REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC CIVIL APPLICATION NO. 216 OF 2010 (JR)

REPUBLIC…….....……APPLICANT

VERSUS

THE CITY COUNCIL OF NAIROBI.....RESPONDENT

EX PARTE

BLUESHIELD INSURANCE COMPANY LIMITED

JUDGEMENT

1. By a Notice of Motion dated August 2012, the ex parte applicant herein, **Blueshield Insurance Company Limited**, seeks the following orders:

1. **THAT an order of Mandamus be and is issued against the Town Clerk of the City Council of Nairobi to compel the said Town Clerk to comply with the decree granted on the 14th day of August 2009 in Milimani HCCC No. 71 of 2006 between Arkchoice Insurance Brokers Limited and Blueshield Insurance Company Ltd versus The City Council of Nairobi.**
2. **THAT an Order of Mandamus be and is hereby issued compelling and requiring the Town Clerk of the City Council of Nairobi to show cause why the City Council of Nairobi has refused and/or failed to comply with the decree granted on the 14th day of August 2009 in Milimani HCCC No. 71 of 2006 between Arkchoice Insurance Brokers Limited and Blue Insurance Company Ltd versus The City Council of Nairobi.**
3. **THAT an Order of Mandamus be and is hereby issued compelling and requiring the Town Clerk of the City Council of Nairobi to show cause why he should not be committed to civil jail for refusing and/or failing to comply with the decree granted on the 14th day of August 2009 in Milimani HCCC No. 71 of 2006 between Arkchoice Insurance Brokers Limited and Blue Shield Insurance Company Ltd versus The City Council of Nairobi.**
4. **Cost of this Application be provided for.**

2. The Motion is based on the grounds set out in the statutory statement filed herein on 14th June 2010 and verifying affidavit sworn by **Lydia Macharia**, the Managing Director of the applicant company on the same day.
3. According to the applicant, by a consent judgement dated 13th January 2009 entered against the City Council of Nairobi and in favour of the Applicant herein together with **Arkchoice Insurance Brokers Ltd** in MILIMANI HCCC NO. 71 of 2006 (wherein the applicant was interested party), it was decreed against the **City Council of Nairobi** that judgement be entered against the **City**

Council of Nairobi for Kshs. 24,572,942.28=. The said sum was to be settled by paying Kshs. 3,800.000.00 directly to **Arkchoice insurance Brokers Ltd**. and Kshs. 12,871,952.00 directly to the Applicant, **Blue Shield Insurance Company Ltd.**

4. It is however, contended that the City Council honoured the payment to **Arkchoice Insurance Brokers Ltd** but in spite of several demands and reminders has totally refused, neglected and/or failed to pay **Blue Shield Insurance Company Ltd** its money amounting to Kshs. 12,871,952.00 as per the decree. In the applicant's view, the failure to pay the Applicant is actuated by malice given that the City Council quickly paid **Arkchoice Insurance Brokers** on account of the same Decree and consent judgement but has flatly refused to pay the applicant and hence unless the court intervenes, the City Council has no intention of paying the applicant amounts due and owing.
5. In opposition to the application, the Respondent filed a replying affidavit sworn by **Karisa Iha**, the Respondent's Director, Legal Services on 14th march 2013. According to the deponent, the applicant is trying to enforce a decree that does not exist. It is deposed that vide a letter dated 14.8.2009 it is the applicant herein wrote to the respondent intimating that there was a dispute as to the amounts payable in the superior court file and expressly instructed/warned the respondent to not to make any payments in the superior court file until the matter was settled. To the deponent's understanding, the said letter and other's by the applicant's advocates the applicant's are disgruntled with the terms of settlement specifically that the decree was unlawful which decree in any event did not reflect the true amount of the applicant's entitlements. It is further deposed that to date the said issue of the amount due to the applicant as interest remains unresolved, and as demonstrated it is the applicant who is the author of the said turn of events. It is averred that the respondent on 9.13.2007 deposited the sum of Kshs 16,671,952/= with this honourable court in the superior court file and on the same breadth the applicant has not intimated whether it has now had a change of heart and is now content with the said sums as per the consent or whether this instant suit is but the beginning of many like suits. To him, litigation cannot be conducted in instalments hence it is clear that this suit is premature, misconceived and the orders as sought cannot issue.
6. Confronted with the aforesaid affidavit the applicant through an affidavit sworn by **Mwaniki Gachoka**, its advocate on 8th April 2013 swore a supplementary affidavit. In the said affidavit it was deposed that a Consent judgement was entered into between parties herein in HCCC No. 71 of 2006 by which the Respondent agreed to pay the Ex parte Applicant Kshs. 12, 871,952/= excluding costs and interest which were to be determined by Despite the extraction of the decree, it is deposed that the same has never been challenged by either party herein and has never been satisfied to date despite several requests made to the respondent by the Applicant. Faced with those circumstances, it is the applicant's position that the Applicant was left with no option but to file this Application on 5th August, 2010 for Orders of Mandamus to compel the Respondent's Town Clerk to pay or show Cause why he had refused to pay or why he should not be committed to civil jail for refusal to pay the decreed amount. It is therefore contended that the allegation that there is no decree is baseless and that in fact, the Respondent has made several promises to pay which have never materialized the latest being the one made on 15th November 2012. Since this consent judgement was entered into on 13th January, 2009 the Respondent has without any justifiable reason kept the Applicant from realizing the fruits of its judgement and hence the respondent's opposition is a delay tactics to the detriment of the Applicant which the Court ought not to condone.
7. In its submissions the ex parte applicant while reiterating the contents of its affidavits contends that once a decree was issued the decreed amount immediately became payable to the ex parte applicant since the Respondent has not initiated any proceedings to stay the execution of the decree. It is therefore submitted hat the Respondent has unjustifiably denied the ex parte applicant the fruits of its judgement for four years hence the Motion ought to be granted.
8. On behalf of the Respondent, t was submitted on the authority of ***Judicial Review*** by Michael Fordham, 5th Edn. That judicial review orders are of discretionary jurisdiction hence utmost good faith is required of an applicant who approaches the court for the same and that failure to disclose material facts to his case and even lack of candour would disentitle one to the said orders.
9. It is submitted that there is no decree of 14th August 2009 in the documents filed by the applicant hence based on **Ashraf Savani & Another vs. Chief Magistrate Court Kibera & 4 Others**

[2012] eKLR, **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HCMS No. 81 of 2002** and **Mohamed Ahmed vs. Republic [1957] EA 523**, the application ought to be struck out.

10. It is submitted that the document relied upon as a decree was disputed by the applicant who put a halt to its settlement on the ground that the same was illegal. It is therefore submitted that by relying on the same the applicant is blowing hot and cold. By failing to disclose to the court that the sum of Kshs 16,671,952/= was deposited in court, it is submitted that the applicant is not being candid. According to the Respondent as the issue of interests and costs still remain unsettled the applicant ought not to be permitted to litigate by instalments. It is therefore submitted that this application is premature.
11. Suffice it to say that these submissions were repeated by counsel in their oral address to court.
12. I have considered the application, the affidavits on record as well as the submissions.
13. The law as it stands presently is that no execution can be levied against the property of a local authority in settlement of a decree in a civil case and hence the only recourse available to a decree holder is to apply for *mandamus* against the Chief Officer of the Local Authority, and upon obtaining such orders, the decree holder will be at liberty to apply for committal of the Chief Officer if the order of *mandamus* is not complied with. See **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441** where it was held:

"The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/ and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the *mandamus* order using this method. There is only one rider – an officer can only be committed where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...Local Authorities Transfer Fund Act, which provides funds to local authorities, part of which should be used to pay debts does not provide for their attachment since section 263A of the Local Government Act prohibits it. It just enables the Local Authorities to honour their debt obligations including those covered by a mandamus order. The Local Authorities have to pay as a matter of statutory duty or in the case of mandamus in obedience to the order from the state or the Republic. There is no provision in the LATF Act for attachment or execution".

14. That was the position in the English case of **R (Regina) vs. Dudsheath**, **ex parte, Meredith [1950] 2 ALL E.R. 741, at 743,** in which **Lord Goddard C. J.** held:-

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges."

15. This procedure was dealt with extensively in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** eloquently, in my view, 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."

16. I fully associate myself with the learned Judge's views in the said matter.
17. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Kosoro**, 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 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."

18. In this case the Respondent has raised four issues. The first issue is that there is no decree. The second issue is that the application is premature as the costs and interests are yet to be determined. The third issue is that the applicant is not candid hence does not deserve favourable exercise of the discretionary orders sought. Lastly, that the decretal sum has been deposited in court.
19. I have perused the materials on record and one of them is a decree dated 14th July 2009 and issued on 12th August 2009 in which it is expressly decreed that Kshs 12,871,952.00 be paid directly to the applicant herein. I therefore do not understand the Respondent's contention that there is no decree. If the said decree is unlawful, a party aggrieved by it ought to have taken the steps to have it set aside. As long as the decree remains it is valid and a party in whose favour it was issued is entitled to its satisfaction.
20. With respect to the determination of costs and interests, the said decree clearly states what the costs and interests are at least up to a particular date. In my view if a party who is entitled to a certain amount decides to apply for mandamus in respect of a smaller amount, that will not deprive the court of the power to issue mandamus in respect of the sum sought. It is not for the court to direct the applicant to apply for the whole sum due to it if the applicant chooses to seek a lesser sum. Accordingly the mere fact that what is sought herein does not include the costs and interests should not be a ground for declining to grant the orders sought as long as the sum sought is due. As to whether the Court would be inclined to grant another order of mandamus in respect of a sum which ought to have been claimed is another matter which must await when and if such an application is made.
21. The next issue is whether the applicant is candid. The decision whether or not to grant an order of

mandamus is an exercise of judicial discretion and obviously the conduct of the applicant for the same is highly relevant. In this matter it is contended that the applicant having disputed the legality of the decree and having warned the Respondent against settling the same ought not to be allowed to rely on the same decree as the basis for his application. In the letter dated 14th August 2009, the Applicant's advocates informed the Respondent to withhold payment of interest until the matter was settled. It would seem that the Applicant only took issue with the payment of interests since vide a letter dated 16th August 2009 the applicants informed the Respondent's advocates to pay the principal sum which was not in dispute. In my view I do not see why the Respondent could not settle what was not disputed. The fact that the Applicants disputed the interest in my view is not a basis for declining to settle the undisputed sum.

22. Lastly it is contended that the Respondent has in fact deposited a sum of Kshs 16,671,952/= in court. There is a court receipt for the said sum dated 9th March 2007. None of the parties has addressed what the current position of the said sum is. Order 22 rule 1(1) of the Civil Procedure Rules provides:

All money payable under a decree or order shall be paid as follows—

(a) into the court whose duty it is to execute the decree;

(b) direct to the decree-holder; or

(c) otherwise as the court which made the decree directs.

23. By virtue of the said provision payment into court is deemed to be payment of the decree. Therefore if the Respondent has paid the sum into court, an order of mandamus would not be issued as the decree would have been settled thereby and the Applicant ought to apply for the release of the same.
24. For this reason I find no merit in the Notice of Motion dated 5th August 2010 which is hereby dismissed with costs to the Respondent.

G V ODUNGA

JUDGE

Dated at Nairobi this 6th day of June 2013

JUDGE

Delivered in the presence of: