



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APP NO. 539 OF 2017

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

(IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT CIVIL SUIT NUMBER 5900 OF 2016, NAPHAS MMENYA T/A MUAMALA ENTERPRISES V MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING & URBAN DEVELOPMENT & OTHERS)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING & URBAN DEVELOPMENT.....1ST RESPONDENT

MINISTRY OF DEVOLUTION & PLANNING2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

NAPHAS MMENYA

T/A MUAMALA ENTERPRISES.....*EX PARTE* APPLICANT

RULING

1. Before me for determination is the *ex parte* applicant's Notice of Motion dated 5th June 2018 seeking an order of *Mandamus* to compel the Respondents to pay him **Ksh. 400,953.00** which amount arises from a decree issued in his favour in Chief Magistrates' Court Civil Suit Number **5900** of 2016, Nairobi, plus interests thereon at the rate of **12%** per annum from **3rd** August 2016 until payment in full and taxed costs.

2. The *ex parte* applicant also seeks an order that the said sum be paid within **14** days from the date of service of the court order, in default, a Notice to Show Cause do issue against the Principal Secretary, Ministry of Devolution and Planning and the Attorney General to show cause why they should not be cited for contempt.

3. The substance of the application is that a decree was rendered in his favour in the above case; and, that, no appeal has ever been preferred against the said judgment; and, that, the decree and the requisite certificate were duly served upon the Respondents. Lastly, it is contended that despite demand, the Respondents have refused to pay.

4. The application is opposed. On record is the Replying Affidavit of **Jackson Njathi Mwangi**, an advocate of the High Court of Kenya and a Principal State Counsel in the Ministry of Devolution and Planning sworn on **22nd** October 2018. The crux of the affidavit is that the *ex parte* applicant was fully paid all his dues. He annexed documents in support of the payment. He further avers that the information pertaining to the payment was not known to the Respondent at the time of the pendency of civil suit number **5900** of 2016, and, that, there is a pending application in the lower court seeking to set aside the judgment. Additionally, he averred that satisfying the decree amounts to

unjustly enriching the *ex parte* applicant and an abuse of the court process.

5. The *ex parte* applicant's counsel submitted that the Respondents are under a statutory duty to satisfy the judgment;^[1] and, that, a decree can only be enforced by way of an order of *Mandamus*.^[2] He argued that the *ex parte* applicant duly satisfied the pre-conditions for enforcing the decree. Also, he argued that no appeal has been preferred against the decree. Lastly, he submitted that the applicant has no alternative means of satisfying the decree.^[3]

6. The Respondent's counsel submitted that the Respondents paid the amount in full. Counsel referred the court to a court order on record directing the police to investigate the payment. It was her contention that despite the said order, the police have done nothing. She also stated that the Respondents filed an application in the lower court seeking to set aside the judgment on the grounds that the said amount had actually been paid. Additionally, she argued that the lower court's file went missing, but, the bottom line remains that there is a pending application in the lower court.

7. 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] It 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]

8. *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.

9. *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] and, 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.*

10. It is imperative that the above tests must be satisfied before an order of *mandamus* can issue. For *Mandamus* to issue, there must be a public legal duty to act and the duty must be owed to the Applicant. There must be a clear right to the performance of that duty, meaning that the Applicant has satisfied all conditions precedent. 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.

11. The question that begs for an answer is whether the *ex parte* applicant has demonstrated the existence of the Respondent's legal duty to act. It is common ground that there an argument that the amount in question was paid. Documents have been annexed in support of the said assertion. It is uncontested that there is a pending application in the lower court seeking to set aside the lower courts judgement. Differently, stated, this court is being invited to compel a party to pay an amount it claims to have paid and has annexed documents demonstrating the payment. Whether the *ex parte* is the recipient mentioned in the payment documents is a matter is a contested issue of fact which can only be determined after hearing oral evidence. Such a determination falls outside the scope of Judicial Review jurisdiction.

12. To me this issue whether the recipient of the funds named in the payment documents relied upon by the Respondents is contested requires interrogation. It will require evidence to demonstrate whether indeed the payee in the said documents is the same person as the *ex parte* applicant in this case. It is a dangerous invitation to this court to determine a contested dispute without hearing evidence. It involves

determining who was paid the said sum and satisfy itself that it was not the *ex parte* applicant. Such a determination falls totally outside the province of Judicial Review. It is simply a misconceived shortcut designed to determine a highly relevant contested central question. In *Republic vs Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 Others*^[9] the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact.^[10] The issue raised in this case can only be determined in a forum where the litigating parties have an opportunity to present their evidence and also test the evidence of their opponents by way of cross examination.

13. Additionally, the pendency of an application to set aside the judgment is a sufficient ground for this court to decline the orders. Differently stated, in the event of this court granting an order of *Mandamus* and ultimately if the judgment is finally set aside, this court will have acted in vain. The order of *Mandamus* if granted will be rendered obsolete. A court of law cannot act in vain.

14. Additionally, the core question is whether the Respondents in the circumstances of this case have refused to perform their legal duty. In my view, they have not refused to act. On the contrary, they acted in good faith. The Respondents have given reasons for their decision not to pay. The reasons offered are that the amount was paid in full. The Respondents have annexed documents in support of the payment. Additionally, the Respondents state that there is a pending application in the lower court seeking to set aside the judgment. The Respondents cannot be accused of refusal to pay on the face of the foregoing reasons. It was a serious error for the *ex parte* applicant to ignore these reasons and invoke Judicial Review jurisdiction. **Mandamus** cannot issue unless there is clear legal duty to act and a refusal to act. Differently stated, mandated cannot issue where a party has acted legally.

15. The other test is "an express refusal, or an implied refusal through unreasonable delay." *First*, as I have concluded above, I am unable to conclude that there was an express or implied refusal in view of the circumstances discussed above. Differently stated, none of the conditions enumerated above has been satisfied for *Mandamus* to issue. *Mandamus* can only issue where it is clear that there is *wilful* refusal or *implied* and or *unreasonable* delay and where a legal right is clear or has been established. Applying the above tests to the facts and circumstances of this case, I find and hold that the *ex parte* applicant has not satisfied the above conditions. It follows that there is no basis at all for the court to grant the order of *Mandamus*.

16. The discretionary nature of the Judicial Review remedy sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for Judicial Review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued.

17. In this case, compelling the Respondents to pay when the basic legal requirements are in doubt would in my view amount to impeding their mandate or directing the Respondents to pay public funds under unclear circumstances whether the payment is lawfully due.

18. In view of my analysis of the law and the determination of the questions raised herein above, the conclusion becomes irresistible that this is not a proper case for Judicial Review orders of *Mandamus* to issue. Accordingly, I find and hold that the *ex parte* Applicant's Application must fail. Consequently, I hereby dismiss the Notice of Motion dated 5th June 2018 with costs to the Respondents.

Orders accordingly.

Signed, Delivered and Dated at Nairobi this 25th day of February 2019.

John M. Mativo

Judge.

[1] Citing *Republic v Kenya National Examinations Council ex parte Gathenji & 8 Others* CA 234 of 2016 and section 21 of the Government Proceedings Act, Cap 40, Laws of Kenya.

[2] *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Engunza* {2012} eKLR.

[3] Citing *Republic v The Attorney General & Another ex parte James Alfred Koroso* {2013}eKLR, *Republic v Principal Secretary State Department of Interior Ministry of Interior & Coordination of National Government & Principal Secretary ex parte Salim Awadh Salim & 12 Others* {2018}eKLR and *Republic v Permanent Secretary Ministry of Water & Resource Management & Development ex parte Akamba Timber & Hardware Ltd* {2006}eKLR.

[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).

[9] {2016}eKLR.

[10] Counsel also cited *Seventh Day Adventist Church vs Nairobi Metropolitan Development* {2014} eKLR in which a similar position was held.