



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW CASE NO. JR. 176 OF 2015

**IN THE MATTER OF AN APPLICATION BY NJENGA MWANGI, WACHIRA & PARTNERS
FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS**

AND IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012

BETWEEN

NJENGA MWANGI WACHIRA & PARTNERS.....APPLICANT

VERSUS

THE COUNTY SECRETARY,

CITY COUNTY OF NAIROBI.....RESPONDENT

RULING

Introduction

1. By an amended Chamber Summons dated 22nd October, 2015, the ex parte applicant herein, **Njenga Mwangi Wachira & Partners**, seeks the following orders:

1. That the applicant, Njenga Mwangi Wachira & Partners, be granted leave to apply for an order of mandamus to compel the Town Clerk County Secretary City County of Nairobi to satisfy the decretal sum of Kshs 1,677,990/= together with interests and costs thereon as awarded by this court in:-

- a. Miscellaneous Civil Application No. 15 of 2001**
- b. Miscellaneous Civil Application No. 363 of 2001**
- c. Miscellaneous Civil Application No. 17 of 2001**
- d. Miscellaneous Civil Application No. 18 of 2001**
- e. Miscellaneous Civil Application No. 239 of 2001**
- f. Miscellaneous Civil Application No. 239 of 2001**
- g. Miscellaneous Civil Application No. 240 of 2001**

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

2. According to the ex parte applicant, between the year 1996 and 2000 he represented the then City Council of Nairobi (hereinafter referred to as “the Council”) herein in various matters at the High Court of Kenya in Nairobi pursuant to which he raised various fee notes in the various matters and forwarded them to the said Council for payment but the Council refused and/or neglected to settle the same.

3. The applicant averred that in the year 2001 he filed his bills of costs for taxation in the High Court Misc. Applications Nos. 15 of 2001, No 17 of 2001, No. 18 of 2001, No. 238 of 2001, No. 239 of 2001, No. 240 of 2001 and No. 363 of 2001 which bills were taxed and certificates of taxation issued by the Deputy Registrar of this court which he duly forwarded to the said Council for payment by a letter dated 12th July, 2012.

4. The applicant disclosed that the total decretal sum issued against the City County the then City Council of Nairobi in the above various bills of costs was Kshs 3,667,939.80/= of which the respondent has paid Kshs 2,000,000/= leaving a balance of Kshs of Kshs 1,677,939.80/= which is still outstanding, due and owing to date. It was revealed that on or about 30th January, 2013 the then City Council of Nairobi issued the applicant’s advocates on record cheque No. 048026 in satisfaction of the balance of the amount taxed of Kshs 1, 677,939/= which upon presentation to the bank was dishonoured for insufficient of funds in the respondent’s account herein. Despite a reminder by the said advocates, no response was received.

5. It was deposed that after the promulgation of the Constitution of Kenya 2010 and the general election held in March 2013 the City County Government of Nairobi took over the duties of the defunct City Council of Nairobi and on or about 11th October, 2013 the Governor of City County of Nairobi appointed a task force to among other things advise him on various legal fees demanded by the advocates from the County Government on respective cases. However, the County Secretary of the City Council of Nairobi has not made any effort to settle the decretal sum and the said amount remains outstanding, due and owing.

6. The applicant however asserted that though it is the duty of the County Secretary as the Chief Executive Officer of the City County of Nairobi to pay the decretal sum from the revenue of the City County of Nairobi without and delay, the County Secretary has deliberately failed to exercise his statutory duty, and unless compelled by this honourable court, he will persist in his refusal to settle the decretal sum which has prejudice of the applicant herein.

Respondent’s Case

7. In opposition to the application, the Respondent filed the following grounds of opposition:

1. That the application is fatally incompetent and incurably defective.

2. That the application is premature as the costs of the suits are yet to be taxed as required by law. A decree cannot be executed in piece meal.

3. That the orders sought by the applicant do not lie as against the respondent as there is no statutory duty imposed upon them to act as demanded. The applicant has not stated under which law the sited respondent has a duty to act as demanded.

4. That under part IV- the County Government responsibilities with respect to management and control of public finance under the Public Finance Management Act Cap 412C of the Laws of Kenya, the Statutory duty to pay out funds from the county treasury vests in the County Executive Committee in charge of finance and not the respondent herein thus the respondent herein is wrongly suited.

5. That the application is frivolous, vexatious and an abuse of the court process is a mere publicity stunt by the applicant as it relates to the respondent.

6. That the respondent has since filed appeals against the judgments herein.

Determinations

8. I have considered the material before me in this application. It is important at this stage to revisit the principles guiding the grant of leave in judicial review proceedings.

9. The starting point in my view is section 9(2), (3) and (4) of the *Fair Administrative Action Act* which provides that:

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

10. Therefore where there exist other alternative mechanisms for resolving the dispute in question, including internal mechanisms for appeal or review such alternative mechanisms or remedies ought to be exhausted first before resort can be had to judicial review relief. This is in line with the principle that judicial review is a remedy of last resort and is not an alternative remedy to other available remedies. The Court however has discretion in exceptional circumstances to dispense with this requirement. There is however a rider that the purported alternative remedy must be convenient, beneficial and effectual. Where such a remedy is a mirage, the Court cannot deem the same as an effectual alternative remedy.

11. The other condition appears in section 9(3) of the Law Reform Act, Cap 26 Laws of Kenya which provides that:

In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

12. Therefore where what is sought to quashed amounts to a *judgment, order, decree, conviction or other proceedings* for the purposes of the section leave ought not to be granted unless the application is brought with the prescribed period.

13. This is however not the end of the matter. The requirement for leave was explained by a three judge bench comprising **Bosire, Mbogholi-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321**, **Nyamu, J** (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless

expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**

14. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

15. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

16. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

“If he [the Applicant] fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers...”

17. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, the Court stated:

“Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court’s discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved.”

18. This position was appreciated by ***Majanja, J*** in *Judicial Review Misc. Civil Appl. No. 139 of 2014*

between Vania Investments Pool Limited and Capital Markets Authority & Others in which the learned Judge expressed himself as follows:

“I do not read the Court of Appeal to be saying that the Court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in Oceanfreight Transport Company Ltd vs. Purity Gathoni and Another Nairobi HC Misc. Appl JR No. 249 of 2011 [2014] eKLR, “In my view, the reference to an “arguable case” in W’Njuguna’s Case is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view.” The duty of the court to consider the facts is not lessened by the mere conclusion that the case is frivolous, or that leave is underserved by examining the facts...Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose.”

19. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave.

20. Whereas he is not required at that stage to go into the depth of the application, the applicant must disclose the existence of *prima facie* grounds for the grant of judicial review reliefs. Such grounds must *prima facie* be based on the facts as averred by the applicant in the verifying affidavit. It is therefore not enough to simply throw the grounds for the grant of judicial review and contend that a *prima facie* case has been made out. A *prima facie* case, in my view is made out when the applicant’s case if true may justify the grant of the orders of judicial review. Where the facts disclosed, even if true cannot possibly justify the grant of judicial review remedies, a *prima facie* case, for the purposes of judicial review cannot be said to have been made out.

21. It must also be remembered that judicial review remedies are discretionary in nature and one of the factors which would militate against the grant thereof is delay in seeking relief. As was held by **Nyamu, J** (as he then was) in Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 and Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707: “Speed and promptness are the hallmarks of judicial review.” Judicial review, it has therefore been held, acknowledges the need for speedy certainty as to the legitimacy of the target activities and requires the applicants for judicial review to act promptly. See Mutemi Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA No. 1108 of 2004 [2006] 1 EA 116.

22. Therefore whereas under the **Law Reform Act** there is no limitation as to when to apply for orders of prohibition and mandamus the Court in determining whether or not to grant the relief sought will take into account the delay in making the application and the import and impact of such delay in the administration of justice. This position was appreciated in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between Vania Investments Pool Limited and Capital Markets Authority & Others* where **Majanja, J** pronounced himself as hereunder:

“The issue of failure to invoke alternative remedies is intricately linked with the issue of delay. Applications seeking leave to commence judicial review proceedings must be made promptly as soon as grounds giving rise to the need for judicial review become known. Undue and inordinate delay in applying for judicial review is a major factor for consideration. Lord Hope of Craighead in *Regina v London Borough of Hammersmith and*

Fulham (Respondents) and Other Exparte Burkett &

Another (FC) (Appellants) [2002] UKHL 23 noted the need for the applicant to move the court promptly when he observed that,

“[64] On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be

found in the well-known observations of Lord Diplock in O'Reilly v Mackman [1983] 2 AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision...But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in Swan v Secretary of State for Scotland 1998 SC 479, 487: "It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass."

23. All the foregoing factors must therefore be considered by the Court in deciding whether or not to grant leave to commence judicial review proceedings.

24. In this case, the Respondent contends that under the **Public Finance Management Act** Cap 412C of the Laws of Kenya, the statutory duty to pay out funds from the county treasury vests in the County Executive Committee in charge of finance and not the respondent herein thus the respondent herein is wrongly suited. It is true that section 103 of the **Public Finance Management Act**, No. 18 of 2012, 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. Under section 103(3) thereof, the County Executive Committee member for Finance is the head of the County Treasury. It is also true that section 104 of the **Public Finance Management Act** sets out the responsibilities and powers of a County Treasury headed by the said County Executive Member for Finance. It would therefore seem that the County Secretary has no role under the Act when it comes to matters of finance since the obligation to do so rests on the County Executive Member for Finance, in the capacity as the accounting officer.

25. It must however be remembered always that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In this case the Respondent ought to have been the Accounting Officer who is the County Executive Member for Finance.

26. However, as this is merely a misjoinder the same ought not to be fatal to the application though the Court may in exercise of its discretion deny the applicant, even if successful, costs of the application. An issue as to the effect of misjoinder in judicial proceedings was the subject of determination in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** in which the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”. [Emphasis added].

27. This was the position adopted in **Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute Nairobi H.C. Misc. Appl. No. 594 of 2002 [2003] KLR 582**, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation. This position is even more relevant to proceedings in the nature of judicial review which are neither criminal nor civil and particularly in application for mandamus where what is sought is the enforcement of a decree against the respondent not in his personal capacity but in his official capacity. In such circumstances, the respondent is simply being compelled to facilitate the payment as opposed to imposing personal liability.

28. It is therefore my view that whereas misjoinder or non-joinder may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed where the substance of the reliefs sought can still be realised notwithstanding the irregularity.

29. Article 159(2)(d) of the Constitution enjoins this Court to administer justice without undue regard to technicalities of procedure, as long as the rules of natural justice are adhered to. At the end of the day the entity which is bound to settle the decree is the County Government and not the said officer in his personal capacity. Misjoinder of parties in County Governments was also considered in **Council of Governors & Others vs. The Senate Petition No. 413 of 2014** where it was held that:

“...the role of the Governor under Section 30(3) (f) of the County Governments Act is critical in fiscal management at the County level. He is the Chief Executive Officer and the buck stops with him in the management of county resources. It is critical that such a provision exists so as to ensure responsibility of public resources which would ultimately enhance the national values as provided for under Article 10 of the Constitution as well as the spirit and tenor of constitution.”

30. In **Republic vs. Attorney General & Another Exparte James Alfred Koroso [2013] eKLR**, this Court expressed itself as hereunder:

“The relief sought is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament.”

31. In **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009** the Court of Appeal appreciated that:

“...the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out.”

32. Therefore considering the nature of judicial review remedy of *mandamus* which strictly speaking is not a proceeding in the nature of execution proceedings, misjoinder of parties ought not to be fatal to such application especially where the pleadings are curable by amendment. In this case judicial review proceedings proper have not yet commenced.

33. Accordingly Order 53, rule 1(1) of the ***Civil Procedure Rules*** provides:

No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

34. The word “leave” is defined by ***Black’s Law Dictionary***, 9th Edn. at page 974 as “*Judicial permission to follow a non-routine procedure*”. “Leave” is clearly therefore a permission to take a particular judicial procedure and in this case it is permission to commence judicial review proceedings. It is therefore clear that an application for judicial review is not made until after leave is granted. If the grant of leave was to be construed as an application for judicial review, it would in my view constitute an absurdity. If the Rules Committee was of the view that an application for leave constitutes the proceedings in judicial review proper, the said Committee would, in my view, have employed the phrase such as “***an application for an order of mandamus, prohibition or certiorari shall be commenced by leave***” or similar provision.

35. The issue is, however not moot. The Court of Appeal in **R vs. Communications Commission of**

Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199 held that proceedings under Order 53 can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted. Similarly in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** it was held by a three Judge bench of this Court that it is consequent upon leave being granted that an application is brought. In **Mike J. C. Mills & Another vs. The Posts & Telecommunications Nairobi HCMA No. 1013 of 1996**, this Court held that application for leave does not commence judicial review until such permission is granted to institute appropriate Judicial Review application.

36. Therefore both on the letter of the law and authority, judicial review proceedings are commenced after leave therefor is granted. Therefore as the proceedings can still be amended, the Court ought not to terminate the proceedings based on the aid objection but to make orders whose effect would be to sustain and breathe life into the proceedings in question.

37. The other objection was the application is premature as the costs of the suits are yet to be taxed as required by law. A decree cannot be executed in piecemeal. That in my view is a matter that should be dealt with when considering the merits of the matter in light of the contrary position adopted by the ex parte applicant.

38. It was also contended that the respondent has since filed appeals against the judgments herein. In my view, the only way in which the Respondent can avoid payment where there is a valid judgement of a Court of competent jurisdiction, save where the conditions precedent have not been satisfied, is to show that the judgement has been set aside on appeal or on review or that an order of stay has been issued suspending the execution of the said judgement. Order 42 rule 6(1) of the ***Civil Procedure Rules*** is clear that even the pendency of an appeal does not *ipso facto* operate as a stay of the decree or order appealed against.

39. Having disposed of the impediments placed on the path of the applicants, I am satisfied that the applicant has established a prima facie case for the purposes of leave. The grounds objection raised by the Respondent do not warrant the denial of leave. Whether or not the application will succeed is another matter altogether.

Order

40. In the result I allow the amended Chamber Summons dated 22nd October, 2015, and grant **Njenga Mwangi Wachira & Partners** leave to apply for an order of *mandamus* to compel the County Executive Member for Finance, City County of Nairobi to satisfy the decretal sum of Kshs 1,677,990/= together with interests and costs. Let the substantive motion be filed and served within 21 days.

41. The costs of this application will be in the cause.

42. Orders accordingly.

Dated at Nairobi this 6th day of February, 2017

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Mwangi.