



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW & CONSTITUTIONAL DIVISION

MISCELLANEOUS APPLICATION NO. 89 OF 2019

REPUBLIC.....APPLICANT

=VERSUS=

NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF EXECUTIVE OFFICER

NATIONAL LAND COMMISSION.....2ND RESPONDENT

DIRECTOR FINANCE & ADMINISTRATION.....3RD RESPONDENT

CABIN CREW INVESTMENTS LIMITED.....EX-PARTE APPLICANT

JUDGMENT

1. By a Notice of Motion dated 15/4/2019, and amended on 18/4/19, upon leave of court granted on 28/3/19, the ex parte applicant seeks specific Judicial Review orders as follows:

“NOTICE OF MOTION

1. Mandamus to compel the 1st Respondent acting through its officials the 2nd and 3rd Respondent herein to pay to the Applicant the sum of KSHS.15,318,050.00/- ordered by the Deputy Registrar, High Court on 02/02/2018 and emanating from a Ruling dated 19/12/2017 and the Judgment award by Hon. R. E. Aburili on 23/03/2017 in Judicial Review Case No. 363 of 2014, Cabin Crew Investments Limited –v- The National Lands Commission and 3 Ors.

2. In default of payment of Kshs.15,318,050/- by the 1st Respondent, the Applicant be at liberty to execute against the property of the 1st Respondent and the personal assets and person of the 2nd and 3rd Respondents.

3. Costs of this application be provided for.”

2. In its Statutory Statement dated 14/2/19, accompanying the application for leave, the ex parte applicant sets out his cause of action as follows:

“THE GROUNDS

1. The Deputy Registrar of the High Court’s Judicial Review Division taxed the Party and Party Bill of Costs dated 04/06/2017 between the Applicant and the 1st Respondent on 19/12/2017 and awarded costs of Kshs.15,318,050/- to the Applicant.

2. The Deputy Registrar’s decision is contained in the Certificate of Taxation dated 02/02/2018.

3. The 1st Respondent National Land Commission has failed, refused and/or neglected to perform its statutory and public duty by failing to comply with the Court’s orders dated 02/02/2018.

4. The Applicant has moved to Court severally over the issue in attempts to extract a decree against the 1st Respondent to no avail.

5. The Applicant has made several demands to the 1st Respondent through its authorized officers namely, the 2nd and 3rd Respondents herein who have failed to perform their statutory and public obligations towards the Applicant by failing, refusing and/or openly neglecting to pay the costs that were awarded to the Applicant by this Honourable Court.

6. The taxation award was pursuant to the Judgment award for costs forming part of JR. No. 363 of 2014, Cabin Crew Investments – vs- The National Lands Commission and 3 Ors delivered on 23/03/2017.

7. Unless the prayers Mandamus order is granted, the Applicant is bound to suffer loss of the rightful fruits of its Judgment through the Respondents' actions/inaction.

3. The Respondents filed a Replying Affidavit sworn by their Ag. Director of Legal Affairs and Enforcement on 3/9/19 and set out their opposition to the application, principally at paragraph 7-17, as follows:

“RESPONDENTS’ REPLYING AFFIDAVIT

7. **THAT** subsequently, the Ex-parte Applicant herein moved Court vided **J.R 363 of 2014 Cabin Crew Investments Ltd – V- NLC & 4 Others** seeking to challenge the decision of the Respondent to revoke its title. This suit was subsequently heard together with **JR 298 OF 2014, Robert Mutiso Leli –V- NLC & 3 Others** as the two suits were related.

8. **THAT** judgment was rendered by the Hon. Justice Aburili on 23rd March 2017 wherein the Court held in favour of the Ex-parte Applicants and quashed the decision of the Respondent. The Court also awarded both Ex-parte applicants in J.R 363 of 2014 and JR 298 OF 2014 costs of the suit which were to be taxed separately.

9. **THAT** the Ex-parte Applicant in **JR 298 of 2014, Robert Mutiso Leli V- NLC & 3 Others** duly filed a notice of taxation dated 12th April 2017. This was subsequently taxed off by the taxing master at Kshs.1,239,095/= vide ruling delivered by the Hon. S. Mwayuli on 2nd November 2019.

10. **THAT** the Ex-parte Applicant herein subsequently filed their notice of taxation which in JR 363 of 2014, Cabin Crew Investments –V- National Land Commission which the respondent herein duly filed their submissions in response thereto.

11. **THAT parties subsequently appeared before the taxing master who then reserved the 19th of December 2017 for date of her ruling on the Ex-parte Applicant’s notice of taxation.**

12. **THAT on 19th December 2017, I am informed by Counsel on record, information which I verily believe to be true, that the matter was not listed on the Deputy Registrar’s Causelist of the day and neither was the ruling delivered on that day.**

13. **THAT to the Respondent’s surprise, in March 2018, the Ex-parte Applicant herein served upon the Respondent with a certificate of cost flowing from the ruling of the taxing master on the Ex-parte Applicant’s bill of costs.**

14. **THAT I am informed by Counsel on record, information that I verily believe to be true, that the ruling of the taxing master was not delivered on 19th December 2017 but on an earlier date. The taxing master did not issue a notice of ruling to the Respondent to show that the judgment would be delivered on a different date.**

15. **THAT on account of the above, the Respondent could not comply with the Regulation 11 (2) of the Advocates Remuneration Order which grants an intended objector 14 days within which to object the decision of the taxing master.**

16. **THAT the award of issued by the taxing master and which the Ex-parte Applicant intends to compel the Respondents to pay is highly exorbitant and in lieu of the above circumstances, the 1st Respondent is taking reasonable steps towards challenging the said award.**

17. **THAT the 3rd Respondent is not the accounting officer and the order of Mandamus cannot issue as against it.”**

4. Counsel for the parties then filed respective written submissions dated 1/8/19 and 4/9/19, and judgment was reserved.

Issues

5. The issues for determination in this Judicial Review application is whether the order of Mandamus is available in the circumstances of the case. Prayer no. 2 (b) of the Notice of Motion which exactly corresponds with prayer no. 2 (b) of the Chamber Summons for leave dated 14/2/2019 is not available as the court on grant of leave determined that it was premature as follows:

“Leave is granted in terms of prayer 2 (b) of the Chamber Summons is denied as the same is premature since the Respondent’s duty to pay has not been established”.

Without leave of court, this prayer in 2 (b) of the Chamber Summons could not be made.

Scope of an order of Mandamus

6. I respectfully agree with the Court of Appeal decision in **Kenya National Examination Council v. Republic Ex P. Geoffrey Gathigi Ngige & 9 Ors. (1997)** eKLR cited by the ex parte applicant herein on the scope of Mandamus as follows:

“What is the scope and efficacy of an ORDER OF MANDAMUS” Once again we turn to HALSBURY’S LAW OF ENGLAND, 4th 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 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.”

7. Is there a public duty to pay the taxed costs the subject of the claim herein? The ex parte applicant asserts the right of the successful party to the fruits of the judgment relying on the decision of Majanja, J. in **R v. Town Clerk of Webuye County Council & Anor.(2014)** eKLR as follows:

*16. The Court cannot grant orders incapable of enforcement as the Town Council and its Town Clerk no longer exist (See **Republic Vs Minister for Lands & 2 Others ex-parte Kimeo Stores Limited [2011]** eKLR, **Kenya National Examination Council vs. Republic ex-parte Geoffrey Gathenji Njoroge & 9 others CA Civil Appeal No. 266 of 1996**). On the other hand, a decree holder’s right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario, the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized under **Article 159 (2) (a) and (b)** and the applicant’s right of access to justice protected under Article 48 of the Constitution.*

8. In his submissions, Counsel for the Respondent urges the discretionary nature of judicial review orders, citing **R v. Director of Immigration Services & 2 others ex parte Olamilekan Gbenga Fasunyi & 2 Ors. (2018)** eKLR per Mativo, J and contends that:

“RESPONDENTS’ SUBMISSION

10. To the present facts of the matter, the decision of the taxing master upon which the Ex-parte Applicant seeks to enforce was not delivered in a manner that afforded the Respondent reasonable opportunity to challenge the said decision.

11. This was because the ruling of the taxing master was delivered on a date earlier than the date the ruling was set for delivery and no prior notice was given to the Respondent.

12. We humbly urge the Court to exercise its discretion and decline to issue the writs of Mandamus, as sought in the amended notice of motion application so as to allow the Respondent reasonable opportunity to challenge the said ruling.

13. We humbly submit that the discretionary nature of the Judicial Review remedies sought in this application means that even if a Court finds a public body has acted wrongly, it does not have to grant any remedy.”

9. It must be pointed out here that the grievance of the respondents on the want of notice of delivery of ruling on costs thereby denying them “reasonable opportunity to challenge the said decision” of the taxing master is a matter for redress elsewhere. For as long as the judgment debt on taxation of costs is established, the same remains enforceable until or unless it is set aside in accordance with the law.

10. The question before the court, therefore, remains whether the obligation to pay the taxed costs has been established in accordance with the law so as to justify an order of Mandamus.

Whether duty to pay has been established

11. The application presents a dilemma for the ex parte applicant whether the Respondent is a **Government Department** within the Section 21 of the Government Proceedings Act which sets out an elaborate procedure for the enforcement of orders against the government. If the Respondent is a **Government Department**, then the ex parte applicant must comply with the procedure under section 21 of the Government Proceedings Act and this application for Mandamus will be **premature**.

12. In his Verifying Affidavit, the ex parte applicant has only made demand for payment of costs as follows:

“paragraph 7 Verifying Affidavit

That the Applicant has through its advocate made several demands to the 1st Respondent through its authorized offices namely, the 2nd and 3rd Respondents herein who have failed to perform their statutory and public obligation towards the applicant by failing,

refusing and /or openly neglecting to pay the costs that were awarded to the applicant by this honourable court. Attached herein and marked "K00-5" is a copy of a Demand letter dated 17/05/2018 received by the 1st Respondent in the matter".

13. The procedure for the satisfaction of orders against the Government is set out in section 21 of the Government Proceedings Act as follows:

21. Satisfaction of orders against the Government

(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 herein after 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.

(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party."

The ex parte applicant has not demonstrated compliance with the elaborate procedure of Section 21 of the Government Proceedings Act Cap 40.

14. If the 1st Respondent is not Government department for purposes of section 21 of the Government Proceedings Act, then the ex parte applicant must point to a provision of statute or the Constitutional provision establishing the 1st Respondent imposing a **statutory duty to satisfy a decree of court by the 1st Respondent and its officers**. True, the decree holder is entitled to the fruits of his judgment, as observed by Majanja, J in the **Webuye County Council** case (supra). But what is in issue here is the method of enforcement of the fruits by the public law remedy of Mandamus. If the ex parte applicant cannot point to a statutory duty, as here, his remedy must be confined to the private law remedies of execution.

15. The National Land Commission is established under Article 67 of the Constitution and its primary function under Article 67 (2) (a) is "to manage public land on behalf of the national and county government". I respectfully consider that it is a government department for purposes of section 21 of the Government Proceedings Act because of its public element of management of public land on behalf of the two government levels, and the transfer of rights, assets, liabilities, obligations and even staff for the Ministry of Lands under sections 23, 31 and 32 of the Act.

16. It is not for the Judicial Review court to look backward to see whether the order of the court, if it is properly certified and processed in accordance with section 21 of the Government Proceedings Act, was regularly obtained or the procedure in arriving at the decision afforded the Respondent opportunity or time to challenge the order as urged by the Respondents. Had the costs claimed been properly certified and processed in accordance with section 21 of the Government Proceedings Act, this court could not have hesitated to grant the Judicial Review order of Mandamus to enforce the statutory duty to satisfy government judgment debt under section 21 (3) of the Act.

Orders

17. However, on the facts of this case, the duty to pay has not crystalized and the prayer for Mandamus must be declined as premature.

18. There shall be no order as to costs.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 7TH DAY OF NOVEMBER 2019.

J.M. MATIVO

JUDGE

Appearances:

M/S Ondieki Orangi & Associates for Ex-parte Applicant.

M/S Wahome Murakaru, Advocate for the Respondents.