



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW NO. 40 OF 2017

IN THE MATTER OF: AN APPLICATION BY ONYANGO MALOMBO

ROBINSON T/A O.M ROBINSON & CO. ADVOCATES FOR AN

ORDER OF MANDAMUS DIRECTED AT THE COUNTY

SECRETARY AND CHIEF FINANCE OFFICER BOTH

OF COUNTY GOVERNMENT OF MOMBASA.

AND

IN THE MATTER OF: SECTION 44(1) OF THE COUNTY GOVERNMENT

ACT NO. 17 OF 2012 AND ARTICLES 156, 176 OF THE CONSTITUTION

OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE LAW.

IN THE MATTER OF: SATISFACTION OF THE DECREE IN MOMBASA HIGH

COURT MISC. CIVIL APPLICATION NO. 418 OF 2016 BETWEEN ROBINSON

ONYAMNGO MALOMBO T/A O.M. ROBINSON & CO. ADVOCATES

VERSUS COUNTY GOVERNMENT OF MOMBASA.

REPUBLIC.....APPLICANT

BETWEEN

1. ONYANGO MALOMBO ROBINSON T/A O.M ROBINSON &

CO. ADVOCATES.....EX-PARTE APPLICANT

VERSUS

2. COUNTY SECRETARY (MOMBASA

COUNTY GOVERNMENT).....1ST RESPONDENT

3. CHIEF FINANCE OFFICER/COUNTY TREASURER

(MOMBASA COUNTY GOVERNMENT).....2ND RESPONDENT

RULING OF THE COURT

The Application

1. Pursuant to leave granted by this Court on 20th July, 2017, the ex-parte Applicant herein filed a Notice of Motion dated 26th July, 2017 brought under Order 53(3) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act in which he seeks the following orders:

a. THAT an Order of Mandamus do issue directed at the Respondents herein namely the County Secretary and the Chief Finance Officer both of the County Government of Mombasa to compel them forthwith and without delay to cause to be paid out of the revenue of the County Government of Mombasa to the ex-parte Applicant the sum of Kshs. 14, 352, 124.90/= being the decretal sum together with further accrued and accruing interest at court rates (14% per annum) from 25th October, 2016 until payment in full in HCCC Miscellaneous Application No. 172(A) of 2015.

b. THAT the costs of this application be borne by the Respondents.

The application was supported by the supporting affidavit of **ONYANGO MALOMBO ROBINSON** sworn on 26th July, 2017.

2. The ex-parte Applicant alleges that on 29th January, 2016, the taxing officer of this court taxed his bill of costs against the County Government of Mombasa at Kshs. 14, 352, 124.90/= and consequently the Applicant applied for judgment in respect of the said costs.

3. The ex-parte Applicant claims that on 25th October, 2016 judgment was entered in favour of the Applicant against the County Government in HCCC Miscellaneous Application No. 172(A) of 2015 and a decree was extracted and a Certificate of Order against the government issued on 24th February, 2017.

4. It is the ex-parte Applicant's contention that he served a notice upon the 1st and 2nd Respondents requiring them to satisfy the decree but they have declined to do so and that he has also made several visits to the Respondents offices only to receive promises that the County Government will pay as soon as it is placed on funds.

5. It is the ex-parte Applicant's case that the Respondents have failed in their public duty conferred by statute to satisfy the decree and further that the Respondents have defied an order of this court thus they ought to be compelled to satisfy the decree.

Response

6. Despite service of the application and other supporting documents the Respondents did not respond to the application.

Submissions

7. The application came up for hearing on 20th September, 2017. Mr. Malombo appeared for the Applicant but there was no appearance by the Respondents. The court ordered the Applicant to file submissions on the application.

8. The ex-parte Applicant filed his written submissions on 22nd September, 2017. Mr. Malombo submitted that the ex-parte Applicant has severally requested the Respondents to settle the decretal sum but they had failed to do so thus necessitating an Order of Mandamus. Counsel cited the case of **Kenya National Examination Council versus Republic, Ex-parte Geoffrey Gathinji Njoroge & Others, Civil Appeal No. 266 of 1996** in which the Court of Appeal dealt with the scope and efficacy of an Order of Mandamus by referring to Halsbury's Laws of England, 4th Edition Volume 1 at page 111 which states:

“The order of mandamus is of a most extensive remedial nature and is, in form, a command issuing from the High Court, 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.”

Counsel argued that an order of mandamus was appropriate in this case.

Determination

9. I have carefully analyzed the application herein and the only issue that arises is whether an Order of Mandamus should be issued to compel the Respondents to Kshs. 14, 352, 124.90/= to the ex-parte Applicant being the decretal sum in HCCC Misc. Application No. 172(A) of 2015 plus the accrued and accruing interest at court rates (14% per annum) from 25th October, 2016.

10. The Respondents did not respond to the application thus it is deemed that the Respondents do not dispute that a bill of costs was taxed against the County Government of Mombasa at Kshs. 14, 352, 124.90/=, the Applicant applied for judgment to be entered against the County Government of Mombasa and a decree was extracted and so was a Certificate of order Against the Government and notices of demand were served upon the Respondents, but the said decree has never been satisfied.

11. An Order of Mandamus is issued to compel a public body to perform a duty that has been imposed on it. However, a judicial review remedy will not issue where there are other convenient remedies available to the Applicant. In the case of **Republic versus Attorney**

General & another Ex-parte Ongata Works Limited [2016] eKLR, 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”.

12. I have carefully perused the County Government Act No. 17 of 2012. I do not find that there is any other appropriate remedy that the ex-parte Applicant ought to have considered before instituting these proceedings. However, for an Order of Mandamus to issue the duty owed by the public body must have become due. In the case of **Republic versus Attorney General & another Ex-parte Ongata Works Limited (Supra)**, Justice Odunga stated as follows:

“...What comes out clearly is that the court only compels the satisfaction of a duty that has become due. In matters where the Applicant claims that the Respondent ought to be compelled to pay a certain amount of money, it does not suffice to simply aver that the Respondent is under an obligation to settle its liability to the Applicant. The Applicant must go a step further and prove that the sum claimed is actually due. Where therefore liability is admitted or proved, the next stage is to prove the actual quantum payable and where the said sum is yet to be determined an order of mandamus cannot be issued for forth payment of the said sum.”

13. In this case, the Ex-parte Applicant has attached his affidavit sworn on 26th July, 2017, the certificate of taxation issued on 2nd February, 2016, the decree issued on 27th February, 2017, and the Certificate of Order against the government issued on 24th February, 2017 to prove that indeed the sum claimed is due to him.

14. For the foregoing reasons the application dated 26th July, 2017 is allowed as prayed.

Dated, Signed and Delivered in Mombasa this 18th day of January, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Nabwana holding brief for Mr. Malombo for Ex parte Applicant

Mr. Kaunda Court Assistant