



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 280 OF 2019

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY SECRETARY,

NAIROBI CITY COUNTY..... RESPONDENT

EX PARTE :

GEORGE KIBUTHA

Suing through Next Friend

FELISTER NJERI KIBUTHA

JUDGMENT

1. This judgment is on an application by way of Notice of Motion Notice of Motion application dated 15th January 2020, filed by George Kibutha, suing through his Next Friend Felister Njeri Kibutha, in which he is seeking the following orders:

i. That an order of Mandamus do issue directed at the respondent, County Secretary, Nairobi County to settle the decretal sum in Nairobi CMCC No. 5818/08 being Kshs. 898,475.06 with interest at court rates from 19th August 2019 till payment in full.

ii. That in default of compliance within 14 days from the date of the order, the respondent County Secretary, Nairobi County to be committed to civil jail for 6 months. The Nairobi County Police Commander or officers under him to assist in availing the secretary to court.

2. The said application is supported by a statutory statement dated 23rd September 2019, a verifying affidavit of the same date and supporting affidavit sworn on 15th January 2020 by Felister Njeri Kibutha, and a further affidavit and supplementary affidavit sworn on 17th October 2020 and 17th December 2020 respectively by Cosmas Ngala, the *ex parte* Applicant's advocate. Ngala Morara & Company Advocates also filed submissions on the application dated 11th December 2020.

3. The main ground for the application is that judgment was delivered in **Nairobi Milimani CMCC No. 5818 of 2008 - George Kibutha and Felister Njeri Kibutha vs City Council of Nairobi** on 22nd September 2010 in favour of the *ex parte* Applicant as against the Respondent, and that since the date of the pronouncement of the judgment, the Respondent has failed, refused or ignored to satisfy the said decree, Further, that under the law, the assets of the Respondent cannot be attached in execution of the decree. The Applicant annexed copies of the certified judgment and of the decree and certificate of costs issued in **Nairobi Milimani CMCC No. 5818 of 2008 - George Kibutha and Felister Njeri Kibutha vs City Council of Nairobi** on 19th August 2019.

4. The *ex parte* Applicant in addition submitted that the respondent has not advanced any reason why the decree should not be honoured, and relied on the decisions in **Republic (ex-Parte Charles M. Tamba) vs The Attorney General And Another, Kakamega H.C Judicial Review No. 13 of 2014** and **Global Exhibitions Incorporated Ltd vs The County Government of Vihiga, Kakamega H.C Judicial Review No. 13 of 2014**.

5. There was no response on record from the Respondent.

The Determination

6. I have considered the *ex parte* Applicant's pleadings and submissions, and I am also guided by the holding of the Court of Appeal on the nature of the remedy of mandamus in its decision in **Republic vs Kenya National Examinations Council exparte Gathenji and 9 Others, [1997] e KLR**. The said Court held as follows in this regard:

“The next issue we must deal with is this: 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....”

7. The requirements for an order of mandamus to issue were further explained by Mativo J. in **Republic vs Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another [2018] eKLR** as follows:

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in Apotex Inc. vs. Canada (Attorney General), [23] and, was also discussed in Dragan vs. Canada (Minister of Citizenship and Immigration).[24] The eight factors that must be present for the writ to issue are:-

- (i) There must be a public legal duty to act;**
- (ii) The duty must be owed to the Applicants;**
- (iii) There must be a clear right to the performance of that duty, meaning that:**
 - a. The Applicants have satisfied all conditions precedent; and**
 - b. There must have been:**
 - i. A prior demand for performance;**
 - ii. A reasonable time to comply with the demand, unless there was outright refusal; and**
 - iii. An express refusal, or an implied refusal through unreasonable delay;**
 - iv. No other adequate remedy is available to the Applicants;**
 - v. The Order sought must be of some practical value or effect;**
 - vi. There is no equitable bar to the relief sought;**
 - vii. On a balance of convenience, mandamus should lie**

8. It is not disputed in the present application that judgment for costs was entered in favour of the *ex parte* Applicant **Nairobi Milimani CMCC No. 5818 of 2008 - George Kibutha and Felister Njeri Kibutha vs City Council of Nairobi**. The issues therefore that require to be determined are firstly, whether the Respondent is under a public duty and obligation to satisfy the orders issued in favour of the *ex parte* Applicant in the said judgment, and secondly, if so, whether the *ex parte* Applicant is entitled to the relief she seeks.

9. Section 21 of the Government Proceedings Act in this regard provides as follows as regards the requirements to be met in the enforcement of orders as against Government organs in civil proceedings:

“(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.”

10. Nairobi City County is one of the Counties established by Article 6 of the Constitution and the First Schedule to the Constitution, and is constitutionally recognized as a distinct government level of government by the said Article. In addition, the definition of “Government” in the Government Proceedings Act refers to the “Government of Kenya”. In this respect I adopt the holding by Odunga J. in **Republic v Attorney General & another ex-parte Stephen Wanyee Roki [2016] eKLR** as regard the application of the Government Proceedings Act to County Governments:

“20 Although the provisions of the Government Proceedings Act do not expressly refer to County Governments, section 7 of the Sixth Schedule to the Constitution (Transitional And Consequential Provisions) provides that:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

21. It follows that the provisions of the Government Proceedings Act, a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. One such construction would be the reality that Government is now at two levels and Article 189(1)(a) of the Constitution requires that the Constitutional status and institutions of government at both the National and County levels be respected. In my view such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to execution proceedings.”

11. The *ex parte* Applicant in this respect annexed copies of the judgment and decree awarded in his favour in **Nairobi Milimani CMCC No. 5818 of 2008 - George Kibutha and Felister Njeri Kibutha vs City Council of Nairobi**. This Court directed the *ex parte* Applicant to file a supplementary affidavit and attach evidence of compliance with the requirements of the Government Proceedings Act. While the *ex parte* Applicant’s advocate averred in the supplementary affidavit sworn on 17th December 2019 that the *ex parte* Applicant had complied with the provisions of the said Act, he did not annex any evidence of a Certificate of Order for Costs Against the Government issued in the *ex parte* Applicant’s favour against the Nairobi City County, or any evidence of service of the same on the Attorney General as required by section 21 of the Government Proceedings Act.

The Disposition

12. In the premises, the current proceedings are premature, as the requisite procedure has not been followed by the *ex parte* Applicant, and the Notice of Motion dated 15th January 2020 is accordingly struck out with no order as to costs.

13. The *ex parte* Applicant is however at liberty to commence fresh judicial review proceedings against the Respondents for an order of mandamus, once the procedure in the Government Proceedings Act has been complied with.

14. Orders accordingly.

DATED AND SIGNED THIS 13TH DAY OF MAY 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondent's Advocates on record.

P. NYAMWEYA

JUDGE