



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 427 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS

BETWEEN

HYDRO WATERWELL (K) LIMITED.....APPLICANT

VERSUS

NATIONAL WATER CONSERVATION

& PIPELINE CORPORATION.....RESPONDENT

RULING

The Application

1. The Applicant, Hydro Water Well Limited, is a limited liability company registered under the Companies Act. It instituted proceedings in HCCC No. 251 of 2011 against National Water Conservation and Pipeline Corporation, the Respondent herein, in which judgment was entered in its favour for Kshs 8,706,450.45 with costs and interests on 21st July 2011.

2. The Applicant consequently filed an application in this Court by way of a Chamber Summons dated 25th October 2018, seeking the following orders:

a) **THAT** leave be and is hereby granted to the Applicant to apply for Judicial Review Orders of Mandamus to issue against the Managing Director of the National Water Conservation & pipeline Corporation to compel the said Managing Director to comply with the Degree granted on the 15th December 2017 in HCCC No 251 of 2011 Hydro Water Well (K) Limited vs National Water Conservation and Pipeline Corporation

b) **THAT** this Honourable Court be pleased to grant leave to the applicant to institute Judicial Review proceedings for orders of Mandamus to compel the Managing Director of National Water Conservation and Pipeline Corporation to show cause why the Corporation has refused and/or failed to comply with the decree granted on the 15th day of December,2017 in HCCC No.251 of 2011 Hydro Water Well (K) Limited vs National Water Conservation and Pipeline Corporation

c) **THAT** this Honourable Court be pleased to grant leave to the Applicant to institute Judicial Review Proceedings for orders of Mandamus to the Managing Director of National Water Conservation and Pipeline Corporation to show cause why he should not be committed to civil jail for refusing and/or failing to comply with the decree granted on the 15th day December,2017 in HCCC NO 251 of 2011 Hydro Water Well (k) Limited-vs- National Conservation and Pipeline Corporation

d) **THAT** the costs of this application be in the cause.

3. The application was supported by the grounds on its face and by a verifying affidavit sworn on 25th October 2018 by Nikhil Savla, a director of the Applicant company. It was his case that pursuant to the judgement a decree was issued on the 15th December 2017 against the Respondent, which has totally refused to pay the Applicant the decretal sum together with interest and costs according to the decree.

4. He therefore contended the Applicant made an application for the execution of the decree by the attachment of moveable assets which was filed on 4th July 2018. Subsequently they obtained warrants of attachment on the 11th July 2018 and proclaimed the moveable assets of the Respondent on 16th July 2018. That the Applicant's auctioneer thereafter visited the judgement debtor and took an inventory of their attachable assets and served them with a notice of proclamation. It is the Applicant's case that its effort to execute against the Respondent

were however not fruitful and it therefore has no other way realising the fruits of its judgement, and unless the court intervenes the Respondent has no intention of paying the applicant the amount.

The Response

5. The application was opposed by the Respondent through Grounds of Opposition dated 19th November 2018 as follows:

- a) **“The application herein is futile, frivolous, fatally defective, misconceived, incompetent, bad in law and an abuse of this Court’s process.**
- b) **The Applicant’s case is not arguable and is not fit for consideration by this Court.**
- c) **There is a clear procedure for realising the decretal amount in favour of the Applicant which should be strictly followed.**
- d) **The Applicant has other options of realising the fruits of their judgement apart from the orders of mandamus sought herein.**
- e) **The Respondent is not Government within the meaning of the Government Proceedings Act to be subjected to the proceedings herein. Further, that the Government Proceedings Act and specifically section 21(4) thereof, do not apply to the Respondent.**
- f) **An order of mandamus is sought to compel a Government official to do what the Government through Parliament, has directed him to do.**
- g) **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.**
- h) **The Court of Appeal (Karanja Mwilu & Azangalala, JJA) in Kenya Revenue Authority Habimana Sued Hemed & Another [2015] eKLR held that “ we hold the view that the Kenya Revenue Authority is not an organ of the Government as contemplated under the Government Proceedings Act. There are three arms of Government, and they are clearly defined and recognised universally over the ages”.**
- i) **The Respondent is a State Corporation established under the state Corporations Act chapter 446 of the laws of Kenya vide legal notice (L.N) No.270 of 24th June, 1988 and L.N 42/1989. The Water Act 2016 came into force on 21st April 2017 establishing the National Water Harvesting And Storage Authority. It is therefore capable of suing and being sued in its own name**
- j) **The prayer number three (3) on civil jail is not a judicial review remedy under any known law.”**

The Determination

6. The application was canvassed *inter partes* by way of written submissions. The Applicant in its submissions urged that it was noteworthy to note that the Respondent has conceded that it is a state corporation under the State Corporations Act. Further, that the Water Act came into force on 21st April 2017 and established the National Water and Harvesting Storage Authority in place of the Respondent, and in section 149 provides for the transfer of all liabilities accrued by the Respondent to the National Water and Harvesting Storage Authority to the same extent as they were enforceable by or against the Respondent before the commencement of the Water Act 2016 .

7. Based on the said provision, the Applicant submitted that the decretal sum the subject of these proceedings is currently due and payable by the National Water and Harvesting Storage Authority. On the argument by the Respondent that it is not government within the meaning of the Government Proceedings Act, and therefore the proceedings herein do not apply to it; the Applicant submitted that the Respondent is an autonomous statutory body capable of suing and being sued in its own name, however that it is also a public body that has failed to perform what it is legally bound to perform, and that the sole issue is whether an order of mandamus to compel the Respondent to satisfy the decretal sum is applicable in the circumstances.

8. The Applicant reiterated that the decree was issued in its favour and the Respondent failed to pay. Further, that it has sufficiently tried to execute the decree to no avail, and that in the circumstances it has demonstrated a *prima facie* arguable case fit for consideration by this court, and relied on the case of **Kenya National Examination Council V Republic Ex-parte Geoffrey Gathenji Njoroge & 9 Others, (1997) e KLR** for the scope of the order of mandamus. Further, that it should be noted that the Respondent is a State Corporation and therefore fall under the purview of judicial review.

9. Lastly, it was the Applicant’s submission based on section 4 of the Water Act 2016, that any person administering or applying the Act should be guided by the principles and values set out in Articles 10, 43, 60 and 232 of the Constitution. Therefore, that the Applicant’s rights should not be thwarted and is protected under Article 48 of the Constitution. Reliance was placed on the case of **Republic V Town Clerk of Webuye County Council & Another (2014) e KLR** for the proposition that a decree holder’s right to enjoy the fruits of his judgement must not be thwarted, and that when faced with such a scenario, the court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights.

10. The Respondent on the other hand submitted that the Applicant is not entitled to the orders sought, as the said orders are ordinarily sought against the government under section 24 of the Government Proceedings Act, where no alternative remedy is available. Further, that the Respondent is established under section 30 of the Water Act as a body corporate capable of being sued and suing in its own name, and at no point does the Water Act 2016 prohibit execution against the Respondent. In addition, that section 149 of the Act transfer of functions, assets, liabilities and staff of the National Water Conservation and Pipeline Corporation to National Water Harvesting and Storage Authority

11. The Respondent relied on the case of **Republic vs Attorney General & another Ex-parte Ongata Works Limited (2016) eKLR** for the proposition that mandamus is neither a writ of course nor a writ of right, but it will be granted where the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no other appropriate remedy. Reliance was also placed on the case of **Kenya Revenue Authority vs Habimana Sued Hemed & Another, (2015) eKLR** for the proposition that the Respondent is not Government within the meaning of Government Proceedings Act.

12. According to the Respondent, the Applicant should have followed the procedure laid out in under section 21 (1) and (2) of the Government Proceedings Act, and relied on the decision in **Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security & Another ex-parte Frederick Manoah Egunza, (2012) eKLR** for the submission that the Applicant has not demonstrated in this respect that it has extracted a certificate of costs and served it on the Attorney General in accordance with the procedure in the section, and that this makes the application fatally defective.

13. Lastly, the Respondent submitted that the prayer on civil jail cannot be granted as the instant proceedings are not contempt proceedings, but an application for leave to institute judicial review proceedings. That in any event, where the government is involved, the contempt proceedings would be instituted only after the order of mandamus is issued.

14. I have considered the arguments and submissions made by the Applicant and Respondent. The applicable law on leave to commence judicial review proceedings is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The reason for the leave was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

15. In the present application, the substantive issue that requires to be determined is whether an arguable case has been shown for leave to be granted to the Applicant to commence judicial review proceedings. The Applicant is seeking payment of a decretal sum that is owed to it by the Respondent, and it is evident that the Applicant is directly affected by the action of the Respondent not to pay its decretal sum, and therefore has *locus* to bring the present proceedings.

16. As regards whether the action by the Respondent is subject to judicial review orders, it was held in **R vs Panel on Take-Overs and Mergers, ex parte Datafin PLC, (1987) QB 815**, that in order to ascertain whether a particular action, decision or failure to act is amenable to judicial review, the Courts will generally consider whether the relevant matter arose out of the exercise of a public function. The question whether a function that is exercised has a public element will depend on a number of factors, including the source of the power being exercised, and if legislation is that source of power, this is a strong indicator that the relevant matter is amenable to judicial review.

17. Other factors that are relevant are the nature of the body in question, and particularly if it is a governmental body or underpinned by statute, then its actions are more amenable to judicial review; and the nature of particular type of action or decision being challenged, particularly whether it involves a public law element as opposed to involving a purely private law dispute.

18. In addition, it was held in the decision in **Republic vs Kenya National Examinations Council exparte Gathenji and 9 Others, [1997] eKLR** that mandamus can issue against a person, corporation or inferior tribunal as follows:

“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..... .”

19. The relevant provisions of law as regards the nature of the Respondent is section 149 of the Water Act No. 46 of 2016, which provides as follows:

“(1) All property, assets, rights, liabilities, obligations, agreements and other arrangements not linked to water services provision as provided for in section 148, existing at the commencement of this Act and vested in, acquired, incurred or entered into by or on behalf of the National Water Conservation and Pipeline Corporation established by the National Water Conservation and Pipeline Corporation Order, 1988 (L.N. 270/1988) shall, upon the commencement of this Act be deemed to have vested in or to have been acquired, incurred or entered into by or on behalf of the Water Harvesting and Storage Authority to the same extent as they were enforceable by or against the National Water Conservation and Pipeline Corporation before the commencement of this Act.

(2) Any legal proceedings pending in any court, the Water Appeal Board or other tribunal by or against the National Water Conservation and Pipeline Corporation in respect of any matter, shall continue by or against the National Water Harvesting and Storage Authority.

(3) A person who immediately before the commencement of this Act was an employee of the National Water Conservation and Pipeline Corporation shall, on the commencement of this Act be deemed to be an employee of the National Water Harvesting and Storage Authority on terms to be determined by the Salaries and Remuneration Commission.”

20. Section 30 of the Act also provides that

“(1) There is established the National Water Harvesting and Storage Authority.

(2) The Water Storage Authority established under this section shall be a body corporate with perpetual succession and a common seal, capable of suing and being sued in its own name and doing all things that a corporation may lawfully do.”

21. The Respondent was a statutory corporation, and its powers are donated by statute. Mandamus can therefore issue against it as a corporation. The issue as to whether the Respondent is under a legal duty to pay the decretal sum that is demanded is not one that can be decided at the leave stage, but after the hearing of the substantive Notice of Motion. In addition, the provisions of the Government Proceedings Act only apply to a governmental body or department, or when a statute specifically states that it will apply to a particular statutory corporation.

22. Therefore, this would ordinarily be a case where leave to commence judicial review proceedings would be granted other than on the prayer for committal to jail which I agree with the Respondent is premature in the absence of contempt of court proceedings. However, from the submissions made in the present case and from the provisions of section 149 of the Water Act, it is evident that the Respondent no longer operational. The said section specifically provides that all legal proceedings pending or brought against the Respondent shall now be brought against the National Water Harvesting and Storage Authority.

23. The Water Act No. 46 of 2016 came into force on 21st April 2017 and the current Chamber Summons was filed in Court on 25th October 2018. It is thus incompetently filed as it is brought against the wrong party in light of the findings in the foregoing. In the premises, the Applicant’s Chamber Summons dated 9th March 2018 is hereby struck out with no order as to costs. The Applicant is however at liberty to bring judicial review proceedings against the proper Respondent.

24. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF FEBRUARY 2019

P. NYAMWEYA

JUDGE