REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO. 476 OF 2016

IN THE MATTER OF AN APPLICATION BY THE APPLICANT MOHAMED TARIQ KHAN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY AN ORDER OF MANDAMUS DIRECTED TO THE COUNTY SECRETARY, NAIROBI CITY COUNTY AND THE CHIEF OFFICER FINANCE/NAIROBI CITY COUNTY TREASURY

IN THE MATTER OF THE GOVERNMENT PROCEEDINGS ACT AND THE URBAN ARREARS AND CITIES ACT

REPUBLIC……..…….APPLICANT

VERSUS

THE COUNTY SECRETARY,

NAIROBI CITY COUNTY……..…….....…..1ST RESPONDENT

CHIEF OFFICER, FINANCE/NAIROBI

CITY COUNTY TREASURER…….…….....…2ND RESPONDENT

EX-PARTE APPLICANT: MOHAMED TARIQ KHAN

JUDGEMENT

Introduction

1. By a Notice of Motion dated 19th January, 2017, the ex parte applicant herein, **Mohamed Tariq Khan**, seeks an order of *mandamus* directed to the County Secretary, Nairobi City County and the Chief Officer, Finance/Nairobi City County Treasurer to comply with the decree issued in High Court Civil Case No. 339 of 2009 by paying to the applicant the sum of Kshs 4,331,397.26/= being the decretal sum together with interest until payment in full. He also seeks the costs of the application.

2. According to the applicant, on the 18th of July 2008 he filed civil Suit No. 330 of 2008 seeking General and Special Damages against the City Council of Nairobi (at it then was) and one **Danson Musola** for

false arrest, detention and malicious prosecution which suit proceeded for hearing on 3rd December 2014 before **Honourable Lady Justice Aburili** and judgment was delivered on 15th May 2015 wherein the Judge found that he had proved his case against the defendants in Civil Suit No. 330 of 2008 jointly and severally.

3. It was averred that the Court awarded him Kshs 4,000,000/= general damages for false arrest, detention and malicious and interest on general damages from the date of the judgment until payment in full. Pursuant to the said judgement the applicant through his advocates extracted the decree in respect thereof as well as a certificate of order which were issued by the Deputy Registrar of the High Court and were duly served on the County Secretary, Nairobi City County, and the Chief Officer, Finance/Nairobi City County Treasury.

4. It was therefore contended that the respondents are liable to pay the applicant the said sum and accruing interest by virtue of section 59 of the ***Urban Areas and Cities Act*** 2011. According to the applicant, though the County Secretary, Nairobi City Country, and the Chief Officer, Finance/Nairobi City County Treasury as the accounting officers of the County Council of Nairobi are by law required to satisfy the decretal amount, to date the County Council of Nairobi has not satisfied the decretal amount.

Respondent's Case

5. In opposition to the application the Respondents filed the following grounds of opposition:

1. That the application is frivolous, vexatious and an abuse of the court process and is a mere publicity stunt by the applicant as it does not relate to the respondents.

2. That neither the decree nor the court order was served upon the respondents nor their advocate as alleged by the applicant.

3. That the application is fatally incompetent and incurably defective

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

5. That under Par 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 vest in the County Executive Committee member in charge of finance and not the respondents herein thus the respondents herein is wrongly suited.

6. That all expenditures by the County Government are appropriated by the County Assembly and not the respondents in each financial year.

7. That the County Government has competing interest including settling decrees to the public but has limited resources and has statutory processes it must abide by before the settlement of the same. The services provided by the County Government serve approximately for million Nairobi residents yet no adequate resources are available.

8. That the alleged contemnors are public officers and are prohibited in law; under sections 196 and 197 of the public Finance Management Act (2012) from paying the applicant as ordered for it would be an offence to spend any public funds without any prior authorization

9. That the immediate settlement of the order would require constitutional or County Legislation approval which has not been given to the respondents because of the already closed budget cycle.

10. That the alleged contemnors (sic) are currently not in a position to pay off the order since the county government is in the middle of its financial year and such funds would have to have been provided for in the county budget.

11. That the alleged contemnors (sic) are ready to pay once the same is allocated for approved and passed by the County Assembly as provided for in Section 125 of the Public Finance Management Act (2012)

12. That we therefore seek the indulgence of the court and the applicant to allow for the budgeting, allocation and approval of the amounts decreed through the procedures provided for under the county Government Act.

13. That the respondents have since filed appeals against the judgments herein.

Determinations

6. I have considered the material before me.

7. The first issue for determination is whether the Respondents are under an obligation to satisfy the decree and/or orders issued against the County Government. 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.

8. 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.

9. 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].

10. 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.

11. 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.

12.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."**

13.In **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** expressed himself, *inter alia*, as follows:

> ***"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 a duty. It issues from the Queen'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 cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of 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 or 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… In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment…The foregoing may also be thought to be much in point in relation to the applicant's unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty…Since *mandamus* originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law…English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting "simply in his capacity of servant". There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a *mandamus* would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of *mandamus* will lie for the enforcement of the duties…With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and**

having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile… *It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose*. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government…Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go…In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of *mandamus* must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament…In the court's view the granting of *mandamus* against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and 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. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata,* and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few…*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory…On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designate* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined,

and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject…The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice… The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of *mandamus* will issue as prayed with costs."

14.In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**, this Court expressed itself as hereunder:

"…the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit…The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. 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. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are nolonger execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."

15. In **Microsoft Corporation vs. Mitsumi Garage Ltd & Another Nairobi HCCC No. 810 of 2001;**

[2001] 2 EA 460, it was appreciated that:

> **"Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the suit. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the court should rise to its calling to do justice by saving the proceedings in issue."**

16.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."**

17. 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.

18.The respondents however contended that they do not have funds to settle the decretal amount. On this issue, **Githua, J** in **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR** expressed herself 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. 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."**

19. It was alleged without evidence that the Respondents have appealed against the judgement. However mere challenge to a judgement does not bar the Court from issuing orders of *mandamus* though the Court may well be entitled to take the same into account in the exercise of its undoubted discretion. This was the position adopted in As rightly held in **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza** (supra):

> **"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."**

20. In my view, the only way in which the Respondents can avoid payment where there is a valid judgement of a Court of competent jurisdiction 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.

21. Having disposed of the impediments placed on the path of the applicants, there is no reason why this otherwise merited Notice of Motion cannot be granted.

Order

22. In the result I allow the Notice of Motion dated 19th January, 2017, and issue an order of *Mandamus* compelling the Respondents to pay the applicants Kshs 4,331,397.26 with interest till payment in full. The applicant will have the costs of these proceedings.

23. Orders accordingly.

Dated at Nairobi this 6th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nganga for the applicant

CA Mwangi