



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC E066 OF 2020

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

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY SECRETARY KIAMBU COUNTY.....1ST RESPONDENT

CHIEF OFFICER, FINANCE/

COUNTY TREASURER.....2ND RESPONDENT

COUNTY GOVERNMENT OF KIAMBU.....3RD RESPONDENT

AND

DANIEL K MWAURA T/A KARURU MWAURA

& COMPANY ADVOCATES.....EX-PARTE APPLICANT

JUDGMENT

1. Daniel K Mwaura T/A Karuru Mwaura & Company Advocates, the *ex parte* Applicant herein, has moved this Court in an application brought by way of a Notice of Motion application dated 7th December, 2020 and is seeking the following orders:

a) THAT the Court be pleased to issue an order of Mandamus, compelling the 1st and 2nd Respondents jointly and severally to release to the Applicant Kshs. 41,195,392/- in settlement of unpaid Certificates of Costs.

b) THAT the costs of this application be provided for by the Respondents jointly and severally.

2. The said application is supported by a statutory statement dated 1st December 2020, and a verifying affidavit sworn on the same date by Daniel Karuru Mwaura, an advocate practicing in the Applicant firm. The deponent explained that since his firm has been rendering legal services to the County Government of Kiambu and its predecessors from 1998, and raised fee notes for the said services, a majority of which remained unsettled. Therefore, that on 15th January 2018, his firm filed HCCC No. 15 of 2018 in Nairobi claiming Kshs. 249,758,359/- in unsettled legal fees, and on 31st May 2018 the Court (Hon. Tuiyott J.) ordered that the Applicant's Bill of Costs be presented for taxation.

3. The *ex parte* Applicant stated that it thereafter presented to court an initial 23 Bills of Costs for taxation in the Commercial Division of the High Court at Milimani Nairobi, and the rulings with respect to the Bills of Costs have all been delivered and Certificates of Costs duly issued and served upon the County Government of Kiambu. It was further the *ex parte* Applicant's contention that the County Government of Kiambu actively participated in the taxation proceedings and the rulings of the said bills have since been delivered and certificates of costs duly issued and served upon the County Government of Kiambu. That to date, the County Government of Kiambu has never challenged the rulings of the Taxing Master as contemplated by law hence the same are due and owing.

4. It was contended that cumulatively, the *ex parte* Applicant was awarded a total sum of Kshs. 39,846,088/- and the Certificates of Costs duly served on the County Government of Kiambu. However, that despite numerous reminders and demands for payment, the County Government of Kiambu has refused, failed and neglected to settle the pending bills. Consequently, that the *ex parte* Applicant filed an

application for partial judgment for fourteen (14) bills of costs, and the Court on 14th July, 2020 allowed his application for the sum of Kshs. 28,913,982/- at 14% interest per annum until payment in full. Furthermore, that since 14th July, 2020, the decretal sum has accrued interest to the tune of Kshs. 1,349,304.65/- totalling to Kshs. 30,262,975.65/-. It was his contention that the remaining 11 Certificates of Cost amount to Kshs. 10,932,417/-, the total cost due and owing to him being Kshs. 41,195,392.65/-.

5. The main ground for the application therefore is that there is no justification from the Respondents for not settling the *ex parte* Applicant's unpaid bills, and that the *ex parte* Applicant's rights are being prejudiced by the actions and/or inaction of the Respondents and is being denied the fruits of his judgement and labour. Indeed, that the Respondent's refusal to pay to pay the decretal sum is prejudicial, oppressive, unreasonable, ultra vires and unlawful.

6. The Respondents did not file any response or submissions to this application.

The Determination

7. The *ex parte* Applicant filed written submissions dated 8th December, 2020 in support of its application. On the instances when an order of mandamus can issue to compel public servants to perform their statutory duties, counsel cited the case of **Republic v County Secretary Nairobi City County & 3 Others; Koceyo & Co. Advocates (Ex-parte), (2020) eKLR**, where the court held that it is the obligation of Government in conjunction with Treasury to ensure that funds are allocated towards the settlement of liabilities owed by the Government. Counsel also cited the case of **County Secretary Nairobi City County & Another Ex-parte Samson Masaba Munikah T/A Munikah & Company Advocates, (2019) eKLR** where the court held that mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty, compel a public duty and controls procedural delays.

8. I have considered the *ex parte* Applicant's pleadings and submissions, and in arriving at a determination, I have also considered the holding by the Court of Appeal on the nature of the remedy of mandamus in its decision in **Republic vs Kenya National Examinations Council exparte 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....”

9. 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

10. The issue therefore that require to be determined is whether the Respondents are under a legal duty and obligation to pay the sums certified in the various certificate of costs and partial decree issued in favour of the *ex parte* Applicant. As explained in the foregoing, 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.

11. In addition, 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. This was also the holding in **Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012)** .

12. In the present case, the *ex parte* Applicant alleges that the decretal sum due from the Respondents of Kshs. 41,195,392.65/- is made up of firstly, the partial judgment entered on 14th July 2020 and resulting decree for the sum of Kshs 28,913,982/- at 14% interest per annum until payment in full which was for fourteen (14) bills of costs; and secondly, the remaining 11 Certificates of Cost which amount to Kshs. 10,932,417/-.

13. The question that therefore needs to be answered is whether a certificate of costs in the absence of a judgment, is sufficient to impose a duty to pay on the part of the Respondents. A certificate of costs only ascertains certain facts which it certifies happened, namely, that there was taxation of Bill of Costs, and that the amount found payable as costs arising from the taxation. Under section 51 of the Advocates Act, it is required that judgment is entered for the said sum to be deemed to be legally due from the person against whom the certificate of taxation is issued. The said section provides as follows:

(1) Every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.

(2) The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.

14. The Applicant has provided evidence of an order dated 6th July 2018 and a partial decree dated 27th November 2020, both issued in **Nairobi High Court Civil Suit Number 15 of 2018- Daniel Karuru Mwaura T/A Karuru Company Advocates vs County Government Of Kiambu**. He has also annexed copies of the Certificate of Costs issued in **Nairobi High Court Misc. Application 277 of 2018, Misc. Application 278 of 2018, Misc. Application 279 of 2018, Misc. Application 298 of 2018, Misc. Application 300 of 2018, Misc. Application 317 of 2018, Misc. Application 318 of 2018, Misc. Application 319 of 2018, Misc. Application 352 of 2018, Misc. Application 353 of 2018, Misc. Application 354 of 2018, Misc. Application 355 of 2018, Misc. Application 356 of 2018, Misc. Application 358 of 2018, Misc. Application 297 of 2018, and Misc. Application 301 of 2018** .

15. This Court therefore finds that the only amount that is at this stage legally due from the Respondents is the sum indicated in the partial decree dated 27th November 2020 issued in **Nairobi High Court Civil Suit Number 15 of 2018- Daniel Karuru Mwaura T/A Karuru Company Advocates vs County Government Of Kiambu**, and not the amount stated in the various certificates of costs provided in evidence. **This is for the reason that the person or authority to whom mandamus is issued must be either under a statutory or legal duty to do or not to do something; and the duty must be of an imperative nature. No such duty or legal obligation arises to pay taxed costs from the mere issuance of a Certificate of Costs, without judgment having been pronounced on the said certificate of costs or at the very least imposing on a party the legal obligation to pay costs.**

16. Lastly, the *ex parte* Applicant in this respect annexed a copy of the partial decree and of a letter sent to the Respondents dated 23rd October 2020, demanding the payment of the decretal sum in the partial decree. The *ex parte* Applicant however did not annex any evidence of a Certificate of Order for Costs Against the Government issued in the *ex parte* Applicant's favour against the Kiambu City County with respect to the partial decree, or any evidence of service of the same on the County Attorney as required by section 21 of the Government Proceedings Act.

17. 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.”

18. Kiambu 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. The definition of “Government” in the Government Proceedings Act refers to the “Government of Kenya” and the application of the Government Proceedings Act to County Governments was confirmed in the holding in Republic vs Attorney General & another ex-parte Stephen Wanyee Roki [2016] eKLR as follows:

“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.”

The Disposition

19. In the premises, the current proceedings are premature, as the requisite procedures have not been followed by the *ex parte* Applicant, and the Notice of Motion dated 7th December, 2020 is accordingly struck out with no order as to costs.

20. The *ex parte* Applicant is however at liberty to commence fresh judicial review proceedings against the Respondents for an order of mandamus, once all the necessary procedures, including those in the Government Proceedings Act has been complied with.

21. Orders accordingly.

DATED AND SIGNED THIS 27TH DAY OF MAY 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 Respondents' Advocates on record.

P. NYAMWEYA

JUDGE