



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 141 OF 2014

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

AND

IN THE MATTER OF: SECTION 59 OF THE URBAN AREAS AND CITIES ACT NO. 13 OF 2011 AND SECTION 44 (1)

OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012 AND ALL OTHER ENABLING PROVISIONS OF THE LAW.

REPUBLIC.....APPLICANT

VERSUS

COUNTY SECRETARY, NAIROBI COUNTY.....1ST RESPONDENT

COUNTY TREASURER, NAIROBI COUNTY.....2ND RESPONDENT

EX-PARTE: SOLOH WORLDWIDE INTER-ENTERPRISES LTD

JUDGEMENT

1. By a Notice of Motion dated 17th April, 2014, the *ex parte* applicant herein, **Soloh Worldwide Inter-Enterprises Ltd**, seeks the following orders:

1. THAT an Order of Mandamus be issued directed to the Respondents herein namely, the County Secretary of Nairobi County and County Treasurer of Nairobi County to forthwith and without delay cause to be paid to the *Ex-parte* Applicant the sum of Kshs. 2,652,033.69 being the outstanding decretal sum together with accrued interest thereon as at 31st March 2014 and costs of Kshs. 145,323/- together with such further accruing interest on the said decretal sum and costs until full and final payment thereof as ordered in the decree given on 13th May 2011 in NAIROBI CMCC NO. 5352 OF 2007 between SOLOH WORLDWIDE INTER-ENTERPRISES LIMITED -VS- CITY COUNCIL OF NAIROBI.

2. THAT the costs of this application and the Chamber Summons dated 8th April 2014 be borne by the Respondents.

2. According to the applicant, it is the decree-holder in CMCC No. 5352 of 2007 between Soloh Worldwide Inter-Enterprises Limited –vs- City Council of Nairobi vide a decree given on 13th May 2011 in which decree the ex parte Applicant was awarded the principal sum of Kshs. 1,258,306/- and costs of Kshs. 145,323/- together with interest thereon at court rates.
3. However, the Respondents have neglected their statutory duty and refused to pay to the *Ex-parte* Applicant the said decretal sum together with accrued interest thereon to-date despite numerous requests from the Applicant.
4. It was the applicant's case that the said decree is wholly unsatisfied and the total decretal sum and interest thereon due from the Respondents amounts to Kshs. 2,652,033.69/- as at 31st March 2014 and costs of Kshs. 145,323/- yet the Respondents do not have any justifiable reasons for failing to pay the same.
5. It was contended by the applicant that the blatant refusal to pay the decretal sum and certified costs amounts to neglect of statutory duty by the Respondents who are legally mandated to administratively ensure the settlement of the subject decree and that the delay in settling the decree is causing the ex-parte Applicant substantial prejudice and the operations of the ex-parte Applicant are threatened due to lack of sufficient capital.
6. To the applicant, there is no other legal remedy available to the *Ex-parte* Applicant except an order for Mandamus as sought in the application.
7. In the submissions filed on behalf of the applicant it was contended that under section 59 of the ***Urban Areas and Cities Act*** No. 13 of 2011 and Section 44(1) of the ***County Government Act*** No. 17 of 2012, the Respondents being the account officers are responsible to settle the payments in the decree aforesaid on behalf of the Nairobi County since Nairobi County enjoys immunity from execution under the Urban Areas and Cities Act No. 13 of 2011 hence there is no other legal remedy available to the ex parte applicant except an order for mandamus as sought in the application.
8. The application was however not opposed by the Respondent.
9. I have considered the application, the verifying affidavit as well as the Statement of facts and the documents on record together with the submissions filed and the authorities cited therein
10. 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.”

11. In the absence of any replying affidavit, I find merit in the Notice of Motion dated 17th April, 2014 and grant the following orders:

a. THAT an Order of Mandamus be issued directed to the Respondents herein namely, the County Secretary of Nairobi County and County Treasurer of Nairobi County to forthwith and without delay cause to be paid to the *Ex-parte* Applicant the sum of Kshs. 2,652,033.69 being the outstanding decretal sum together with accrued interest thereon as at 31st March 2014 and costs of Kshs. 145,323/- together with such further accruing interest on the said decretal sum and costs until full and final payment thereof as ordered in the decree given on 13th May 2011 in NAIROBI CMCC NO. 5352 OF 2007 between SOLOH WORLDWIDE INTER-ENTERPRISES LIMITED -VS- CITY COUNCIL OF NAIROBI.

b. THAT the costs of this application and the Chamber Summons dated 8th April 2014 be borne by the Respondents.

Dated at Nairobi this 13th day of November, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kemboi for Mr Kangethe for the Applicant

Cc Patricia