



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JR MISCELLANEOUS APPLICATION NO. 429 OF 2012

**IN THE MATTER OF AN APPLICATION BY MWANGANGI & COMPANY ADVOCATES
FOR LEAVE TO APPLY APPLICATION FOR THE JUDICIAL REVIEW ORDER OF
MANDAMUS**

AND

**IN THE MATTER OF THE CONSTITUTION, ARTICLES 47(1), 159 (2) & 176 (1) AND
SECTION 33 OF THE SIXTH SCHEDULE OF THE CONSTITUTION, SECTIONS 58 & 59 OF
THE URBAN CITIES ACT, 2011, AND SECTIONS 5,6,& 30 OF THE COUNTY
GOVERNMENTS ACT 17 OF 2012**

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE GOVERNOR, NAIROBI CITY COUNTY.....RESPONDENT

EX-PARTE: MWANGANGI & COMPANY ADVOCATES

JUDGEMENT

1. By an amended Notice of Motion dated 10th April, 2014 the *ex parte* applicant herein, **Mwangangi & Company Advocates**, seeks the following orders:

1. THAT an order of Mandamus do issue to compel the Governor, Nairobi City County, to cause to be paid to the Applicant, out of the revenue of the Nairobi City County the sum of Kshs 659,480.78 together with interest thereon at the rate of 9% per annum from 31st January 2012 in Nairobi H.C Misc Application 251 of 2010 and in Nairobi H.C.C. Misc Application No. 383 of 2010 from 18th February 2011 until payment in full.

2. THAT the costs of this application be provided for.

2. The application was supported by a supporting affidavit sworn by **Florence M. Mwangangi**, an advocate of the High Court of Kenya practicing in the name of the applicant firm on 10th April, 2014.

3. According to the deponent, the Applicant rendered legal services to the then City Council of

Nairobi at its instructions in Nairobi HCCC Misc. No. 581 of 2005 (Judicial Review) and Nairobi H.C Misc Application No. 318 of 2005 (Judicial Review) where the said Council and or its employees/agents had been sued. However, the Applicant was not paid remuneration in the said matters despite repeated demands forcing the Applicant to institute legal action to enforce recovery of the Advocates-Clients costs payable vide Nairobi High Court Misc. Application No. 251 of 2010 and 383 of 2010.

4. Pursuant thereto the Applicant was awarded the Advocate-Client costs of Kshs. 276,467.07 in the said Nairobi High Court Misc. Application No. 251 of 2010 and Kshs. 383,013.71 in Nairobi High Court Misc. Application No. 383 of 2010 making the total sum herein of Kshs 659,480.78 and decrees for the said costs were issued in the respective suits.
5. Subsequently to the issuance of the decrees the Applicant again demanded payment of the sums payable but the payment was not effected thereby provoking the instant proceedings in which by an order of this Court the Respondent substituted the said Town Clerk of the said then Nairobi City Council and has been given due notice of all the proceedings referred to herein above.
6. According to the deponent, to date the sums due to the Applicant as detailed herein above have not been settled by the Respondent and that has put Applicant into great loss and inconvenience hence it is in the interest of justice that the orders sought herein do issue.
7. The application was however not opposed by the Respondent.
8. I have considered the application, the verifying affidavit as well as the Statements and the documents on record together with the submissions filed and the authorities cited therein.
9. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**, this Court expressed itself as hereunder:

“...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 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."

10. The said holdings apply *mutatis mutandi* to the instant case.

11. In the absence of any replying affidavit, I find merit in the amended Notice of Motion dated 10th April, 2014. Accordingly, an order of *mandamus* is hereby issued compelling Governor, Nairobi City County, to cause to be paid to the Applicant, out of the revenue of the Nairobi City County the sum of Kshs 659,480.78 together with interest thereon at the rate of 9% per annum from 31st January 2012 in Nairobi H.C Misc Application 251 of 2010 and in Nairobi H.C.C. Misc Application No. 383 of 2010 from 18th February 2011 until payment in full.

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

Dated at Nairobi this 24th day of July 2014

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

Cc Kevin