



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW NO. 237 OF 2014

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF SECTION 44(10) OF COUNTY GOVERNMENT ACT NO. 17 OF 2012 AND SECTION 59 THE URBAN AREAS AND CITIES ACT NO. 13 OF 2011 ARTICLES 156, 176 OF THE CONSTITUTION OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE LAW.

REPUBLIC.....APPLICANT

-VERSUS-

COUNTY SECRETARY

(NAIROBI CITY COUNTY).....1ST RESPONDENT

AND

CHIEF OFFICER FINANCE/COUNTY

TREASURER (NAIROBI CITY COUNTY).....2ND RESPONDENT

EXPARTE:

CATHERINE W. NGALA practicing as CW NGALA & CO. ADVOCATES

JUDGEMENT

1. By a Notice of Motion dated 20th June, 2014 the *ex parte* applicant herein, Catherine W. Ngala practicing as C W Ngala & Co. Advocates, seeks the following orders:

1. That an order for Mandamus do issue directed to the Respondents herein namely the County Secretary and the Chief Officer Finance/County Treasurer both of the Nairobi City County to compel them forthwith and without delay cause to be paid to the Ex parte Applicant the decretal sum delineated hereunder together with accrued interest until payment in full, that is to say;

(a) A sum of Kshs. 19,771,403.55 made up of the principal sum of Kshs. 15,814,226.22 plus interests at 14% totalling Kshs. 3,957,177.33 calculated up to 31st December, 2013 arising out of Advocate/Client costs taxed and decreed by this honourable Court.

(b) A sum of Kshs. 922,496.53 being further interests calculated from the total principal sum of Kshs. 15,814,226.22 at 14% p.a from 1st day of January 2014 to 31st day of May 2014.

(c) Further interests at 14% on the principal sum of Kshs. 15,814,226.22 from 1st June 2014 until payment in full.

2. That cost of this application be borne by the Respondents.

2. The application was supported by a supporting affidavit sworn by the applicant on 18th June, 2014.

3. According to the deponent, the decretal sums subject of this application arose out of instructions given to her firm **C W Ngala & Company Advocates** to act for the Respondent in 139 suits at various dated from year 2000 which were finalized, fee notes issued, Bill of costs taxed, Certificate of taxation issued and decreed as judgments of this honourable court.

4. According to her, the Respondent in all matters did not deposit with the applicant any funds on account of fees and disbursements and therefore the applicant had to file advocate/client bills of cost, applications to have certificates of taxation decreed by this honourable court as judgments of court and obtained 129 decrees. To carry out his exercise, it was deposed the firm spent disbursements of an approximate sum of Kshs. 5,000/= per file for 139 matters totalling Kshs. 695,000/= and to enable the firm claim this amount, it were required again to tax these costs after certificate of costs were made judgment of the court but the firm could not afford the exercise again so it had to abandon the said costs reluctantly and moved on to file this mandamus application.

5. It was deposed that from the schedule for High Court Civil Division and Commercial and Admiralty Division Miscellaneous Application it was shown the total number of cases, the firm's Reference numbers, the Suit instructed by the Respondent, the Miscellaneous Application filed for purposes of taxation of Advocates/Client cost, the parties in Miscellaneous case, the date when the Certificate of Taxation were issued, when the Decree was issued, the principal amount taxed in each cases, Interest awarded at 14%, interest calculated on each decree up to 31st December 2013 and the Total Principal amount taxed plus interest calculated up to 31st December 2013 in each of the cases.

6. It was therefore the deponent's case that the schedule for the matter taxed and decreed at Civil Division of the High Court shows the final calculation as follows:-

- Total Principal Amount Taxed..... Kshs. 11,190,470.08
- Add interest on the principal amount
Taxed up to 31/12/2013..... Kshs. 2,666,066.30

- Total unpaid as at 31/12/2013..... Kshs. 13,855,537.38

7. With respect to the schedule for matters taxed and decreed in Commercial and Admiralty Division of the High Court shows the final calculations as follows:-

- Total Principal Amount taxed..... Kshs. 4,623,753.14

- Add Interest on the principal amount
 Taxed up to 31/12/2013..... Kshs. 1,292,113.03
- Total unpaid as at 31/12/2013..... Kshs. 5,915,866.17

8. The applicant's case was therefore that the total Principal Amount outstanding as at 31st December, 2013 on these taxed matters in both Civil Division and Commercial and Admiralty Division of the High Court comes to Kshs, 15,814,226.22 while Interest at 14% p.a on the principal sum in each matter from the date shown in each decree up to 31/12/2013 is Kshs. 3,957,177.33 bringing up to a total of Kshs. 19,771,403.55.

9. It was further deposed that the *Ex parte* Applicant is also entitled to Kshs. 992,496.53 being interests at 14% p.a on the total principal sum of Kshs. 15,814,226.22 from 31/12/2013 to 31/5/2014 as prayed is also entitled to further interests on the principal sum Kshs. 15,814,226.22 at 14% p.a from 1st June 2014 until payment in full as prayed.

10. Despite service upon the Respondent of our Fee notes, Bill of Costs, Certificate of Taxation, Applications to make certificates of Taxation Judgments of the Court and the actual Decrees in these 139 matters, which were attached, it was averred that the Respondent has remained a stranger to the firm's financial agony and business and financial standing has totally been crippled.

11. Further upon being dutifully served with the Notice of intention to file these Mandamus proceedings vide a demand dated 21st January 2014, the Respondent has remained noncommittal. However, by a letter dated 4th February 2014 written by **Mr. Karisa Iha** of the Legal Affairs Department of the Respondent on behalf of the County Secretary, the Respondent in reply to the demand letter dated 21st January 2014 admitted the entire claim and talked of a Task Force stating that the task force was seized of the matter and the delay in addressing the legal fees had been occasioned by the sheer volume of files that were being examined and therefore sought indulgence. However despite 4 months having lapsed no payment was made and the applicant was of the view that the Respondent was insensitive to her financial plight hence only a compelling Order of Mandamus from this court could effectively make them pay up the decretal sum to her firm.

12. In the applicant's view, the Respondent being the most powerful County in the country, the Respondent/Judgment Debtor had capacity to satisfy the decretal sum hence the court was urged to put an end to the matter by granting the orders sought.

13. The application was however not opposed by the Respondent.

14. I have considered the application, the verifying affidavit as well as the Statements and the documents on record together with the submissions filed and the authorities cited therein including **Printing Industries Ltd vs. City Council of Nairobi HCMA No. 224 of 2012**, **National Housing Corporation vs. Nairobi City Council & Another [2002] 1 KLR 767**, **Republic vs. The Governor, Nairobi City County ex parte Mwangangi & Co. Advocates JRMisc. Appl. No. 429 of 2012**, **Republic vs. The Town Clerk City Council of Nairobi ex parte Njagi Wanjeru Misc. Appl. No. 82 of 2008**, **Republic vs. Hon. Attorney General & Others ex parte Ombaso Masese Misc. Appl. No. 107 of 2013** and **Republic vs. Permanent Secretary Office of the Vice President and Ministry of Home Affairs ex parte Benjamin Komu HCMA No. 187 of 2012**.

15. 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:

“...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.”

16. In the absence of any replying affidavit, I find merit in the Notice of Motion dated 20th June, 2014 and grant the following orders:

1) An order of *mandamus* is hereby issued compelling Respondents herein namely the County Secretary and the Chief Officer Finance/County Treasurer both of the Nairobi City County to compel them forthwith and without delay cause to be paid to the Ex parte Applicant the decretal sum delineated hereunder together with accrued interest until payment in full, that is to say;

(a) A sum of Kshs. 19,771,403.55 made up of the principal sum of Kshs. 15,814,226.22 plus interests at 14% totalling Kshs. 3,957,177.33 calculated up to 31st December, 2013 arising out of Advocate/Client costs taxed and decreed by this honourable Court.

(b) A sum of Kshs. 922,496.53 being further interests calculated from the total principal sum of Kshs. 15,814,226.22 at 14% p.a from 1st day of January 2014 to 31st

day of May 2014.

(c) Further interests at 14% on the principal sum of Kshs. 15,814,226.22 from 1st June 2014 until payment in full.

2) The applicant will have the costs of this application.

Dated at Nairobi this 13th day of October, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mrs Ngala for the Applicant

Cc Patricia