



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISCELLANEOUS APPLICATION NO. 335 OF 2018

REPUBLIC.....APPLICANT

AND

THE COUNTY GOVERNMENT OF MANDERA.....1ST RESPONDENT

THE COUNTY SECRETARY, COUNTY GOVERNMENT OF MANDERA.2ND RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER IN CHARGE OF FINANCE/

COUNTY TREASURER, COUNTY GOVERNMENT OF MANDERA.....3RD RESPONDENT

ATTORNEY GENERAL.....4THRESPONDENT

AND

EXPORT-HYDRO PUMP AND SERVICES (AFRICA) LIMITED.....EX PARTE APPLICANT

RULING

1. The *ex parte* applicant moved this Court by way of Notice of Motion dated 12th November 2018 seeking the following orders:-

a) An order of Mandamus to compel the County Secretary and County Executive Committee Member in Charge of Finance/ County Treasurer, County Government of Mandera to comply by paying to the applicant within seven (7) days the sum of Ksh.15,168,876/= being the decretal sum and accrued interest up to 22nd May 2018 in respect of civil suit number 7867 of 2016-Export Hydro-Pump & Services (Africa) Ltd v County Government of Mandera.

b) An order of Mandamus to compel the County Secretary and County Executive Committee Member in charge of Finance/County Treasurer, County Government of Madera to pay the applicant further interest on the said sum of Ksh. 15,168,876/= at the rate of 12% p.a from 22nd May 20178 until payment in full.

c) That the costs of this application be provided for.

2. The core ground in support of the application is that the *ex parte* applicant obtained a judgment in its favour in civil Suit No. 7867 of 2016. It states that it served the Respondents with a copy of the decree and Certificate of Order against the government, but the Respondents refused to pay.

3. Azal Rashid Yarrow, the legal counsel of County Government of Mandera swore the Replying Affidavit dated 17th September 2019. The substance of his averments is that the Respondent paid part of the money prior to filing the suit in the lower court and, that the Respondent is currently undertaking a reconciliation exercise to confirm if any invoices are outstanding. He also averred that under section 21 of the Government Proceedings Act,[\[1\]](#) the Respondent is obliged to pay the sums contained in the Certificate of Order against the Government.

Determination

4. The applicant's counsel relied on the grounds on the face of the application, the statutory statement, the verifying affidavit annexed to the application seeking leave and the affidavit in support of the application.

5. The Respondent's counsel relied on the Replying Affidavit of Anzal Rashid Yarrow referred to above.

8. I find that only one issue falls for determination, namely:- *Whether the ex parte applicant has established grounds for this court to grant the orders of Mandamus.*

7. It is convenient to remind ourselves about some elementary principles about the writ of *Mandamus*. *First*, it issues 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.^[2] *Second*, it is a judicial command requiring the performance of a specified duty which has **not been** performed. *Third*, originally a common law writ, *Mandamus* has been used by courts to review administrative action.^[3] *Fourth*, *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**.^[4]

8. *Fifth*, *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.

9. *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)*.^[5] It was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*.^[6] 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.*

10. The first test for *Mandamus* to issue is the existence of a public legal duty to act. There is no doubt that there is an unsatisfied court decree. The Certificate of Order against the Government was served as the law demands. The argument that part of the money was paid prior to filing of the suit is attractive. But such an argument ought to have been raised in the trial court. Alternatively, the Respondent ought to apply to review or vary the decree in the lower court. Simply put, the said argument is of no value as a defense to the application before me.

11. It is not disputed that a Certificate of Order against the Government was served upon the Respondents as required. The Replying Affidavit seems to send mixed signals by stating that only the amount in the Certificate is payable, not the interest, suggesting the Respondents are only disputing interests. There is a legal duty to pay the said sum. Additionally, there is a clear right to the performance of that duty. The *ex parte* applicant has no other way of enforcing the decree.

12. The constitutionally guaranteed access to justice would be seriously impinged if successful litigants were to be deprived the fruits of their judgments. Such a scenario has the unpleasant potential of rendering litigation worthless which would be an affront to the Rule of Law, one of the values enshrined in Article 10 of the Constitution.

13. It is not disputed that there was demand for payment. On record are letters dated 5th June 2018 and 15th January 2018 asking for payment, hence, there has been a reasonable time to comply with the demand. It is correct to state that there has been an outright refusal, express refusal or an implied refusal to pay through unreasonable delay.

14. It is also a requirement that no other adequate remedy is available to the applicant. Indeed, in the circumstances of this case, there is no other adequate remedy. The *ex parte* applicant cannot execute the decree against the Respondents. Further, it is a requirement that the Order sought must be of some practical value or effect. The practical value of the order sought cannot be gainsaid. As stated above, there is no other effective remedy available to the *ex parte* applicant. Further, I find no equitable bar to the relief(s) sought, and lastly, on a balance of

convenience, *Mandamus* should lie.

15. Applying the above tests to the facts and circumstances of this case, I find and hold that the *ex parte* applicant has satisfied the above conditions. It follows that there is a basis for the court to grant the order of *Mandamus* sought in this application compelling the Respondents to pay the principal sum plus interests as more particularly set out in the Certificate of Order Against the Government dated 22nd May 2018.

16. Accordingly, in view of my conclusions and/or findings herein above, I allow the application dated 12th December 2018 and order as follows:-

a. An order of Mandamus be and is hereby issued directed against The County Secretary, County Government of Mandera, the County Executive Committee Member in Charge of Finance/County Treasurer, County Government of Mandera compelling them jointly and severally to pay the ex parte applicant Ksh. 15,168,876/= as set out in the Certificate of Order Against the Government dated 22nd May 2018 in respect of the decretal sum in CMCC No. 7867 of 2016.

b. That the Respondents do pay the ex parte applicant the costs of this application.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 15th day of November 2019

John M. Mativo

Judge

[1] Cap 40, Laws of Kenya.

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

[3] 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.

[4] *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. II. 19, 25-26 (1964).

[5] [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.

[6] [2003 FCT 211 \(CanLII\)](#), [2003] 4 F.C. 189 (T.D.), aff'd [2003 FCA 233 \(CanLII\)](#), 2003 FCA 233).