



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 704 OF 2017

IN THE MATTER OF AN APPLICATION SEEKING LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW OF MANDAMUS AGAINST THE COUNTY SECRETARY NAIROBI CITY COUNTY AND CHIEF FINANCE/COUNTY TREASURER, NAIROBI CITY COUNTY.

BETWEEN

REPUBLIC.....APPLICANT

AND

THE COUNTY SECRETARY,

NAIROBI CITY COUNTY.....1<sup>ST</sup> RESPONDENT

CHIEF OFFICER, FINANCE/COUNTY TREASURER,

NAIROBI CITY COUNTY.....2<sup>ND</sup> RESPONDENT

AND

SAMSON MASABA MUNIKAH T/A

MUNIKAH AND CO. ADVOCATES.....EX PARTE APPLICANT

RULING

1. Pursuant to the leave of this court granted on 23<sup>rd</sup> July 2018, the ex parte applicant moved this Court by way of Notice of Motion dated 3<sup>rd</sup> August 2018 expressed under the provisions of sections 8 and 9 of the Law Reform Act, [1] Order 51 Rule 1 and Order 53 Rules 1 (1) (3) of the Civil Procedure Rules, 2010, seeking an order of Mandamus directed against the Respondents to compel them to pay the ex parte applicant Ksh. 847,887,435.97 being the decretal sum in respect of High Court Misc. Application No. 247 of 2011.

2. Additionally, the ex parte applicant seeks an order of Mandamus directing the Respondents to pay the ex parte applicant Ksh. 9,756, 512.96 being the interest accrued on the decretal sum as at 29<sup>th</sup> July 2016 and further interest thereon at the rate of 14% per annum until payment in full. Lastly, the ex parte applicant prays for any other relief that this court deems fit and just in the circumstances plus costs of the application.

3. The core grounds in support of the application are that the ex parte applicant, a law firm was duly instructed by the defunct City Council of Nairobi in RMCC No. 2 2003, Nairobi (City Council v The Attorney General (for the Commissioner of Lands)), and, that, an Advocate/Client Bill of Costs was filed and allowed by consent. Further, he contends that a Certificate of Taxation was issued on 1<sup>st</sup> August 2012 against the City Council of Nairobi for a sum of Ksh. 498,757,315.28, and, that, the Certificate of Taxation has not been revised, varied and or set aside.

4. The ex parte applicant also states that section 51(2) of the Advocates Act [2] stipulates that in a case where the retainer is not disputed, an order ought to issue entering judgment for the sum certified. He also states that, the ex parte applicant filed Miscellaneous Application No. 247 of 2011 under section 51(2) of the Advocates Act [3] for adoption of the Certificate of Taxation as a judgment which application was allowed on 30<sup>th</sup> October 2017.

5. The *ex parte* applicant also states that he unsuccessfully asked the Respondents to settle the said sum. Additionally, he states that the decree can only be enforced by a order of *Mandamus*. Lastly, he states that he served the Certificate of Taxation and decree upon the Respondent's Accounting Officer, but, he failed and or neglected to pay the said sum necessitating this application.

6. The *ex parte* filed a supplementary Affidavit sworn on 14<sup>th</sup> May 2018. He averred that the *ex parte* applicant extracted the Certificate of Order Against the Government and served the same upon the Respondents. Additionally, he stated 30 days lapsed since the Certificate of Order Against the Government was served.

7. Additionally, the *ex parte* applicant filed a further supplementary Affidavit dated 30<sup>th</sup> November 2018 in which he averred *inter alia* that vide a Gazette Notice Number 2101 of 9<sup>th</sup> March 2018, the Governor of Nairobi City County established a committee of the County known as "Committee on Finalization of Pending Bills and Audit of Procurement Process" whose terms of reference were to *inter alia* to analyze any un paid claims and or bills on account of provision of goods and services to the City County of Nairobi or its predecessors the City Council of Nairobi and make appropriate recommendations and/or identify fraudulent/false claims among others.

8. The *ex parte* applicant averred that he appeared before the said Committee on 13<sup>th</sup> November 2018 and notified the Committee that he was aware that the Anti-Corruption Commission had given his fees a clean bill of health. Further, he averred that he declined a request by the said Committee to reduce his fees on grounds that it would prejudice this application. Lastly, he averred that the Committee despite his refusal to lower his fees, it made a written proposal to him reducing the fees which he declined.

#### **Respondent's Response.**

9. **Pauline Kahiga-Waititu**, the Respondent's County Secretary and Head of Public Service swore the Replying Affidavit dated 7<sup>th</sup> December 2018. He averred that the Respondents are employees of Nairobi City County Government, and, that the Nairobi City County Government is overwhelmed by debts it inherited from the previous regimes. **Mr. Waititu** also deposed that the Respondent has not refused to pay the sums claimed but that the delay was caused by the County's obligations to authenticate all the legitimate debts. He also averred that the previous Nairobi County Government and the defunct Nairobi City Council incurred huge debts which amounts continue to attract huge interests which will then be translated to Nairobi City County for payment.

10. **Mr. Waititu** further averred that the Respondent has to maintain a delicate balancing act of meeting its obligations and paying its debts. Lastly, he also averred that the purpose of the Committee referred to above is to bring to finality the problem of pending claims against the County Government, and, that, the applicant has already filed his claim with the Committee.

#### **Determination.**

11. **Mr. Gatheru Gathemia**, counsel for the *ex parte* applicant relied on the grounds listed in the application, the supporting affidavit, and, the supplementary Affidavits. He pointed out that the decision has never been appealed against, and, that, that the reasons offered in the Replying Affidavit are not sufficient.

12. **M/s Nduta**, counsel for the Respondent relied on the Replying Affidavit.

13. I find that only one issue falls for determination, namely:- ***Whether the ex parte applicant has established grounds for this Court to grant the orders of mandamus.***

14. Perhaps it is convenient to start by stating that it is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. [4] *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. Originally a common law writ, *Mandamus* has been used by courts to review administrative action. [5]

15. Additionally, *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either.** [6]

16. It is also important to state that *Mandamus* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

17. More fundamental is the truism 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. The test for *mandamus* is set out in *Apotex Inc. vs. Canada (Attorney General)*. [7] It was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. [8] 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.

18. The first test is the existence of a public legal duty to act. This is not in doubt nor is it contested. The claim arises from professional fees for legal services rendered by the *ex parte* applicant to the Respondent. This is not contested. The advocates fees were taxed by consent, hence, there is no contest on the sum claimed. A Certificate of Costs was issued and served upon the Respondent. Again this is not contested. It is not disputed that a Certificate of Order Against the Government was issued and served upon the Respondent. The decree has not been appealed against or set aside or reviewed. The duty to pay the said sum is owed to the *ex parte* Applicant. Additionally, there is a clear right to the performance of that duty. The *ex parte* applicant has no other way of enforcing the decree.

19. In my view, the *ex parte* Applicant has satisfied the conditions precedent listed in the above case. Specifically, there must have been a prior demand for performance. It is common ground that the *ex parte* applicant demanded the payment. The taxation was done on 1<sup>st</sup> August 2011, hence, hence, a reasonable time to comply with the demand has been served. To me the reasons offered amount to outright refusal. It is also my view that an express refusal or an implied refusal through unreasonable delay has been established.

20. It is also a requirement that no other adequate remedy is available to the Applicant. Indeed, in the circumstances of this case, there is no other adequate remedy. The *ex parte* applicant cannot execute the decree against the Respondents. Further, it is a requirement that the Order sought must be of some practical value or effect. The practical value of the order sought cannot be gainsaid. As stated above, there is no other effective remedy available to the *ex parte* applicant. Further, I find no equitable bar to the relief(s) sought, and lastly, on a balance of convenience, *Mandamus* should lie.

21. Applying the above tests to the facts and circumstances of this case, I find and hold that the *ex parte* applicant has satisfied the above conditions. It follows that there is basis for the court to grant the order of *Mandamus* sought in this application.

22. Accordingly, in view of my determination and findings herein above, the conclusion becomes irresistible that the application dated 3rd August 2018 is successful. Consequently, I allow the said application and order that:-

a. An order of *Mandamus* be and is hereby issued directed against The County Secretary, Nairobi City County and the Chief Officer, Finance/County Treasurer, Nairobi City County compelling them to pay the *ex parte* applicant **Ksh. 847,887,435.97** being the decretal sum in respect of High Court Misc. Civil Application No. 247 of 2011.

b. Additionally, an order of *Mandamus* be and is hereby issued directed against The County Secretary, Nairobi City County and the Chief Officer, Finance/County Treasurer, Nairobi City County compelling them to pay the *ex parte* applicant **Ksh. 9,756,512.96** being accrued interests on the decretal sum as at 29<sup>th</sup> July 2016 and further interests thereon at the rate of 14% per annum until payment in full..

c. That the Respondents do pay the *ex parte* applicant the costs of this application.

Orders accordingly

**Signed, Dated and Delivered at Nairobi this 25<sup>th</sup> day of February 2019**

**John M. Mativo**

**Judge**

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[1] Cap 26, Laws of Kenya.

[2] Cap 16, Laws of Kenya.

[3] Ibid.

[4] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[5] W. G. & C. Byse, *Administrative & Review Law, Cases and comments* 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[6] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review*, 53 GEO. IJ. 19, 25-26 (1964).

[7] [1993 Can LII 3004 \(F.C.A.\)](#), [1994] 1 F.C. 742 (C.A.), aff'd [1994 CanLII 47 \(S.C.C.\)](#), [1994] 3 S.C.R. 1100.

[8] [2003 FCT 211 \(CanLII\)](#), [2003] 4 F.C. 189 (T.D.), aff'd [2003 FCA 233 \(CanLII\)](#), 2003 FCA 233).