



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISC. APPL. JR. NO 258 OF 2012

BETWEEN

REPUBLIC APPLICANT

AND

THE COMMISSIONER OF LANDS as Trustee

for various Government Ministries

through the ATTORNEY GENERAL RESPONDENT

EXPARTE

CITY COUNCIL OF NAIROBI

JUDGMENT

Background

1. The subject of this application is a Notice of Motion dated 8th August 2012 seeking an order that; “*an order of mandamus directed to the Respondent do issue compelling him to pay to the ex-parte applicant the sum of Kshs 332,512,125.85 together with interest and thereon at Court rates with effect from 30th day of October 2008.*”
2. The Commissioner of Lands is sued in its capacity as the Trustee for various government ministries charged with the responsibility of paying out the revenue of the various ministries to the person entitled, such amount as may, by judgment, be awarded against the Attorney General on behalf of the Commissioner of Lands.
3. The genesis of the present application is ***City Council of Nairobi v The Attorney General & the Commissioner of Lands City Court RMCC No. 2 of 2003*** in which the *ex-parte* applicant (“the City Council”) sued the Commissioner of Lands and the Attorney General claiming contributions in lieu of rates between the years 1992 and 2002.

4. The Attorney General refuted the claim by initially filing a Statement of Defence. Leave was then sought to amend the defence in order to include a counter claim. The application was granted and the defence was duly amended to include a counter claim seeking the sum of Kshs. 13,299,051,074.
5. The City Council filed a Reply to the Amended Defence and a Notice of Preliminary Objection against the Counter Claim raised by the respondent. The objection was heard *ex parte* on 11th September 2008 and the respondent's counter claim was dismissed whereupon the City Council proceeded to assess costs amounting to Ksh 332,543.958 which are now the subject of this case.

Disputed facts

6. What happened next in the proceedings is disputed. According to the replying affidavit of Waigi Kamau sworn on 21st January 2013, the Attorney General being aggrieved by the partial decree for costs moved the court to set it aside. Mr Waigi contends that the application was duly heard on the 5th May 2009 and the court set aside the partial decree.
7. Mr Kamau further depones that after the partial decree was set aside, the applicant filed a Bill of costs in **High Court Misc. Appl. 523 of 2009**. When the bill of costs came up for taxation before the Deputy Registrar, the respondent raised a preliminary objection stating that there was no suit pending before the High Court to warrant taxation, that taxation only arises after a matter is concluded and further that the entire process was an abuse of process.
8. On its part, the City Council disputes this version of events. In the Supplementary Affidavit sworn by Kennedy Asinuli sworn on 8th March 2013, it asserts that the learned magistrate did not set aside the partial decree as alleged or at all. Mr Asinuli asserts that on the contrary, the court declined to set aside the partial decree on the basis that after assessing the costs by the Respondent on the dismissed counter-claim it became *functus officio*. He avers that the Bill of Costs in the High Court was abandoned not because of the preliminary objection but because it was felt that indeed the matter was *res-judicata*. In any case, he avers there was not need to tax costs as the same has been assessed by the Magistrate's Court.

Determination

9. This is an application for an order of mandamus. In **Kenya National Examinations Council v Republic ex-parte Gathenji and Others CA Civil Appeal No.266 of 1996 [1997]eKLR**, the Court of Appeal addressed the scope of an order of mandamus, "*What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says: "The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."* At paragraph 90 headed "the mandate" it is stated: "*The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.*" What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

10. An *ex-parte* applicant seeking to invoke the court's jurisdiction to order mandamus must place before the court material to demonstrate that the respondent must perform a duty that it is obliged to do so under the law. In a case such as this the City Council must show that it has a final decree which remains unsatisfied despite request. The only way to confirm this is place before the court the record of proceedings, judgment and decree to show that the obligation to pay has been determined.
11. In this case the issue of dispute is whether the subordinate court set aside the decree which the City Council seeks to enforce. There are two contentions to this point and which this court can hardly be expected to resolve such an issue in the absence of a court record to confirm the actual position.
12. I have perused the verifying affidavit sworn by Aduma J. Owuor on 3rd March 2012 and apart from the averments set out in support of the Motion, there is nothing to show that it is entitled to an order of mandamus based on a court record and that it has a right to enforce a decree. The duty imposed on the Attorney General to satisfy a decree is one founded on a clear and unequivocal court record that demonstrates that there is indeed such a duty. The *ex-parte* applicant bears the burden to place before the court such a record in order to invoke the court's coercive power. The High Court cannot venture into an inquiry to determine or speculate what that record is in order to discern whether indeed there is a decree or order giving rise to the duty to be enforced.
13. In the circumstances and in light of the disputed facts, I am not satisfied that a case has been made out for the grant of the orders of mandamus. The Notice of Motion dated 8th August 2012 is dismissed and as all the parties litigating are State entities I shall not award costs. It is for the same reason that I think both parties should find a way to resolve the underlying matter.

DATED and DELIVERED at NAIROBI this 30th day of August 2013.

D.S. MAJANJA

JUDGE

Mr Asinuli instructed by Munikah and Company Advocates for the *ex-parte* applicant.

Mr Kiage, Litigation Counsel, instructed by the State Law Office for the respondent.