



**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**JUDICIAL REVIEW DIVISION**  
**JUDICIAL REVIEW CASE NO. 30 OF 2019**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY JUDICIAL REVIEW ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26, ORDER 53 RULE 1 OF THE CIVIL  
PROCEDURE RULE 2010, AND THE GOVERNMENT PROCEEDINGS ACT CAP 40**

**AND**

**IN THE MATTER OF: EXECUTION OF THE DECREE DATED 24<sup>TH</sup> MAY 2019 FOR KSHS. 617,475.00/= IN THE CMCC NO.  
1123 OF 2007 (MOMBASA) INVOLVING ABDALLAH A. HASSAN (PLAINTIFF) AND THE COUNTY GOVERNMENT OF  
MOMBASA (DEFENDANT)**

**BETWEEN**

**ABDALLAH A. HASSAN.....APPLICANT**

**AND**

**COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT**

**RULING**

1. Pursuant to the leave of the court granted on 9/10/2019, the ex-parte Applicant filed the Amended Motion herein on 15/11/2019 under Sections 1A, 1B, 3A of the Civil Procedure Act Cap 21, Order 53 rules 3 and 4 of the Civil Procedure Rules 2010 and Sections 8 and 9 of the Law Reform Act Cap 26, and the Government Proceedings Act Cap 40, seeking:

(a) An order of mandamus compelling the Respondent herein to pay the sum of Kshs. 617,475.00/= due and owing on the accounts of the decree dated 24/5/2019 in CMCC No. 1123 of 2007 (Mombasa) involving Abdalla A. Hassan (Plaintiff) and the County Government of Mombasa (Defendant) to the applicant herein, Abdalla A. Hassan.

(b) The costs of this application.

2. The motion is premised on the grounds that the Applicant obtained a decree in his favour of Kshs. 617,475/= against the Respondent in CMCC No. 1123 of 2007, and despite several demands the Respondent has refused and continues to refuse to pay the decree, and that the said refusal has put the Applicant in difficulties, losses and damages and that it is in the interest of justice for this court to intervene and order the Respondent to satisfy the said decree through the grant of an order of mandamus sought herein.

**The Response**

3. The Respondent opposed the application through Grounds of Opposition filed on 27/1/2020 stating that the application is procedurally flawed and that the costs have not been ascertained by the Deputy Registrar, nor Judgment endorsed against the government.

**Issues for Determination**

4. The only issue which in my view arises for determination is whether the Applicant has established grounds for this court to issue an order of mandamus as prayed.

5. The applicant's counsel cited the circumstances under which an order of *mandamus* can be issued as held in *Republic vs. Kenya National Examinations Council & Others*. He argued that the decree in the applicant's favour has never been satisfied, and that, execution cannot be issued against the Government, hence, the applicant has no other alternative for realizing the fruits of the Judgment. The Applicant submitted he served the County Government and their Advocates and that the accounting officer of the Mombasa County Government is legally bound to satisfy the decree.

6. On their part, the Respondent's counsel submitted that the Respondent is a Government, hence the provisions of section 21 of the Government Proceedings Act apply. Counsel further submitted that it has not been demonstrated that the Applicant served a Notice under section 21(2) of the Government Proceedings Act upon the Attorney General. Counsel submitted that there is no evidence that the Reasons for Taxation, the Certificate of Costs and Decree were ever served upon the Respondent nor is there evidence that payment was demanded. Counsel submitted that it is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. Counsel averred that *mandamus* is a judicial command requiring the performance of a specified duty which has not been performed. Originally a common law writ, *Mandamus* has been used by courts to review administrative action, and is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving Judgment and discretion, but not to direct the exercise of Judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either.

7. I have considered these submissions. *Mandamus* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. *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)** and was also restated in **Republic vs. County Secretary - Nairobi City County & another Ex Parte Tom Ojienda & Associates [2019] eKLR**. 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. The above tests must be satisfied before an order of *mandamus* can issue. In this matter, it is common ground that the complaint giving rise to this application stems from a court decree. For *Mandamus* to issue, there must be a public legal duty to act and the duty must be owed to the Applicant. These two tests are not in dispute. There must be a clear right to the performance of that duty, meaning that the Applicant has satisfied all conditions precedent. There must have been a prior demand for performance; a reasonable time to comply with the demand, unless there was outright refusal; and an express refusal, or an implied refusal through unreasonable delay.

9. In this case, the Applicant did not exhibit evidence showing that there was a prior demand for performance. No demand notice was annexed to the application. One cannot talk of a refusal to pay if there is no evidence of prior demand for the payment. There is no evidence that the Certificate of Taxation and Decree annexed to the application were served upon the Respondent prior to filing this application. It was a serious omission for the Applicant to fail to avail evidence of prior demand to the Respondent to comply with the decree. On the test of what constitutes a reasonable time to comply before *Mandamus* can issue, it is not possible to compute the time in absence of a prior demand to comply.

10. *Mandamus* can only issue where it is clear that there is *wilful* refusal or *implied* and or *unreasonable* delay. In the absence of a demand this Court cannot tell whether the Respondent has refused to settle the decree. Therefore, there is no basis at all for the Court to grant the order of *Mandamus*.

11. There is no evidence that the decree herein or the certificate of costs against the County Government were ever served upon the Respondent pursuant to Section 21 of Government Proceedings Act.

12. Accordingly therefore, this action is pre-mature and is dismissed with costs.

**Dated, Signed and Delivered at Mombasa this 5<sup>th</sup> day of May, 2020.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Mr. Tajbhai for Respondent

No appearance for Applicant

Mr. Kaunda Court Assistant