the Applicant against the Attorney General in Milimani Chief Magistrate's Civil Case No. 2473 of 2001 in which it was ordered that the applicant be awarded his full salary from the time of interdiction to the time he would attain the age of 55 years. According to him, his job was terminated in early September 1997 and he was set to retire in January 2006 at the age of 55 years pursuant to the civil service regulations. On 28th November, 2002, it is contended that the Respondent filed Civil Appeal No. 732 of 20002 against the Lower Court's decision which appeal was dismissed for want of prosecution. However, despite demand made by the applicant's advocates on record to the Respondent to make good the said Judgement, the Respondent has intentionally ignored to satisfy the same hence the present application.
3. There was no replying affidavit filed in reply to the application despite the Respondent having been granted 21 days on 18th September 2012 to file the same within 21 days. Again on 31st October 2012 the Respondent was granted another 14 days to file a response but none was filed. To make matters worse,

despite the parties having been directed to file submissions, only the applicant did so.

4. In the submissions filed on behalf of the ex parte applicant, it is submitted that following the entry of judgement a decree was issued and the costs assessed at Kshs 26,400.00. Although two appeals were filed by the Respondent, both were unsuccessful. Despite this, the Respondent has intentionally refused and declined to pay the sum due in favour of the applicant as a whole or in part hence these proceedings. According to the Applicant the conduct of the Respondent in not prosecuting the appeals to the High Court and the Court of Appeal clearly shows that the Respondent did not have a genuine appeal or at all but is only out to frustrate the Applicant through his deliberate efforts to deny him from enjoyment of the fruits of his judgement or entitlement. In support of his submissions the ex parte applicant relies on **Republic vs. The Permanent Secretary of State in the Office of the President Misc. Civil Suit No. 225 of 2008** and **Peter Ndururi vs. Attorney General Misc. Application No. 345 of 2005.**

5. Before dealing with the merits of the case, it is important to deal with the issue of intitulement of the application herein. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**

6. 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 appellants’ 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”.

7. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486** Ringera, J (as he then was) expressed himself 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. It is clear from the title of the proceedings herein that the Motion herein is not an epitome of impeccable, elegant or paragon drafting. However 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”.

9. I however must state that the failure by a party to properly intitle 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.

10. Section 21(4) of the Government Proceedings Act prohibits execution against the Government thus leaving the applicant no other appropriate remedy except *mandamus*. That was the position in the English case of R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 All E.R. 741, at 743, Lord Goddard C. J. said -

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges."

See also Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants[2007] 2 EA 441.

11. This procedure was dealt with extensively in Shah vs. Attorney General (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543 where Goudie, J eloquently, in my view, expressed himself, *inter alia*, as follows:

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...The foregoing may also be thought to be much in point in relation to the applicant’s unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty...Since *mandamus* originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law...English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting “simply in his capacity of servant”. There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a *mandamus* would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of *mandamus* will lie for the enforcement of the duties...With regard to the

question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile... It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government....Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go... In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of *mandamus* must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament... In the court's view the granting of *mandamus* against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and 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 Treasury Officer of Accounts 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 Crown servant in his official capacity and the duty is owed not to the Crown 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. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata*, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few...*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designata* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the

consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of *mandamus* will issue as prayed with costs."

12. I fully associate myself with the learned Judge's views in the said matter.

13. 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."

14. I adopt my reasoning in the said case.

15. The only issue that has caused me concern is that in none of the documents annexed to the application is the figure of Kshs 6,594,705.00 mentioned. There is no explanation at all as to how this figure has been arrived at. In the judgement of the lower court the Court decreed that "the plaintiff be paid his full salary from the time that he would attain the age of 55 years, from thereon, he be paid his full

retirement benefits calculated according to the Civil service regulations”. Whether or not the actual figure was determined is difficult for this Court to ascertain based on the scanty material on record. In **Republic vs. The Attorney General & Another ex parte James Alfred Kosoro** (supra) I held:

“In an application for *mandamus* the Court can only compel the Respondent to undertake the duty imposed by the judgement and not anything else. It is not upon the Court determining an application for an order of *mandamus* to determine the intention of the Judge who granted the decree being enforced. Any such determination ought to be sought in the original suit and not in the application for enforcement thereof.”

16. Therefore there is no material before me on which I can compel the Respondent to pay the sum of money sought in this Motion. The best I can do in the circumstances is to issue an order of *mandamus* which I hereby do compelling the Respondent to pay the ex parte Applicant his full salary from the time he would attain the age of 55 years, from there on, he be paid his full retirement benefits calculated according to the civil service regulations together with costs as per the decree given on 14th November, 2002.

17. The *ex parte* applicant will also have the costs of this application.

Dated at Nairobi this day 11th day of April 2013

**G V ODUNGA
JUDGE**

Delivered in the presence of Ms Masakwe for Mr Keengwe for the ex parte applicant.