



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 253 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NAIROBI CITY COUNCIL.....RESPONDENT**

**EX PARTE: OJIENDA & COMPANY ADVOCATES**

**JUDGMENT**

**The Application**

1. The Ex Parte Applicant herein filed a Notice of Motion dated 27<sup>th</sup> July 2018, in which they seek that an order of mandamus to compel the Respondent to comply with the court order dated 15<sup>th</sup> of April 2016 by settling the Applicant's taxed fee of Kenya shillings one Hundred and Sixteen Thousand One Hundred and Ninety Two (Kshs 116,192/=).
2. The application is supported by the affidavit sworn on 19<sup>th</sup> June 2018 by Seth Ojienda, the advocate in conduct of the matter. He stated that this Court made an order on the 30<sup>th</sup> June 2015 taxing a Bill of Costs dated 2<sup>nd</sup> March 2015 at Kshs 116,192/=, and a certificate of taxation was issued on 14<sup>th</sup> July 2015. However, that despite service of the said order on, and several reminders to the Respondent, the said monies have not been paid. The Applicant annexed a copy of the Certificate of Taxation.
3. The application was opposed through a replying affidavit sworn on 23<sup>rd</sup> November 2018 by David Oseko, the acting County Attorney. He admitted to being aware of the orders of the court passed on the 30<sup>th</sup> June 2015 in favour of the Applicant, and contended that the application before court is unwarranted as the Respondent has not made any decision that is contrary to the Court's directive with regard to the payments of dues payable to the Applicant. Further, that the commencement of judicial review proceedings by the Applicant is unreasonable, and not necessary, as the Applicant has not reached out for negotiations or arrangement on how to settle the Certificate of Costs.
4. The deponent explained that the Respondent has reshuffled its employees causing delays in financial authorisation, as the process of appointing financial signatories is complex and lengthy, but reiterated that it does not mean that the Respondent is unwilling to pay the dues owing. It refuted the allegation that it has received reminders with regard to the same, and that the applicant has not shown any serious prejudicial loss that will be occasioned as contended if the application is not granted. It was his case that's in the interest of justice and the Applicant that the matter be settled amicably through negotiations and reasonable understanding in order to save time and costs, as the issues can be dealt with without involving the courts

**The Determination**

5. The parties at the hearing of the application relied on the written submissions they had filed in Court. The Applicant's Advocate, Ojienda & Company Advocates, filed submissions dated 31<sup>st</sup> October 2018, while Osero & Company Advocates filed submissions for the Respondent dated 26<sup>th</sup> November 2018.
6. The Applicant urged that the only issue for determination is whether they are entitled to the orders sought. They relied on the case of **Kenya National Examinations Council vs Republic Ex-parte Geoffrey Gathenji Njoroge & Others (1996) eKLR, Shah vs Attorney General No 3 [1970] EA 543, Republic vs Nairobi City County Government & another Ex parte Simon Mukuria Kamau T/A City Clothing (2017) eKLR and Mureithi & 2 Others vs Attorney General & 4 Others (2006) 1 KLR (E&L) 707** for the purpose, scope and reach of the order of mandamus.

7. It was their submission that they served the Respondent with the certificate of taxation on the 22nd of July 2015 and despite several reminders and follow ups the Respondent has not made any steps towards settling the same. Further, that the certificate of taxation is an order of the Court which must be adhered. The Applicant also relied on the case of **Republic vs Attorney General & Another ex-parte Ongata Works Limited (2016) eKLR** for the proposition that an order of mandamus may compel the performance of the general duty where it exists, it will however not compel the payment of a particular amount, unless the amount has been ascertained. It was submitted that the amount in this case has been ascertained as Kshs 116,192/=.

8. Also cited was the case of **Republic vs Kenya Broadcasting corporation Ex-parte Muskari Kombo (2018) eKLR** for the proposition that the decrees holders right to enjoy fruits of his judgement should not be thwarted and that the court should adopt an interpretation that favours enforcement.

9. The Respondent on its part submitted that the law on the grounds for granting judicial review is well settled and relied on various judicial decisions including the case of **Council of Civil Service Unions vs Minister of State for Civil Service, (1984) 3 ALL ER 935** for this proposition. Further, that the Applicant has not established the grounds upon which the Court would issue the judicial review orders, and that the cause of action it has taken is unreasonable and not necessary.

10. The Respondent relied on the definition of unreasonableness given in the case of **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation, (1948) 1 KB 223**. It was its submission that the Applicant has not in any way reached out for negotiation or arrangements to settle the Certificate of Taxation, that the Respondent has not refused to comply with the court order and it refuted having received reminders to that effect.

11. Lastly, the Respondent urged that in making its determination, the Court will need to address itself to the primary question whether the Applicant can have this matter amicably settled through negotiations out of court to save time and costs.

### **The Determination**

12. I have considered the arguments by the Applicant and Respondent. The main issues for determination is whether the Applicant is entitled to the order of mandamus he seeks.

13. The Court of Appeal discussed the nature of the remedy of mandamus in great length in its decision in **Republic vs Kenya National Examinations Council exparte Gathenji and 9 Others, [1997] eKLR**, as follows:

**“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, 4<sup>th</sup> 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..... .”**

14. I have perused the copy of the certificate of costs annexed by the Applicant to its verifying affidavit sworn on 19<sup>th</sup> June 2018, which shows that was issued by the Deputy Registrar of this Court on 19<sup>th</sup> April 2016, and note that it is for the amount of Kshs 389,222.12, and yet the amount that is sought to be paid of Kshs 116,192/= which is the amount that ought to be evidenced by the certificate of costs. No explanation is given by the Applicant for the discrepancy.

15. The annexed certificate of costs is dated 19<sup>th</sup> April 2019 and seems to differ from the certificate of costs referred to in the Applicant’s verifying affidavit, which is stated to have been issued on 14<sup>th</sup> July 2015. The statement of facts dated 19<sup>th</sup> June 2018 in support of the application for leave to commence judicial review proceedings, on the other hand indicates that the certificate of costs was issued on 15<sup>th</sup> April 2016.

16. This Court therefore finds that in light of the discrepancies in the pleadings filed by the Applicant on the amount payable by the Respondent, the orders sought of mandamus cannot issue as the amount payable is not certain and certificate of costs that is annexed is not capable of enforcement.

17. In the premises, I find that the Applicant's Notice of Motion dated 27<sup>th</sup> July 2018 is not competently before this Court, and it is accordingly struck out with costs to the Respondent. The Applicant is however at liberty to apply with respect to the proper and correct certificate of costs.

18. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JANUARY 2019**

**P. NYAMWEYA**

**JUDGE**