



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 370 OF 2018**

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

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NAIROBI CITY COUNTY.....RESPONDENT**

**EX PARTE :**

**OJIENDA & COMPANY ADVOCATES**

**JUDGMENT**

**The Application**

1. The *ex parte* Applicant herein, Ojienda & Co Advocates, filed the instant judicial review proceedings by way of a Notice of Motion dated 17<sup>th</sup> October 2018, seeking orders of mandamus to compel the Respondent directly or through their officers and/or agents to pay the Applicant's taxed fee of Kenya Shillings Four Hundred and Sixty Four Thousand (Kshs 464,000/=). The Applicant also sought costs.
2. The Applicant relied on the statement dated 10<sup>th</sup> August 2018 that accompanied the Chamber Summons application for leave to commence judicial proceedings, a verifying affidavit sworn on the same date by Seth Ojienda, an Advocate practicing in the Applicant firm, and a further affidavit that the said Advocate also swore on 17<sup>th</sup> October 2018.
3. The Applicant contends that the Court taxed its bill of costs on 21<sup>st</sup> June 2018 at Kenya Shillings Four Hundred and Sixty Four Thousand (Kshs 464,000/=) in **Nairobi High Court Misc. Case No. 234 of 2018 - Ojienda & Co Advocates vs City Council of Nairobi**. Subsequently a certificate of taxation to that effect was issued on 26<sup>th</sup> July 2018, and the same served on the Respondent which they have refused to obey despite there being several reminders to that effect.
4. The Applicant therefore prays for the Court to issue the order of mandamus for the Respondent to comply with the orders and pay the amount of money due. The Applicant in written submissions relied on the decision in **B vs. Attorney General**, [2004] 1 KLR 431 that the Court does not make orders in vain, and on the scope of the judicial review remedy of mandamus as explained by the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others** [1997] eKLR and in **Mureithi & 2 Others vs. Attorney General & 4 Others** [2006] 1 KLR (E&L) 707.
5. The Applicant submitted that the Respondent was served with the certificate of taxation, and parties had been engaged in talks where the Respondent had promised to pay the monies. Further, that despite several reminders through follow up letters, the Respondent has not made any steps towards settling the costs awarded. The Applicant contended that the certificate of taxation is an order of the court which must be adhered to.
6. The decision in **Republic v Attorney General & another Ex-Parte Ongata Works Limited** [2016] eKLR was also cited by the Applicant for the position that the amount in this case can be ascertained as Kenya Shillings One Hundred and Ninety One Thousand Two Hundred and Eighty Four (Kshs 191,284/=). Also cited were the decisions in **Republic v Kenya Broadcasting Corporation Ex-parte Muskari Kombo**, [2018] eKLR and **Republic vs. Town Clerk of Webuye County Council & Another**, HCCC 448 of 2006 for the proposition that a decree holder's right to enjoy fruits of his judgment must not be thwarted.

## The Response

7. The application was opposed through an affidavit sworn on 14<sup>th</sup> November 2018 by David Oseko, the Respondent's acting County Attorney. He averred that he was aware of the judgement entered in favour of the Applicant, in which the Respondent was ordered to pay the Bill of Costs dated 9<sup>th</sup> May 2018 for Kshs 464,000/=. However, that the judicial review application is unwarranted as there are no sufficient grounds for the court to grant the same, since the Respondent has not made any decision contrary to the Court's directives, with regard to the payment of the amounts due.

8. Therefore the cause of action taken is unreasonable as the Applicant has not in any way reached out for negotiations or arrangements to settle the certificate of taxation and the amounts therein.

9. The deponent also contended that the Respondent has on several occasions reshuffled its employees causing delays in financial authorisations, as the process of appointing financial signatories is complicated and lengthy. However, that this does not mean that the Respondent is unwilling to pay dues. He refuted receiving reminders from the Applicant as alleged, and added that it's in the interest of the Applicant that the matter should be settled amicably through negotiation and reason.

10. The Respondent submitted that the law relating to the granting of judicial review is settled, and relied on the decisions in **Council of Civil Service Unions vs Minister of State for Civil Service, (1984) 3 All ER 935**; **Rahab Wanjiru Njuguna v Inspector General of Police & Another (2013) eKLR**; and **Pastoli vs Kabale District Local Government Council and Others (2008)2 EA 300** for the position that a judicial review orders can only be issued on the grounds of illegality, irrationality and procedural impropriety. It was its submission that the Applicant has not in any way established those grounds in order for the court to issue the remedy sought.

11. The Respondent also cited the decision in **Republic vs Commissioner General, Kenya Revenue Authority ex parte BOC Kenya Limited, (2014) e KLR** for the argument that availability of other remedies are an important factor in exercising the discretion whether or not to grant relief in judicial review, and it was their submission that the Applicant has not reached out in any way for negotiations or arrangements to settle the certificate of taxation of costs. Therefore that the action taken by the Applicant to apply for judicial review was unreasonable and unnecessary.

12. Lastly, the Respondent stated that it has not refused to comply with the court order dated 2<sup>nd</sup> June 2016, and that in addressing this matter the Court will have to address itself to the primary question of whether the matter can be settled amicably through negotiations and reasonable understanding in and outside court.

## The Determination

13. I have considered the pleadings by the Applicant and Respondent, and also considered the holding by 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] eKLR**, wherein it held 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. It is not disputed in the present application that judgment for costs was entered in favour of the Applicant in **Nairobi High Court Misc. Case No. 234 of 2018 - Ojienda & Co Advocates vs City Council of Nairobi**. The issues therefore that require to be determined are firstly, whether the Respondents are under a public duty and obligation to satisfy the orders issued in favour of the Applicant in the said judgment, and secondly, if so, whether the Applicant is entitled to the relief he seeks.

15. Section 21 of the Government Proceedings Act provides as follows as regards the requirements to be met in the enforcement of orders as against Government 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.”

16. 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. The definition of “Government” in the Government Proceedings Act refers to the “Government of Kenya”, and J. Odunga held as follows 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.”

17. In addition, execution proceedings against a government or public authority can only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a judgment made by the Court against that body. This was the holding in Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) where J. Githua held as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (*hereinafter referred to as the Act*) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”

18. As regards who the accounting officers of the Nairobi City County are, section 44 of the County Government Act establishes the office of the County Secretary who is secretary to the County executive Committee, and is answerable for the operations of the County Executive, and whose functions include being head of the county public service. Section 103 of the Public Finance Management Act also establishes the County Treasury comprising of the County Executive member of Finance, the Chief Officer and the departments of the County Treasury responsible for finance and fiscal matters.

19. In the present application, the amount due from the Respondent has not been disputed, and the Applicant in this respect annexed a copy of the Certificate of Taxation dated 26<sup>th</sup> July 2018 issued in **Nairobi High Court Misc. Case No. 234 of 2018 - Ojienda & Co Advocates vs City Council of Nairobi** whereby it is stated that the Applicant's Bill of Costs was taxed and allowed as against the Respondent at Kenya Shillings Four Hundred and Sixty Four Thousand (Kshs 464,000/=).

20. The Applicant did not annex a copy of a Certificate of Order against Government or any proof of service of the same on the Respondent. This Court finds that this omission is not fatal, as the Certificate of Costs issued by a Deputy Registrar of the High Court is adequate certification of what the particulars of an order are in respect of costs to be paid, and suffices for purposes of section 21 of the Government Proceedings Act. In addition, the Respondent did admit to being aware of the judgment entered against them as stated in the Certificate Of Taxation dated 26<sup>th</sup> July 2018.

21. It is noteworthy in this respect that the procedure in section 21 of the Government Proceedings Act is not meant to relieve the Respondent from meeting its legal and statutory obligation to satisfy decrees and orders of the Court, and its main purpose is to notify the Respondent that the debt is due to facilitate payment.

22. This Court therefore finds that as judgment was already entered in favour of the Applicant with respect to the taxed costs, and the procedure stated in section 21 of the Government Proceedings Act has largely been followed, there is a duty upon the Respondent to pay a debt already decreed by a competent Court of law to be due and payable by them.

23. In the premises, I find that the Applicant's Notice of Motion dated 17<sup>th</sup> October 2018 is merited. I accordingly grant the following orders:

**(a) An order of mandamus is hereby issued compelling the County Secretary and County Finance Executive Member of the Nairobi City County to effect payment to the Applicant of taxed costs of Kenya Shillings Four Hundred and Sixty Four Thousand (Kshs 464,000/=) in satisfaction of the court order issued in Nairobi High Court Misc. Case No. 234 of 2018 - Ojienda & Co Advocates vs City Council of Nairobi on 15<sup>th</sup> of April 2016.**

**(b) The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 17<sup>th</sup> October 2018 of Kshs 20,000/=.**

24. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 14<sup>TH</sup> DAY OF FEBRUARY 2019**

**P. NYAMWEYA**

**JUDGE**