



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

JUDICIAL REVIEW APPLICATION NO. 64 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

REPUBLIC.....APPLICANT

VERSUS

CHIEF OFFICER OF FINANCE-MACHAKOS COUNTY.....RESPONDENT

AND

BERNARD NZIVO WAITA.....EX PARTE APPLICANT

RULING

1. Pursuant to the leave of the court granted on **12.2.2018**, the *ex parte* applicant moved this court by way of Notice of Motion dated **12th June, 2018** expressed under the provisions of Order 53 Rules 3 of the Civil Procedure Rules, 2010, seeking :- **(a) An order of Mandamus directed at the Respondent and compelling it to pay within 30 days from the date of the ruling the ex parte applicant Kshs 196,828/- plus costs and accrued interest being the decretal sum arising out of Mavoko SPMCC 952 of 2014, Bernard Nzivo Waita v County Government of Machakos (Mavoko Sub- county); (b) a declaration that the respondent is in breach of their duty under the law in that they have failed to settle; (c) Order for Costs.**

2. The application is premised on the grounds contained in the statement dated **8th February, 2018**, namely; **(a) the ex parte applicant sued the respondent in Mavoko SPMCC 952 of 2014 and a consent was entered on liability whereupon judgement was entered for general damages and costs and interest against the respondent on 13th April, 2017; (b) subsequently a certificate of costs was issued on 30th March, 2016 and the respondent was served however has refused to pay the same.**

3. Also in support of the application is the verifying affidavit of **Mr. Shem Kebongo** reiterating the foregoing grounds. Annexed to the affidavit is a copy of the bill of costs and the decree and certificate of costs as well as an application for stay of execution filed by the respondent.

4. In reply to the application are grounds of objection filed by J. Muoki and Co. Advocates for the respondent dated 15.1.2019. Counsel felt that the application was defective, unprocedural, unnecessary, premature and unfounded. There is no other response by the respondents.

5. The court directed that the application be canvassed vide written submissions that are on record. Vide submissions filed on 18th June, 2019 by counsel for the applicant, it was submitted in placing reliance on the case of **Danson Mwangi Kiawano v County Secretary Nairobi City County (2016) eKLR** that the applicant is entitled to the order of mandamus as the only available remedy for satisfaction of his judgement. It was submitted that the applicant had a valid judgement, a decree was extracted and that the documents were served on the respondent who has since ignored the demands for payment. It was further submitted in placing reliance on **Republic v Town Clerk, Municipal Council of Mombasa ex Parte Shimanzi Enterprises Ltd (2009) eKLR** that the grounds of opposition dated 15.1.2019 lacked evidential basis.

6. In response, counsel for the respondent submitted that the applicant did not comply with Section 21 of the Government Proceedings Act and Order 29 of the Civil Procedure Rules to realize the fruits of his judgement. Counsel cited the case of **R v County Secretary Migori County Government & Another (2018) eKLR** where an application was dismissed for failure to comply with Section 21 of the Government Proceedings Act and Order 29 of the Civil Procedure Rules.

7. Upon analysing the opposing facts presented by the parties, I find that only one issue falls for determination, namely:- **whether the applicant has established grounds for this court to issue an order of mandamus and the declaration prayed for.**

8. An order of mandamus (also referred to as a mandatory order) has been defined in **Halsbury's Laws of England, 2001, 4th Ed, Vol. 1(1),**

para. 119 at p. 268 as follows:

“A command issued by the High Court, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing specified in the command, and which appertains to his or their office, and is in the form of a public duty. ... The breach of duty may be a failure to exercise a statutory discretion, or a failure to exercise it according to proper legal principles.”

9. Simply stated, an order of mandamus is ‘a prerogative order available on application for judicial review from the High Court, requiring an inferior court, tribunal or other public body to perform a specified public duty relating to its responsibilities.’ See **Oxford’s Dictionary of Law, Oxford University Press, 2009, 7th Edition, p. 340**. The order is applicable to the enforcement of public duties by public, administrative bodies. In my view the procedure of judicial review by which the order of mandamus is sought is quite instructive as to the intrinsic nature of that prerogative remedy

10. According to **Wade, H. W. R, Administrative Law, 5th Ed.**, p.630 :

“The commonest employment of mandamus is as a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty by him. ... It is a discretionary remedy, and the court has full discretion to withhold it in unsuitable cases.”

11. The circumstances to be established by the ex- applicant to obtain a writ of mandamus have been repeatedly stated by the courts. They are:-

a) A clear legal right and a corresponding duty in the Respondent.

b) A specific act or thing which the law requires that particular officer to do has been omitted to be done by him.

c) Lack of any alternative remedy

d) Whether the alternative remedy exists but is inconvenient, less beneficial or less effective or totally ineffective.

12. The respondent had opposed the application on the grounds of failure to comply with Order 53 of the Civil Procedure Rules. The respondent in their submissions challenged the non-compliance with Section 21 of the Government Proceedings Act, a matter that did not come up on the pleadings. In **Republic v Permanent Secretary Office Of The President Ministry Of Internal Security & another Ex-Parte Nassir Mwandihhi [2014] eKLR**, Justice Odunga observed that “It therefore follows from the foregoing discourse that the rules applicable to normal execution proceedings by way of committal to civil jail are not necessarily applicable to enforcement of an order of the Court arising from an order of mandamus by way of committal. It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the Government Proceedings Act have been complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, 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.” Section 21 of the Act provides that

“21. Satisfaction of orders against the Government

(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.

(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party

13. In this case, the ex parte applicant has exhibited copies of the decree, certificate of costs and the letter of demand dated 15.2.2016. According to the decree although the ex parte applicant sought payment for Kshs 177,956.00, the particulars of the award in the decree was for the sum of Kshs 142,283.40 together with Kshs 54,545.00. There is no mention of the award of costs in the decree. Be that as it may, I find that the objection has no merit as there is a certificate of costs that was issued and served on the respondent and the same is on record, the same is against the respondent. In **Republic v Permanent Secretary Office Of The President Ministry Of Internal Security & another Ex-Parte Nassir Mwandihhi [2014] eKLR**, Justice Odunga observed “Where a party has complied with all the procedures leading to the grant of an order of mandamus to subject the party to the normal procedures relating to contempt of court proceedings would engender a miscarriage of justice yet Article 159(2)(b) mandates that justice ought not to be delayed. To take a successful litigant in circles when adequate notices have been given to the Government to settle a decree would be to turn the legal process into a theatre of the absurd.”

14. Clearly, there has been active litigation over the same decree. As late as **5th May, 2017**, the Respondent filed an application in court for stay of execution and this frustrated the attempt by the ex parte applicant to realize the fruits of a judgement in a matter that had been in court since 2014. *Mandamus* is befitting as the ex parte applicant has demonstrated that there is a right entitling him to be paid the decretal amount and the duty is owed by the respondent.

15. I find that there has been reasonable notice to the respondent. This is because annexed to this applicants is a letter dated **15.2.2016** giving the Respondent "a reasonable time to comply with the demand. There has been reasonable time since then to date.

16. It can be imputed that on the part of the respondent there is implied refusal through unreasonable delay." *This* has been established by the unpaid amount since 2016 and even the stay of execution application seeking time to pay though the payment had not come forth. In failing to file a replying affidavit, it is uncontroverted that the payment had not been effected to date. I place reliance on the case of **Mohammed & Another v Haidara [1972] E.A 166** at page 167 paragraph F-H, Spry V.P considered the failure by a party to file any reply to allegations set out in evidence and expressed himself as follows:

“The respondent made no attempt to reply to these allegations and they therefore remain unrebutted...Here, the respondent’s affidavit gives no material facts and the only real evidence of facts is that contained in the appellants’ affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied...”

17. Similarly in **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR** the court stated as follows:

“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”

18. The outcome of the stay application had not been brought to the attention of this court. However I am satisfied that there is *implied refusal* and or *unreasonable* delay on the part of the respondent and mandamus ought to issue.

19. Applying the above tests to the facts and circumstances of this case, I find and hold that the applicant satisfied the conditions for grant of mandamus and it follows that there is basis for the court to grant the order of *Mandamus*. Consequently the Notice of Motion dated 12.06.2018 is allowed as prayed.

Orders accordingly.

Dated and delivered at Machakos this 6th day of February, 2020.

D. K. Kemei

Judge