



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 116 OF 2020

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY SECRETARY,

NAIROBI CITY COUNTY.....RESPONDENT

EX-PARTE:

THE REGISTERED TRUSTEES OF SIR ALI MUSLIM CLUB

JUDGMENT

1. This judgment is on an application by way of Notice of Motion dated 26th October 2020, filed by The Registered Trustees of Sir Ali Muslim Club, the *ex parte* Applicant herein. The *ex parte* Applicant is seeking an order of mandamus to compel the County Secretary, Nairobi City County, who is the Respondent herein, to pay to it the sum of Kshs. 910,005/= plus interest at 14% per annum from 4th September, 2019 until payment in full. The said sum is the taxed costs awarded to the *ex parte* Applicant in **High Court Judicial Review Application Number 46 of 2017 - Republic vs Nairobi City County and the Registered Trustees of Sir Ali Muslim Club**. The *ex parte* Applicant also sought an order that the costs of the application be paid by the Respondent.

2. The said application is supported by a statutory statement dated 15th May 2020, a supporting affidavit sworn on the same date and a supplementary affidavit sworn on 9th June 2020 by Hilary Mecheo Orina, the *ex parte* Applicant's advocate. The main ground for the application is that the Respondent is under a public duty to make the payment to the *ex parte* Applicant, and is unlawfully neglecting or refusing to do so.

3. The *ex parte* Applicant averred that it filed a suit in this Court for judicial review orders of prohibition, certiorari and various declarations in **High Court Judicial Review Application Number 46 of 2017 - Republic vs Nairobi City County and the Registered Trustees of Sir Ali Muslim Club**, and were granted the said reliefs and costs of the suit in a judgment delivered on 17th October 2017. Further, that the Bill of Costs filed on behalf of the *ex parte* Applicant in **Judicial Review Application Number 46 of 2017** was taxed on 4th September, 2019 in the sum of Kshs. 910,005/=. However, that despite service of a Certificate of Order against the Government in respect of the taxed costs and repeated written requests made to the Respondent, no payment has been received.

4. The Applicant annexed copies of the certified judgment and decree issued in **High Court Judicial Review Application Number 46 of 2017 - Republic vs Nairobi City County and the Registered Trustees of Sir Ali Muslim Club**, the Certificate of Taxation issued therein dated 4th September 2019, a Certificate of Order against the Government issued therein on 10th January 2020, and of letters to the Respondent requesting payment of the taxed costs.

5. There was no response on record from the Respondent.

The Determination

6. This Court directed the parties to canvass the instant application through written submissions. The *ex parte* Applicant through its Advocate, A.H. Malik & Company Advocates, filed written submissions dated 26th October, 2020 wherein the averments in the foregoing

were reiterated. The Respondent did not file any submissions.

7. I have considered the *ex parte* Applicant's pleadings and submissions, and I am also guided by the holding of the Court of Appeal on the nature of the remedy of mandamus in its decision in **Republic vs Kenya National Examinations Council *ex parte* Gathenji and 9 Others, [1997] e KLR**. The said Court held as follows in this regard:

“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“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 and 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.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel 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....”

8. The requirements for an order of mandamus to issue were further explained by Mativo J. in **Republic vs Principal Secretary, Ministry of Internal Security & another *ex parte* Schon Noorani & Another [2018] eKLR** as follows:

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in *Apotex Inc. vs. Canada (Attorney General)*, [23] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. [24] The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. The Applicants have satisfied all conditions precedent; and

b. There must have been:

i. A prior demand for performance;

ii. A reasonable time to comply with the demand, unless there was outright refusal; and

iii. An express refusal, or an implied refusal through unreasonable delay;

iv. No other adequate remedy is available to the Applicants;

v. The Order sought must be of some practical value or effect;

vi. There is no equitable bar to the relief sought;

vii. On a balance of convenience, mandamus should lie

9. It is not disputed in the present application that judgment for costs was entered in favour of the *ex parte* Applicant **High Court Judicial Review Application Number 46 of 2017 - Republic vs Nairobi City County and the Registered Trustees of Sir Ali Muslim Club**. The issues therefore that require to be determined are firstly, whether the Respondent is under a public duty and obligation to satisfy the orders issued in favour of the *ex parte* Applicant in the said judgment, and secondly, if so, whether the *ex parte* Applicant is entitled to the relief she seeks.

10. Section 21 of the Government Proceedings Act in this regard provides as follows as regards the requirements to be met in the enforcement of orders as against Government organs in civil proceedings:

“(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.”

11. Nairobi City County is one of the Counties established by Article 6 of the Constitution and the First Schedule to the Constitution, and is constitutionally recognized as a distinct government level of government by the said Article. In addition, the definition of “Government” in the Government Proceedings Act refers to the “Government of Kenya”. In this respect I adopt the holding by Odunga J. in Republic v Attorney General & another ex-parte Stephen Wanyee Roki [2016] eKLR as regard the application of the Government Proceedings Act to County Governments:

“20 Although the provisions of the Government Proceedings Act do not expressly refer to County Governments, section 7 of the Sixth Schedule to the Constitution (Transitional And Consequential Provisions) provides that:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

21. It follows that the provisions of the Government Proceedings Act, a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. One such construction would be the reality that Government is now at two levels and Article 189(1)(a) of the Constitution requires that the Constitutional status and institutions of government at both the National and County levels be respected. In my view such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to execution proceedings.”

12. As to whether the Respondent herein is under a duty to pay the subject decretal sums, an order of mandamus is normally issued when an officer or an authority by compulsion of law or statute is required to perform a duty, and that duty, despite demand in writing, has not been performed. Execution proceedings against a government or public authority under the Government Proceedings Act can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body.

13. This was also the holding in Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) where Githua J. held as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees

for money issued 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 judgment. 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 concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”

14. The decretal sum due from the Nairobi City County has in this respect not been disputed by the Respondent, and the *ex parte* Applicant in this respect annexed copies of the judgment and decree for costs against the said County awarded in its favour in **High Court Judicial Review Application Number 46 of 2017 - Republic vs Nairobi City County and the Registered Trustees of Sir Ali Muslim Club**. The *ex parte* Applicant also annexed a copy of the Certificate of Taxation and Certificates of Order for Costs Against the Government issued in its favour against the Nairobi City County for the sum of Kshs 910,005/=, after taxation of its Bills of Costs.

15. Section 44 of the County Government Act in this respect establishes the office of the County Secretary who is secretary to the County Executive Committee, and is answerable for the operations of the County Executive, and whose functions include being head of the county public service. Section 103 of the Public Finance Management Act No 18 of 2012 also establishes the County Treasury comprising of the County Executive member of Finance, the Chief Officer and the departments of the County Treasury responsible for finance and fiscal matters. Under section 103(3) of the Act, the County Executive Committee Member for Finance is the head of Treasury, and is thus the responsible for finance matters in the County.

16. This Court therefore finds that arising from these provisions, the Respondent is jointly responsible with the County Executive Committee Member of Finance for the satisfaction of Court orders and decrees on payment of money owed by the Nairobi City County by virtue of their roles and functions. In this regard, I adopt the holding in **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006** wherein Majanja J. addressed the importance of the Court in ensuring that the right of a successful litigant to enjoy the fruits of his judgement as follows:

“...a decree holder’s right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant’s right of access to justice protected under Article 48 of the Constitution.

17. While still on the duty of the Respondent to pay the decretal sum, the *ex parte* Applicant has brought evidence to show that it has made several demands and requests for payment which have not been heeded to by the Respondent, and in this respect annexed copies of letters dated 23rd September 2019, 30th September 2019, 1st November 2019, 2nd December 2019, 6th February 2020 and 28th April 2020, wherein the Certificate of Taxation and Certificate of Order for Costs were also enclosed. There is thus an implied refusal on the part of the Respondent to pay the demanded sums.

18. Lastly, as to the actual amount of costs due from the Respondent, I have perused the judgment delivered on 17th October 2017 in **High Court Judicial Review Application Number 46 of 2017 - Republic vs Nairobi City County and the Registered Trustees of Sir Ali Muslim Club**, and Certificate of Order against the Government issued therein on 10th January 2020, and I note that there was no award of interest made therein. Section 26(2) of the Civil Procedure Act in this respect provides that where a decree for the payment of money is silent with respect to the payment of interest on the aggregate sum from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

The Disposition

19. In the premises, I find that the *ex parte* Applicant’s Notice of Motion dated 26th October 2020 is merited.

20. I accordingly grant the following orders:

I. An order of mandamus to compel the County Secretary, Nairobi City County and County Executive Committee Member for Finance Nairobi City County, to pay to the *ex parte* Applicant herein the sum of Kshs. 910,005/=, being the costs awarded to the *ex parte* Applicant in High Court Judicial Review Application Number 46 of 2017 - Republic vs Nairobi City County and the Registered Trustees of Sir Ali Muslim Club, together with interest thereon at 6% per annum from 20th July 2017 until payment in full.

II. The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 26th October 2020 of Kshs 30,000/=.

21. Orders accordingly.

DATED, AND SIGNED AT NAIROBI THIS 19TH DAY OF APRIL 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondent's Advocates on record.

P. NYAMWEYA

JUDGE