



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW CASE NO. 401 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY SECRETARY, NAIROBI CITY COUNTY.....1ST RESPONDENT

THE COUNTY EXECUTIVE MEMBER IN

CHARGE OF FINANCE, NAIROBI CITY COUNTY.....2ND RESPONDENT

THE CHIEF OFFICER IN CHARGE OF FINANCE,

NAIROBI CITY COUNTY.....3RD RESPONDENT

EX PARTE : KOCEYO AND CO.ADVOCATES

JUDGMENT

The Application

1. The *ex parte* Applicant herein is the firm of Koceyo and Company Advocates (herein referred to as “the Applicant”), and it claims that it rendered legal services to the County Government of Nairobi in various matters and on diverse dates. However, that the said County Government failed to pay the Applicant for the legal services, and the Applicant thereupon filed its Bills of Costs for taxation, which Bills were taxed and certificates of taxation issued. The Applicant states that the County Government has refused failed and/or neglected to satisfy the decretal sum.

2. The Applicant consequently filed a substantive application for judicial review orders herein by way of a Notice of Motion dated 24th January 2019, in which it has sued the County Secretary, County Executive Member in charge of Finance, and the Chief Officer in charge of Finance of the Nairobi City County as the 1st 2nd and 3rd Respondents respectively. The Applicant is seeking the following orders:

1. That an Order of Mandamus be issued to compel the County Secretary Nairobi City County, the County Executive Member in charge of Finance, Nairobi City County and the Chief Officer in charge of Finance, Nairobi City County, to satisfy the decretal sum of Kshs 1,620,692.50 together with interest and Costs thereon as awarded by the Courts in:-

a) CMCC Suit no 466 of 2015.....Kshs 104,261.00

b) CMCC Suit No 7257 of 2014.....Kshs 154,163.00

c) CMCC Suit No 467 of 2015.....	Kshs 122,771.00
d) CMCC Suit No 218 of 2015.....	Kshs 115,138.00
e) CMCC Suit No 7929 of 2017.....	Kshs 342,380.00
f) Misc. Application No. 16 of 2015.....	Kshs 185,298.00
g) JR Misc. Application No. 10 of 2018.....	Kshs 103,138.50
h) JR Misc. Application No. 8 of 2018.....	Kshs 110,968.50
i) JR Misc. Application No. 8 of 2015.....	Kshs 382,574.50
Total Decretal sum.....	Kshs 1,620,523.05

2. That the costs of this Application be borne by the Respondents.

3. The Applicant relied on its statement dated 24th January 2019, and a verifying affidavit sworn on the same date by Titus Koceyo, its Managing Partner, which annexed a letter of demand addressed to the Respondents dated 23rd January 2019. Also relied on was a further affidavit the said deponent swore on 30th October 2018, and to which he annexed the pleadings, judgments and decrees in the aforementioned suits.

4. The 1st, 2nd and 3rd Respondents did not file any response to the application, despite being given the opportunity to do so.

The Determination

5. The application was canvassed by way of the Applicant’s written submissions dated 19th July 2019, wherein it reiterated that it had rendered legal services to the County Government of Nairobi which has a duty to pay up the legal fees. Further, that it is trite law that for a court to grant an order of mandamus the Respondent must have a duty by law which they have refused to fulfill. The Applicant relied on the decision in **Republic vs Kenya National Examinations Council exparte Gathenji and Others, Civil Appeal No 234 of 1996** on the nature of the remedy of mandamus, and for their submission that the Respondents are mandated by law to pay up debts they owed where a suit is instituted against the County Government.

6. Reliance was also placed on the decision in **Soloh Worldwide Inter-enterprises vs County Secretary Nairobi County and Another (2016) eKLR**, for the position that the person who had the overall financial obligation for the purpose of the affairs of the county government must be the county executive in charge of finance and unless he shows otherwise, he is the one under the obligation to pay funds in the capacity as the accounting officer. Further, that jurisprudence on the subject of the order of mandamus demands that where there is a breach of public duty or power, the Court must compel the public authority to perform the duty imposed by statute.

7. It was the Applicant’s submissions that as the law bars him from executing against the Government, he has no other effective remedy but judicial review, and he asked the court to allow the Notice of Motion. The Applicant relied on the cases of **Republic vs Attorney General & Another Exparte James Alfred Koroso (2013) eKLR**, **Republic vs County Secretary, Nairobi City County & Another Exparte Wachira Nderitu Ngugi & Co Advocate (2016) eKLR**, and **Republic vs County Chief Officer, Finance & Economic Planning, Nairobi City County Exparte Stanley Muturi (2017) eKLR** for this position.

8. I have considered the Applicant’s pleadings and submissions. I am guided by the Court of Appeal’s decision on the nature of the remedy of mandamus in **Republic vs Kenya National Examinations Council exparte 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.”

9. The 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 relief it seeks.

10. 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 in this respect I adopt the holding by Odunga J. 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.”

11. 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 Githua J. 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.”

12. As regards the accounting officers of the Nairobi City County, 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 No 18 of 2012 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.

13. Under section 103(3) the County Executive Committee Member for Finance is the head of Treasury, and is thus the responsible for finance matters in the County. Therefore, both the 1st and 2nd Respondents are jointly responsible for the satisfaction of Court orders and decrees on payment of money owed by the 3rd Respondent by virtue of their roles and functions.

14. The Applicant presented evidence of a letter of demand as proof that the provisions of the Government Proceedings Act have been complied with. Section 21 of the Government Proceedings Act provides as follows in this respect:

“(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.”

15. The Applicant deponed that he had made demands for payment of the costs, and also in this respect brought evidence of the said demand, and of the decrees and costs awarded in its favour arising from claims against the Respondent.

16. I therefore find that sufficient proof has been provided that judgment was entered with respect to the subject costs, and it is my view that the Procedure stated in section 21 of the Government Proceedings Act has largely been followed, and the Respondents had the necessary notice of the subject judgment and decrees. There is thus a duty upon the Respondents to pay a debt already decreed by a competent Court of law to be due and payable by them.

17. It is also notable in this regard that the procedure in section 21 of the Government Proceedings Act is not meant to relieve the Respondents from meeting their legal and statutory obligation to satisfy decrees and orders of the Court, and its main purpose is to notify the Respondents of the debt is due to facilitate payment, which was satisfied by the annexed letter of demand by the Applicant dated 23rd January 2019, which also annexed the decrees in the various suits that are the subject of this application.

18. In the premises, I find that the Applicant’s Notice of Motion dated 24th January 2019 is merited. I accordingly grant the following orders:

I. An order of mandamus directed to the County Secretary Nairobi City County, and the County Executive member in charge of Finance, Nairobi City County to comply by paying to Koceyo and Company Advocates the sum of Kshs 1,620,692.50 together with interest at the rate of 14% from the date of this judgment until payment in full, being the specified decretal sums in respect of decrees issued by the Chief Magistrate’s Courts and this Court in:-

- a) CMCC Suit no 466 of 2015.....Kshs 104,261.00
- b) CMCC Suit No 7257 of 2014.....Kshs 154,163.00
- c) CMCC Suit No 467 of 2015.....Kshs 122,771.00
- d) CMCC Suit No 218 of 2015.....Kshs 115,138.00
- e) CMCC Suit No 7929 of 2017.....Kshs 342,380.00
- f) Misc. Application No. 16 of 2015.....Kshs 185,298.00
- g) JR Misc. Application No. 10 of 2018.....Kshs 103,138.50
- h) JR Misc. Application No. 8 of 2018.....Kshs 110,968.50
- i) JR Misc. Application No. 8 of 2015.....Kshs 382,574.50

Total Decretal sum.....Kshs 1,620,523.05

II. The Applicant shall have the costs of the Notice of Motion dated 24th January 2019.

19. Orders accordingly.

DATED AND SIGNED THIS 18TH DAY OF NOVEMBER 2019

P. NYAMWEYA

JUDGE

DELIVERED ON BEHALF OF JUSTICE P. NYAMWEYA AT NAIROBI THIS 20TH DAY OF NOVEMBER 2019

J.M. MATIVO

JUDGE