



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW CASE NO. 16 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 GOVERNOR,

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 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 his Bills of Costs for taxation, which Bills were taxed and certificates of taxation issued. The Applicant states that the Respondents have 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 8th February 2018, in which the is seeking the following orders:

1. That this Court be pleased to issue an Order of Mandamus compelling the County Secretary Nairobi City County, the County Executive Member in charge of Finance, Nairobi City County and the Governor Nairobi City County, to pay to Koceyo and Company Advocates Kshs 1,423,523.05 together with interest and Costs thereon in satisfaction of the decrees issued by this Court in:-

a) CMCC Suit no 6371 of 2014

b) CMCC Suit No 1778 of 2014

c) CMCC Suit No 6749 of 2014

d) CMCC Suit No 1395 of 2014

e) CMCC Suit No 6370 of 2014

f) Misc. Application No. 62 of 2014

Total Decretal sum.....Kshs 1,423,523.05

2. That the costs of this Application abide the outcome of the Judicial Review Application

3. The Respondents are all offices of the County Government of Nairobi City County. The 1st Respondent is an office in the Executive arm of the County Government of Nairobi. The 2nd Respondent is the member in charge of Finance in the said Executive arm of the said County Government; while the 3rd Respondent is the elected Governor to the County of Nairobi.

4. The application was opposed by the Respondents by way of Grounds of Opposition dated 5th April 2018, wherein they denied being served with any pleadings, entry of judgement, certificate of costs or decree issued in various matters stated in the said Notice of Motion, contrary to provisions of Article 47 and 48 of the Constitution of Kenya. In addition, that the certificates of costs and decree of the court arising from the said matters were never served upon the Attorney General and the same is contrary to section 21(1) and 2 of the Government Proceedings Act.

5. The Respondents also contended that no demand for payment was made by the Applicant of the decree or certificate of costs contrary to provisions of section 21(3) of Government Proceedings Act. The Respondents urged that the Notice of Motion dated 8th February 2018 should be dismissed with costs to the Respondents.

The Submissions

6. The application was canvassed by way of written submissions. The Applicant filed submissions dated 23rd February 2018, while the Respondents' Advocates, Murimi Murango & Associates, relied on submissions filed on and dated 5th April 2018.

7. The Applicant submitted that it had rendered legal services to the County Government of Nairobi which has a duty to pay up the legal fees. 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.

8. Reliance was also placed on the decision in **Soloh Worldwide Inter-enterprises v 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.

9. 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 that proposition.

10. The Respondents on their part submitted that they are State Officers with the City County of Nairobi within the meaning of Article 260 of the Constitution; the Nairobi City County is a County Government established under Article 176(1), and that Article 6 enshrines the County Government as part of the Government of Kenya. Therefore, that the provisions of section 21 of the Government Proceedings Act are applicable to the County Government, and the application fails to meet its tenets. They relied on the case of **John Mining Temoi & Another vs Governor of Bungoma County & 17 others (2014) eKLR** for the foregoing proposition.

11. The Respondents submitted that upon the court issuing the decree and certificate of costs, the Applicant slept on its rights to demand for payment, and no proof has been tendered to show that it did a demand letter, and that it was acknowledged by the Respondents for the purpose of planning and seeking approval of the budget for execution of the decree that arises from various matters.

12. Further, that the application fails to uphold Article 40 and 47 for its failure to issue a demand notice. The Respondents submitted therefore that the burden shifted to the Applicant to prove to the contrary that service was effected to the Attorney General and that he demanded for payments from them. The Respondents relied on section 109 of the Evidence Act for this argument.

13. The Respondents also relied on section 21 of the Government Proceedings Act on the procedure to be followed. That section 21(2) of the Government Proceedings Act 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 Attorney General by the court after the expiration of 21 days after judgment has been entered. Further, that once the certificate has been served, section 23(1) imposes a duty on the accounting officers to pay sums specified in the order to the person or his advocate together with interest lawfully accrued.

14. In conclusion, the Respondents submitted that the application should be dismissed with costs, and relied on the holding in Newton Gikaru Githioni & Another vs Ag/Public Trustee Nairobi HC JR 472 2014 that judicial review remedies are discretionary, and that it would have been appropriate for the Applicant to strictly adhere to the provisions of the Government Proceedings Act.

The Determination

15. The Court of Appeal discussed the nature of the remedy of mandamus at length in its decision 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.”

16. 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 he seeks.

17. 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 J. Odunga held as follows 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.”

18. 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 J. Githua 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.”

19. As regards who 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.

20. 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.

21. On the second issue, the Respondents have argued that there is no proof that the provisions of the Government Proceedings Act have been complied with, as regards demand for payments after the issuance of the certificate of costs. 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.”

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

23. In the present case, judgment was already 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 been followed, and especially as regards the Respondents as they were party to the proceedings giving rise to the decrees sought to be enforced, and therefore had the necessary notice. 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.

24. It is also notable in this regard that the procedure in section 21 of the Government Proceedings Act is also 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 that the debt is due to facilitate payment.

25. In the premises, I find that the Applicant’s Notice of Motion dated 8th February 2018 is merited. I accordingly grant the following orders:

(a) 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 1,423,523/05 together with interest at the rate of 14% from the date of this judgment until payment in full, being the decretal sum in respect of decrees issued by the Chief Magistrate’s Courts and this Court in:-

- i. CMCC Suit no 6371 of 2014
- ii. CMCC Suit No 1778 of 2014
- iii. CMCC Suit No 6749 of 2014
- iv. CMCC Suit No 1395 of 2014
- v. CMCC Suit No 6370 of 2014
- vi. Misc. Application No. 62 of 2014

(b) The *ex Parte* Applicant shall have the costs of the Notice of Motion dated 8th February 2018.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF MAY 2018

P. NYAMWEYA

JUDGE