



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION NO. 354 OF 2012**

**IN THE MATTER OF: AN APPLICATION BY WACHIRA NDERITU, NGUGI & CO.  
ADVOCATES FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS.**

**AND**

**IN THE MATTER OF:**

- 1. THE HIGH COURT MISC. APPLICATION 631 OF 2009.**
- 2. THE HIGH COURT MISC. CIVIL APPL. NO. 632 OF 2009**
- 3. THE HIGH COURT MISC. CIVIL APP. NO. 538 OF 2009**
- 4. THE HIGH COURT MISC. CIVIL APPL. NO. 360 OF 2011**
- 5. THE HIGH COURT MISC. CIVIL APPL. NO. 361 OF 2011**

**WACHIRA NDERITU, NGUGI & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**THE TOWN CLERK, CITY COUNCIL OF NAIROBI.....RESPONDENT**

**RULING**

1. On 4<sup>th</sup> February, 2013, this Court granted an order of mandamus compelling the Respondent to pay the applicant the sum of Kshs 31,333,689.83 within 30 days.
2. By a Notice of Motion dated 30<sup>th</sup> October, 2014, the Respondent herein seeks the following orders:
  - a. **That this application be certified as urgent and service of this Application on the Applicant/Respondent be dispensed with in the first instance for purposes of this prayer and prayers b), c) and d) herein;**
  - b. **That this Honourable Court grants the firm of Prof. Tom Ojienda & Associates Advocates leave to come on record in place of Abwao Erick Odhiambo Advocate, in terms of the Consent filed herewith.**
  - c. **That pending the inter partes hearing and determination of the Application herein the Court order given on 17<sup>th</sup> day of October 2014 and any other Court Order directing the arrest of the County Secretary, Nairobi City County and her arraignment before their Honourable Court for the purpose of showing cause why she cannot be committed to jail for 6 months as a result of disobedience of this Court Orders and/or further orders, be stayed;**
  - d. **That pending the inter partes hearing and determination of the Application herein, any warrants of arrest issued against the County Secretary Nairobi City County in this matter, be stayed;**

- e. **That pending the inter partes hearing and determination of the Application herein, the Court Order given on 17<sup>th</sup> day of October 2014 and any other Court Order directing the arrest of the County Secretary, Nairobi City County and her arraignment before this Honourable Court for the purpose of showing cause why she cannot be committed to jail for 6 months as a result of disobedience of this Court Orders and/or further orders, be set aside and or varied;**
  - f. **That pending the inter partes hearing and determination of the Application herein, any warrants of arrest issued against the County Secretary Nairobi City County in this matter, be lifted;**
  - g. **That the costs of and incidental to this Application be provided for.**
3. The application was supported by various affidavits the main one being the supplementary affidavits sworn by **Lilian W. Ndegwa**, the County Secretary and Head of County Public Service on 4<sup>th</sup> December, 2014 and 8<sup>th</sup> December, 2014 respectively.
  4. In the said affidavits it was contended that there is a Transitional Authority (hereinafter referred to as the Authority), a statutory body established under Section 4 of the Sixth Schedule of the constitution, with the general mandate of facilitating and coordinating the transition to devolved system of Government and also to prepare and validate the inventory of all existing assets and liabilities of Government, public entities and defunct local authorities. The said Authority, it was contended publicized a moratorium (which is still in force) on transfer on assets and liabilities as provided pursuant to Section 35 of ***Transition to Devolved Government Act, 2012*** (hereinafter referred to as the Act) which stipulates that a state organ, public entity of local authority (defunct) shall not transfer assets of its liabilities during the transition period without seeking the approval of the Authority.
  5. It was contended that it is public notice that the said Authority advised the public to register complaints regarding payment of claims on liabilities particularly creditors of the defunct local authorities to enable the state organ to verify the liabilities and conclude on its nationwide audit of assets and liabilities of the defunct local authorities, before taking any action against a County Government.
  6. According to the respondent, Phase One of the Transitional Phases as prescribed under the Fourth Schedule of the ***Transition Devolved Government Act, 2012*** is still ongoing as the Transitional authority is yet to conclude its national verification and audit of assets and liabilities of defunct local authorities and thus the assets and liabilities are yet to be fully transferred to the County Government as described in Phase Two of the Transitional Phases and prescribed under the Fourth Schedule of the Act.
  7. The deponent contended that there has never been any agreement between the Respondent/Applicant and the national government to take over the mandate of the notional government to control assets and liabilities and in turn pay claims on unverified liabilities of the defunct local authorities that are in the custody of the national Government through the Transition Authority during the transition period.
  8. In the respondent's opinion, Section 6 of the Sixth Schedule to the Constitution of Kenya vests in the national government, all rights and obligations however arising that the Government entered into with any party prior to the establishment of the Applicant on 4<sup>th</sup> March 2013.
  9. It was therefore the respondent's position that as the assets and liabilities of the Respondent/Applicant are yet to be transferred by the national government by law, the national government is the proper party from which the Applicant/Respondent can legitimately claim payments of its liabilities which emanate from the defunct local authority, Nairobi City Council.
  10. It was further submitted that no public officer of a public body can be committed to jail for offences where the public body has not deliberately refused to pay funds. In support of this submission the case of **Republic vs. Town Clerk Municipality Of Kisumu Ex Parte Argos Furnishers Ltd Kisumu HCMA No. 473 of 2003** was relied upon. However the respondent had already paid Kshs 15 million and had indicated a commitment to pay Kshs 500,000.00 per month due to the limited resources vis-à-vis its financial obligations of over Kshs 39 Billion.
  11. On behalf of the respondent, it was contended that the initial Notice of Motion was filed under section 59 of the ***Urban and Cities Act, 2011*** which was a transitional section and covered court proceedings existing against local authorities by any party.

12. It was submitted that the Act herein did not oust the jurisdiction of the Court over pending matters hence the Authority's notice does not affect the liability of the respondent to the applicant.
13. It was further contended that since the respondent has partly performed the decree by paying over Kshs 13.5 million and made commitments to pay the balance, its conduct of relying on the Act is an afterthought.
14. While admitting that a public officer cannot be personally liable to settle the debts of a public body, it was contended that such an officer is enjoined to settle the debts as a matter of statutory obligation. Mere financial constraints, it was contended cannot be equated to insolvency in order to justify avoidance of payment of debts.
15. The court was urged that if the warrants are to be discharged then it ought to be conditional on payment of Kshs 6.5 million as committed by the respondent.
16. I have considered the application herein, the various affidavits filed and the submissions made on behalf of the parties herein.
17. The effect of an order of mandamus was considered by this Court in High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso** where the Court held 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 officers, 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.”**

18. Therefore once an order of mandamus is issued, the matter is no longer merely one of settlement of a decretal sum, but that of compelling a public officer to carry out his/her statutory duty. Therefore the issue of the officer's immunity for payment of sums due from a public body no longer arise. What then is in issue is the failure by the concerned officer to carry out a duty imposed on him/her by the law.
19. From the respondent's own deposition, it is clear that the public notice that the Transitional Authority gave was to advise the public to register complaints regarding payment of claims on liabilities particularly creditors of the defunct local authorities to enable the state organ to verify the liabilities and conclude on its nationwide audit of assets and liabilities of the defunct local authorities, before taking any action against a County Government. [Emphasis added].
20. In this case not only has a judgement been given in favour of the ex parte applicant, but this Court has gone ahead to grant an order of mandamus compelling the respondent to satisfy the decree in question since execution proceedings cannot issue against the respondent. There is no longer a question of verifying the liabilities which seems to have been the Authority's concern in the said notice.
21. Both the judgements and the orders of mandamus which were issued herein have not been appealed against. In fact a careful reading of the application before me does not seem to challenge or question the said decisions. To make the matters worse the manner in which the instant application is drawn limits the period of the grant of the orders sought to the *inter partes* hearing and to determination of the application. In other words there are no substantive orders sought in the instant application. So that even if the application was to be granted as prayed, no useful purpose would be served by the same.
22. In my view the issue being raised herein ought to have been raised at the time of the hearing of the application for mandamus since the effect of the moratorium could have been to keep the finding of the respondent liable to satisfy the decree in abeyance. Once that stage was passed the horse had bolted and any attempt to close the stable thereafter would not serve any useful purpose.
23. I therefore do not see any reason why the respondent cannot comply with the orders of this Court.
24. I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up.
25. Accordingly I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein.
26. By a letter dated 24<sup>th</sup> October, 2014, the respondent committed itself to pay Kshs 6.5 million by the following week and to settle the balance of Kshs 19.5 million in three equal monthly instalments. In the circumstances I direct the respondent to pay the applicant the sum of Kshs 5,000,000.00 within the next fifteen days and settle the balance by an equal monthly instalment of Kshs 1000,000.00 on the last day of each month with effect from the last day of March, 2014 till payment in full. In default warrant of arrest to issue against the respondent's accounting officer.
27. Liberty to apply granted.
28. The ex parte applicant will have the costs of this application.

**Dated at Nairobi this 16<sup>th</sup> day of February, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Nderitu for the ex parte applicant/respondent**

**Mr Karanja for the respondent/applicant**

**Cc Patricia**