



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**MISC. CIVIL APPLICATION NO. 4 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF KERUGOYA ELC NO. 34 OF 2012 MILCAH MUTHONI WAGOCO**

**VERSUS**

**THE COUNTY GOVERNMENT OF KIRINYAGA & 2 OTHERS**

**AND**

**IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT AS APPLIED TO COUNTY GOVERNMENT**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY SECRETARY COUNTY GOVERNMENT OF KIRINYAGA...1<sup>ST</sup> RESPONDENT**

**THE EXECUTIVE COMMITTEE MEMBER FOR FINANCE.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

Via a Chamber Summons application dated 4<sup>th</sup> February 2019, the Ex-parte Applicant sought leave to apply for an order of mandamus to compel the Respondents to pay the Applicant an amount of Ksh. 3,142,288 (Ksh. 2,500,000/= as damages and Ksh. 642,288.00/= as costs plus interest at 12% per annum from 9<sup>th</sup> August 2018 till payment in full. The Applicant also sought the costs of the application to be provided for. The application is supported by grounds shown on the face thereof and an affidavit sworn by Milka Muthoni Wagoco. The supporting affidavit is further supported by a statutory statement of facts, a verifying affidavit and a Petition No. 250/2012 (formerly ELC No. 34 of 2012), judgment delivered on 16<sup>th</sup> June 2017, a decree, certificate of costs, a demand and a certificate of order against the Government.

On 1<sup>st</sup> July 2019, the Ex-parte applicant was granted leave to file a substantive motion sought in the Chamber Summons dated 4<sup>th</sup> February 2019 within 21 days from the said date. On the same date, the Ex-parte applicant filed their Notice of Motion seeking leave to commence these Judicial Review proceedings for an order of mandamus to compel the respondents to pay the decreed amount of Ksh. 3,142,288 plus interest at 12% per annum from 9<sup>th</sup> August 2018 till payment in full. On 14<sup>th</sup> November 2019, the respondents through their County Attorney and Legal advisor filed a replying affidavit opposing the said Notice of Motion.

By way of a rejoinder, the Ex-parte applicant on 20<sup>th</sup> November 2019 filed a further affidavit in support of the main motion.

**EX-PARTE APPLICANT’S CASE**

The Ex-parte applicant contends that there is a valid judgment by this Honourable Court delivered in her favour on 16<sup>th</sup> June 2017 vide ELC Case No. 34 of 2012 between Milka Muthoni Wagoco (Suing as the Administrator of the Estate of the late Wagoco Kabinga) Vs The County

Council of Kirinyaga and others). The Ex-parte applicant further stated that she filed a bill of costs which was taxed and allowed in the sum of Ksh. 642,288/= on 5<sup>th</sup> July 2018 and a certificate of taxation issued on 9<sup>th</sup> August 2018. The Ex-parte applicant also stated that following the issuance of the certificate of costs, she applied for and obtained a certificate of order against the Government for the said sum of Ksh. 3,142,288/= on 7<sup>th</sup> January 2019. She stated that despite demand made on 7<sup>th</sup> December 2018, the respondents have failed to pay the said amount despite the fact that they are mandated to pay all claims against the County Government ordered by the Courts. The Ex-parte applicant therefore stated that this Honourable Court has power to compel Government officials to comply with money decrees and cited two cases of Nairobi Judicial Review Misc. Appl. No. 276 of 2016; Republic Vs Principal Secretary Ministry of Defence Ex-parte George Kariuki Waithaka.

### **RESPONDENTS CASE**

The respondents through their County Attorney and Legal advisor stated that the claim herein arises from a Petition filed by the applicant on 8<sup>th</sup> June 2012 where this Honourable Court delivered a judgment on 16<sup>th</sup> June 2017 against the respondents. She stated that the respondents did not file a response to the said petition as they were not aware of the suit as the County Government of Kirinyaga was never served with the Petition or any Court documents with regard to this suit. The respondents County Attorney also deponed that the previous firm on record for the respondents in the petition failed to inform the 1<sup>st</sup> respondent of the suit or keep them updated and failed to respond to the petition and did so without the knowledge of the respondents. The said County Attorney further deponed that as a result of the matters aforesaid, judgment was entered against the respondents without being given a chance to set out their case regarding the suit and that the respondents were prejudiced all along until final determination of the matter. The respondents through the County Attorney also stated that mandamus is a discretionary remedy and the facts of this case do not indicate that the respondents have been stubborn.

She deponed that they have never been served with any order or decree and therefore they are strangers to the allegation that they ignored the Court order as there was no express refusal, or an implied refusal through unreasonable delay. The respondents also contend that the application seeks to compel the respondents to satisfy a decree they were not a party to and which they were never heard and that the same has been brought after unreasonable and inordinate delay of 2 years after the judgment which was allegedly delivered on 16<sup>th</sup> June 2017. The respondents further contend that the underlying petition was not against the respondents and there was no proper substitution of parties as to properly direct the subject proceedings against the respondents herein as they are not the Local Authority against whom the judgment was entered and therefore they ought not to be compelled to satisfy the decree issued against the Local Authority. In conclusion, the respondent contend that they are proceeding to apply for setting aside of the judgment and that the application should be dismissed and/or struck out to await the determination of the intended application to set aside the impugned judgment which is now the subject of these proceedings.

### **EX-PARTE APPLICANT'S SUBMISSIONS**

The firm of Kamau Kuria & Co. Advocates for the applicant submitted that it is now settled law that this Honourable Court has power to compel Government officers to comply with money decrees. He submitted that the two leading decisions in this subject have been delivered by Honourable Justice Odunga and Lady Justice Namweya in Nairobi Judicial Review Misc. Application No. 276 of 2016; Republic Vs Principal Secretary, Ministry of Defence Ex-parte George Kariuki Waithaka. The learned counsel also cited the case of Republic Vs Attorney General & 2 others (2018) e K.L.R and submitted that in the case before Court, there exists a judgment, a decree, a certificate of taxation and a certificate of order against the County Government. All these documents have been supplied to the respondents but they have failed and/or neglected to satisfy the same. The applicants through her counsel on record further submitted that failure by the respondents to satisfy the decree of this Honourable Court contravenes Article 10 of the Constitution which provides that all State organs must observe National values which include adherence to the rule of law. He cited the definition of the rule of law in the 8<sup>th</sup> Edition of Administrative law by Prof. Sir William Wade and Christopher Forsyth. In conclusion, the learned counsel submitted that for good order to reign, public institutions and persons like the respondents herein should obey Court orders and further abide by the principles set out in the Constitution and that no valid reasons have been placed before this Honourable Court to warrant a decline of the orders sought.

### **RESPONDENTS SUBMISSIONS**

The respondents did not file submissions within the time lines set out by the Court.

### **ANALYSIS AND DECISION**

I have considered the Notice of Motion dated 1<sup>st</sup> July 2019 and the replying affidavit both in support and in opposition thereto. I have also considered the verifying affidavit, the statutory statement of fact and all the documents attached thereto. I have further considered the written submissions by counsel for the applicant. The applicant is seeking an order for mandamus. The scope of the Judicial Review remedy of mandamus is the subject of the Court of Appeal in the case of *Kenya National Examination Council Vs Republic Ex-parte Geoffrey Gathenji Njoroge & others Civil Appeal No. 266 of 1996 reported in (1977) e K.L.R* where it was held:

**“The order of mandamus is 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 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 impose 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 a 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 the party who has legal 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 of 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”.

In the case of *Mureithi & 2 others Vs Attorney General & 4 others (2006) 1 K.L.R (E.X.L) 707*, it was held:

“The order of mandamus is 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 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”.

From my understanding of the two decisions herein above, it is clear that a person seeking a remedy of Judicial Review by way of mandamus must satisfy the Court that the action he seeks to compel the respondent to perform is a duty which the respondent is under a duty to perform by statute or even under common law. It is employed to compel the performance when refused, of a ministerial duty and may also be used to compel action when refused in matters involving judgment and discretion. Being discretionary in nature, the Courts may refuse to grant the relief even when the requisite grounds for it exists. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. However, the discretion must be exercised judicially. The test for mandamus was set out in the case of *APOTEX INC. VS CANADA (ATTORNEY GENERAL) (1993) Can LII 3004 (F.C.A)* as follows:

**There must be a public legal duty to act.**

**The duty must be owed to the applicant**

**There must be a clear right to the performance of that duty, meaning that:**

**The applicant have satisfied all conditions precedent; and**

**There must have been:**

**A prior demand for performance**

**A reasonable time to comply with the demand, unless there was outright refusal; and**

**An express refusal, or an implied refusal through unreasonable delay;**

**No other adequate remedy is available to the applicant**

**The order sought must be of some practical value or effect**

**There is no equitable bar to the relief sought**

**On a balance of convenience, mandamus should lie.**

Clearly, there is evidence that the respondents have refused to act in satisfying the judgment, decree, demand and the certificate of order against the Government. The respondent is only lamenting that her hitherto lawyers on record failed them and even threatened to set aside the judgment of the Court but these threats have remained as mere threats. In view of my analysis above, I am satisfied that on a balance of convenience, mandamus should lie.

Accordingly, the order which commends itself to me and which i hereby grant is an order of mandamus compelling the respondents to pay the applicant the decretal amount of Ksh. 3,142,288/= plus interest at 12% per annum from 9<sup>th</sup> August 2018 till payment in full. The costs of these proceedings shall also be borne by the respondents. It is so ordered.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 5<sup>th</sup> day of June, 2020.**

.....

**E.C. CHERONO**

**ELC JUDGE**

**In the presence of:**

**Ms Kinyua holding brief for Beacco for Respondent**

**Mr. Asiimwe holding brief for Munyori for the Ex-parte Applicant**

**Mbogo – Court clerk**