



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILLIMANI COURTS

MISC. APPLICATION NO. 306 OF 2017

Republic.....Applicant

versus

The County Secretary, Nairobi City County.....1st Respondent

Chief Officer, Finance/County Treasurer, Nairobi City County2nd Respondent

and

Ex parte Applicant.....Prof. Tom Ojienda & Associates

JUDGMENT

1. Pursuant to the leave of the Court granted on 12th June 2017, the *ex parte* applicant moved this court by way of Notice of Motion dated 15th June 2017 expressed under the provisions of Order 53 Rules 3 of the Civil Procedure Rules, 2010, seeking :-

a. *An order of Mandamus be issued directed to the County Secretary, Nairobi City County and the Chief Officer, Finance/County Treasurer, Nairobi City County.*

b. ***That** the County Secretary, Nairobi City County and the Chief Officer, Finance/County Treasurer, Nairobi City County shall comply by paying to the applicant within 7 days the sum of **Ksh. 87,378,487.75** being the decretal sum and accrued interests up to 28.03.2017 in respect of Misc. Application No. 5 of 2016.*

c. ***That** the County Secretary City County and Chief Officer, Finance/County Treasurer, Nairobi City County shall in addition pay the applicant interest on the said sum of **Ksh. 87,378,487.75** at the rate of 14% from the 29.03.2017.*

d. ***That** in default, notice to show cause do issue against the County Secretary, Nairobi City County and the Chief Officer, Finance/County Treasurer, Nairobi City County for them to show cause why they should not be cited for contempt of court.*

e. ***That** the costs of this application be provided for.*

2. The grounds in support of the application are that the Deputy Registrar of the High Court of Kenya, Nairobi taxed the applicant's Bill of Costs dated 22nd December 2015 at **Ksh. 87,258,000/=** on 5th July 2016, and, a Certificate of Taxation dated 8th February 2017 was issued for the said sum which amount remains un paid. The applicant states that he filed an application before the High Court to have the Certificate of Taxation translated into a judgment for purposes of execution, and, pursuant thereto, a decree was issued in Misc. Civil App No. 5 of 2016 on 21st March 2017 ordering the Nairobi City County to pay the applicant the said sum plus interests thereon at the rate of 14% from 29th March 2017 until payment in full. The applicant states that the said sum remains un paid. Copies of the Ruling and Reasons for Taxation, Certificate of Taxation and the Decree referred to above are annexed to the supporting Affidavit.

Respondent's Grounds of Opposition.

3. The Respondents' grounds of opposition filed on 25th September 2018 are that the application is pre-mature, misconceived, lacks merit, frivolous and an abuse of the court process. Also, the Respondents state that they are State Officers with the City County Government of Nairobi, established under Article 176(1) of the Constitution, and, that, Article 6 of the Constitution enshrines the County Government to be part of the Government of Kenya and therefore, the provisions of section 21 of the Government Proceedings Act^[1] are applicable to the County Government, hence, the application fails to meet the tenets of the said act.

4. The Respondents also state that the documents in support of the application, namely, the Ruling and Reasons for Taxation, Certificate of Taxation and Decree were never served upon the Attorney General contrary to section 21(1) and (2) of the Government Proceedings Act.^[2] Further, it is contended that no demand for payment was made by the *ex parte* applicant to the second Respondent contrary to section 21(3) of the Government Proceedings Act.^[3] Further, the Respondents contend that committal proceedings ought not to issue against a party who was not a party to HCC Misc App No. 5 of 2016 and was not served with the order or decree as this will offend Articles 47 & 50 of the Constitution.

Issues for determination.

5. From the above facts, 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 Notice to Show Cause prayed.***

6. The applicant's counsel cited the circumstances under which an order of *mandamus* can be issued as held in *Republic v Kenya National Examinations Council & Others*.^[4] 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 of realizing the fruits of the judgment.^[5] He also submitted that the applicant served the County Government and their Advocates and that the accounting officer of the Nairobi City County Government is legally bound to satisfy the decree.^[6]

7. The Respondents' counsel submitted that the Respondents are State Officers hence the provisions of section 21 of the Government Proceedings Act^[7] apply. Further, he submitted that it has not been demonstrated that the applicant served a Notice under section 21(2) of the Government Proceedings Act^[8] upon the Attorney General. Also, he submitted that there is no evidence that the Reasons for Taxation, the Certificate of Costs and Decree were ever served upon the Respondents^[9] nor is there evidence that payment was demanded.^[10]

8. 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.^[11] *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.^[12]

9. *Mandamus* 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**.^[13]

10. 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.

11. *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)*,^[14] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*.^[15] 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.*

12. It is imperative that the above tests must be satisfied before an order of *mandamus* can issue. I find it apposite to examine the facts and circumstances of this case to satisfy myself whether the above tests have been satisfied. It is common ground that the complaint giving rise

to this application stems from a court decree.

13. 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.

14. The applicant did not exhibit evidence showing that there was a prior demand for performance. One would have expected a written prior demand for payment. This has not been 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 Ruling and Reasons for Taxation, Certificate of Taxation and Decree annexed to the application were served upon the Respondents prior to filing this application. It was a serious omission for the applicant to fail to avail evidence of prior demand to the Respondents to comply with the decree.

15. 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. The other test is "an express refusal, or an implied refusal through unreasonable delay." First, as I have concluded above, I am unable to conclude that there was an express or implied refusal in absence of a prior notice to comply. Further, I am unable to conclude whether there was a delay and if so, whether it was "unreasonable delay" in absence of evidence of a prior demand to comply. Differently stated an express refusal or even implied has not been established in the circumstances of this case. Lastly, *Mandamus* can only issue where it is clear that there is wilful refusal or implied and or unreasonable delay. I am not able to conclude that there is wilful refusal in the circumstances of this case nor has it been established.

16. Applying the above tests to the facts and circumstances of this case, I find and hold that the applicant has not satisfied the above conditions. It follows that there is no basis at all for the Court to grant the order of *Mandamus*.

17. Flowing from my above finding, it is also my conclusion that there is no basis upon which this Court can issue a *Notice to Show Cause* upon the Respondents as requested. This is because for the notice to show cause to issue, the disobedience of the court order must be established first.

18. In view of my determination and findings herein above, the conclusion becomes irresistible that the relief of *Mandamus* and the order of *Notice to Show Cause* sought and the order compelling the Respondents to pay the said sum cannot be issued in the circumstances of this case. It follows that this application is fit for dismissal. The effect is that the orders sought herein are hereby refused. The application dated 15th June 2017 is hereby dismissed with no orders as to costs.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 17th day of January 2019

John M. Mativo

Judge

[1] Cap 40, Laws of Kenya.

[2] Ibid.

[3] Ibid.

[4] Civil Appeal No. 266 of 1996.

[5] Citing Misc App No. 44 of 2012, *Republic v The Attorney General & Another ex parte Alfred Koroso*.

[6] Citing *Shah v Attorney General (No. 3)* Kampala HMC No. 31 of 1969 {1970}EA 543.

[7] Cap 40, Laws of Kenya.

[8] Ibid.

[9] Citing *Republic v Nairobi City v County Government ex parte Ndiara Enterprises Limited* {2017}eKLR.

[10] Citing *Newton Gikaru Githioni & Another v A/G/Public Trustee*, Nairobi HC JR 472 of 2014.

[11] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[12]W. G. & C. Byse, *Administrative & Review Law, Cases and comments* 119-20 (5th ed. 1970). Originally, mandamus was a writ issued

by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[13] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review*, 53 GEO. IJ. 19, 25-26 (1964).

[14] [1993 Can LII 3004 \(F.C.A.\)](#), [1994] 1 F.C. 742 (C.A.), aff'd [1994 CanLII 47 \(S.C.C.\)](#), [1994] 3 S.C.R. 1100.

[15] [2003 FCT 211 \(CanLII\)](#), [2003] 4 F.C. 189 (T.D.), aff'd [2003 FCA 233 \(CanLII\)](#), 2003 FCA 233).