



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 209 OF 2019

IN THE MATTER OF: AN APPLICATION BY KENNEDY WAINAINA NGENGA FOR JUDICIAL REVIEW BY WAY OF AN ORDER OF MANDAMUS.

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF OFFICER FINANCE OFFICER,

COUNTY GOVERNMENT OF NAIROBI.....RESPONDENT

EX PARTE.....KENNEDY WAINAINA NGENGA

RULING

The case for the *ex parte* applicant

1. The *ex parte* applicant seeks an order of mandamus to compel the respondent to satisfy the decree dated 12th April 2017, the certificate of order of against Government dated 12th June 2019 and the certificate of order for costs against Government dated 12th June 2019, issued in Nairobi High Court Civil Case No. 63 of 2017, Kennedy Wainaina Ngengi v. County Government of Nairobi, within 21 days of this judgement and an order for costs.

2. The application is grounded upon the statutory statement dated 28th June 2019 and the verifying affidavit of Kennedy Wainaina Ngenga. The application is supported by nine grounds that are set out on the face of the notice of motion. The major grounds are as followings. There exists an unsatisfied decree of the High Court in Nairobi High Court Case No. 63 of 2017, Kennedy Wainaina Ngenga v County Government of Nairobi, now outstanding at Kshs 80,088, 936. 30, which was performed partially by the respondent, who paid Kshs 36,000,000/= but has since defaulted. Additionally, the decree of the court has not been stayed. In its ruling dated 7th June 2019 the High Court while dismissing the applicant's application for garnishee of the respondent's bank accounts stated that the applicant was at liberty to pursue the execution of the decree in the laid down proper and legal process.

3. Furthermore, the applicant served the respondent with the necessary certificates to pay within 7 days, but the respondent in gross contempt of the decree and orders neglected to pay, hence this application. For each month the decree remains unsatisfied, tax payers are forced to incur additional expense of Kshs 540,000/=as interest on the decree. And that the order of madamus is sought to compel the respondent to perform his public duty under section 148 of the Public Finance Act No. 18 of 2012. It is in the interests of justice that the reliefs sought be granted to protect the public interest and the fundamental rights of the applicant.

4. The applicant has replicated in the verifying affidavit the same matters that are set out in the statement of fact and for that reason it is unnecessary to reproduce them here.

5. The applicant has denied in his further affidavit that he siphoned the monies of the respondent. Additionally, he has also denied the allegations made against him.

Submissions of the *ex parte* applicant

6. The *ex parte* applicant filed written submissions in support of his application for an order of mandamus. He cited the famous case of **Shah**

v Attorney General (No 3) [1970] EA 543 in which the Uganda high court issued an order of mandamus as being the appropriate order to enforce a monetary decree against the respondent government. He also cited a number of local authorities among them, ***Republic v Town Clerk, Kisumu Municipality, ex parte East African Engineering Consultants [2007] 2 EA 441***, in which the court held that mandamus is an order that will be granted if the duty is in the nature a public duty and where it affects the rights of an individual, provided there is no more appropriate remedy

The case for the respondent

7. In his replying affidavit the respondent through its chief finance officer (Halkano Waqo) has filed a 41 paragraphs replying affidavit in opposition to the application. The major averments in that affidavit are as follows. He has averred that he has read and understood the judicial review proceedings and the application together with the supporting affidavit of Kennedy Wainaina Ngenga. He has deposed to the following major matters. The decree sought to be executed is *res judicata* and is *sub-judice* as a motion has been filed in the High Court at Nairobi being HCC No. 63 of 2017 to set aside the said decree. Additionally, he has averred that the decree is also a sham. The instant judicial review application for an order of mandamus constitutes an abuse of the court process for there is in existence an order of stay of execution in HCC 63 of 2017 as between the applicant and the respondent. That the certificates issued and the process of execution sought pursuant to the said suit are a violation of the said stay orders. The application to set aside the decree is fixed for hearing on 17th October 2019.

8. Furthermore, the applicant failed to make a material disclosure to the court that the said order of stay of execution barred any execution process until the application of the Nairobi City County Government dated 9th May 2018 is heard and determined. The deponent has further averred that no taxation process has issued against the Nairobi County Government. He has also averred that the judicial review application for an order of mandamus constitute gross abuse of the court process as it is barred by section 34 (1) of the Civil Procedure Act.

9. Apart from the foregoing, the deponent has averred that the law governing the execution process against the Government is set out in Order 29 Rule 2 (2) of the Civil Procedure Rules of 2010. He also has averred that what has been paid to the applicant by the previous County Government of Nairobi was part of a scheme to siphon off monies through the Legal Department and virtually all employees of the respondent who were involved have been charged in court or dismissed. The deponent is aware that the exercise of verification of the debts properly due to debtors of the respondent led by Prof. PLO Lumumba was finalized and the report handed over to the respondent. That report established that the claim by the applicant was established as not being valid and that all monies advanced by the previous Government of the City County to the ex parte applicant (plaintiff in HCC 63 of 2017) will be recovered.

SUBMISSIONS OF THE RESPONDENT

10. The respondent has not filed any written submissions.

11. I have considered the affidavit evidence of the parties. I have also considered the written submissions and the many authorities cited by counsel for the *ex parte* applicant. As a result, I find the following to be the issues for determination.

1. Whether or not it is proper for me to determine the inter parties' application in respect of the application for an order of mandamus, when there is in existence an application to set aside the judgement and decree pending before Hon. Lady Justice Muigai, which is sought to be enforced vide the order of mandamus, that is the subject of this application.

2. Whether or not this matter should be heard and determined before the same matter that is pending before Hon. Lady Justice Muigai is heard and determined

3. Who bears the costs of this application?

ISSUE No 1

12. The respondent has raised weighty issues of law such as that this matter is *res judicata* and is *sub-judice*, since the main suit is before Hon. Lady Justice Muigai, where it is pending for hearing and determination in respect of the application for the setting aside of the same judgement and decree that is sought to be enforced. I find that the rule of prudence requires that the two applications should be heard and determined by one judge of the High Court to avoid a multiplicity of suits and the issuance of conflicting orders. It is Hon. Justice Mativo, who is better placed to decided that issue, since I am outside Nairobi and is the one who granted the *ex parte* leave to the *ex parte* applicant to file for an order of mandamus.

ISSUE No 2

13. This issue is to be determined by Hon. Justice Mativo, who granted the *ex parte* leave to the *ex parte* applicant to file for an order of mandamus. He is still properly seized with jurisdiction to hear and determine the substantive motion in respect of the application for an order of mandamus.

14. It should always be borne in mind that every High Court Judge is a judge of every division of the High Court including the commercial, judicial review, constitutional and human rights division. The divisions are administrative units for efficient delivery of justice.

ISSUE No. 3

15. Costs of this application should be cost in cause.

16. This application should be urgently placed before Hon. Justice Mativo for further directions

Ruling signed and dated at Narok this 11th day of November 2019.

J. M. Bwonwong'a

Judge

and,

Ruling signed, dated and delivered in open court at Nairobi this 15th day of November 2019

in the presence of Collins holding brief for Mokere for the applicant and Mr. Kinyango for respondent.

J. M. Mativo

Judge

15/11/2019