REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

J.R.MISC. NO. 14B OF 2016

IN THE MATTER OF AN APPLICATION BY GABRIEL GATHIGO MARIGI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF MANDAMUS

AND

IN THE MATTER OF SATISFACTION OF A DECREE IN MACHAKOS CMCC NO. 736 OF 2011

AND

IN THE MATTER OF CONSTITUTION ARTICLES 47 (1), 159 (2) AND 176 (1) AND 533 OF THE CONSITITUTION SECTION 58 AND 59 OF THE URBAN CITIES ACT 2011 AND SECTION 5, 6 AND 30 OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

AND

REPUBLIC.....APPLICANT

VERSUS

GABRIEL GACHIGO MARIGI .....EX PARTE

THE GOVERNOR KAJIADO COUNTY.....RESPONDENT

JUDGEMENT

The ex-parte applicant Gabriel Gathigo Marigi filed a notice of motion dated 6/10/16 which he sought to compel the Governor of Kajiado County through an order of mandamus to immediately cause to be paid to him the sum of Kshs1. 554,005 being the decretal amount plus uses costs with interest from a decree issued in the judgment in Machakos CMCC No. 736 of 2011. The notice of motion is stated to be brought pursuant to Article 47(1) 159(2) and 176(1) and 33 of the sixth schedule of the constitution, Section 58 and 59 of the Urban Centers Act 2011 and Section 5, 6 and 30 of the County Government Act No. 17 of 2011.

Historical Background

A brief summary of the facts in the case below provides as follows. The ex-parte applicant had been allocated some property reference plot NO. 1010/RES-ILBISSIL Trading Centre by the predecessor of the 1st respondent namely County Council of Ole Kajiado. Pursuant to the letter of allotment the ex-parte applicant moved to put up a fence, water reservoir tank, dug a pit latrine and ferried other construction materials in readiness to develop the property.

In June 2011 the 2nd respondent without the ex-parte applicant permission, consent and or authority hired a group of village elders and came with an earth wire to the suit property and did an extensive damage to the fence, the water reservoir tank, as well as the construction materials on the suit property. As a result of the 2nd respondent the ex-parte applicant suffered loss and damage. Subsequently the ex-parte applicant filed a claim in court compelling the respondents to pay special damages quantified at Kshs. 956,000 in CMCC 736 of 2011 at Machakos. The ex-parte applicant deposes that he served the suit papers upon the respondents but they opted not to enter appearance or defend the claim.

That upon the delivery of judgment in CMCC Machakos No. 736 of 2011, the decree and certificate of costs was served upon the 1st respondent who has to date refused to settle the judgement. The ex-parte applicant sought a declaration from this court for an order of

mandamus to compel the 1st respondent to pay the decretal amount.

At the hearing of the judicial review before this court the 1st respondent filed a replying affidavit dated 14th July, 2017 in which they deposed that the claim is not tenable as prayed by the applicant due to the following reasons:

First, the Judgement in question is a product of an ex-parte hearing where they were never given an opportunity to defend the suit. **Secondly**, the alleged affidavit of service relied upon by the ex-parte applicant to obtain judgment is contested. **Thirdly**, the 2nd respondent is sued in his private capacity and the terms of his entailment with the 1st respondent were not established by the trial court. **Fourthly**, that from the evidence on record before the trial court besides the receipts produced to support the claim nothing is available to go by regarding destruction of property on the suit land.

The respondent deposed that the orders sought by the applicant cannot issue on the fact of clear facts and evidence that the decree is based on an ex-parte judgement which is considered void abinitio.

Submissions by the ex-parte applicant

It was the submissions by Mr. Macharia for the ex-parte applicant that it is not disposed that a valid judgement in CMCC 736 of 2011 awarding Kshs. 956,000 plus costs and interests against the predecessor of the respondent remains due and owing to the applicant.

According to Mr. Macharia despite various demand notices served upon the respondent there has been no elaborate response as to the settlement of the claim. Mr. Macharia further contended that contrary to the submissions by the respondent and also in the affidavit of Kennedy Ole Kerei the judgement on record was properly obtained upon the defendants – county council of Olekejuado failing to enter appearance or file any defence to the claim. Mr. Macharia argued and submitted that no appeal nor review has been filed by the respondent to challenge the validity of the judgment upon which this judicial review petition is based.

According to Mr. Macharia, it is trite law that the right for an exparte applicant to pursue any remedy of this nature against the government to realize the judgement can only be through an order of mandamus. For this proposition learned counsel relied on the following decisions:

Republic v The Attorny General & Another Exparte James Alfred Kiroso JR No. 44 of 2012, Republic v Town Clerk of Kisumu Municipality Exparte East African Engineering Consultants 2007 2 EAA 441, Republic v Minister of State for Provincial Administration and Internal Security Ex-parte, Fredrick Manoa Esipisu Egunza 2012 eKLR

Submissions by the respondent

Mr. Kaikai on the other hand submitted that the order of mandamus is not available on this petition due to the evidence in the replying affidavit that the decree is based on an exparte judgement. Further Mr. Kaikai argued and submitted that when the respondent learnt of entry of judgment in CMCC 736 of 2011 at Machakos all efforts were made to trace the file to appraise themselves of the proceedings but the same did not bear fruits.

According to Mr Kakai the prayer of mandamus raises the question as to the legality and regularity of the judgement before the trial court obtained without the respondent given an opportunity to be heard. The respondent counsel reiterated in his submissions that they still reserve a right to apply at an opportune time to challenge the exparte judgement giving rise to the decree and certificate of costs in favour of the applicant. Learned counsel to buttress his arguments and submissions relied and cited the legal Principles in the following cases: ***Newton Gikaru Githendu & Another v. A.G/Public Trustee Nairobi JR No. 472 of 2014, the Republic v Director General of East African Railways Corporation Ex parte Kaggwa 1997 KLR 194.***

In Mr. Kakai's opinion and contention the exparte applicant cannot purport to enforce an exparte judgement obtained without participation of the respondent. According to learned counsel the respondent has demonstrated the reasons for his failure not to comply with the decree issued by the trial court.

Analysis and resolution

The gist of this judicial review petition is whether viewed through the lens of the exparte application a case on the merits exist for this court to grant a writ of mandamus. The decision of ***Republic v. Director General of East African Railways co-operation exparte Kaggwa*** is significant on the scope of an order of mandamus.

As was further stated by My brother Odunga, J. in the case of ***Republic v. Commissioner of Land and Another exparte, Kithinji Murugu Magere Narobi HCC No. 395 of 2012*** citing with approval the ambit on the law with regard to the order on mandamus had this to say in the following passage:

> **"Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of duty, it issues from the Queens's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain case when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ or course nor or right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person of authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an**

imperative nature"

The above cited cases do demonstrate that for mandamus relief to be issued it requires the applicant to satisfy the court that there has been an abuse of discretion of legal duty imposed by law. Secondly, the public office has unreasonably neglected to perform that public duty and thirdly there is inadequate remedy to redress the violation or infringement of a right. I know of no power besides the weapon of judicial review that the constitution confers upon the High Court jurisdiction by which a citizen can challenge the validity of the decision of an inferior tribunal, body, authority or court.

What then are the grounds for this court to consider in determining the instant application? In Tanzania the scheme relating to prerogative writs of prohibition, certiorari and mandamus is very much similar to that obtaining in Kenya. For instance in the persuasive authority in the case of ***Alfred Lakaru v Town Director 1980 TLR 326*** the court set out the following conditions to be met for a successful party to be granted the order of mandamus to be:

> **1. The applicant must have demanded performance and the respondents must have refused to perform. (2)The respondents as public officers must have a public duty to perform imposed on them by statute or any other law but it should not be a duty** ***owed solely to the state but should be a duty owed as well to the individual citizen. (3)The public duty imposed should be of an imperative nature and not a discretionary one. (4)The applicant must have a locus standi that is, he must have sufficient interest in the matter he is applying for there should be no other appropriate remedy available. In other words the judicial review court has to consider the order and or proceedings by the administrative body or the court below upon which the prerogative orders sought are directed at as being wrong in this respect.***

The circumstances under which judicial review orders are granted can be founded in the following dictum by the court of Appeal of Tanzania ***Sanai Murumbe & Another v Muhere Chacha 1990 TLR 54*** where the court stated as follows: "***The high court is entitled to investigate the proceedings of a lower court or tribunal or a public authority on any of the following grounds apparent on the record***. **One, that the subordinate court or tribunal or public authority has taken into account matters which it ought not to have taken into account. Two, that the court or tribunal or public authority has not taken into account matters which it ought to have taken into account that lack or excess of jurisdiction by the lower court. Three, that the conclusion arrived at it so unreasonable that no reasonable authority could ever come to it. Four, rules of natural justice have been violated. Five, illegality of procedure or decision.**

I have no doubt that the above decision correctly reflect the law as it is in Kenya in relation to the judge's decision to any judicial review proceedings – indeed it is apparent to me that an order of mandamus may issue where the applicant satisfies the threshold test that exceptional and compelling circumstances exist to warrant the exercise of discretion for the order to be granted.

When dealing with similar situations in Kenya the court in the case of *Kenya National Examination s Council vs Republic Ex-parte Geoffrey Gathenji Njoroge & Others Civil* Appeal No. 266 of 1996 [1997] eKLR the court held "***The order of mandamus is of 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 or 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. The order must command no more than the party against whom the application 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 - These principles mean that an order of mandamus compel the performance of public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal a right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done – only an order or certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons"***

I do not think that the dictum in (**Sanai and KNEC)** cases cited above lays down any formal bounds of restrictions as to what circumstances the scope and breadth for grounds on grant of prerogative orders. In my view the jurisdiction and exercise of discretion solely depend on the peculiar facts of each case but within the defined parameters.

In the instant case I pause the question whether the applicant has sufficiently brought himself within the ambit of an order of mandamus to be issued?

Given the vital importance of both National and County Government the law has recognized the provisions under the government proceedings Act which sets inter-alia execution and enforcement of civil judgment against the government. The framers of the law determined and prohibited efforts by the judgment debtor to proclaim and attach assets of any one branch of government. Although the government is considered a debtor like any other party to civil suit it prohibits attachment or sale of its properties and assets to satisfy the decree. The legal position is quite clear as deduced from the diction in the case of ***Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security & Another Exparte Fredrick Manoa Egunza 2012 eKLR.***

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 on 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. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues"

As regards the vital question as to whether the government is liable to satisfy the judgment and decree used by a competent court, I answer that in the affirmative. Notwithstanding this the proper mechanism provided to enforce the decree in default of payment is by way of an order or by way of an order of mandamus. These are the principles I will apply in the proceedings and application before me seeking the relief of mandamus:

The instant case from the pleadings and submissions by both counsels is very much borderline case. Having regard to the evidence and to the incidence of this judicial review, the burden of proof in cases of this nature lies with the ex-parte applicant to exhibit that he has merited discretion of this court. From the prospective of the ex-parte applicant he has a valid judgment totaling to a sum of Ksh. 1,306,760 plus costs and interest which has remained outstanding since 2014 against the respondent. The applicant's case against the respondent is that despite demand notice to the respondent to satisfy the decretal amount he has continued to ignore the notice to the detriment and injustice to the ex-parte applicant.

It cannot be denied by either side to this proceedings that the subject matter is the judgement of the court in CMCC 734 of 2011. In their long affidavit in defence of the application, the respondent has pointed out that he was neither a party to the proceedings at Machakos court nor has he been given an opportunity to show cause why the judgement remains unpaid. Thus the respondent submitted that the bonfides of the applicant's claims in this respect remains seriously in question.

An examination of the lower court record shows that Seki Ole Salaone was the one who trespassed into the suit land of the ex-parte applicant and damaged the property. What is not clear from the judgement of the learned trial magistrate is whether he did so as a servant of Olekejuado county council or in the scope outside his employment. It is unfortunate that the defendants were not party to the proceedings in the court below despite the alleged service of sermons. They could have told the court precisely who was liable for the acts of trespass, damage and consequential loss occasioned against the ex-parte applicant in this case. In the respondent view the only basis for advancing such a right of mandamus is on a judgement procedurally obtained by the ex-parte applicant. In the language of Mr. Kaikai for the respondent there is no evidence that the person mentioned in the affidavit of service was an employee of the respondent and in receiving service he acted in the course of his employment.

In my view the applicant seems to have a well-founded case against the respondent. The broad approach I take of this matter is the requirement of natural justice that the respondent counsel has raised in respect to the proceedings before the trial court. It is not in dispute that the judgement in CMCC 736 of 2014 was obtained ex-parte. This court is not in a position to interrogate the merits of the impugned judgment at this state whereas the ex-parte applicant may be in possession of a valid judgement. The respondent who was not a party in the lower court case should be given a fair opportunity or put forward an explanation on the claim by the applicant. It may be that the respondent has no genuine grounds to attack the ex-parte judgement but in my opinion the principle of natural justice that a fair opportunity must be given to him to contradict or affirm any statement of claim in the suit. Since the respondent do not sufficiently know what was the case against him at the trial court he cannot be compelled to settle a decree whose source is being disputed. For my part I agree with the submissions by Mr. Kaikai for the respondent which are consistent with the rules of natural justice as stated in the case of ***Megary J. in John Vees 1970 Ch 345, 402*** as follows:

> ***"It may be that there are some who would decry the importance which the courts attach to the observance of the rule of natural justice. When something is obvious, they may say, why force everybody, to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard. The result is obvious from the start. Those who take this view do not think, do themselves justice.***
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> ***As everybody who has anything to do with the law well knows, the path of the law is shown with examples of open and suit cases which, somehow will not of unanswered charges which in the event were completely an answered, of inexplicable conduct which was fully explained, of fixed and unutterable determinations that by decision, suffered a change, nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events"***

In the instant case for reasons of substantive justice it may be necessary for the respondent to be granted leave to file pleadings challenging the ex-parte judgement in this judicial review petition. Secondly, it is common ground that the hearing of the plaint had commenced in the chief magistrate's court pursuant legal interest claimed by the ex-parte applicant in property land referenced as Plot No. 1010/RIS/Ilbissil Trading center. It common knowledge that the allotment letter is approved and issued with the consent of Olekejuado county council the predecessor of the current corporate entity county government of Kajiado.

In a case like this one I will not usurp the jurisdiction of the trial court but I have no hesitation to express a pure question of law as it relates to title to land in Kenya. I refer to the following cases ***Joseph Ole Ngok v Justice Moijo Ole Keiwa civil appeal no. 60 of 1998*** where the court held as follows: "***It is trite that such title to land and property can only come into existence after issuance of letter of allotment meeting of conditions stated in such letter and actual issuance thereafter of title document pursuant to the provisions in the Act under which the property is held"***

I would only add that in my view, letters of allotment perse as understood in law does not confer right of title or interest to land. What is more it initiates the process of acquisition of the suit property subject to fulfilment of such conditions expressed or implied in the letter. The question as to the validity of the allotment letter was therefore obviously being contemplated to be determined in CMCC 734 of 2014. From the stated point of the plaintiff in the court below and ex-parte applicant before me. The nature of interest held has to be appropriately determined before award of damages. It boils down to the lower conferred rights in the letter of allotment as defined between the plaintiff and the defendant to warrant assessment of damages.

It is obvious to me that the respondent who was not a party to the lower court case in essence requires to be given an opportunity to ventilate his defence to the dispute. The court has considered the applicants concerns and those of the respondent on the writ of review for an order of mandamus in light of the above cited cases. This order of mandamus to compel the respondent satisfy the decree is capricious in view of the fact he was not a party to the underlying civil claim in the magistrate court. Secondly, the applicant asserts his right on a decree in respect of the suit land plot No. 1010/Ris/Ilibissil Trading Centre subject matter of trespass and award of damages for destruction of construction materials. It is not in dispute that the respondent was not a party to the initial proceedings. He has been sued in his official capacity as the Governor of Kajiado County.

As stated above the power to the court to issue an order of mandamus must establish that the applicant has a legal right to the relief sought.

Secondly, a clear legal duty to perform on the part of the respondent to perform as requested but continues to ignore or decline the request. Thirdly, there is lack of an adequate remedy to address the violation of the legal right imposed by law. Upon review of the original decision and the procedure employed by the trial court it is therefore queried whether the rules of natural justice applied to the making of the decision which gave rise to this petition. I conclude that the respondent has in this case provided sufficient evidence that substantive requirement of a right to a fair hearing and constitutional right to access court may have been violated by the ex-parte applicant. It requires of the plaintiff that the subsistence of the claim be put to the ex parte applicant that the subsistence of the claim subject matter of the decree be served upon the respondent for him to have an opportunity to answer and give his defence before a writ of mandamus can be applied for to enforce the judgement.

Doubt exist about the standing of the applicant to be availed the discretion of this court to warrant an order of mandamus against the respondents. It is important in my view to hold that I should be careful that mandamus in the present case should not be used to avoid recourse to the remedy that may be available to the respondent to challenge the judgment of the trial court.

For those reasons based on the principles of natural justice, and a right to a fair hearing raised by the respondent are legitimate questions which ought to be dealt with in order to affirm the validity of the ex-parte judgment. In the event the respondent succeeds in setting aside the ex-parte judgement an order of mandamus could have been issued in vain. If the trial court claim entails a denovo hearing on review or appeal there is nothing the judicial review proceedings will hang on. Accordingly the notice of motion dated 6th October, 2016 be and is hereby dismissed with no orders as to costs.

Dated, signed and delivered in open Court at Kajiado this 7th day of February, 2018.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Waiganjo for Macharia for applicant.

Mr. Kaikai for the respondent