



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 690 OF 2017

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY SECRETARY, NAIROBI CITY COUNTY.....RESPONDENT

EX-PARTE: PETER KARURI MWANGI

JUDGMENT

1. By a Notice of Motion dated 28th February, 2018, the ex-parte applicant seeks the following orders:

a) THAT the Respondent be compelled to satisfy the decretal sum and costs totaling to Kshs. 361,500/= as awarded in Nairobi CMCC No. 3926 of 2011.

b) THAT the costs of this application be borne by the Respondent.

The application is supported by the grounds set out therein and those in the Supporting affidavit of PETER KARURI MWANGI sworn on 9th March, 2018.

2. The Applicant alleges that he filed **Nairobi CMCC No. 3926 of 2011; Peter Karuri v. City Council of Nairobi** seeking general damages for malicious prosecution in Nairobi Criminal Case No. 380 of 2009 before the City Court. The Applicant contends that the civil suit was determined and judgment entered in his favour for Kshs. 250,000/= as general damages; interest at 12%p.a from 10/01/2017 to 25/04/2017 amounting to Kshs. 8,630/= and costs for Kshs.102,870/=, all totaling to Kshs. 361,500/=.

3. It is the Applicant's case that the decree was issued on 19th June, 2017 but despite demands being made to the Respondent for it to settle the decretal sum, the Respondent has failed to do so. The Applicant now seeks the court's assistance for the Respondent to be compelled to pay the decretal sum.

4. The Respondent did not respond to the application.

Submissions

5. The ex-parte applicant filed submissions on 6th November, 2018. The Respondent did not file any submissions.

6. The ex-parte applicant submitted that he was arraigned before the City Court, in Nairobi on 10th July, 2009 and charged with the offence of depositing debris contrary to Section 30(1) as read with Section 3 of the Physical Planning Act, Cap 286, Laws of Kenya vide **Nairobi Criminal Case No. 380 of 2009**. The ex-parte applicant was acquitted of the charges on 6th September, 2010 and he filed **Nairobi CMCC No. 3926 of 2011; PETER KARURI MWANGI v. CITY COUNCIL OF NAIROBI** (now defunct) seeking damages for malicious prosecution. Judgment was entered in favour of the ex-parte applicant for the sum of Kshs. 250,000/= as general damages plus costs and interest leading up to a final decree being issued for the sum of Kshs. 361,500/= on 19th June, 2017.

7. The ex-parte applicant contended that he has made several demands to the Respondent's advocates to settle the decretal sum but the Respondent has failed to do so.

8. On whether the Respondent was properly enjoined to this matter, the ex-parte applicant submitted that Section 33 of the Sixth Schedule to

the Constitution provides that “an office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name”. The ex-parte applicant opines that the City Council of Nairobi was replaced by the Nairobi City County thus the legal rights and liabilities of the defunct City Council of Nairobi accrued during its existence are sustainable against the Nairobi City County.

9. The ex-parte applicant submitted that a court can issue an order of mandamus to compel a public authority to perform a duty imposed on it by statute. In this case, the ex-parte applicant stated that the County Secretary of the Respondent is under an obligation to satisfy the decretal sum or instruct the settlement of the same.

10. Further, the ex-parte applicant lamented that he does not have any other effective remedy outside an order of mandamus to compel the Respondent to settle the decretal sum as the law bars the ex-parte applicant from carrying out an execution against the Government.

The Determination

11. The only issue that arises for determination by this court is whether the Respondent should be compelled to pay the decretal sum owed. The Respondent did not respond/oppose this application. The ex-parte applicant contends that it instituted a suit against the Respondent vide **Nairobi CMCC No. 3926 of 2011**, for malicious prosecution. In the said suit, the ex-parte applicant who was the plaintiff was awarded Kshs. 250,000/= as general damages, interest at 12%p.a from 10/01/2017 to 25/04/2017-Kshs.8,630/= and costs at Kshs 102,870/= all totaling to Kshs. 361,500/=. The ex-parte applicant claims that it has demanded the said amount from the Respondent but the respondent has failed to settle the amount.

12. An order of Mandamus is issued to compel a public authority to perform its duty. The said duty must be imposed on the public authority by law. However, an order of Mandamus will not be issued where there are other available remedies to the applicant. This was the finding in **Republic versus Attorney General & another Ex-parte Ongata Works Limited [2016] eKLR**, where Justice Odunga cited the case of **R(Regina) versus Dudsheath, ex-parte, Meredith [1950] 2 All E.R. 741**, where Lord Goddard C.J stated:

“It is important to remember that “mandamus” is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specifically affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it”.

Also in **Republic vs. Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996**. The Court of Appeal cited, while relying on Halsbury’s Law of England, 4th Edn. Vol. 7 p. 111 para 89 stated:

“The order of mandamus is of 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.”

13. The ex-parte applicant submitted that there is no other remedy available to him as against the Respondent as he cannot carry out an execution against the Respondent. In the case of **Republic v Attorney General & another Exparte James Alfred Koroso [2013] eKLR**, the court observed as follows:

“In the present case the ex parte 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 that he has been awarded is realized. Unless something is done he will forever be left baby-sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.”

14. In my view, no other remedy is available to the ex-parte applicant. The ex-parte applicant has the right to enjoy the fruits of his win before the lower court and the only way to do so is by compelling the Respondent through its Accounting officer, who is, the County Secretary to pay the sum owed. I do not think that it is in dispute that although the sum sought was accrued by the City Council of Nairobi (now defunct), the liabilities and assets of the defunct authority were inherited by the Nairobi City County. If anything, the Respondent who ought to have raised this issue and argued over it, did not.

15. The ex-parte applicant has attached the decree issued on 19th June, 2017 by the lower court. It is important to note that the Respondent did not file any appeal against the decision of lower court in **Nairobi CMCC No. 3926 of 2011**. There is also no evidence of stay of execution of the decree of the court. A letter dated 4th September, 2017 written to the Respondent’s advocate seeking payment of the amount tabulated in the decree is also annexed to the application. Neither the Respondent nor its advocate responded to the letter. It is therefore

befitting that an order of mandamus be issued by this court to enable the ex-parte applicant enjoy the fruits of the judgment from the lower court.

16. For the foregoing reasons, orders are issued as follows:

a) **THAT an order of Mandamus be and is hereby issued compelling the Respondent to satisfy the decretal sum and costs totaling Kshs. 361,500/= as awarded in Nairobi CMCC No. 3926 of 2011.**

b) **Costs of the application to the ex-parte applicant.**

Dated, Signed and Delivered in Nairobi this 29th Day of March 2019.

D. CHEPKWONY

JUDGE.