



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION
MISC. CIVIL APPLICATION NO. 662 OF 2003

**IN THE MATTER OF: AN APPLICATION BY MOMBASA FIRE BRIGADE ASSOCIATION
FOR LEAVE TO APPLY ORDERS OF MANDAMUS**

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT

AND

**IN THE MATTER OF: HCC NO. 125A OF 1998 MOMBASA FIRE BRIGADE ASSOCIATION
VERSUS THE MUNICIPAL COUNCIL OF MOMBASA**

**IN ACCORDANCE WITH ORDER LII RULES 1, 2, 3 AND 4 OF THE CIVIL PROCEDURE
RULES**

BETWEEN

MOMBASA FIRE BRIGADE ASSOCIATION.....APPLICANT

VERSUS

THE SECRETARY, COUNTY OF MOMBASA

THE COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

RULING

The Application

1. The Applicant's application is contained in the Further Amended Notice of Motion dated 18th December, 2018. The motion prays for the following orders:

(1a) THAT this Honourable Court do issue Orders of Mandamus to compel the Respondents to pay the balance of Kshs. 667,935 together with costs and interests due to the ex-parte Applicant in HCCC NO. 125 A OF 1998 MOMBASA FIRE BRIGADE ASSOCIATION VERSUS THE MUNICIPAL COUNCIL OF MOMBASA

d) THAT the costs of the Application be in the cause.

2. The motion is premised on the grounds set out therein and is supported by a Supporting Affidavit

sworn by **ALI SAID MUZUNGU** sworn on 18.12.18.

3. The Applicant's case is that Judgment was entered in favour of the Plaintiff on 17th June, 2002 for Kshs. 4,000,000 plus interest and costs in HCCC NO.125A of 1998. The Applicant avers that through its Advocates he has recovered the judgment sum save for a balance of Kshs. 667,935 which he has tried to recover but to no avail.

4. The Applicant further avers that the Respondents have refused to pay the aforesaid sum despite negotiations for payment by monthly installments and that even though warrants of arrest have been issued against the Town Clerk it has been impossible to effect the same on him. As such there is no other option of satisfying the decree except through the current application for mandamus.

5. The Applicant avers that the 1st Respondent is the Accounting Officer of the 2nd Respondent and is under a legal duty to ensure that the Court Judgments are satisfied and that it is necessary for orders to be made to compel the two Respondents to ensure that the matter is settled.

The Response

6. The Respondents responded to the Application by filing Grounds of Opposition on 8th March, 2019. The Respondents allege that the Application is premature, misconceived and bad in law in view of the fact that the writ of mandamus will not issue where there is no statutory duty imposed upon the Respondents.

7. Further the Respondents avers that granting the orders sought would be in vain since under Section 104 of the Public Finance Management Act No. 18 of 2012 the County Secretary has no statutory duty in respect of County Finances and that the applicant cannot found a cause of action by suing a wrong party and that the Constitution places the management of county funds within the control of the County Executive in charge of Finance.

Submissions

8. Parties chose to submit orally in court on 4th April, 2019.

Analysis and determination

9. I have carefully considered the application and the submissions by Counsel. The only issue that arise for determination is whether:

The application before the court for an order of mandamus is properly before this court.

10. The Court of Appeal discussed the nature of the remedy of mandamus at length in its decision in **Republic vs. Kenya National Examinations Council ex parte Gathenji and Others, Civil Appeal No 234 of 1996** as follows:

“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.”

11. The sub-issues that require to be determined therefore are firstly, whether the Respondents are under a public duty and obligation to satisfy the decree and orders issued in favour of the Applicant, and

secondly, if so, whether the Applicant is entitled to the reliefs he prays for.

12. 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.”

13. I have carefully perused the application before the court. The application is not supported by a Certificate of Order against the Government for the decretal amount. The Certificate required under Section 21(1) of the Government Proceedings Act is a Certificate of Order against the Government. Under section 21(3), the Accounting Officer in a Ministry can only pay **“the amounts indicated in the Certificate of Order against the Government”**

14. The Certificate of costs itself comes after other procedural details have taken place including Certificate of Taxation and Demand. The final demand or notice is that based on the certificate of costs. Upon the procedure being complete the orders of mandamus will naturally issue to compel the relevant government departments to pay the claim. This application is therefore premature

15. For above reasons I find that the orders sought cannot be granted because the conditions precedent stipulated in section 21(1) of the Government Proceedings Act have not been satisfied. Consequently, the Application dated 18th December, 2018 is without merit and is hereby dismissed. Parties to bear own costs.

16. Orders Accordingly.

Dated, Signed and Delivered at Mombasa this 18th day of November, 2019.

E. OGOLA

JUDGE

In the presence of:

Mr. Magolo holding brief Ms. Okumu for the Applicant

Ms. Nyaga holding brief Kibara for Respondent

Mr. Kaunda Court Assistant