



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW CASE NO. 315 OF 2012

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND
MANDAMUS PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, THE LOCAL GOVERNMENT
ACT, CAP 265 OF THE LAWS OF KENYA, THE PUBLIC PROCUREMENT AND DISPOSAL
ACT NO. 3 OF 2005**

REPUBLIC

VERSUS

NAIROBI CITY COUNCIL1ST RESPONDENT

GEOMAPS AFRICA LIMITED.....2ND RESPONDENT

EX PARTE

IBRAHIM DAKANE RAFAT

PAUL SIMBA ARATI

ALEX OLE MAGELO.....THE APPLICANTS

JUDGEMENT

INTRODUCTION

1. The ex parte applicants herein, **Ibrahim Dakane Rafat, Paul Simba Arati and Alex Ole Magelo**, by a Notice of Motion dated 8th August, 2012 seek the following orders:
1. **An order of Certiorari to remove into the High Court and quash the entire decision of the 1st Respondent contained in the 1st Respondent's Special full Council meeting dated 6th July 2012, minute number 5 authorizing the 1st respondent to conduct forensic audit with a view to resolving the claim by the 2nd Respondent in the sum of Kshs 1,003,912,624 together with general damage, costs and interest.**

2. **An order of certiorari to remove into the High Court and quash the entire decisions of the 1st respondent full Council meeting dated 6th July 2012 authorizing the 1st respondent to carry out forensic audit on the claim by Geomaps Africa Ltd.**
3. **An order of mandamus compelling and directing the 1st respondent to terminate all negotiations, and or forensic audit into the 2nd Respondent's claim herein.**

APPLICANTS' CASE

2. The Motion is based on the Statutory Statement filed on 2nd August 2012 and the verifying affidavit sworn by **Ibrahim Dakane Rafat**, one of the applicants herein on 31st July, 2012.
3. According to the deponent, a special full Council meeting of the City Council of Nairobi was held on 6th July 2012 and was attended by Councillors **Simba Arati** and **Alex Magelo** and one of the items discussed under minute 5 was Dispute between **GeoMaps Africa Ltd Vs. City council of Nairobi**. The deponent is however, aware of the existence of **HC MISC Suit No. 720 of 2008 between GeoMaps Africa Limited and Nairobi City Council** which suit is still pending in Court as at the time of filing this application. Under the aforesaid minute of the Council meeting the director of Legal Services is reported to state *inter alia*: "He further reported that in the month of August 2010 Geomaps Africa Ltd lodged a claim of Kshs. 1,003,912,624/= for purportedly services rendered and accumulated interest thereon. He pointed out that the contract was not very clear on the modalities of computation of the total amount invoiced to the Council for payment by GeoMaps systems and that only an effort had been made by the Claimant to link the cash office and the rates section when the contract was terminated." According to the deponent, it is clear from a literal reading of the minutes that the contract between GeoMaps Africa Ltd and Nairobi City Council contains numerous grey areas lacks transparency and is generally opaque. However, a resolution was passed that proper forensic audit be conducted concerning the claim by GeoMaps Africa Ltd. In the deponent's view, despite what appears to be a well-meaning Resolution of the Council the applicants are apprehensive that the whole process is littered with under-hand deals and they are aware of their own investigation that certain overtures are being made between undisclosed parties with a view to arriving at a settlement in this matter which settlement will invariably involve payments by the Nairobi City Council to GeoMaps Africa Ltd without proper and due procedure. He deposes that they are accountable to the citizens and the general population of Nairobi first and foremost by virtue of their nomination and ultimately any payment involving large sums as aforesaid may require them to make an account. According to him, previous attempts to make payments met firm resistance from past Town Clerks namely **Mr. Gakuo** and **Mr. Philip Kisia** respectively and that by Special Council meeting dated 25.8.2008 it was resolved that the contract between Geomaps Africa Ltd and Nairobi City Council be terminated.
4. According to the deponent, the council has failed refused and or neglected to provide firm directions with regard to the GeoMaps Africa Ltd matter and he believes that it is in the overall general interest of rate-payers and in the greater public interest to seek the protection of this Honourable court hence this application.
5. It is further deposed that the Public Procurement and Disposal Act No. 3 of 2005 mandates the 2nd Respondent to procure services in a fair, equitable, transparent, competitive and cost-effective manner hence he believes that the ends of justice demand that leave be granted to enable the Applicants seek an order of certiorari to quash the said decisions of the 2nd Respondent to order that forensic audit be conducted concerning the claim by GeoMaps Africa Ltd.

1ST RESPONDENT'S CASE

6. In opposition to the application the 1st respondent filed the following grounds of opposition:

- 1. That the Applicants by an application dated 31st July, 2012 and filed in Court on 2nd August, 2012 under certificate of urgency seeking orders inter alia, that the Applicants be granted an order of certiorari to remove into the High Court and quash the decision of the 1st respondent contained in the 1st Respondent's Special Full council meeting dated 6th July, 2012, minute Number 5 authorizing the 1st Respondent by the 2nd Respondent in the sum of Kshs. 1,003,912,624/= and an order of mandamus compelling and directing the 1st Respondent to terminate all negotiations and/or forensic audit into the 2nd Respondent's claim.**
- 2. That the said Court Orders sought if granted will be prejudicial to the 1st Respondent as they restrain the Council from conducting a forensic audit to investigate a claim lodged against the Council by Geomaps Africa Limited, with a view to gathering evidence that could be presented in a court of law in High Court Misc. Suit Number 720 of 2008 between Geomaps Africa Limited and the City Council of Nairobi. The Applicants have themselves acknowledged the existence of this suit against the council.**
- 3. That the Audit was also meant to identify and rectify situations which could afford the council a defence in regard to that suit. The ex-parte Applicants admit that the Contract between Geomaps Africa Limited and city Council has grey areas. This in itself necessitates a forensic Audit to be carried out by the council.**
- 4. That the Council's constitutional and inherent right to respond to and/or defend itself has been unjustly curtailed with a real likelihood that a colossal claim of Kshs. 1,003,912,624/= against it by the 2nd respondent may proceed without the Council putting forth its documentary evidence to rebut the claim.**
- 5. That whereas the suit High Court Misc. Suit Number 720 of 2008 is for a sum of Kshs. 1,003,912,624/= against the 1st respondent, which claim the 1st Respondent is entitled in law to defend, the stay orders forbids the council from auditing its own records to prepare to defend and/or respond to the same. The existence of stay orders will result to the claim of Kshs. 1,003,912, 624/= being heard without the defence by the council.**
- 6. That the facts giving rise to the dispute arose out of a Special full Council meeting held on 6th July, 2012 which was attended by the Applicants who also agreed that a forensic audit is necessary as a precautionary measure to enable the council reconcile its record and gather further evidence in pursuant of its case. None of the applicants objected to the resolution during deliberations by the members of the council.**
- 7. That the suit is an afterthought by the Applicants to frustrate and embarrass the 1st respondent in performance of its duties which are always carried out through council resolutions.**
- 8. That the 1st Respondent has an inherent constitutional and legal right to audit its own records with a view of responding to and/or defending a claim lodged against it in a court of law.**
- 9. That the Applicants have not demonstrated to the Court that their own interest particularly has been prejudiced or about to be prejudiced by the said resolution to which they participated and passed as a council resolution.**
- 10. That the intended forensic Audit is meant to bring about transparency to establish whether Geomaps Africa Limited has indeed rendered services to the council and the genesis of the claim, if any, for the sum of Kshs 1,003,912,624/= . It logically follows that there is no action to be stayed pending hearing and determination of an application.**

11. That the 1st Respondent being a custodian of Public funds risk losing a colossal sum of Kshs. 1,003,912,624/= if the Orders sought herein are granted restraining it from presenting a credible defence to the High Court Misc. Suit Number 720 of 2008 is not vacated.
12. That in the circumstances, and based on the foregoing reasons, the Orders sought herein be refused as granting the same against the Council would be unjust and disadvantageous to the council.
13. That the Applicants will not suffer irreparable injury if the Orders are not granted as carrying out of a forensic audit is not equivalent to making out any payment.
14. That it appears, and based on the ex-parte Applicants admission, that the suit herein is based on mere presumptions and apprehensions without any evidential materials. The ex-parte Applicants allege “under head deals and certain overtures being made by undisclosed parties with a view of arriving at a settlement.” Such drastic orders sought ought not to be granted on such unfounded presumptions.
15. That a literal reading of the Council resolutions indicated that there was no resolution to pay out any Council funds nor to re-start the Contract between Geompas and the Council. The ex-parte Applicants are misleading this Court in pursuit of raw vendetta against the Council to which they are members and to a well meaning resolution to which they robustly contributed to and participated in its deliberation.
16. That in view of the foregoing it is only fair, just and equitable that the said Notice of Motion be dismissed with costs.
17. That the Resolution by the Council for a proper forensic audit to be conducted concerning the dispute between the Applicant and the 2nd Respondent is guided by the fact that the Special full Council Meeting of the 1st Respondent/Applicant held on 6th July 2012 essentially recognizes that a genuine dispute exists and that there is a need for the 1st Respondent/Applicant to determine itself the extent of its liability and either amicably resolve the dispute or refer the same to some mutually acceptable form of dispute resolutions process as provided in the clause 18 of the contract.
18. That contractual right and obligations such as the contract between the 1st Respondent and the 2nd Respondent are not amendable to judicial review, more so in light of the provisions of section 78(20) of the Local government act Cap 265 Laws of Kenya.
19. That the Ex-parte applicants concede that the decisions of both the Special Full council Meeting of 25th August 2008 or 6th July 2012 cannot be impinged on grounds lack of or in excess of their breach of rules of natural justice or that the decision was irrational and as such is not amendable to judicial review in light of the provisions of section 78 (2) of the Local Government Act Cap 265 laws of Kenya.
20. That the Ex-parte applicants seek a merit or appeal review of the decision rather than the decision making process and it is therefore not competent for either the Court or indeed the Ex-parte applicants to review the decision of the Special Full council meeting on its merits, nor substitute its own opinion for that of the special Full Council meeting to whom the matter has been delegated to and/or entrusted under Section 78(20) of the Local Government Act, Cap 265 Laws of Kenya.
21. That grounds of legitimate expectation, based on the decision of the Special Full Council Meetings of 6th July 2012 are outside the scope of judicial review jurisdiction and fall solely within the realm of contract law, and the fact that one of the parties to the dispute happens to be a public authority is incidental to the nature of the dispute as falling purely within

contract law.

22. That the public interest and public policy as safeguarded under the provisions of Section 78 (2) of the Local Government act Cap 265 Laws of Kenya can only be preserved and upheld by dismissing the Notice of Motion herein.
23. That Ex-parte Applicants in their individual capacities have no locus before this court within the broader context of the Special Full council Meeting of 6th July 2012.
24. That the ex-parte applicants in their individual capacities lack standing within the meaning of section 86A of the Local Government Act 265 Laws of Kenya and in the absence of authorization, the proceedings are a nullity in law.
25. That the ex-parte applicant's Notice of Motion application dated 8th August 2012 does not present any actionable dispute that is of a legal nature judicially enforceable within the well established confines of judicial review proceedings.
26. That the ex-parte applicant's notice of motion application dated 8th August 2012 is not only premature and but also grossly hypothetical in nature within the context of a forensic audit.
27. That ex-parte applicants are not in any event entitled to orders of Mandamus in the absence of a formal demand highlighting what is in the nature of a public duty and at whom the said order should apply to in relation to the decision being challenged.

2ND RESPONDENT'S CASE

7. On behalf of the 2nd respondent, a replying affidavit sworn by **Lenny Kivuti**, its director was sworn on 15th October 2012 and filed on 16th October 2012.
8. After outlining the circumstances under which the disputed sum arose he concluded that the Council still owes Geomaps Africa Limited hundreds of millions of shillings in terms of outstanding fees, which it has failed and/or ignored to pay despite demands for the same and that the Council despite terminating the contract, is intent on using Geomaps software and database without any benefit to the Geomaps Africa Limited, without paying for it seeking to enter into a licensing arrangement. To him, it defies all logic as to how these nominated councillors can, in good faith, allege as they have done in paragraph 7 of their Verifying Affidavit, that the contract between the Council and Geomaps Africa Limited contains numerous grey area, lacks transparency and is generally opaque. If indeed they had any doubts, a good faith attempt at appreciating the legal position of the parties in High Court Misc. Application No. 720 **Geomaps Africa Limited Vs City Council of Nairobi** would have revealed the genuine need to avoid needless escalation of expenses and costs.
9. It is his view that the Resolution by the Council for a forensic audit to be conducted concerning the dispute between the Council and Geomaps Africa Limited is guided by the fact that the Special Full Council Meeting of the City Council of Nairobi held there is a need for the Council to determine for itself the extent of its liability and either amicably resolve the dispute or refer the same to some mutually acceptable position adopted by the Council as early as 2008 in High Court Misc. Application No. 720 **Geomaps Africa Limited Vs City Council of Nairobi**. Whichever the decision of the Council, it goes without saying that as has been done throughout the engagement between Geomaps and the City Council, any proposal for settlement or referral for resolution must go through all legal approvals at the Council level and for this reason, the contents of Paragraphs 9-12 of the Affidavit's Verifying Affidavit can only amount to spurious conjectures, solely aimed at tainting not only the name and reputation of Geomaps Africa Limited but also members of the Council who were in attendance at the aforesaid Special Full Council Meeting.

10. According to him the applicants lack locus standi and the issue raised by them is not justiciable and does not present any actionable dispute that is of a legal nature, judicially enforceable within the well-established confines of judicial review proceedings. Further, ex-parte Applicant's Notice of Motion application dated 8th August, 2012 is not only premature and but grossly hypothetical in nature, within the context of a forensic audit. It is his position that the ex-parte Applicants are not, in any event, entitled to orders of Mandamus, in the absence of a formal demand highlighting what is in the nature of a public duty and at whom the said order should apply to in relation to the decision being challenged.

DETERMINATION

11. When this matter came up on 7th May 2013, Miss Odhiambo learned counsel for the 1st respondent urged the Court to dismiss the Motion on the ground that the applicant had failed to comply with the directions given on 24th August 2012 and 17th October 2012. I have perused the record and I have confirmed that indeed it is correct that the said directions were not complied with.

12. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** in which the said Court held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...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 or 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. The order must command no more than the party against whom the application 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... These principles mean that an order of *mandamus* 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. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if

the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

13. However judicial review proceedings do not deal with the merits of the decision but by the decision making process. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

14. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60.***

15. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R vs. Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285.

16. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See *Chief Constable of the North Wales Police vs. Evans* (1982) 1 WLR 1155.

17. In the instant case it is not alleged that the 1st respondent had no power to order for an audit to be conducted concerning the claim by GeoMaps Africa Ltd. By ordering the said audit, the 1st respondent therefore did not exceed its jurisdiction. What is alleged is that there is a possibility of the said audit leading to a finding that the claim ought to be paid. That the result of the audit can go either way is not in doubt. It is therefore clear that the applicants hinge their case on an assumption that the result of the audit may be in favour of the 2nd respondent. In other words the applicant’s application is based on speculations and conjectures.

18. In my view this court does not operate on the premise of conjectures and speculations. To be entitled to an order of prohibition or *certiorari*, a party coming to court must either show a case to the satisfaction that the authority concerned has committed or is threatening to commit an illegality, irrationality or procedural impropriety as enunciated in the case of **Council of Civil Unions vs. Minister for Civil Service [1985] AC 374, [1984] 3 All ER 935.**

19. With respect to *mandamus*, an applicant must show that there is a duty imposed upon the authority

- concerned which duty the authority has failed to perform. It has not been alleged that the 1st respondent herein is under a duty to terminate all negotiations, and or forensic audit into the 2nd Respondent's claim herein hence no case has not been made out to warrant the issuance of such order.
20. Apart from that as rightly contended by the respondents, for an order of mandamus to issue the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule. See **The District Commissioner Kiambu, vs. R and Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109.**
21. In my view what the applicant's seek from this court is to make a finding that the 2nd respondent's claim is unmerited and that is beyond the jurisdiction of a judicial review court. That determination belongs to the ordinary civil law courts since a Court, in a judicial review application, only deals with the process and not the merits of the dispute.
22. Apart from the foregoing, it is not disputed the audit intended to be carried out is not a decision but just a finding upon which further action may be undertaken. In *Halsbury's Laws of England, Vol. 11, 2nd Edn. At page 134 para 251* it is stated that:
- “The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be found.”**
23. Apart from the foregoing in **Riachand Khimji & Co. vs. Attorney-General Civil Appeal No. 49 of 1972 [1972] EA 536** the East African Court of Appeal held *inter alia* that the High Court's supervisory powers over administrative and quasi-judicial tribunals are discretionary and should only be used in exceptional cases, for instance if there has been a failure of justice or want of good faith. Similarly in **Republic vs. The Commissioner for Co-Operative Development & Kariobangi Housing & Settlement Co-Operative Society Limited Ex Parte David Mwangi & 15 Others Nairobi HCMCC No. 805 of 1990** it was held that *certiorari* is a discretionary remedy which a Court may refuse to grant even when the requisite grounds for its grant exist since the Court has to weigh one thing against another whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the Court being a judicially must be exercised on the basis of evidence and sound legal principles. In **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA NO. 96 of 2000** it was held that the court exercises a discretionary jurisdiction in granting prerogative orders and can withhold the gravity of the order where among other reasons there has been delay, where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised.
24. In this case it is contended that to grant the orders sought would have the effect of limiting the 1st applicant's ability to effectively secure material to defend itself in the case in the 2nd respondent's claim. To do that would be to cripple and stifle the 1st respondent's access to justice contrary to Article 48 of the Constitution.

ORDER

25. I have said enough to show that the Notice of Motion dated 8th August, 2012 lacks merit and the same is dismissed with costs to the respondents.

Dated at Nairobi this 2nd day of August 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Ilako for Mr Koceyo for the 1st respondent and Ms Wanguhu for Mr Ngacha for the 1st respondent.