



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC JUDICIAL REVIEW NO. 14 OF 2019**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE GOVERNOR NAIROBI CITY COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY EXECUTIVE COMMITTEE MEMBER FOR FINANCE,**

**NAIROBI CITY COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**AND**

**KUZA FARMS AND ALLIED LIMITED**

**(EX-PARTE APPLICANT)**

**JUDGMENT**

Sometimes in 2014, the ex-parte applicant, Kuza Farms and Allied Limited (hereinafter referred to only as “the applicant”) filed a civil suit in the High Court of Kenya at Nairobi namely, High Court Civil Suit No. 507 of 2014, Kuza Farms and Allied Limited vs. The Board of Directors A.E.F Reuben Primary School and the Nairobi City County (hereinafter referred to only as “the civil suit”).

In the civil suit, the applicant claimed that it was at all material times the registered proprietor of all that parcel of land known as L.R No. 209/11887, I.R No. 58301, Nairobi (hereinafter referred to only as “the suit property”). The applicant averred in that suit that sometimes in 2008, the 2<sup>nd</sup> defendant in that suit namely, the Nairobi City County invaded the suit property and purported to allocate it to some charitable organizations which established thereon a primary school and a clinic that were being managed by the 1<sup>st</sup> defendant in the said suit, the Board of Directors of A.E.F Reuben Primary School. The applicant averred in the said suit that the said actions by the Nairobi City County amounted to forceful acquisition of the applicant’s property without compensation which was prohibited under the laws of Kenya.

The applicant averred further in that suit that it had a valid and indefeasible title to the suit property which conferred upon it exclusive proprietary right over the same. The applicant sought judgment against the defendants in that suit for; a mandatory injunction compelling the said defendants to demolish the structures they had erected on the suit property and to vacate the property; general damages for trespass on the suit property and committing waste thereon; a permanent injunction barring the defendants in that suit from encroaching on to the suit property and costs of the suit.

The civil suit was defended by the Nairobi City County which claimed that the suit property was allocated to it by the Government of the Republic of Kenya for public purposes. The Nairobi City County claimed that the suit property was set aside for the development of public amenities and that the applicant’s title over the suit property was revoked by the Registrar of Titles through Gazette Notice No. 8653 dated 29<sup>th</sup> June 2012. The suit property according to the Nairobi City County was developed with a community centre, a police station, a public primary school, a public health clinic and a vocational training centre. The Nairobi City County averred that there were several specialised social services programs being run from the suit property.

Following negotiations over a long period of time which involved the Nairobi City County Government, the applicant and the Attorney General of the Republic of Kenya, a decision was made to settle the civil suit with the applicant. On 28<sup>th</sup> July, 2016 a consent judgment was entered for the applicant in the civil suit against among others, the Nairobi City County on the following terms;

1. “That the defendants do jointly and severally compensate the plaintiff for its land more specifically described as L.R No. 209/1187, I.R No. 58301 comprising of 1.012 Ha. or thereabouts situate in the city of Nairobi.

2. That the value of the said land for purposes of this compensation is hereby declared and agreed at the sum of Kenya Shillings Two hundred and fifty million (Kshs.250,000,000/=) all inclusive.
3. That the plaintiff do ensure that all encumbrances over the said parcel of land (whether loans, statutory debts, rates or rents) are cleared and settled in full which settlement will be conditional to the payment of the compensation agreed herewith to the plaintiff failure of which the same will be subtracted from the sum payable to the plaintiff.
4. That before payment of the compensation as stipulated hereinabove, the plaintiff do execute all requisite transfer documents and hand over the original title for the said land in favour of the Nairobi City County Government to the advocate for the 2<sup>nd</sup> defendant and the registration of the said transfer to precede the payment of the compensation above to the plaintiff.
5. That payment to the plaintiff be made within 50 days of the entry of the judgment herewith provided that the transfer mentioned in 4 above has been duly effected.
6. That each party to bear its own costs”.

What is now before me is a Notice of Motion application dated 21<sup>st</sup> November, 2018 brought by the applicant seeking an order of mandamus to compel the respondents herein to pay to the applicant a sum of Kshs. 250,000,000/= plus interest from 15<sup>th</sup> September, 2016 until payment in full and the costs of the application. The application is supported by a statutory statement dated 5<sup>th</sup> June, 2018 and a verifying affidavit sworn by Cyrus Shakhhalaga Khwa Jirongo on the same date.

In summary, the application has been brought on the grounds that the applicant is the registered proprietor of the suit property and that in or about the year 2008, the Nairobi City Council, the predecessor to the Nairobi City County Government invaded the suit property and allowed development thereon of certain facilities and purported to allocate the property to third parties. The applicant has contended that it promptly initiated court action against the Nairobi City County and the said third parties seeking vacant possession and/or compensation for the suit property which action prompted negotiations which resulted in a consent judgment being entered in favour of the applicant in the sum of Kshs. 250,000,000/= payable within 50 days of the date of the judgment.

The applicant has contended that the respondents have refused to honour the decree of the court and that the applicant has pleaded with the respondents for payment of the decretal sum but they have persisted in their disobedience and refusal to satisfy the decree. The applicant has contended that through the unlawful actions of the respondents, the applicant has been denied the use of its property and continues to suffer massive opportunity costs and the benefit of property ownership which have financially crippled the applicant. The applicant has contended that the actions of the respondents are capricious, unreasonable and inimical to the principles enshrined in the Constitution of Kenya 2010.

The respondents and on the direction of the court, the Attorney General were served with the application. The respondents entered appearance through the firm of Njenga Maina and Company Advocates on 2<sup>nd</sup> July, 2018 but did not file any response to the application. The Attorney General did not enter appearance. When the application came up for hearing on 31<sup>st</sup> October, 2019 Mr. Kiplagat advocate appeared for the applicant while the advocates for the respondents did not appear in court. Mr. Kiplagat relied entirely on the statutory statement and verifying affidavit filed in support of the application and urged the court to allow the application as prayed.

I have considered the application together with the statutory statement and verifying affidavit filed in support thereof. Following the amendment of the Government Proceedings Act, Chapter 40 Laws of Kenya in 2015, Section 21 of the Government Proceedings Act relating to the satisfaction of orders against the government now applies to County Governments. Section 21 of the Government Proceedings Act provides as follows: -

**1. “Where in any civil proceedings by or against the government or any proceedings in connection with any arbitration in which the government is a party, any order (including an order for costs) is made by any court in favour of any person against the government or against a government department, or against an officer of the government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of 21days from the date of the order or, in case the order provides for the payment of costs and the costs are required to be taxed, at any time after the costs have been taxed, whichever is the latter, issue to that person a certificate in the prescribed form containing the particulars of the order:**

**Provided that if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.**

**2. A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney General.**

**3. If the order provides for the payment of any money by way of damages or otherwise, or any costs, the certificate are state the amount payable and the accounting officer for the government department concerned shall, subject as hereinafter provided pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:**

**Provided that the court by which any such orders are as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.**

**4. Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any such court for**

**enforcing payment by the government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the government, or any government department, or any officer of the government as such, of any money or costs.**

**5. This section shall, with necessary modification, apply to any civil proceeding by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.”**

In Halsbury’s Laws of England, 4<sup>th</sup> Edition Volume 1 at page 111 paragraphs 89 and 90, the authors have explained the nature and mandate of an order of mandamus as follows:

**“The order of mandamus is of most extensive remedial nature and is in the form a command issuing from the High Court of justice, directed to any person, cooperation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy defect of justice (and accordingly it will issue, to the end that justice may be done, in all cases where there is specific legal right and there no specific legal remedy for enforcing that right) and it may issue in cases where although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute which imposes a duty leave discretion as to the mode of performing the duty in the hand of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”**

In the case of Kenya National Examination Council v. Republic ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the court explained the principle pronounced in the foregoing passage from Halsbury’s Laws of England as follows:

**“They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of person by a statute and where that person or body of persons has failed to perform the duties to the detriment of a party who has a legal right to expect the duty to be performed.”**

It is not in dispute that the applicant obtained judgment against among others, the Nairobi City County Government in the civil suit on 6<sup>th</sup> July, 2016 in the sum of Kshs. 250,000,000/=. Under the Public Finance Management Act 2012, the County Executive Committee Member for finance of a County Government is the accounting officer of the County Government. Section 21(3) of the Government Proceedings Act that I have reproduced herein earlier places an obligation on the accounting officer of the government to pay or settle any judgment made against the government. It follows therefore that to the extent that the judgment in the civil suit was against the Nairobi City County Government, the accounting officer of the said government which is the County Executive Committee Member of finance, Nairobi City County Government, the 2<sup>nd</sup> respondent herein had a duty and an obligation to settle the said sum of Kshs. 250,000,000/= that was awarded to the applicant. However, I am of the view that the 2<sup>nd</sup> respondent was only under a duty to settle the said amount provided that the conditions under which the said amount was to be paid had been fulfilled by the applicant and that the applicant had complied with the provisions of section 21(1) of the Government Proceedings Act aforesaid.

I have noted from the decree issued in the civil suit on 1<sup>st</sup> August, 2016 that the applicant had a duty to ensure that all encumbrances over the suit property in the form of loans, statutory debts, rates and rents were cleared and settled in full before the said payment of Kshs.250,000,000/= was made to the applicant and that the applicant was to execute an instrument of transfer in favour of the Nairobi City County Government in respect of the suit property and was to handover the original title for the suit property to the Nairobi City County Government prior to receipt of the said payment of Kshs.250,000,000/=.

I have noted further that the registration of the transfer of the suit property in favour of Nairobi City County Government was a condition precedent to any payment of compensation being made to the applicant. I have also noted that the payment of said sum of Kshs. 250,000,000/= to the applicant was to be made within 50 days from the date of judgment in the civil suit on condition that the suit property was duly transferred to the Nairobi City County Government. In his affidavit in support of the present application, the applicant has not indicated whether it has fulfilled its part of the consent judgment that was given in the civil suit. The applicant has not mentioned whether it has discharged all the encumbrances on the title of the suit property and whether it has delivered an instrument of transfer of the suit property to the City County Government and that the property has been registered in the name of Nairobi City County Government.

As I have mentioned earlier, the payment of the said sum of Kshs. 250,000,000/= was to be made to the applicant provided that the suit property had been transferred to the Nairobi City County Government. In the absence of any evidence that the applicant has complied with its part of the bargain in the consent judgment that was made in the civil case, I am unable to say that the 2<sup>nd</sup> respondent herein was duty bound to pay to the applicant the said sum of Kshs. 250,000,000/=. The applicant had a duty to demonstrate that it had complied with the conditions in the judgment which had to be met prior to the payment being made to it.

I have also observed that the applicant has failed to comply with section 21 (1) of the Government Proceedings Act. There is no evidence that the applicant has applied in the civil suit to be issued with a certificate in the prescribed form containing the particulars of the order that was made in its favour. Under section 21 (3) of the Government Proceedings Act, the accounting officer of the government is only supposed to make payment of the amount which has been certified to be due by the court. In the absence of a certificate, the accounting officer is not under any duty to make payment to a judgment debtor.

The upshot of the foregoing is that I find no merit in the Notice of Motion application dated 21<sup>st</sup> November, 2018. The application is dismissed with costs to be in the cause.

**Delivered and Dated at Nairobi this 7<sup>th</sup> day of November 2019**

**S. OKONG'O**

**JUDGE**

**Judgment delivered in open court in the presence of:**

Mr. Biketi h/b for Dr. Kiplagat for the Applicant

Mr. Maina for the Respondents

C. Nyokabi-Court Assistant