REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 224 of 2012

IN THE MATTER OF: AN APPLICATION BY PRINTING INDUSTRIES LIMITED FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF: JUDGEMENT AND DECREE DATED 9TH JANUARY 2012 IN MILIMANI COMMERCIAL COURTS

NAIROBI CMCC NO. 2668 OF 2009 IN PRINTING INDUSTRIES LTD VS CITY COUNCIL OF NAIROBI

AND

IN THE MATTER OF: TOWN CLERK – CITY COUNCIL OF NAIROBI

JUDGEMENT

1. By a Notice of Motion dated 29th May 2012 filed in this Court the same day, the *ex parte* applicant herein, **Printing Industries Limited** seeks the following orders:

1. That an order of Mandamus directed to the Town Clerk – City Council of Nairobi do issue compelling the said Town Clerk to pay the decretal sum in Milimani Commercial Courts Nairobi CMCC No. 2668 of 2009 in Printing Industries Ltd Vs. City Council of Nairobi.

2. Cost of the proceedings to be awarded to Printing Industries Limited.

2. The Motion is based on the grounds set out in the Statement and verifying affidavit sworn on 24th May 2012 by **Sachin Dave**, a director of the applicant and herein filed on 25th May 2012.

3. According to the deponent, by an Amended Plaint filed in the Chief Magistrate's Court Milimani Commercial Courts Nairobi CMCC No. 2668 of 2009 the Plaintiff sued the Respondent seeking relief set out in the said Amended Plaint a copy of which was exhibited to the said affidavit. Following the hearing of the suit on 30th day of May 2011, Judgement was delivered on 12th August 2011 and thereafter the Deputy Registrar of this court certified costs of the suit and issued a certificate of costs together with the Decree dated 9th January 2012 a copy of which was exhibited. However, despite service of the demand notice there has been no satisfaction of the decree hence the filing these proceedings and according to legal advice from the applicant's advocates, the Town clerk is an office established under Section 129 of the ***Local Government Act Chapter 265*** of the Laws of Kenya and that under Section 260, the Town Clerk has the conduct of prosecutions and legal proceedings. Section 263A (a) ***Local Government Act*** Chapter 265 provides that in cases where a judgement or Order has been made against a local authority

the Town Clerk shall without delay cause to be paid out of the revenue of the local authority to the person entitled thereto and hence the refusal and/or failure by the Town Clerk to satisfy the Decree continues to adversely affect and cause undue hardship on the Applicant's business operations since the subject money of the suit has been kept away from the Applicant for close to a decade.

4. The said application was opposed by way of a replying affidavit sworn by **E O Abwawo**, the assistant director for the time being of the Respondent's legal affairs department, on 19th July 2012.

5. According to him, the notice of the hearing that was served on 6th April 2011 was received under protest as the counsel was engaged in another matter CMCC 3707 of 2008 whose notice was served earlier and former notice was received under protest. According to the advice received from the respondent's advocates on record the applicant's application is misconceived and lacks merit on the grounds that the judgment and the subsequent decree giving rise to this application was obtained by the applicant suppressing material facts and that the applicant did not come to court with clean hands.

6. On behalf of the *ex parte* applicant, it was submitted that it is it is mandatory that Court Orders must be obeyed and a Decree issued by the Court must be satisfied. Section 263A(a) of the ***Local Government Act Cap 265***, where judgement or order has been made against a local authority the Town Clerk shall without delay cause to be paid out of the revenue of the local authority such amounts as may, by the judgement or Order, be awarded against the local authority to the person entitled thereto. It is therefore submitted that the Town-Clerk to the Respondent in exercising his functions ought to have satisfied the Decree of this Court and paid the Decretal sum to the Applicant pursuant to the aforementioned Decree without undue delay and that the failure to do so raises sufficient grounds to bring this application to compel him to settle the said decretal sum. Relying on **Mureithi & 2 Others (for Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others [2006] 1, 443**, it is submitted that the order of mandamus issues to enforce a duty the performance of which is imperative and not optional or discretionary hence the duty placed on the Town Clerk being mandatory he can be compelled to pay the decretal sum. The *ex parte* applicant further relies on **National Housing Corporation vs. Nairobi City Council & Another [2002] 1 KLR 767** that what is open to the decree holder was to move by process of law (mandamus) to get the Defendant's Town Clerk without delay to cause to be paid out of the revenue the amount owed.

7. With respect to the averments contained in the replying affidavit, it is contended that the same are afterthought and the Respondent ought to have used proper channels to address the grievances instead of simply choosing to ignore an order of the Court.

8. On the part of the Respondent it was submitted that whereas it is true that there was a judgement and a subsequent decree against the respondent, the same was obtained without disclosing material facts to the Court at the hearing stage since the hearing notice was received under protest as the Respondent's advocate was engaged elsewhere. But instead of disclosing this fact the applicant decided to proceed *ex parte* the absence of the Respondent notwithstanding. Therefore it is submitted that the Respondent did not ignore the Court order but that the manner in which the orders were obtained was in bad faith. *Mandmus* being discretionary, it is submitted the court has full discretion to withhold it in unsuitable cases and it is submitted this is a case where this court should exercise that discretion to refuse to grant the same since the orders which were obtained by the applicant were vitiated by *mala fide*.

9. Having considered the foregoing this is the view I form of the matter. In the latter case, **Githua, J** expressed herself as follows:

"An order of mandamus is issued to compel performance of a public duty or a duty imposed by statute where there has been failure to perform the said duty to the detriment of an aggrieved party. A local authority has a legal obligation and a public duty to satisfy decrees issued against it and the person entrusted with this task is the Clerk to the Local Authority who according to section 129(1) of the Local Government Act is the Chief Executive and Administrative Officer in-charge of coordinating the operations of a Local Authority...Section 263A of the Local Government Act requires the Clerk of a Local Authority to pay without delay sums awarded in a judgement or order to the person entitled out of the revenue of the Local Authority. As the Respondent has failed

or refused to pay the Applicant the monies decreed...it is evident that he is in blatant breach of the express duty imposed on him by statute to satisfy decrees issued against the City Council of Nairobi out of the revenue generated by the Council. I do not see any reason why the respondent should not be compelled to pay the Applicant without delay, the decretal sums due out of the revenue of the City Council of Nairobi".

10. The law as it stands presently is that no execution can be levied against the property of a local authority in settlement of a decree in a civil case and hence the only recourse available to a decree holder is to apply for *mandamus* against the Chief Officer of the Local Authority, and upon obtaining such orders, the decree holder will be at liberty to apply for committal of the Chief Officer if the order of *mandamus* is not complied with. See **Republic vs. Town Clerk, Kisumu Municipality, *Ex parte* East African Engineering Consultants[2007] 2 EA 441** where it was held:

"The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/ and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the *mandamus* order using this method. There is only one rider – an officer can only be committed where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...Local Authorities Transfer Fund Act, which provides funds to local authorities, part of which should be used to pay debts does not provide for their attachment since section 263A of the Local Government Act prohibits it. It just enables the Local Authorities to honour their debt obligations including those covered by a mandamus order. The Local Authorities have to pay as a matter of statutory duty or in the case of mandamus in obedience to the order from the state or the Republic. There is no provision in the LATF Act for attachment or execution".

11. That was the position in the English case of **R (Regina) vs. Dudsheath**, ***ex parte*, Meredith [1950] 2 ALL E.R. 741, at 743,** in which **Lord Goddard C. J.** held:-

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges."

12. This procedure was dealt with extensively in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** eloquently, in my view, 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… ….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 relief sought arises out...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...........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. ...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…… 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."

13. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another *ex parte* James Alfred Kosoro**, I expressed myself *inter alia* 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…...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."

14. I see no reason to depart from the said reasoning which I adopt in this case.

15. It is however contended on behalf of the Respondents that the Court ought not o exercise its discretion in favour of the *ex parte* applicant since the Decree which gave rise to these proceedings was obtained by non-disclosure of the material facts since on the hearing date the Respondent's advocate was unable to attend Court as he was engaged in another matter and the hearing notice was received under protest. That submission calls for a determination of the effect if any of receiving a hearing notice under protest. In **Sarfraz Motors & Another vs. Kisii Hardware Civil Appeal No. 98 Of 1990, Kwach, JA** expressed himself, *inter alia*, as follows:

"When the hearing notice was served on Mr. Wasilwa, an advocate in the firm representing the appellants, on 22nd March, 1990, he accepted service but made the following endorsement at the back: "Under serious protest – 1. Notice too short 2 Hearing date not suitable....In his ruling, the Judge dealt with the excuses the advocate had given for failing to attend court on 26th March, 1990. The Advocate claimed that he was engaged in a matter before the Court of Appeal in Kisumu and that his partner was out of town. This was clearly a flimsy excuse as Mr. Wasilwa could have got in touch with one of the seventeen Advocates who ordinarily practice in Kisii to hold his brief and apply for adjournment. I cannot agree more with the Judge's view that the squiggles which Mr. Wasilwa had scribbled on the back of the notice showed a certain measure of discourtesy to the court."

16. In my view the practice of receiving hearing notices "under protest" is a practice without any force of law. As between the parties to a suit, it is meant to alert the other party that the party served may seek an adjournment on the basis of the "protest". It is, in my view, not an application for adjournment and the Court is not bound to consider it as such.

17. **Bosire, JA** was categorical in **Sukari Investments Co-Operative Society Ltd. vs. Snowball Construction Co. Ltd. Civil Application No. Nai. 269 of 1999** that it is discourteous on the part of an advocate to fail to attend Court and that there is no procedure for application for adjournment being made by letter.

18. Whereas the Court may take it into account in deciding to exercise its discretion whether to proceed or not, an advocate ought to secure the services of another advocate to expressly apply for adjournment. Otherwise an advocate who receives a notice of hearing "under protest" does so at his own risk. In this case, the Respondent did not even bother to move the Court for the setting aside of the judgement. The conduct of the Respondent herein is a clear manifestation of lack of courtesy on the part of the Respondent followed by a callous attitude which border on arrogance. Such a party cannot expect favourable exercise of judicial discretion in his favour. Judgement the subject of this matter was given on 12th August 2011 while the decree was issued on 9th January 2012. There is no indication of the step, if any, that has been taken on behalf of the respondent to remedy the situation. To accede to the submissions made on behalf of the Respondent will forever lock the *ex parte* applicant from the enjoyment of the fruits of its judgement as it has no other remedy available to it.

19. Accordingly, I do not see why the respondent should not be compelled to perform its statutory duty by settling the sums due from it to the applicant.

20. In the result I allow the application the Notice of Motion dated 29th May 2012 and issue an order of mandamus directed to the Respondent herein compelling it to satisfy the decree issued in Nairobi CMCC No. 2668 of 2009 pursuant to the decree issued on 9th January 2012 within the next 30 days in default of which the *ex parte* applicant be at liberty to take out a Notice to Show Cause against the Respondent's Accounting Officer. The *ex parte* applicant will also have the costs of this application.

Dated at Nairobi this 18th day of April 2013

G V ODUNGA

JUDGE

Delivered in the absence of the parties