



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MISC. CIVIL APPLICATION NO. 309 OF 2015

IN THE MATTER OF THE CONSTITUTION OF KENYA SECTION

23(3) (F)

AND

**IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA SECTIONS
8, 9 AND 10**

AND

IN THE MATTER OF COUNTY GOVERNMENT ACT 2012

REPUBLIC.....APPLICANT

AND

THE GOVERNOR NAIROBI COUNTY GOVERNMENT.....1ST RESPONDENT

THE MINISTER FINANCE AND ECONOMIC

PLANNING-NAIROBI COUNTY GOVERNMENT.....2ND RESPONDENT

THE CHIEF ACCOUNTING OFFICER

NAIROBI COUNTY GOVERNMENT.....3RD RESPONDENT

EX PARTE: SALIMA ENTERPRISES LIMITED

JUDGMENT

Introduction

1. By a Notice of Motion dated 29th September, 2015, the applicant herein, **Salima Enterprises Limited**, seeks the following orders:

1. **The honourable court be pleased to grant an order of mandamus against the respondents compelling them to immediately pay the sum of Kshs 325,000,00 mesne profits of Kshs**

200,000 per month with effect from 1st June 2013 till payment in full, costs of Kshs 6,744,612.00 plus accrued interests at 12% p. a. with effect from 4th July 2014 till payment in full as decreed in Nairobi HC ELC 1144 of 2013 Salima Enterprises Limited -versus- Nairobi City County.

2. The costs of this application be provided for.

Applicant's Case

2. According to the applicant, on 25th September 2013, it filed a suit being NRB ELC 1144 of 2013 against the Nairobi City County to which the defendant therein filed a memo of appearance but did not file any defence and judgment was entered in default and matter set for formal proof. According to the Applicant, the defendant was duly informed of the date for formal proof of 25th March 2014 and they duly attended during the hearing of the matter. At the formal proof, the defendant did not raise any objection to the formal proof or even suggest they were unhappy with the interlocutory judgment or proceedings before the honourable court and thereafter, the matter was then set for further mention on 15th May 2014 to take a judgment date on which date the defendant were well represented and the judgment date was set for 4th July 2014.

3. It was averred that on 4th July 2014 the court delivered the judgment and ordered the defendant (Nairobi City County) to pay the sum of Kshs 325,000,000 and mesne profits of Kshs 200,000 per month from the date of possession (1st June 2013) till payment in full. The Applicant averred that on the judgment, date the defendant advocate was present and after the same was read, he sought and was granted stay of execution for 30 days. Following the delivery of the judgement a decree was duly extracted and served upon the defendant after which the Applicant filed a bill of cost which was fixed for taxation on 15th July 2014 on which date the registrar orders for written submissions and the bill was eventually taxed at Kshs 6,744,612.00 on 18th August 2014 with full participation of the defendant.

4. It was averred that on 22nd July 2014 the defendant applied to set aside the judge of the court but the application was dismissed with costs on 12th June 2015. On 30th June 2015 and on 12th August 2015 the Applicant's advocates wrote to the respondents and their advocates asking them to settle the decretal amount and the costs plus interests but they have not bothered at all to settle the same despite being under a public duty to make the said payments and they have totally refused to do so.

5. According to the Applicant, despite the foregoing, the respondents are continuing with constructions on premises which they forcibly took from the Applicant without pay compensation as ordered by the court.

6. To the Applicant, evidently the respondents have funds but they are refusing to pay the Applicant's claim hence the urgency for the payment to be made before continuing the constructions further.

Respondents' Case

7. The Respondents opposed the application.

8. According to it, the orders sought herein are against public policy since the applicant seeks that the Respondent pays to it the sum of Kshs 325 million without first having surrendered or executed transfer documents for the suit property to the County Government. To do so, it was contended would be unjustly enriching the applicant.

9. According to the Respondent, it has emerged that the parcel of land in respect of which enforcement of the judgement is sought was illegally and unlawfully allotted to the Applicant and a title illegally issued hence to enforce the same is to justify corruption. To the Respondent the said parcel has always belonged to the Respondent and was earmarked for public use. It was the Respondent's position that since the said property was acquired for public use, the same was not available for transfer to a private company for

private benefit. It was its view that public interest first takes precedence to individual interest especially where the procedure was unlawful as in this case.

10. It was further contended that the judgement which the applicant seeks to enforce was obtained without disclosing material facts to the effect that there were two other matters pending in respect of the same matter.

Determinations

11. I have considered the issues raised in this application.

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

“...in 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 no longer 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.”

13. The circumstances under which judicial review order of *mandamus* are issued were set out by the Court of Appeal in In Republic vs. Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996, the Court of Appeal cited, with approval, *Halsbury's Law of England*, ^{4th} Edn. Vol. 7 p. 111 para 89 thus:

"The order of mandamus is of 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." ...These principles mean that an order of mandamus compels 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 a party who has a legal right to expect the duty to be performed."

14. In this case, the Applicant herein has moved this Court to compel the satisfaction of a judgement already decreed in its favour by a competent Court of law. The Respondent has, however, raised the following issues:

- 1. That the Applicant did not disclose in the ELC No. 1142 of 2013 that there were two other cases pending before the Court touching on the same matter.**
- 2. That the Applicant seeks orders compelling the County Government to pay the sum of Kshs 325 million without surrendering or executing transfers documents to the County.**
- 3. That the property in respect of which the Applicant intends to enforce the judgement is a public property that was illegally and unlawfully allotted to the Applicant and that the said property rightfully belongs to the County Government.**

15. In my view the first and the third issues ought to have been the subject of the proceedings before the trial Court. In proceedings of this matter, the Court's mandate is limited to enforcement of the decision of the trial Court. This Court in such proceedings is not entitled to revisit the merits of the decision of the trial Court since in exercising its supervisory jurisdiction the Court is not sitting as an appellate Court over the earlier judgement. Accordingly, it is no longer open, in such proceedings for the Respondent to raise, and the Court to consider, the merits of the decisions sought to be enforced. A party aggrieved by a decision of the trial Court ought to apply for the same to be set aside where, as in this case, fraud is alleged.

16. In this case, the Respondent attempted to set aside the judgement that arose from the said proceedings but the same was fruitless. If the Respondent, was aggrieved by the decision dismissing its application it ought to have appealed against the same rather than to challenge the same in these proceedings. Accordingly, the judgement stands notwithstanding any misgivings the Respondent may have in respect thereof. If the Respondent was dissatisfied with the judgement it ought to have appealed against the same.

17. It is therefore my view that the issues raised herein no longer fall for determination in these proceedings.

18. I associate myself with the position adopted by **Majanja, J** in Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006 that:

"...a decree holder's right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized in Article 10, the obligation of the court to do justice to the parties

and to do so without delay under Article 159 (2) (a) & (b) and the Applicant's right of access to justice protected under Article 48 of the Constitution."

19. Similarly, in this case we are dealing with the duty to pay a debt already decreed by a competent Court of law to be due and payable by the Respondent.

20. With respect to the 2nd issue whether the Court can take into consideration the allegation that the Applicant has not surrendered the suit land and executed the transfer thereof to the Respondent, this Court appreciates that the decision whether or not to grant orders of judicial review in particular mandamus is no doubt an exercise of judicial discretion.

21. This position was appreciated in **The Republic v. Director – General of East African Railways Corporation, ex parte Kaggwa (1997) KLR 194**, in which Chesoni, J (as he then was) stated:

"Mandamus is neither a writ of course neither a writ of right but a discretionary remedy which the court will grant only if there is no more appropriate remedy. In other words, if there is a satisfactory alternative remedy available to the applicant, the court will not grant mandamus. Adequate alternative remedy is an important limitation to the availability of an order of mandamus. The purpose of Mandamus is to compel the performance of a public duty or an act contrary to, or evasive of, the law; and it does not lie against a public officer as a matter of course and where one or more, of the bars or limitations exists, the court will, usually, not exercise its discretion in favour of the applicant. These bars are: that there is an alternative specific remedy at law; that there is no possibility of effective enforcement, or performance will be impossible by reason of the circumstances, like lack of power or means to obey on the part of the Respondent; and that it will result in interference by the judicial department with the executive arm of the government...All in all, these bars are discretionary; but there has to be a good reason for them not to apply to a particular case where they exist." [Emphasis added].

22. The parameters of the remedy of *mandamus* was set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 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 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." [Emphasis added].

23. Therefore the Court will only decline to grant an order of *mandamus* where it is shown that there exist an alternative remedy which is more convenient, beneficial and effectual. The Respondent has not shown which alternative remedy exists and whether the same meets the criteria for declining to grant the order sought herein. As was appreciated by Goudie, J in **Shah vs. Attorney General (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543**:

"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."

24. On my part, I have read the judgement that gave rise to these proceedings, and it is clear to me that the same was not conditional upon the surrender and transfer of the suit property. The Respondent, in my

view, is free to make an application for review of the decision and seek the grant of appropriate orders from the trial Court.

25. In my view, the reasons advanced by the Respondent for the failure to satisfy the decree are flimsy excuses meant to deny the applicant the fruits of its judgement and I have no reason to decline to grant the orders sought herein.

Order

26. In the premises I hereby issue an order of *mandamus* against the respondents compelling them to immediately pay the sum of Kshs 325,000,000.00 mesne profits of Kshs 200,000 per month with effect from 1st June 2013 till payment in full, costs of Kshs 6,744,612.00 plus accrued interests at 12% p. a. with effect from 4th July 2014 till payment in full as decreed in Nairobi HC ELC 1144 of 2013 Salima Enterprises Limited -versus- Nairobi City County.

27. The Applicant will have the costs of these proceedings.

28. Orders accordingly.

Dated at Nairobi this 7th day of June, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Oswera for Mr Kirimi for the Applicant

Cc Mutisya