



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS APPLICATION NO. 67 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS**

**AND**

**IN THE MATTER OF YIMBAYA MODERN FURNITURE & GENERAL CONSTRUCTION AND THE COMMITTEE, TOM MBOYA PRIMARY SCHOOL & ANOTHER**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE COMMITTEE, TOM MBOYA PRIMARY SCHOOL....1<sup>ST</sup> RESPONDENT**

**THE CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> RESPONDENT**

**AND**

**YIMBAYA MODERN FURNITURE &**

**GENERAL CONSTRUCTION.....EX PARTE APPLICANT**

**JUDGMENT**

1. Pursuant to the leave of the Court granted on 16<sup>th</sup> February 2018, the *ex parte* applicant moved this Court by way of Notice of Motion dated 28<sup>th</sup> February 2018 expressed under the provisions of Order 53 Rules 1 (1), (2) and (4) of the Civil Procedure Rules, 2010, section 4 (1), (2), (3), (4) and 11 of the Fair Administrative Action Act, [1] and Article 47 of the Constitution of Kenya seeking an order of *Mandamus* directed against the Respondents to compel them to honour the Decree and Certificate of Costs issued on 4<sup>th</sup> November 2016 in Milimani CMCC No. 1465 of 2009 to pay the *ex parte* applicant a sum of Ksh. 1,710,000/= together with interest thereon until payment in full and costs of this application.

2. The core ground in support of the application is that judgment was entered in favour of the applicant in the sum of Ksh. 1,710,000/= in Chief Magistrates Court Civil Case No. 1465 of 2009 and that despite reminders, the Respondent has ignored, neglected and or refused to pay the said sum. There is on record a copy of a letter dated 7<sup>th</sup> November 2016 forwarding the decree and requesting for payment.

3. In opposition to the application, the Respondents filed grounds of opposition stating that the application is vexatious, bad in law and abuse of court process; and, that the application offends order 53 Rule 1 of the Civil Procedure Rules and falls short of the threshold provided under the said Rules and lastly, that the application is not specific on whom the order should be enforced.

4. Both parties filed written submissions. The applicants counsel argued that the Respondents have failed to comply with the court decree and that they have a duty to pay the same. To buttress his argument, counsel cited *Njenga Mwangi Wachira v County Secretary, City County of Nairobi* [2] where it was held that mandamus is a prerogative order issued in certain cases to compel the performance of a duty and *Town Clerk City Council of Nairobi & Another ex parte North End Trading Company Limited* where the court granted mandamus compelling the Respondent to settle a court decree and *Republic vs County Secretary, Nairobi City County & Another ex parte Wachira Nderitu Ngugi & Co Advocates* [3] where the court similarly granted orders as sought in this case.

5. The Respondents' counsel argued that the applicants first applied for leave on 1<sup>st</sup> February 2017 which was granted, but they failed to file and serve the substantive application within 21 days provided under the law. Counsel further argued that the applicants on 6<sup>th</sup> February 2018 sought and obtained a second leave to apply for mandamus against the Respondents, and, again, failed to serve the application.

6. The above argument is powerful and could have disposed of this matter. This is because the conduct cited borders on abuse of court process which if proved can disentitle a party from getting the reliefs sought. Unfortunately, it's being introduced by way of submissions yet these are matters of facts which ought to be introduced by way of affidavit and documents in support thereof annexed. Counsel cannot adduce evidence by way of submissions. That is not the purpose and function of submissions.

7. Further, the court record shows that the application seeking leave was filed on 16<sup>th</sup> February 2018, and that the leave was granted the same day. The substantive application was filed on 2<sup>nd</sup> February 2018, within the 21 days allowed. Thus, unless, the counsel is referring to a different file, in which event, he ought to have filed an affidavit and make the necessary averments, there is nothing in this file to support his allegations.

8. The second issue raised by the Respondent's counsel is that the Respondents were not directly served with the decree. I find no merit in this argument. The letter referred to earlier forwarding the decree and demanding payment was addressed to the counsel on record then and now. To me this is sufficient service.

9. Third, counsel argues that the order ought to be directed against a particular officer as opposed to the Respondent and that there ought to be a demand for the payment. I find nothing wrong with the order as prayed. It's after an order of *mandamus* is disobeyed that a particular officer can be cited for contempt.

10. Lastly, counsel cited three cases where the court declined to grant orders of *mandamus*, but to me, the facts and circumstances in the said cases are totally distinguishable from the case at hand.[\[4\]](#)

11. I find that only one issue falls for determination, namely:- ***Whether the applicant has established grounds for this Court to issue an order of mandamus as prayed.***

12. It is common ground that an order of *Mandamus* will issue 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.[\[5\]](#) *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. Originally a common law writ, *Mandamus* has been used by courts to review administrative action.[\[6\]](#)

13. *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.**[\[7\]](#)

14. *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.*

15. *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)*,[\[8\]](#) and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*.[\[9\]](#) 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.*

16. In the present case, the complaint arises out of a court decree. The Respondents were represented by an advocate. The decree has not been appealed against or set aside or reviewed. It was served upon the advocate on record for the Respondents. The decree has not been settled, yet, it was forwarded to the Respondents advocates on 7<sup>th</sup> November 2016. This case was filed in court on 16<sup>th</sup> February 2018.

17. Differently stated, the Respondents were given notice to settle the decretal amount but they refused to pay. One of the requirements enumerated above is "a reasonable time to comply with the demand." On the test of what constitutes a reasonable notice before *Mandamus* can issue, I think, from the time the decree was forwarded in November 2017, and, the time this matter was filed in court in February 2018, is ample notice.

18. The other test is "an express refusal, or an implied refusal through unreasonable delay." *First*, as I have concluded above, "unreasonable delay" has been established in the present case. *Secondly*, an express refusal or even implied has also been established. No good cause has been shown as to why payment has not been effected. *Mandamus* can only issue where it is clear that there is *wilful* refusal or *implied* and/or *unreasonable* delay in complying with the court order.

19. Applying the above tests to the facts and circumstances of this case, I find and hold that the applicant has satisfied the above conditions. It follows that there is basis for the Court to grant the order of *Mandamus*.

20. Flowing from my above finding, it is my conclusion that the application dated 16<sup>th</sup> February 2018 is merited as against the second Respondent, but, not against the first Respondent. This is because for a Judicial Review order to issue, the decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function. It is not clear whether the first Respondent is a public body whose decisions can be challenged by way of a Judicial Review remedy, hence, prefer to error on the said of the law and find that the application succeeds only as against the second Respondent.

21. In view of my determination and findings herein above, the conclusion becomes irresistible that the application dated 28<sup>th</sup> February 2018 is successful to the extent discussed above. Accordingly, I allow the application and order that:-

a. *An order of Mandamus be and is hereby issued directed against the second Respondent compelling it satisfy the Decree and Certificate of Costs issued on 4<sup>th</sup> November 2016 in Milimani CMCC No. 1465 of 2009 and pay the ex parte applicant the sum of Ksh. 1,710,000/= together with interest thereon until payment in full.*

b. *That the second Respondent do pay the ex parte applicant the costs of this application.*

Orders accordingly

**Signed, Dated and Delivered at Nairobi this 19<sup>th</sup> day of November 2018**

**John M. Mativo**

**Judge**

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[1] Act No. 4 OF 2015.

[2] {2008} eKLR.

[3] {2016}eKLR.

[4] Counsel cited *Registrar of Societies ex parte Stephen O. Owino & Others*, HCC Misc App No. 652 of 2017, *Republic vs National Employment Authority & 3 Others ex parte Middle East Consultancy Services Ltd*, and *Cortec Mining Kenya Limited vs The Cabinet Secretary, Attorney General & Others* Civ App No. NAI 119 of 2015.

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

[6] 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.

[7] *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. IJ. 19, 25-26 (1964).

[8] [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.

[9] [2003 FCT 211 \(CanLII\)](#), [2003] 4 F.C. 189 (T.D.), aff'd [2003 FCA 233 \(CanLII\)](#), 2003 FCA 233.

