



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI JUDICIAL REVIEW DIVISION

MISCELLANOUS CIVIL APPLICATION NO. 207 OF 2015 (JR)

IN THE MATTER AN APPLICATION BY DANSON MWANGI KIAWANO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE DECEASED JULIUS MWANGI KIAWANO) FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF THE COUNTY SECRETARY, NAIROBI CITY COUNTY

AND

IN THE MATTER OF THE URBAN AREAS AND CITIES ACT AND COUNTY GOVERNMENT ACT

BETWEEN

DANSON MWANGI KIAWANO

(suing as the administrator of the estate of the deceased

JULIUS MWANGI KIAWANO)APPLICANT

VERSUS

COUNTY SECRETARY, NAIROBI

CITY COUNTY (sued as the successor of

CITY COUNCIL OF NAIROBIRESPONDENT

JUDGEMENT

Introductions

1. By a Notice of Motion dated 6th August, 2015, the ex parte applicant herein, **Danson Mwangi**

Kiawano, seeks the following orders:

1. That an order of mandamus be and is hereby issued to compel the Respondent to pay to the Applicant the sum of Kshs.1,939,149.00 being the decretal amount together with Kshs.176,715.00/- being the certified costs in Nairobi Chief Magistrates Courts, Milimani Commercial court Civil Suit No. 2606 of 2007, Danson Mwangi Kiawano Vs City Council of Nairobi and 2 others and interest thereon at 12% per annum from 5th March 2014 until payment in full.

2. That the costs of the application be cost in the cause.

Applicants Case

2. According to the applicant, he is the Decree holder in Nairobi Chief Magistrates Courts, Milimani Commercial Court Civil Suit No. 2606 of 2007 -Danson Mwangi Kiawano vs City Council of Nairobi and 2 Others in which by a judgement delivered on 13th May 2013 the Court found that the applicant's deceased son was on 17th day of August 2006 while going about his hawking business along Tom Mboya Street next to Nairobi Fire Station accosted, tortured, assaulted and battered by the respondent and its employees who inflicted fatal injuries on him in excess of their powers when executing their duties as City Council Askaris. It was therefore held that their employer, the respondent, was vicariously liable for the carelessness and negligence of its employees, servants and/or agents.
3. By the same judgement the applicant was awarded general damages of Kshs 1,686,600/= under the **Law Reform Act** and **Fatal Accidents Act** and Kshs 41,165/= in special damages plus costs and interest. Consequently, a decree and Certificate of Costs were issued and the applicant through his advocates demanded payment from the Respondent through its legal office by a letter dated 5th March 2014 delivered on 26th March 2014 to the assistant director legal affairs. The said officer duly acknowledged the receipt thereof but did not make good the payment requested and or make any suggestions towards settlement.
4. It was the applicant's case that he had been wrongfully deprived of the fruits of his judgement as a consequence whereof the he was suffering loss and damage. To the applicant, the said loss and damage was Kshs 1,939, 149.00/= in judgement and Kshs 176,715.00/= in costs together with interest from 5th March 2014. The applicant added the Respondent had neither appealed against the said decree nor had the same been halted/alterd by the Court.
5. The applicant disclosed that since the entry of judgment, and despite numerous reminders to the office of the Respondent, the Respondent had failed, refused and/or neglected to settle the decretal amount which was still due and accruing interests and further costs.
6. To the applicant, the County Secretary to Nairobi City County, as the accounting officer of Nairobi City County, was under a public duty to make good the said payment and had wrongfully refused to do so. It was therefore proper to compel the County Secretary to Nairobi City County to perform his public functions.

Respondent's Case

7. In response to the application, the Respondent filed the following grounds of opposition:
 1. **That at the outset, the said application is premature, misconceived and bad in law in view of the fact that the writ of mandamus will not issue where there is no statutory duty imposed upon the Respondent.**
 2. **That further, granting the orders sought would be in vain since under Section 104 of the Public Finance Management Act No. 18 of 2012 the County Secretary has no statutory duty at all in respect of county finances.**
 3. **That the application is fatally and incurably defective and does not lie in law since no nexus has been produced to show that there is a statutory duty imposed upon the Respondent and orders sought.**

4. That the orders sought to be enforced are yet to be served upon the Respondent and indeed there is no annexed of service of orders or proof of any service thereof.
5. That the Constitution places the management of county funds within the control of the County Executive in charge of finance.
6. That the Applicant has not shown that he has an arguable application or prima facie case worth meritorious consideration and determination by this honourable court on perusal of the materials presented to it by the Applicant.
7. That the Applicant's claim is out rightly frivolous, vexatious, unjust, without substance and raises no single triable issue for the determination of the court.
8. That in the premises, the Respondent denies that he the Applicant is entitled to any of the relief prayed in the application or at all.

Determinations

8. I have considered the material before which includes, the application, the affidavit in support of the application, the grounds of opposition as well as the submissions filed.
9. The only issue for determination in this matter, in my view, is whether the Respondent herein is the correct person to be sued.
10. In Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 where Goudie, J expressed himself, *inter alia*, as follows:

“*Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...The foregoing may also be thought to be much in point in relation to the applicant's unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty...Since *mandamus* originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law...English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting “simply in his capacity of servant”. There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a *mandamus* would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of *mandamus* will lie for the enforcement of the duties...With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to

compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile... It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government....Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go... In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of *mandamus* must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament... In the court's view the granting of *mandamus* against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and 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 Treasury Officer of Accounts 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 Crown servant in his official capacity and the duty is owed not to the Crown 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. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata*, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few...*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designate* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but

they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of *mandamus* will issue as prayed with costs."

11. It is true that the County Executive in Charge of Finance is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered 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. I therefore associate myself with the views expressed by **Githua, J** in **Republic vs. Permanent Secretary Ministry of State for Provincial Administration and Internal Security & Another ex parte Fredrick Manoa Egungza** that:

"The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issues against the Government is found in section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon. Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgement. Once the certificate of order against the Government is served on the Hon. Attorney General, Section 21(3) imposes a statutory duty on the accounting officer to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues. The Respondent's claim that the Applicant should have waited until the start of the next financial year to enforce payment of the decree issued in his favour cannot be sustained firstly because it has no legal basis and secondly because it is the responsibility of the Government to make contingency provisions for its liabilities in tort in each financial year so that successful litigants who obtain decrees against the Government are not left without remedy at any time of the year."

12. 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"

13. 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. As this Court appreciated in **Council of Governors & Others vs. The Senate Petition No. 413 of 2014:**

“...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.”

14. In this case, it is noted that the affidavit in support of the application was sworn by the advocate rather than the applicant himself. It is now trite that advocates ought not to swear affidavits on contested facts or facts which are likely to be contested if their clients are available to swear the same. In this case, however since the Respondent has not sworn any affidavit, the factual issues are not in contention. However that is an issue which the Court may properly take into account in making a decision on costs.
15. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**, I expressed myself as hereunder:

“...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 no longer 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.”

- 16.I see no reason to depart from the said reasoning which I adopt in this case.
- 17.Having considered the material on record and in the absence of any impediment, I do not see why the respondent should not, on behalf of the County Government of Nairobi, be compelled to perform the statutory duty by settling the sums due to the applicant.
- 18.In the result I allow the Notice of Motion dated 6th August, 2015 and issue an order of mandamus directed to the Respondent herein compelling him to pay to the Applicant the sum of Kshs.1,939,149.00 being the decretal amount together with Kshs.176,715.00/- being the certified costs in Nairobi Chief Magistrates Courts, Milimani Commercial court Civil Suit No. 2606 of 2007, **Danson Mwangi Kiawano vs City Council of Nairobi and 2 Others** and interest thereon at 12% per annum from 5th March 2014 until payment in full.
- 19.In light of misjoinder and the sentiments expressed by the Court in relation to the supporting affidavit, there will be no order as to costs.
- 20.Orders accordingly.

Dated at Nairobi this 25th day of February, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Makumi for the Applicant

Cc Patricia