



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW NO. 78 OF 2018**

IN THE MATTER OF:AN APPLICATION BY PROF TOM OJIENDA & ASSOCIATES FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF:THE HIGH COURT MISC. CAUSE NO. 3 OF 2017 PROF. TOM OJIENDA VERSUS NAIROBI CITY COUNTY ARISING FROM (JR NO. 366 OF 2014 GATEWAY INSURANCE COMPANY LIMITED VERSUS NAIROBI COUNTY GOVERNMENT & 3 OTHERS)

**BETWEEN**

PROF. TOM OJIENDA & ASSOCIATES.....APPLICANT

VERSUS

1. THE COUNTY SECRETARY NAIROBI CITY COUNTY

2. CHIEF OFFICER, FINANCE/COUNTY TREASURER, NAIROBI CITY COUNTY.....RESPONDENTS

**RULING**

**The Application**

1. By the Notice of Motion herein dated 27<sup>th</sup> February, 2018 the Ex parte Applicant prays for an order of mandamus to issue and the same be directed to the Respondent to comply and satisfy the decree herein of Kshs. 20,275,500.00 being the decretal sum in respect of Miscellaneous Application No. 4 of 2017.

2. The application is based on the grounds that the Applicant filed Advocate-client Bill of Cost dated 30<sup>th</sup> January, 2017 and filed on 7<sup>th</sup> February, 2017. The bill arose out of a court Judgment in the parent file, of Petition No. 300 of 2014 (consolidated with Petition No. 490 of 2014, Judicial Review application No. 35 and 247 of 2012). Real Deals Limited & 2 others vs. Kenya National Highways Authority & others in which the Applicant represented the Respondent. The Deputy Registrar of the High Court of Kenya at Nairobi taxed the Bill of Costs dated 30<sup>th</sup> January, 2017 at Kshs. 20,275,500/= in a Ruling delivered on 10<sup>th</sup> April, 2017. That the Deputy Registrar also issued a certificate of taxation of Kshs. 20,275,500/= against the Respondent on 2<sup>nd</sup> May, 2017. The Applicant herein has tried and had several formal meetings with the Respondents who promised to pay each time but have since refused to honour their promise. Due to the lack of payment by the Respondents the Applicant herein sought to file an application under the Advocates Act Section 51 (2) to have the Certificate of Taxation dated 2<sup>nd</sup> May, 2017 converted to a Judgment to enable the Applicants execute. By an application dated 9<sup>th</sup> May, 2017 the Certificate of Taxation dated 2<sup>nd</sup> May, 2017 was converted into a Judgment and a Decree was issued on the 17<sup>th</sup> October, 2017 of Kshs. 8,934,134.40/= with interest of 9% and that the Respondents are yet to pay the Applicant, hence the current application seeking the order of mandamus and we therefore seek leave of this court to file an application seeking the order of mandamus to compel the Respondents to settle the amounts owed that is Kshs. 20,275,500/= plus interest at a rate of 9%.

3. The application is supported by affidavit sworn by **Professor Tom Ojienda** on 27<sup>th</sup> February, 2018. The Applicant's case is that he is the Managing Partner in the Applicant's firm and hence competent to make this affidavit. The deponent states that an order was made by this Court in Misc. Application 3 of 2017 on 10<sup>th</sup> day of April, 2017. The Respondent was ordered to pay to the Applicant a sum of Kshs. 8,934,134.40/=. The Applicant filed Advocate-Client Bill of Costs dated 30<sup>th</sup> January, 2017. The bill arose out of a court Judgment in the parent file, of Judicial Review Application No. 366 of 2014 Gateway Insurance Limited vs. Nairobi City County Government in which the Respondents were successfully represented. The Applicant sought costs of Kshs. 20,377,450/= which was taxed at Kshs. 20,275,500/= against the Respondents after in a Ruling delivered on 10<sup>th</sup> April, 2017. That the Deputy Registrar also issued a certificate of cost of Kshs. 20,275,500/= against the Respondent. That the Applicant herein has tried and had several formal meetings with the Respondent and they

promise to pay each time but have since refused to honour their promise. There is therefore an outstanding sum of Kshs. 8,934,134.40/= and accrued interest due and payable by the Respondent to the Applicant in respect of the above decree

### **The Response**

4. The application is opposed by the Respondents vide Notice of Preliminary Objection dated 7<sup>th</sup> March, 2018 filed by W. S. Ogola Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The grounds are that:

(a) The Applicant did not first seek leave of this Honourable Court to make this instant application.

(b) That leave was not granted by this Honourable Court to commence proceedings of this nature.

(c) That the application herein is an abuse of court, incurably defective, frivolous, vexatious and devoid of any merits, hence ought to be struck out with costs.

5. The application is also opposed vide Grounds of Opposition dated 24<sup>th</sup> September, 2018 by Murimi Murango & Associate Advocates also for the Respondents on the grounds that:

(a) The Respondents were never served with any pleadings entry of Judgments, Certificate of Costs or Decree issued in various matters stated in the said Notice of Motion dated 27<sup>th</sup> February, 2018 and the same is contrary to provisions of Articles 47 and 48 of the Constitution of Kenya.

(b) The Certificate of Costs and Decree of the Court arising from matter stated in prayers 2 and 3 of the said Notice of Motion were never served upon the Attorney General and the same is contrary to provision of Section 21(1) and (2) of the Government Proceedings Act.

(c) No demand for payment by the Applicant by the Applicant of the decree of certificate of costs to the Respondents and the same is contrary to provisions of Section 21 (3) of the Government Proceedings Act.

(d) The Notice of Motion dated 27<sup>th</sup> February, 2018 should be dismissed with costs to the Respondents.

### **Submissions**

6. Parties filed submissions which I have carefully considered. The issue to be determined by the court is whether or not the Respondents were served by the said decree or if they were aware of it so as to satisfy it.

### **Determination**

7. I have considered the submissions of the parties. I am satisfied that there is a decree which should be paid by the Respondent pursuant to Section 21 of the Government Proceedings Act. I am also satisfied that under that Section, and once proof of debt is established, mandamus is the most appropriate remedy for the Ex parte Applicant. However, I am persuaded both by logic and by the submissions of the Respondent that the Respondent can only pay or satisfy a decree of whose notice it is aware. Although the Ex parte Applicant herein has shown to the satisfaction of the court that the said debt is due, and to that end the Ex parte Applicant has annexed the Ruling, Decree and Certificate of Taxation, there is no evidence on record that there was ever a **demand** for payment of the decree. The Ex parte Applicant has not shown this court any demand notice sent to the Respondent to satisfy the decree. The remedy of mandamus is a discretionary remedy. However, since under Section 21 of Government Proceedings Act it is the only remedy to compel payment of decree by government, it will normally not be denied. However, before it is given the court must satisfy itself that the government was given notice to pay, and that there was failure to pay the same. In other words, mandamus will normally not issue if there are some outstanding procedure to be done by the Ex parte Applicant.

8. The Respondents cannot be compelled to pay a decree for which a demand has not been made, or of which it is not aware. The Ex parte Applicant merely stated that he tried and had several formal meetings with the Respondents who promised to pay each time but have since refused to honour their promise. There is no way the court can affirm this averment. There was nothing stopping the Applicant from making written demands duly served for the purposes of verification. From the foregoing it is the finding by this court that the application before the court is premature, and that the Ex parte Applicant should first bring to the notice of the Respondents the said decree and certificate of costs and make a demand. It is the failure to comply with that demand that shall trigger the remedy of mandamus.

9. For the foregoing reasons the motion before the court is dismissed. The Ex parte Applicant shall be at liberty to file fresh proceedings. Parties shall carry own costs.

**Dated, Signed and Delivered in Nairobi this 11<sup>th</sup> day of April, 2019.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Mr. Ochieng holding brief Professor Ojienda for Applicant

No Appearance for Respondents

Mr. Ibrahim Court Assistant