



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS APPLICATION NO. 393 OF 2018**

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

**AND**

**IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 21 (4) OF THE GOVERNMENT PROCEEDINGS ACT AND SECTION 7 AND 33 OF THE SIXTH SCHEDULE OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**NDUKU MUTISO.....APPLICANT**

**VERSUS**

**THE COUNTY SECRETARY, NAIROBI CITY COUNTY.....1ST RESPONDENT**

**COUNTY GOVERNMENT OF NAIROBI.....2ND RESPONDENT**

**CHIEF OFFICER, FINANCE/COUNTY TREASURER,**

**NAIROBI CITY COUNTY OFFICER, FINANCE.....3RD RESPONDENT**

**JUDGMENT**

1. The *ex parte* applicant prays for an order of *Mandamus* directed against the first and third Respondents to compel them to pay to her the decretal sum of **Ksh. 2,111,379/=** awarded to her in Milimani CMCC Case No. **2314** of 2014, inclusive of accrued interests calculated up to 24<sup>th</sup> September 2018. The applicant also prays for costs of this application.

2. The genesis of the case is that she sued the Nairobi County Government in CMCC No. 2314 of 2014 (*Nduku Mutiso v Nairobi County Government*), and, that judgment was entered in her favour for Ksh. 1,561,724.61 together and interests at court rates of 12% p.a from the date of filing the suit. She states that her efforts to have the said sum paid has been futile, and, that, the outstanding amount as at 24.9.2018 stood at Ksh. 2,111,379/= inclusive of costs and interests which amount continues to attract interests at court rates.

3. The applicant states that a Notice of Entry of Judgment and a copy of the decree were served upon the first Respondent, and, that, she has written several demand letters to the Respondents including letters to the Chairman of the Pending Bills Committee to no avail. She states that she continues to suffer loss and prejudice due to the non-payment.

4. In her supplementary Affidavit dated 8<sup>th</sup> October 2018, she annexed copies of all the pleadings in the said case and averred that the said decree has not been appealed against.

5. In response to the application, the Respondents filed the Replying Affidavit of David Kaunda Oseko dated 19<sup>th</sup> November 2018. He

averred that the Respondent was in the process of settling the claim when the county government changed and introduced the Pending Bills Committee. He deposed that it is not true that the Respondents have frustrated the applicant, but it is the applicant who has been impatient.

6. In reply to the Replying Affidavit, the applicant filed a supplementary Affidavit dated 9<sup>th</sup> January 2019 stating *inter alia* that the Respondent in their Replying Affidavit admitted that they were served with the decree. She also averred that the Respondent halted the payment after the formation of the Pending Bills Committee even after they had prepared the payment voucher annexed to the Replying Affidavit.

#### **Determination.**

7. The applicant's counsel cited *Republic v The Attorney General & Another ex parte James Alfred Koroso*[1] in support of the proposition that 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.

8. In addition, she cited *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza*[2] for the proposition that the only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the government is found in section 21(1) (2) of the Government Proceedings Act.[3] She added that a decree holder has right to enjoy the fruits of his/her judgment.[4] Also, she premised the application on Article 47 of the Constitution.[5]

9. The Respondent's counsel submitted that *Mandamus* is a discretionary remedy[6] and that the facts of this case do not indicate that the Respondent has been stubborn. Counsel argued that the applicant failed to disclose that she submitted herself to the Pending Bills Committee; hence, this case is aimed at circumventing the Pending Bills Committee, put pressure on the Respondents, hence, as opposed to adjudicating a legitimate claim.

10. From the above facts/arguments, I find that only one issue falls for determination, namely: - *Whether the ex parte applicant has established grounds to warrant orders of mandamus.*

11. *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.[7] *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.[8]

12. *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.**[9]

13. *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 the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised based on evidence and sound legal principles. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty. A remedy controls procedural delays.

14. The test for granting *mandamus* was eloquently set out in *Apotex Inc. vs. Canada (Attorney General)*.<sup>[10]</sup> The position was reiterated in *Dragan vs. Canada (Minister of Citizenship and Immigration)*<sup>[11]</sup> which listed 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.*

15. The first test is the existence of a public legal duty to act. This claim arises from a valid court decree, which has not been appealed against. The Respondents have a legal duty to satisfy the decree. A Certificate of Costs was issued and served upon the Respondent. The duty to pay the said sum is owed to the Applicant. There is a clear right to the performance of that duty. The *ex parte* applicant has no other way of enforcing the decree.

16. There must have been a prior demand for performance. It is common ground that the applicant demanded the payment. In fact, the Replying Affidavit is a clear admission of the existence of the debt. To me the reasons offered amount to outright refusal to pay or neglect to pay. It is also my view that an express refusal or an implied refusal through unreasonable delay has been established.

17. 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 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 applicant. Further, I find no equitable bar to the relief(s) sought, and lastly, on a balance of convenience, *Mandamus* should issue.

18. Applying the above tests to the facts and circumstances of this case, I find and hold that the 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.

19. In view of my analysis and findings herein above, the conclusion becomes irresistible that the application dated 23<sup>rd</sup> November 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 first and third Respondents compelling them to pay the applicant Ksh. 2,111,379/= being the decretal sum awarded to the applicant in CMCC No. 2314 of 2014 inclusive of accrued interests as at 24<sup>th</sup> September 2018.*

*b. An order of Mandamus be and is hereby issued directed against the first and third Respondents compelling them to pay the applicant accrued interests on the above sum at court rates from 24<sup>th</sup> September 2018 until payment in full.*

*c. That the Respondent do pay the applicant the costs of these proceedings*

Orders accordingly

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

**John M. Mativo**

**Judge**

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[1] JR Misc App No. 44 of 2012.

[2] {2012} e KLR.

[3] Cap 40, Laws of Kenya.

[4] Citing *Republic v Town Clerk of Webuye County Council & Another*.

[5] Citing *Judicial Service Commission v Mbalu Mutava & Another* {2015} e KLR.

[6] Citing Sir William Wade and Christopher Forsyth on Administrative Law.

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

[8] 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.

[9] *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).

[10] [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.

[11] [2003 FCT 211 \(CanLII\)](#), [2003] 4 F.C. 189 (T.D.), aff'd [2003 FCA 233 \(CanLII\)](#), 2003 FCA 233).

