



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 577 OF 2017**

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLE 23 (3) (F)**

**AND**

**IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT,  
CAP 26 AND SECTION 11 (1) (F) & (J) OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO. 6828 OF 2015-NAIROBI**

**REPUBLIC.....APPLICANT**

**AND**

**THE COUNTY SECRETARY,  
ISIOLO COUNTY GOVERNMENT.....1ST RESPONDENT**

**CHIEF OFFICER, FINANCE/COUNTY TREASURER,  
ISIOLO COUNTY GOVERNMENT.....2ND RESPONDENT**

**AND**

**VETERAN PHARMACEUTICALS LIMITED.....EX PARTE APPLICANT**

**JUDGMENT**

1. The *ex parte* applicant prays for an order of *Mandamus* directed against the Respondents compelling them to pay it **Ksh. 914,424.20/=** being the decretal sum plus costs of **Ksh. 115,115/=** decreed in its favour in Nairobi Chief Magistrates Court Civil Case No. 6828 of 2015. The applicant also prays for costs of this suit.
2. The core ground in support of the application is that the *ex parte* applicant obtained a decree in its favour in Nairobi Chief Magistrates Court Civil Case No. 6828 of 2015 (*Veteran Pharmaceuticals Limited v Isiolo District Hospital & Another*), and, despite notice and several demands, the Respondents have refused to settle the amount.
3. The Respondents filed the Replying Affidavit sworn by a one Ahmed Galgalo Guyo, the County Secretary, Isiolo County dated 24<sup>th</sup> December 2018. He averred *inter alia* that the Respondents were not served with summons and the plaint and that the Respondent is in the process of effecting an appeal against the judgment. He also deposed that the Respondent is prohibited under sections 196 and 197 of the Public Finance Management Act<sup>[1]</sup> from paying the applicant without prior authorization. He asked that the court allow the Respondent to

factor the amount in the next budget. Lastly, he averred that the Respondents are currently not in a position to pay the said sum.

4. Robert Kamau Willie Ngige, a director of the applicant swore the further Affidavit dated 13<sup>th</sup> February 2019. He averred that the issue of service of summons was heard and determined by the lower court, which held that service was properly effected. He also averred that institution of an appeal does not operate as a stay. Lastly, he averred that payment of a debt is not an illegality nor can budgetary constraints be used to avoid responsibilities.

#### **Determination**

5. The *ex parte* applicant's counsel argued that the Respondent has a statutory mandate to settle the decree and that under section 21 (4) of the Government Proceedings Act, [2] execution cannot issue against the government. He submitted that there is failure to perform a duty on the part of the Respondent, hence, *Mandamus* can issue.

6. Counsel for the Respondent argued that the applicant acted in bad faith by failing to serve summons, that, *Mandamus* is a discretionary remedy and urged the court to dismiss the application.

7. 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.*

8. *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. [3] *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. [4]

9. *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.** [5]

10. *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.

11. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty. It is a remedy, which controls procedural delays. The test for *mandamus* was stated in *Apotex Inc. vs. Canada (Attorney General)* [6] and reiterated in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. [7] 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.*

12. The first test is the existence of a public legal duty to act. The claim arises from a court decree. The decree has not been appealed against or set aside. It is not sufficient to say at this stage that summons in the suit which gave rise to the decree were not served. The decree still stands. It has not been overturned on appeal or review. In any event, on record is a copy of a ruling dated 5<sup>th</sup> July 2018 dismissing the Respondent's application to set aside the judgement alleging that it was not served with court summons.

13. A Certificate of Costs under Order 29 Rule 3 of the Civil Procedure Rules was issued and served upon the Respondent. 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.

14. I find that the *ex parte* Applicant has satisfied the conditions precedent to qualify for an order of *Mandamus*. It is not denied that the *ex parte* applicant demanded the payment. It is my view the applicant has established the existence of an express and or an implied refusal to pay and unreasonable delay.

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

16. 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.

17. Accordingly, in view of my determination and findings herein above, the conclusion becomes irresistible that the application dated 13<sup>rd</sup> November 2018 is successful. Consequently, I allow the application and order as follows-

*a. An order of Mandamus be and is hereby issued directed against The County Secretary, Isiolo County Government and the Chief Officer, Finance/County Treasurer, Isiolo County Government, compelling them to pay the ex parte applicant Ksh. 914,424. 20 being the decretal amount payable to the applicant as ordered in Chief Magistrates Court Civil Suit No. 6828 of 2015 plus costs of the said case in the sum of Ksh. 115,115/=plus interest on the said sums at the rate of 12% per annum from 12.5.2015 until payment in full.*

*b. That the Respondent 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 **June** 2019

**JOHN M. MATIVO**

**JUDGE**

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[1] Act No. 18 of 2012.

[2] Cap 40, Laws of Kenya.

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

[4] 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.

[5] *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).

[6] [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.

[7] [2003 FCT 211 \(CanLII\)](#), [2003] 4 F.C. 189 (T.D.), aff'd [2003 FCA 233 \(CanLII\)](#), 2003 FCA 233).