



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC CIVIL APPLICATION NO. 282 OF 2014

IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF SECTION 59 OF URBAN AREAS AD CITIES ACT NO 13 OF 2011 AND SECTION 44 (1) OF THE COUNTY GOVERNMENT ACT NO 17 OF 2012 AND ALL OTHER ENABLING PROVISIONS OF THE LAW

REPUBLIC.....APPLICANT

VERSES

COUNTY SECRETARY NAIROBI COUNTY.....1ST RESPONDENT

COUNTY TREASURER NAIROBI COUNTY....2ND RESPONDENT

EX-PARTE APPLICANT: Park Towers Limited

JUDGEMENT

Introduction

1. By a Notice of Motion dated 23rd July, 2014, the applicant herein, **Park Towers Limited**, seeks the following orders:
1. **An order of mandamus be issued directed to the respondents herein namely; the county secretary of Nairobi city county and county treasurer of Nairobi city county to move into the honourable court forthwith and without delay cause to be paid to the Exparte applicant the sum of Kshs. 33,770,321.08 being the decretal sum as per the decree dated 13th march 2014 in HC ELC No. 376 of 2004 pursuant to the judgment by the honourable Justice Mutungi of 27th February 2014, further orders of 30th March 2014 and the ruling of the deputy registrar, honourable M/s L.M Wachira on 12th June 2014 in respect to the applicant's Bill of cost arising from the aforesaid suit.**
2. **The cost of this application and the chamber summons dated 18th July 2014 be borne by the respondents.**

Ex Parte Applicant's Case

2. The Motion is supported by an affidavit sworn by the applicant on 23rd July, 2013.
3. According to the deponent, the Ex-parte applicant is the decree holder in HC ELC No. 376 of 2004 (hereinafter referred to as the said suit), a suit involving Park Towers Company Limited verses Nairobi City Council and 7 others vide a decree and certificate of taxation issued on the 13th March 2014 and 12th June 2014 respectively. It was deposed that despite the respondents' knowledge of the same vide their representation in court and exchange of correspondences, the respondents have neglected their statutory duty and refused to pay to the Ex-parte applicant the decretal sum together with the certified costs.
4. It was averred that the respondents were given 30 days and a further 21 days stay by the honourable court which lapsed. It was therefore the deponent's view that the respondents did not have any justifiable reasons for failing to pay the decretal sum plus costs and interest accruing therefrom and that the blatant refusal to pay the said sums amounts to neglect of statutory duty by the respondents who are mandated to administratively ensure the settlement of the subject decree.
5. The deponent added that the respondents are the mandated officers by the Nairobi City County who is the legal predecessor of the Nairobi city council; the judgment debtor in the fore-stated suit. The deponent averred that the delay in settling the just decree is causing the Ex-parte applicant substantial prejudice and amounts to blatant disobedience of this honourable court's orders yet there is no other legal remedy available to the Ex-parte applicant save for an order of Mandamus as sought in this present application.

Respondents' Case

6. In opposition to the application the Respondents filed a replying affidavit sworn by **Abwao Erick**, the Assistant Director of Legal Affairs of Nairobi City Council on 26th September, 2014.
7. According to the deponent, whereas it is not disputed that the ex parte applicant is the decree holder in the said suit in which a sum of Kshs 33,770,321.58 was claimed, following an application for stay pending appeal by the Respondent, the Court granted a temporary stay of execution to enable the Respondents move the Court of Appeal for a substantive stay. It was averred that the Respondent indeed filed in the Court of Appeal Nairobi Civil Application No. 170 of 2014 which application was filed for hearing on 29th October, 2014.
8. It was therefore the deponent's view that the said application ought to be disposed first before the instant application since the intended appeal is arguable and has high chances of success. Unless the said option is resorted to, it was the deponent's view that the Respondents would suffer irreparable harm if execution proceeds as the applicant's financial means are unknown. On the other hand it was the deponent's position that no prejudice would be occasioned to the applicant if the said application for stay was disposed of.

Determination

9. I have considered the application, the affidavits in support of and in opposition to the application as well as the submissions made by the applicant and the authorities cited therein.
10. The only ground raised by the Respondents for not settling the decree was the pendency of an application for stay in the Court of Appeal. First and foremost Order 42 rule 6(1) of the **Civil Procedure Rules** is clear that even the pendency of an appeal ipso facto does not operate as a stay of the decree or order appealed against. In this case, it has not even been contended that there is a pending appeal. To the contrary, it was submitted on behalf of the ex parte applicant that when the application for stay came up for hearing before the Court of Appeal the same was adjourned sine die as some of the parties had not been served. No submissions were filed on behalf of the Respondents.
11. 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 follows:

“...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.”

12. Adopting the same reasoning and in the absence of any compelling reason, I do not see why the respondents should not be compelled to perform their statutory duty by settling the sums due from them to the applicant.

13. In the result I allow the Notice of Motion dated 23rd July, 2014.

Order

14. Consequently, an order of *mandamus* is hereby issued compelling the Respondents herein namely, the county secretary of Nairobi city county and county treasurer of Nairobi city county to pay to the ex parte applicant the sum of Kshs. 33,770,321.08 being the decretal sum as per the decree dated 13th March 2014 in HC ELC No. 376 of 2004 pursuant to the judgment by the **Honourable Mr. Justice Mutungi** of 27th February 2014 and consequential orders made therein on 12th June 2014 in respect to the applicant’s Bill of cost arising from the aforesaid suit.

15. The applicant will have the costs of this application.

16. It is so ordered.

Dated at Nairobi this 17th February, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Oyatta for the pplicant

Mr Nyamai for Mr Omoti for the Respondent

Cc Patricia