



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. E1132 OF 2020**

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

**BETWEEN**

**CROWN MOTORS GROUP LIMITED.....APPLICANT**

**VERSUS**

**NAIROBI CITY COUNTY GOVERNMENT.....RESPONDENT**

**JUDGEMENT**

1. Crown Motors Group Limited, the Applicant herein, has filed a Notice of Motion application dated 20th November 2020, seeking an order of mandamus to compel the Respondent to pay Kshs. 35,644,337.60 together with interest and costs pursuant to the ruling issued on 29<sup>th</sup> April, 2019 in **Nairobi High Court Civil Suit Number 201 of 2017- Crown Motors Group Limited vs Nairobi City County Government**. Further, that that costs of the instant application be borne by the Respondent.

2. The Applicant relied on its statement dated 11<sup>th</sup> November, 2020, and a verifying affidavit sworn on the same date by Wynand Van Niekerk, its General Manager, who stated that the ruling delivered on 30th April 2019 in **HCCC No. 201 of 2017 - Crown Motors Group Limited vs Nairobi City County Government**, struck out the Respondent's statement of defence and entered judgment in favour of the Applicant in the sum of Kshs. 35,644,337.60 together with interest and costs. The Applicant averred that despite demands to the Respondent to settle the decretal sums, it has either ignored, refused, ignored or otherwise neglected to make payment as ordered by court. Further, that on 21<sup>st</sup> September, 2020, a Certificate of Order against Government was issued by this Court and the same served upon the Respondent on 24<sup>th</sup> September, 2020. In conclusion, the Applicant deposed that it does not have other avenues of execution other than through these proceedings and through the assistance of this Court.

3. The Respondent opposed the application by way of a replying affidavit sworn on 9<sup>th</sup> December, 2020 by Eric Odhiambo Abwao, the Assistant Director, Legal Affairs for the Respondent, who stated that he had seen the Certificate of Order against the Government issued on the 21<sup>st</sup> September, 2020 but the same was never served upon the Respondent, and that the copy attached has no County Government stamp. He further contended that it on the 24<sup>th</sup> September 2020, they were served with a letter purportedly forwarding the Certificate of Order but the Certificate of Order itself was never received. He asserted that the Applicant is therefore in breach of the Government Proceedings Act on the rules of applying for an order of mandamus hence the Notice of Motion lacks merit. He added that from the above, it is clear that there has been no demand and refusal to pay hence the application is premature.

4. The Respondent further contended that the subject ruling mentioned that Kenya Shillings Eleven Million, Two Hundred and Sixty-Four Thousand, Six Hundred and Sixty-Three Eighty Cents (Kshs. 11,264,663.80/=) was paid by the Respondent after the filing of **Nairobi High Court Civil Suit Number 201 of 2017- Crown Motors Group Limited vs Nairobi City County Government** by the Applicant, but the amount was not deducted from the amount claimed in these proceedings. In conclusion, the Respondent averred that a mandatory order can only be issued under clear circumstances but in this case, there is no clarity on whether the Applicant is owed or not.

**The Determination**

5. I have considered the Applicant's and Respondent's pleadings, 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 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, 4<sup>th</sup> 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....”

6. 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

7. It is not disputed in the present application that judgment for costs was entered in favour of the Applicant in Nairobi HCCC No. 201 of 2017 - Crown Motors Group Limited vs Nairobi City County Government. The Applicant in this regard annexed the ruling and decree issued in Nairobi HCCC No. 201 of 2017 - Crown Motors Group Limited vs Nairobi City County Government as well as a Certificate of Order against Government issued on 21<sup>st</sup> September, 2020. The Applicant also annexed a copy of the demand letter addressed to the Respondent dated 6<sup>th</sup> May, 2019, and a letter dated 23<sup>rd</sup> September, 2020 forwarding the Certificate of Order against Government to the Respondent.

8. 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 Applicant in the said ruling, and secondly, if so, whether the Applicant is entitled to the relief he seeks.

9. The Applicant in submissions dated 2<sup>nd</sup> March, 2021 contended that the procedure for enforcing an award or a decree against a county government is set out in Section 21 of the Government Proceedings Act Cap. 40 of the Laws of Kenya. As per this Act, a county government is recognized as being a part of the national government for purposes of enforcement decrees and/or awards which was the position held by the Court in the case of Josphat Gatheo Kibuchi vs Kirinyaga County Council [2015] eKLR. Reliance was also placed on the decisions in Republic vs The Principal Secretary, State Department of Interior, Ministry of Interior & Coordination of National Government & Principal Secretary ex parte Salim Awadh Salim & Others (2018) eKLR and Republic vs Attorney General Ex Parte Italbuild Imports Limited [2017] eKLR for the position that the procedure in section 21 was followed and an order of mandamus should therefore

issue.

10. The Respondent's submissions were dated 18<sup>th</sup> December, 2020 wherein it was reiterated that the judicial review proceedings have been brought prematurely before this Court, because there has been no demand and refusal to pay as per the requirements of the Government Proceedings Act. Reliance was placed on the decision in **Kisya Investments Ltd vs. Attorney General (2005) 1KLR 74** for the rationale behind the procedure set out in section 21 of the Government Proceedings Act.

11. 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.”**

12. 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.”**

13. Nairobi 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.”**

14. An order of mandamus will therefore issue 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. 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. Section 103 of the Public Finance Management Act No 18 of 2012 in this respect 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.

15. As to whether these officers of the Respondent are under a duty to pay the demanded sum, it is notable that the decretal sum due has in this respect been disputed by the Respondent. A perusal of the ruling that was delivered on 30<sup>th</sup> April, 2019 in **HCCC No. 201 of 2017 - Crown Motors Group Limited vs Nairobi City County Government** does indeed indicate that out of the amount claimed of Kshs 46,909,001.40, a payment of Kshs. 11,264,663.80/= was made after the suit was filed, leaving a balance of Kshs 35,644,337.60=. However, the decree issued in **HCCC No. 201 of 2017 - Crown Motors Group Limited vs Nairobi City County Government** on 15<sup>th</sup> September 2020 and the Certificate of Order against Government issued on 21<sup>st</sup> September 2020 indicate the decretal sum to be Kshs 46,909,001.40, with costs and interest. The amount that the Applicant is seeking to be paid as the decretal sum in the instant application is Kshs. 35,644,337.60 with interest and costs, but there is also no supporting documents as regards the amount of costs payable.

#### **The Disposition**

16. This Court therefore finds that the outstanding amounts due from the Respondent are not certain, and the Applicant needs to get the proper certifications in this regard and serve them on the Respondent. The order sought of mandamus cannot therefore issue at this stage and the Applicant is at liberty to file a new application once it puts its house in order in this regard.

17. In the premises, the Applicant’s Notice of Motion application dated 20th November, 2020 is struck out, with no order as to costs.

18. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 17<sup>TH</sup> DAY OF DECEMBER 2021**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF DECEMBER 2021**

**J. NGAAH**

**JUDGE**