**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW CASE NO 176 OF 2015**

**NJENGA MWANGI WACHIRA & PARTNERS…….....……APPLICANT**

**VERSUS**

**THE COUNTY SECRETARY,**

**CITY COUNTY OF NAIROBI……RESPONDENT**

**JUDGEMENT**

## Introduction

1. By a Notice of Motion dated 23rd February, 2017, the ex parte applicant herein, **Njenga Mwangi Wachira & Partners**, seeks to compel the Town Clerk County Secretary City County of Nairobi to pay out of the revenue of the said county the total decretal sum of Kshs 1,677,990/= costs and interests as awarded by the High Court in miscellaneous Civil Application No. 15 of 2001, miscellaneous Civil Application No. 363 of 2001, miscellaneous Civil Application No. 17 of 2001, miscellaneous Civil Application No. 18 of 2001, miscellaneous Civil Application No. 238 of 2001, miscellaneous Civil Application No. 239 of 2001 and miscellaneous Civil Application No. 240 of 2001 (Milimani Commercial and Tax Division). The applicant also seeks an order that the costs of this application be provided for.

2. According to the ex parte applicant, between the year 1996 and 2000 he represented the then City Council of Nairobi (hereinafter referred to as "the Council") herein in various matters at the High Court of Kenya in Nairobi pursuant to which he raised various fee notes in the various matters and forwarded them to the said Council for payment but the Council refused and/or neglected to settle the same.

3. The applicant averred that in the year 2001 he filed his bills of costs for taxation in the High Court Misc. Applications Nos. 15 of 2001, No 17 of 2001, No. 18 of 2001, No. 238 of 2001, No. 239 of 2001, No. 240 of 2001 and No. 363 of 2001 which bills were taxed and certificates of taxation issued by the Deputy Registrar of this court which he duly forwarded to the said Council for payment by a letter dated 12th July, 2012.

4. The applicant disclosed that the total decretal sum issued against the City County the then City Council of Nairobi in the above various bills of costs was Kshs 3,667,939.80/= of which the respondent has paid Kshs 2,000,000/= leaving a balance of Kshs of Kshs 1,677,939.80/= which is still outstanding, due and owing to date.

5. It was revealed that on or about 30th January, 2013 the then City Council of Nairobi issued the applicant's advocates on record cheque No. 048026 in satisfaction of the balance of the amount taxed of

Kshs 1, 677,939/= which upon presentation to the bank was dishonoured for insufficient of funds in the respondent's account herein. Despite a reminder by the said advocates, no response was received.

6. It was deposed that after the promulgation of the Constitution of Kenya 2010 and the general election held in March 2013 the City County Government of Nairobi took over the duties of the defunct City Council of Nairobi and on or about 11th October, 2013 the Governor of City County of Nairobi appointed a task force to among other things advise him on various legal fees demanded by the advocates from the County Government on respective cases. However, the County Secretary of the City Council of Nairobi has not made any effort to settle the decretal sum and the said amount remains outstanding, due and owing.

7. The applicant however asserted that though it is the duty of the County Secretary as the Chief Executive Officer of the City County of Nairobi to pay the decretal sum from the revenue of the City County of Nairobi without and delay, the County Secretary has deliberately failed to exercise his statutory duty, and unless compelled by this honourable court, he will persist in his refusal to settle the decretal sum which has prejudice of the applicant herein.

**Respondent's Case**

8. In opposition to the application, the Respondent filed the following grounds of opposition:

1. **That the application is fatally incompetent and incurably defective.**

2. **That the application is premature as the costs of the suits are yet to be taxed as required by law. A decree cannot be executed in piece meal.**

3. **That the orders sought by the applicant do not lie as against the respondent as there is no statutory duty imposed upon them to act as demanded. The applicant has not stated under which law the sited respondent has a duty to act as demanded.**

4. **That under part IV- the County Government responsibilities with respect to management and control of public finance under the Public Finance Management Act Cap 412C of the Laws of Kenya, the Statutory duty to pay out funds from the county treasury vests in the County Executive Committee in charge of finance and not the respondent herein thus the respondent herein is wrongly suited.**

5. **That the application is frivolous, vexatious and an abuse of the court process is a mere publicity stunt by the applicant as it relates to the respondent.**

6. **That the respondent has since filed appeals against the judgments herein.**

***Determinations***

9. I have considered the material before me in this application.

10. Section 6 of the Sixth Schedule to the Constitution provides that all rights and obligations however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the Republic under the Constitution. However, those rights and obligations are expressly stated to be subject to contrary provisions in the Constitution. Section 33 of the sixth schedule, on the other hand provides:

> ***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.***

11. According to **Kasango, J** in **Argos Furnishers Ltd vs. Municipal Council of Mombasa HCCC No. 13 of 2008,** in which the learned Judge cited with approval the decision in **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006**:

> **"Pursuant to the provisions of the said section 33 of the Sixth Schedule to the Constitution of Kenya, 2010 County Governments are therefore the natural and presumptive legal successors of the defunct local authorities."**

**12. Majanja, J** who delivered the decision in **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006** pronounced himself on the provisions of section 59 of the ***Urban Areas and Cities Act*** No. 13 of 2011 as read with Section 33 of the Sixth Schedule of the Constitution. The former provides:

> ***Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force or any defence appeal or reference howsoever field by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.***

13. The learned Judge accordingly found that:

> **"the County is the legally established body unit contemplated under the law that takes the place of local authorities unless there is a contrary enactment. I therefore find and hold that the proceedings and judgment against Webuye Town Council and its officers must continue against Bungoma County which must now bear the burden of the judgement. The court cannot grant orders incapable of enforcement as the Town Council and its Town Clerk no longer exist (See Republic vs. Minister for Land & 2 Others ex parte Kimeo Stores Ltd (2011) eKLR, Kenya National Examination Council vs. Republic exparte Geoffrey Gathenji Njoroge & Others CA Civil Appeal No. 266 of 1996)."**

14. It follows that section 33 of the 6th Schedule is an exception to section 6 thereof hence legal rights and liabilities of the defunct local authorities are to accrue in favour of and be sustained against their successors which in this case are the respective County Governments.

15. In this case, the Respondent contends that under the ***Public Finance Management Act*** Cap 412C of the Laws of Kenya, the statutory duty to pay out funds from the county treasury vests in the County Executive Committee in charge of finance and not the respondent herein thus the respondent herein is wrongly suited. It is true that section 103 of the ***Public Finance Management Act***, No. 18 of 2012, establishes the county treasury comprising of the County Executive Member of Finance, the Chief Officer and the departments of the County Treasury responsible for finance and fiscal matters. Under section 103(3) thereof, the County Executive Committee member for Finance is the head of the County Treasury. It is also true that section 104 of the ***Public Finance Management Act*** sets out the responsibilities and powers of a County Treasury headed by the said County Executive Member for Finance. It would therefore seem that the County Secretary has no role under the Act when it comes to matters of finance since the obligation to do so rests on the County Executive Member for Finance, in the capacity as the accounting officer.

16. It must however be remembered always that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In this case the Respondent ought to have been the Accounting Officer who is the County Executive Member for Finance.

17. However, as this is merely a misjoinder the same ought not to be fatal to the application though the Court may in exercise of its discretion deny the applicant, even if successful, costs of the application. An issue as to the effect of misjoinder in judicial proceedings was the subject of determination in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal**

**(Application) No. Nai. 281 of 2005** in which the Court of Appeal stated:

> **"Suffice it to say that a defect in form in the title or heading of an appeal, or *a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment*...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".** [Emphasis added].

18. This was the position adopted in **Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute Nairobi H.C. Misc. Appl. No. 594 of 2002 [2003] KLR 582**, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation. This position is even more relevant to proceedings in the nature of judicial review which are neither criminal nor civil and particularly in application for *mandamus* where what is sought is the enforcement of a decree against the respondent not in his personal capacity but in his official capacity. In such circumstances, the respondent is simply being compelled to facilitate the payment as opposed to imposing personal liability.

19. It is therefore my view that whereas misjoinder or non-joinder may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed where the substance of the reliefs sought can still be realised notwithstanding the irregularity.

20. Article 159(2)(d) of the Constitution enjoins this Court to administer justice without undue regard to technicalities of procedure, as long as the rules of natural justice are adhered to. At the end of the day the entity which is bound to settle the decree is the County Government and not the said officer in his personal capacity. Misjoinder of parties in County Governments was also considered in **Council of Governors & Others vs. The Senate Petition No. 413 of 2014** where it was held that:

> **"…the role of the Governor under Section 30(3) (f) of the County Governments Act is critical in fiscal management at the County level. He is the Chief Executive Officer and the buck stops with him in the management of county resources. It is critical that such a provision exists so as to ensure responsibility of public resources which would ultimately enhance the national values as provided for under Article 10 of the Constitution as well as the spirit and tenor of constitution."**

21. In **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009** the Court of Appeal appreciated that:

> **"…the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out."**

22. Therefore considering the nature of judicial review remedy of *mandamus* which strictly speaking is not a proceeding in the nature of execution proceedings, misjoinder of parties ought not to be fatal to such application especially where the pleadings are curable by amendment.

23. This Court dealt with this duty robustly in **High Court Judicial Review Miscellaneous Application No. 44 of 2012** between **Republic vs. The Attorney General & Another ex parte James Alfred Koroso** as follows:

> **"…in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from**

**mandamus, he has no option of ensuring that the judgement that he has been awarded is realised. 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 judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement 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…The institution of judicial review proceedings in the nature of mandamus cannot be equated with execution proceedings. In seeking an order for mandamus the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In mandamus cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it. In other words, mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of mandamus, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are nolonger execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."**

24. The other objection was the application is premature as the costs of the suits are yet to be taxed as required by law. It is true that a decree cannot be executed in piece meal and that is my understanding of section 4 of the ***Civil Procedure Act*** which provides as hereunder:

> ***Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.***

25. However as already stated hereinabove, in this application, the Court is not dealing with execution proceedings. Accordingly the Court can compel the Respondent to pay what the applicant is seeking as long as the same is ascertained. As to whether the applicant will be able to commence further proceedings in respect of what ought to have been claimed herein is not a matter that falls for determination in these proceedings and will have to await a determination if and when that claim is made.

26. It was also contended that the respondent has since filed appeals against the judgments herein. In my view, the only way in which the Respondent can avoid payment where there is a valid judgement of a Court of competent jurisdiction, save where the conditions precedent have not been satisfied, is to show that the judgement has been set aside on appeal or on review or that an order of stay has been issued suspending the execution of the said judgement. Order 42 rule 6(1) of the ***Civil Procedure Rules*** is clear that even the pendency of an appeal does not *ipso facto* operate as a stay of the decree or order appealed against.

27. Having considered the issues raised herein, I have no reason to decline to grant the orders sought herein

**Order**

28. Accordingly an order of *mandamus* is hereby issued compelling the Respondent to pay to the Applicant the sum of Kshs 1,677,990/=.

29. Costs of this application are awarded to the Applicant.

**Dated at Nairobi this 27th day of July, 2017**

***G V ODUNGA***

***JUDGE***

***Delivered in the presence of:***

**Miss Mumo for Mr Nzioka for the applicant**

**CA Mwangi**