



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 221 OF 2016

IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY CHIEF OFFICER, FINANCE & ECONOMIC PLANNING,

NAIROBI CITY COUNTY.....REPODENT

EX PARTE: STANLEY MUTURI

JUDGEMENT

Introductions

1. By a Notice of Motion dated 26th May, 2016, the ex parte applicant herein, **Stanley Muturi**, seeks the following orders:

1. That of Mandamus directed against the County Chief Officer in charge of Finance and Economic Planning, to compel him to honour the decree and certificate of costs issued on 15/3/2016 in Milimani CMCC No. 4428 of 2013, to pay the ex parte applicant a sum of Kshs 516, 362.52 together with interest thereon at the rate of 12% till payment in full.

2. That costs be borne by the Respondent.

Applicant's Case

2. According to the applicant, he works as a newspaper vendor along Loita Street next to Maendeleo House in Nairobi. On 21st May, 2012 he was arrested by Nairobi City County Marshalls and together with his colleague, **David Mugo Mwangi** bundled into a Nairobi City County van. They were then taken to City Hall, where they were charged jointly with the offence of interfering with the works of Water supply of Nairobi Water company, contrary to section 95(1) of the **Water Act**, Cap 372 of the Laws of Kenya to which they pleaded not guilty and he was released on a cash bail of Kshs 20,000.00.

3. Following the inability of the prosecutor to avail the witnesses, on 26th July, 2012, the prosecutor applied to withdraw the case which application was granted and he was set free.

4. Aggrieved by the manner in which he was arrested, detained and maliciously charged and the eventual withdrawal of the charges in July 2013, he filed Civil Suit No. 4428 of 2013 against the Nairobi City County which case was heard and judgment delivered on 10th December, 2015, the court entered judgment for Kshs 420,000.00 being general damages for malicious prosecution, false imprisonment and for special damages plus costs and interest at court rates.

5. According to the Applicant, despite extracting the decree and certificate of costs and serving the same upon the Nairobi City County, with a demand for the payment of the sum decreed as payable, the same has not been honoured by Nairobi City County to date, and the demand has been ignored.

6. It was further deposed the respondent was involved in the extraction of the said decree as required under the **Civil Procedure Rules**, and that they did not object to the same after which the same was sealed by the court and a copy thereof forwarded to the respondent, with a demand for settlement of the decretal amount. However the respondent neither acknowledged receipt thereof nor acted thereon.

7. The applicant averred that the Certificate of Order against the Government has been issued and the sum due from the defendant is ascertained with clarity but the respondent has failed to carry out a statutory duty, and ignored a court order, hence it is in the interests of justice that an order issued against him as prayed.

Respondent's Case

8. In response to the application, the Respondent while acknowledging that judgement was entered against it on 10th December, 2015 averred that it was neither served upon the respondent nor its advocate as alleged by the applicant.

9. According to the Respondent, the application is fatally incompetent and incurably defective and 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. According to the Respondent, under Part 1V of the **County Government Act**, responsibilities with respect to management and control of public finance under the **Public Finance Management Act** Cap 412C of the Laws of Kenya and the statutory duty to pay out funds from the County Treasury vests in the County Executive Committee Member in charge of finance and not the respondent herein thus the respondent herein is wrongly suited.

10. It was further averred that the application is frivolous, vexatious and an abuse of the court process and is a mere publicity stunt by the applicant as it relates to the respondent.

11. To the Respondent, the County Government has competing interests including settling decrees to the public but has limited resources and has statutory processes it must abide by before the settlement of the same. Further, the services provided by the county government serve approximately four million Nairobi residents yet no adequate resources are available. It was contended that the alleged contemnor (sic) is a public officer and is 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. It was averred that the immediate settlement of the order would require constitutional or county legislation approval which has not been given to the respondent because of the already closed budget cycle hence he is 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. It was however disclosed that he was ready to pay once the same is allocated for, approved and passed by the County Assembly as provided in Section 125 of the **Public Finance Management Act**, 2012.

12. The Respondent therefore sought the Court's indulgence to allow for the budgeting, allocation and approval of the amounts decreed through the procedures provided for under the **County Government Act**.

13. It was however disclosed that the respondent has since filed Appeals against the Judgment herein.

Determinations

14. I have considered the material before me.

15. The first issue for determination is whether this Court ought not to grant the orders sought herein on the basis of the unavailability of funds. **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.*” [Emphasis mine].

16. I associate with the said decision and it is therefore my view that settlement of decretal sum by the Government whether National or County does not necessarily depend on the availability of funds. This position was appreciated by this Court in **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012** in which this Court pronounced itself as follows:

“I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein.”

17. In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations. In other words financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle a sum decreed by the Court to be due from it. That objection therefore fails.

18. The next issue is whether service of a decree on the respondent is mandatory before an order of mandamus can issue. As rightly held in **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte 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.”

19. However, generally a demand for the actions to be taken is a prerequisite to the grant of an order of mandamus though there may be exceptions to this general rule. See **The District Commissioner Kiambu vs. R & Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109.**

20. In this case the applicant has exhibited a copy of the letter dated 30th March, 2016 by which a demand for the settlement of the sum herein was made. The said letter bears the stamp of the Respondent. Accordingly no issue turns on the allegation of non-service of the decree whose existence the Respondent acknowledges.

21. The next issue is whether the Respondent herein is the correct person to be sued.

22. 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."

23. It is true that the County Executive in Charge of Finance is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered 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.

24. 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].

25. 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.

26. 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.

27. 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.”

28. 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:

“...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.”

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

Order

30. In the result I allow the Notice of Motion dated 26th May, 2016, and issue an order of Mandamus directed against the County Chief Officer in charge of Finance and Economic Planning, compelling him to honour the decree and certificate of costs issued on 15th March 2016 in Milimani CMCC No. 4428 of 2013, and pay the ex parte applicant a sum of Kshs 516, 362.52 together with interest thereon at the rate of 12% till payment in full.

31. As there was misjoinder of parties there will be no order as to costs.

32. Orders accordingly.

Dated at Nairobi this 13th day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Khayega for the Applicant

Cc Mwangi