



**REPUBLIC OF KENYA**

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

**CIVIL MISC. APPLICATION NO. 11 OF 2019**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY SECRETARY,**

**COUNTY GOVERNMENT OF GARISSA.....RESPONDENT**

**EXPARTE.....PAUL MWANGI & CO. ADVOCATES**

**RULING**

1. The exparte applicant seeks orders for mandamus to compel the respondent to pay applicant Ksh. 9,178,563.88 together with interest at 12% per annum with effect from 23/8/2018 to date of payment in full in Nyeri HCC No. 17 and 18 of 2017, Embu HC Misc. Appl. No. 86 of 2017 and Garissa CMCC No. 16 of 2018 plus costs.
2. The same is granted on the facts in statutory statement and verifying affidavit filed on 16/9/2019 and annexed documents.
3. The respondent response is via replying affidavit of Ismail Aden Dabar sworn on 13/12/2019 in which he alleges that there are applications for leave to put objection to taxations pending as the respondent avers that he was not served with notice to taxation which generated the amount subject of the instant motion.
4. This court has no application before court to stay instant proceedings and the fact that there may be other pending matters is no concern to this court unless it is properly moved.
5. Parties agreed to canvass the application via submissions but only the applicant filed same as at the date and time of preparation of the instant ruling.

**APPLICANT'S SUBMISSIONS**

6. The applicant's submissions are that on the 6<sup>th</sup> day of September, the applicant herein filed against the respondent various Advocate – Client Bill of Costs in Nyeri HCC Misc. No. 17 & 18 of 2017, Embu HCC Misc. No. 86 of 2017, Garissa HCC Misc. No. 1 of 2017, No. 2 & 3 of 2017 seeking assessment of legal fees for legal services rendered to the County Government in Nyeri CA No. 213 and 214 of 2012, Garissa PMCC No. 3 of 2011, Garissa HCC Misc. No. 3 of 2011 (formerly Embu HCC Misc. No. 55 of 2010) and Garissa HCC Misc. No. 12 of 2012 respectively.
7. The Bill of Costs together with the notice of taxation was duly served on the County Government on the 7<sup>th</sup> of September 2017 however the same were not challenged.
8. Consequently, the Bill of Costs were taxed and allowed as follows: -

- a. Nyeri HCC Misc. No. 17/2017.....Kshs. 420,986.10
- b. Nyeri HCC Misc. No. 18/2017.....Kshs. 422,640.92
- c. Embu HCC Misc. No. 86/2017.....Kshs. 626,385.00
- d. Garissa HCC Misc. No. 1/2017.....Kshs. 1,274,057.00

e. Garissa HCC Misc. No. 2/2017.....Kshs. 3,550,800.06

f. Garissa HCC Misc. No. 3/2017.....Kshs. 2,269,930.32

**TOTAL.....KSH. 9,178,563.88**

9. No reference has been made against any of the said taxations by the respondent to date.

10. The Decree and Certificates of Taxation were duly served upon the respondent on the 24<sup>th</sup> day of August 2019 and despite being served; the Accounting Officer of the County Government has made no efforts to effect payment in satisfaction of the same.

**Applicable Law:**

11. The Government Proceedings Act Cap 40 Laws of Kenya provides under section 6 that, ***“where the government is subject to any liability by virtue of this part, the law relating to indemnity and contribution shall be enforceable by or against the government in respect of the liability to which it is so subject as if the government were a private person of full age and capacity.”***

12. In **Republic vs County Government of Nairobi Misc. No. 306 of 2017** the learned judge pointed out that, ***“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.”***

13. The court further mentioned the case of **Dragun vs Canada (Minister of Citizenship and Immigration)** where the test for mandamus was set out. The factors that must be present for the writ to issue are:

**1) There must be a public legal duty to act.**

**2) The duty must be owed to the applicant.**

**3) There must be a clear right to performance of that duty, meaning that a. the applicants have satisfied all conditions precedents and there must have been a prior demand for performance, a reasonable time to comply with the demand, unless there was outright refusal, and an express refusal or an implied refusal through unreasonable delay.**

**4) No other adequate remedy is available to the applicant.**

**5) The order sought must be of some practical value or effect.**

**6) There is no equitable bar to the relief sought.**

**7) On a balance of convenience, mandamus should lie.**

14. On whether the respondent owe a legal duty to the applicant, in considering whether the applicants have a legal right to the performance of a legal duty by the respondent herein, applicant relied on the case of **Stanley Olonana Ntutu & 12 Others vs District Land Registrar Narok & 73 Others JR No. 46 of 2012** where the court reiterated the sentiments of the Court of Appeal in **Prabhulala Gulabchad Shah vs A.G and Another** that: -

***“The person seeking mandamus must show that there resides in him a legal right to performance of a legal duty by a party against whom the mandamus is sought or alternatively that he has a substantial personal interest and the duty must not be permissive but imperative and must be of public rather than private nature.”***

15. The applicant submits that the applicant herein filed various Advocates – Client Bills of Costs. The same were taxed and certificates of taxation issued by the Taxing Master. The certificates were served on the respondent and despite service; they have never made any efforts to effect payment.

16. The failure by the respondent to pay the applicant the taxed amount is a violation of its statutory obligation and the public duty to obey all orders of the court.

17. The applicant relies on the case of **Kisya Investment Limited vs Attorney General & Another Civil Case No. 2832 of 1990** where the court granted an order of mandamus against the respondent, who was the Permanent Secretary in the Ministry of Public Works to pay the applicant a sum of Kshs. 57,040,293. The Court stated in its judgment that: -

***“The government is obliged to obey the law and discharge all of its statutory and legal obligations. It ought not to abuse the privileges and immunities granted to it by law to the detriment of other parties and in particular the public interest. It is the duty of the government and every department and ministry to abide by and obey the law which includes satisfaction of decrees and compliance with court orders.”***

18. On whether the applicant has satisfied all conditions precedents, the applicant submitted that the certificates of taxations were issued; the applicant forwarded the same to respondents via letter dated 21<sup>st</sup> June 2019 attaching all the certificates requesting the respondents to pay the

amount owed. The letter was duly received on 24<sup>th</sup> June 2019. The same has been attached to the application dated 28<sup>th</sup> October 2019 and **marked as “WM8”**.

19. Even after service, the applicant did not receive any form of communication from the respondent herein showing any willingness to pay or otherwise.

20. The applicant further submitted that the respondent in replying affidavit sworn by Ismail Aden Dabar avers that service of the Bills of Costs and Certificates of Taxations were not properly served on them as service was effected on the County Government instead of the Firm of Gerane & Somane Advocates. This averment is irrelevant in this scenario as the judgment and decree in Garissa CMCC No. 16 of 2018 is still enforceable as has not been set aside.

21. The above is an issue that should not affect this present application as the applicant herein has adhered to the provisions of Order 53 of the Civil Procedure Rules pertaining to Judicial Review Proceedings.

22. The applicant submits that that there is no other form of remedy available to the applicant. The law prohibits execution and attachment against government. The applicant has no other option of realizing the fruits of the decree. Apart from mandamus, it has no other option of ensuring that the decree awarded is satisfied.

23. In **Republic vs Attorney General & Anor Ex parte James Alfred Kosoro Misc. No. 44 of 2012** the court stated that, **“the exparte applicant has no other option of realizing the fruits of his judgment since he is barred from executing against the Government. Apart from Mandamus he has no option of ensuring that the judgment awarded is realized unless something is done he will forever be left babysitting his barren decree.”**

24. The only issue before this court is whether the remedy of mandamus is available in the circumstances of this case?

25. The circumstances under which judicial review order of mandamus are issued were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** inter alia as follows:

***“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 or 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...These principles mean that an order of mandamus compels 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.”***

26. Therefore as was appreciated in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** there is a specific legal right but no specific legal remedy available for enforcing that right as execution cannot issue against the Government in the ordinary way. In such circumstances it is clear that an order of mandamus may go forth in order to remedy the defects of justice.

27. The applicant herein filed various Advocates – Client Bills of Costs. The same were taxed and certificates of taxation issued by the Taxing Master. The certificates were served on the respondent and despite service; they have never made any efforts to effect payment.

28. The failure by the respondent to pay the applicant the taxed amount is a violation of its statutory obligation and the public duty to obey all orders of the court.

29. In the case of **Kisya Investment Limited vs Attorney General & Another Civil Case No. 2832 of 1990**, the court granted an order of mandamus against the respondent, who was the Permanent Secretary in the Ministry of Public Works to pay the applicant a sum of Kshs. 57,040,293. The Court stated in its judgment that: -

***“The government is obliged to obey the law and discharge all of its statutory and legal obligations. It ought not to abuse the privileges and immunities granted to it by law to the detriment of other parties and in particular the public interest. It is the duty of the government and every department and ministry to abide by and obey the law which includes satisfaction of decrees and compliance with court orders.”***

30. The response by the respondent was that, there were applications for leave to put objection to taxations pending as the respondent avers that he was not served with notice to taxation which generated the amount subject of the instant motion. The respondent did not demonstrate the reason as to why he never sought stay of proceedings herein pending the hearing of the alleged pending applications for leave to object to taxations.

31. The court finds no merit in the opposition to the instant application which ipso facto has merit.

32. The court therefore makes the following orders;

**i) Orders for mandamus to compel the respondent to pay applicant Ksh. 9,178,563.88 together with interest at 12% per annum with effect from 23/8/2018 to date of payment in full in Nyeri HCC No. 17 and 18 of 2017, Embu HC Misc. Appl. No.**

86 of 2017 and Garissa CMCC No. 16 of 2018 plus costs be and are hereby issued.

ii) Orders accordingly.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 10<sup>TH</sup> DAY OF MARCH, 2020.

.....

C. KARIUKI

JUDGE