REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MISC. APPLICATION NO. 216 OF 2015

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF MANDAMUS BY NGUYO NGIBUINI T/A NGIBUINI & ASSOCIATES, CONSULTING ARCHITECTS FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF ORDER 53 RULES 1, 2 AND 3 OF THE CIVIL PROCEDURE RULES, 2010 AND SECTION 3A OF THE CIVIL PROCEDURE ACT

BETWEEN

NGUYO NGIBUINI T/A NGIBUINI &

ASSOCIATES, CONSULTING ARCHITECTS.......................................APPLICANT

VERSUS

DR. EVANS KIDERO, GOVERNOR

NAIROBI CITY COUNTY GOVERNMENT....................................1ST RESPONDENT

LUKE GATIMI, MANAGER, FINANCE DEPARTMENT

NAIROBI CITY COUNTY GOVERNMENT....................................2ND RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 16th July, 2015 the *ex parte* applicant herein, **Nguyo Ngibuini T/A Ngibuini & Associates, Consulting Architects**, seeks the following orders:

> **1. That orders of mandamus do issue commanding the Respondents to satisfy the decree issued by the Nairobi High Court Civil Case No. 446 of 2012 between Nyuyo Ngibuini t/a Ngibuini & Associates, Consulting Architects versus Nairobi City County Government wherein the decretal sum Kshs 15,656,101.54 together with interest at the rate of 14% per annum from 6/5/2011 until full settlement.**
>
> **2. That the costs of this application be paid by the Respondents**

Applicant's Case

2. The application was supported by an affidavit sworn by **Gikandi Ngibuini**, the *ex parte* Applicant's Advocate on 23rd June, 2015.

3. According to the deponent, he filed a Plaint in the Nairobi High Court Civil Case No. 446 of 2012 on behalf of the ex parte

Applicant herein and Nairobi City County Government filed its memorandum of appearance and defence and the case proceeded for full hearing and judgment was delivered on 12th February 2015.

4. He deposed that he obtained a decree against the said Government which was duly served upon the Respondents, **Dr. Evans Kidero** and Mr**. Luke Gatimu** who are the accounting officers in the said County Government. He deposed that the Respondents have not settled the judgment, even after such service of the said decree.

5. It was deposed that the total amount due to satisfy the said judgment f the court is Kshs 15,656,101.54 which sum is attracting interest at court rates until the matter is fully settled.

6. It was the Applicant's case that the failure by the Respondents to discharge their duties as mandated by the law is causing the ex-parte Applicant to suffer losses as he is not enjoying the fruits of his successful litigation.

7. Since the Respondents hold the offices of Governor and Manager of Finance Department of the Nairobi City County Government, it was averred that the said two persons have full responsibility to settle monetary decrees against the said Government but they have abdicated on that responsibility thereby making this application necessary.

8. To the deponent, it is just that this honourable court do issue a mandamus order against the Respondents to be commanded to release payment in the sum of Kshs. 15, 656,101.54 to the *ex parte* Applicant so as to ensure that the judgment of the court is adhered to.

Respondents' Case

9. In opposition to the Application the Respondents filed the following grounds of opposition:

> **1. That the application is fatally incompetent and incurably defective**
>
> **2. That the application is premature as the costs in the suit are yet to be taxed (ruling on taxation fixed for 7th August 2015) as is required by law. A decree cannot be executed in piece meal**
>
> **3. That the orders sought by the Applicant do not lie as against the Respondents as there is no statutory duty imposed upon them to act a demanded. The Applicant has not stated under which law the cited Respondents have a duty to act as demanded.**
>
> **4. That under Part IV- County Government Responsibilities with respect to management and control of Public finance under the Public Finance Management act Cap 412C of the Laws of Kenya, the Statutory duty to pay out funds from the county treasury vests in the County Executive Committee in charge of Finance and not the Respondents herein thus the Respondents herein are wrongly suited.**
>
> **5. That the application is frivolous, vexatious and an abuse of the court process and is a merely publicity stunt by the Applicant as it relates to the Respondents.**
>
> **6. That the Respondents have since filed an Appeal against the Judgment herein.**

Determination

10. I have considered the application, the supporting affidavit as well as the grounds of opposition and the submissions filed herein.

11. As the Respondents did not file any replying affidavit the allegation that the costs have not been taxed cannot be taken seriously by this Court.

12. The Respondents have however contended that they are not the accounting officers of the Nairobi County Government hence they cannot be compelled to satisfy the decree. 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. 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. 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. As this Court appreciated in **Council of Governors & Others vs. The Senate Petition No. 413 of 2014**:

> **"…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. Apart from that the affidavit in support of the application was sworn by the advocate rather than the applicant himself. It is now trite that advocates ought not to swear affidavits on contested facts or facts which are likely to be contested if their clients are available to swear the same. In this case, however no issue arises as the averments are not contested. However that is an issue which the Court may properly take into account in making a decision on costs.

14. As can be discerned from the title to these proceedings, the Applicant is indicated as **Nguyo Ngibuini T/A Ngibuini & Associates, Consulting Architects**. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486** the court expressed itself on the issue as follows:

> **"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari*, *Mandamus* or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -**

> **"REPUBLIC…………………..……………….……..APPLICANT**
>
> **V**
>
> **THE ELECTORAL COMMISSION OF KENYA………RESPONDENT.**
>
> **EX PARTE**
>
> **JOTHAM MULATI WELAMONDI"**

15. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

> **"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".**

16. Nevertheless, 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** 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".**

17. This Court has time and again warned the litigants and their counsel that the failure by a party to properly intitule the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs since it must be remembered that judicial review proceedings are special proceedings which are neither criminal nor civil. Proper intitulement of applications both for leave and the substantive Motion not only helps in minimizing confusion at the appellate level, but is a reflection of the fact that judicial review proceedings are in substance commenced so as to enable parties seek and obtain orders which are not ordinarily available in the usual civil proceedings.

18. I must say with due respect that these proceedings were instituted in a rather causal manner.

19. 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 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."**

20. I adopt my reasoning in the said case. However, it is clear that the claim herein differs from the award in the judgement which gave rise to these proceedings. As was held in **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR,** the order must command no more than the party against whom the application is legally bound to perform. Accordingly, save for costs of these proceedings, I can only compel the satisfaction of the award in the judgement.

21. Accordingly, an order of mandamus is hereby issued directed to the Respondents compelling them to satisfy the decree issued by the Nairobi High Respondents compelling them to satisfy the decree issued by the Nairobi High Court Civil Case No. 446 of 2012 between Nguyo Ngibuini t/a Ngibuini & Associates, Consulting Architects versus Nairobi City County Government wherein the decretal sum Kshs 10,437,401.00 together with interest at the rate of 12% per annum from the date of filing suit till payment in full was given.

22. As the application was not properly intituled coupled with the failure to institute these proceedings against the proper officer of the County Government I, in the exercise of my discretion, decline to award the Applicant the costs of these proceedings. Consequently there will be no order as to costs.

Dated at Nairobi this day 2nd November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Osoro for Mr Gikandi for the Applicant

Mr Jelle for Mr Koceyo for the Respondents

Cc Patricia