



Macharia v County Government of Nairobi (Miscellaneous Civil Application E073 of 2024) [2024] KEELC 7111 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7111 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION E073 OF 2024**

**JA MOGENI, J
OCTOBER 30, 2024**

BETWEEN

MARY NYAMBURA MACHARIA APPLICANT

AND

COUNTY GOVERNMENT OF NAIROBI RESPONDENT

RULING

1. By a Notice of Motion dated 11/04/2024 the applicant herein, Mary Nyambura Macharia, seeks the following orders:
 1. That an order for mandamus now be issued and the same be directed to the County Secretary, Nairobi City County and the Chief Officer, Finance/County Treasurer, Nairobi City County
 2. That the County Secretary, Nairobi City County and the Chief Officers, Finance/County Treasurer Nairobi City County shall comply by paying Kshs 7,461,632.33 being the decretal sum costs and accrued interest in ELC 555/2011
 3. That County Secretary, Nairobi City County and the Chief Officer, Finance/County shall in addition pay to the Applicant further interest on the said sum of Kshs 7,461,632.33 at the rate of 14% from the filing of this suit until payment in full.
 4. That in default, notice to show cause do issue against the County Secretary, Nairobi City County and the Chief Officer, Finance/County Treasurer, Nairobi City County for them to show cause why they should not be cited for contempt of court
 5. That the costs of this application be in the cause.
2. A brief background to the case is that according to the applicant, the Honorable Court at Nairobi in ELC No. 555/2011 issued a decree on 9/02/2023 dated 16/06/2023 for Kshs 6,910,000 and the Deputy Registrar also issued a certificate of taxation of Kshs 551,632.33 against the respondents dated



30/06/2023. Yet the amount remains unpaid by the respondents and the Applicant has now filed an application before the Court to have the Certificate of Taxation translated into a judgment for purposes of execution.

3. The Court issued a decree on 9/02/2023 and the Respondent was ordered to pay to the Applicant a sum of Kshs 6,040,00 and special damages of Kshs 870,000.
4. The Applicant has filed annexures to the Supporting Affidavit sworn by the plaintiff Mary Nyambura Macharia, of a ruling delivered on 6/02/2023, a certificate of taxation of Kshs 551,632.33 against the respondent, the decree issued on 9/02/2023 for Kshs 6,910,000 and the order issued on 20/03/2024.
5. The respondent in opposition of the Application filed grounds of opposition where he stated that the application offends part IV section 21 of the Government proceedings Act Cap 40 and that the notice has not been served on all persons directly affected as is stipulated under Order 53 Rule 3 (2) and (3) of the Civil Procedure Rules.
6. This being the case therefore the order of mandamus is directed to persons who are strangers to the judgment, decree, proceedings rules and that the application falls below the threshold provided for under the relevant rules. Thus the application is bad in law and it should be dismissed and that the application offends section 9(2) (3) of the Fair Administrative Actions Act
7. The Court gave directions on the disposal of the application vide written submissions and directed the parties on filing of written submissions on 12/06/2024. The plaintiff filed their submissions dated 9/07/2024. As at the time of writing this ruling the respondent had not filed their submissions.

Analysis and Determination

8. From my perusal of the application, annexures and the written submissions the only issue that commends itself for determination is whether the applicant's application is merited and what orders I should issue?
9. I am in this regard guided by the decision by the Court of Appeal on the nature of the remedy of mandamus in its decision in Republic vs Kenya National Examinations Council exparte Gathenji and 9 Others, [1997] eKLR, where the court stated as follows:

“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF Mandamus? Once again we turn to Halsbury's Law of England, 4th Edition Volume 1 at page 111 From paragraph 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation 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 the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“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 leaves discretion as to the mode of performing the duty in the hands 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.”

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

10. It is not disputed that judgment was entered in favour of the Applicant in ELC 555 of 2011 and that costs were awarded to the Applicant in addition to the decretal sum. The Applicant produced a copy of the judgment in ELC No. 555 of 2011 and also a copy of the Certificate of Taxation issued by the Deputy Registrar for Kshs 551,632.33 as “Annexure MNM2”. Alongside the Certificate of Taxation the Applicant also annexed, a ruling delivered on 6/2/2023, the decree issued on 9/02/2023 for Kshs 6,910,00, a letter dated 9/04/2024 requesting for copies of the ruling and an order issued on 20/03/2024. The question that therefore requires to be answered is whether the Respondent is under a public duty and obligation to satisfy the decree and orders issued in favour of the Applicant.
11. It is common ground that an order of Mandamus will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed as already noted in the case of Republic vs Kenya National Examinations Council *ex parte* Gathenji and 9 Others, [Supra]. Mandamus is a judicial command requiring the performance of a specified duty which has not been performed. Originally a common law writ, Mandamus has been used by courts to review administrative action.
12. Mandamus is employed to compel the performance, when refused, (emphasis added) of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, (emphasis added) in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either. What this means is that the performance of the duty must have been refused by the person duty bound to implement or to undertake that duty. It is not enough to just cry “he/she has refused!). There must be a clear demonstration of this refusal such as a letter written to and also a response stating refusal or a failure to respond to a letter. This is what was decided in the case of *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930).
13. For a court to issue this order which is a discretionary and equitable remedy, even when the requisite grounds for it exist such as compelling a public authority to perform its public legal duty which may control procedural delays the court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.
14. *Mativo J* (as he then was) explained the test for mandamus in the case of *Republic vs Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another* [2018] eKLR as follows:
 - (i) There must be a public legal duty to act;
 - (ii) The duty must be owed to the Applicants;
 - (iii) There must be a clear right to the performance of that duty, meaning that:
 - a. The Applicants have satisfied all conditions precedent; and



- b. There must have been:
 - i. A prior demand for performance;
 - ii. A reasonable time to comply with the demand, unless there was outright refusal; and
 - iii. An express refusal, or an implied refusal through unreasonable delay;
 - iv. No other adequate remedy is available to the Applicants;
 - v. The Order sought must be of some practical value or effect;
 - vi. There is no equitable bar to the relief sought;
 - vii. On a balance of convenience, mandamus should lie.

15. The court has to be satisfied that the test and threshold to grant mandamus is met before the order can issue. From the facts of this case, it is not in dispute that a decree was issued in favour of the applicant herein but as already stated above for Mandamus to issue, there must be a public legal duty to act and the duty must be owed to the Applicant. These two tests are not in dispute. There must be a clear right to the performance of that duty, meaning that the Applicant has satisfied all conditions precedent. There must have been a prior demand for performance; a reasonable time to comply with the demand, unless there was outright refusal; and an express refusal, or an implied refusal through unreasonable delay.
16. In examining the bundle of documents the Applicant had annexed to the application I note that the applicant did not exhibit evidence showing that there was a prior demand for performance. One would have expected a written prior demand for payment. This has not been annexed to the application. One cannot talk of a refusal to pay if there is no evidence of prior demand for the payment. Infact there is no evidence of service to the Respondent of the documents annexed to the application. It was a serious omission for the applicant to fail to avail evidence of prior demand to the Respondent to comply with the decree.
17. The applicant should have shown that the respondent was served and failed to comply so that the court can compute time to see if the time that elapsed can be considered to be reasonable time within which the respondent should have complied prior to a demand being issued. The other test is "an express refusal, or an implied refusal through unreasonable delay."
18. From the documents filed this court is unable to conclude that there was an express or implied refusal in absence of a prior notice to comply. Having not proved service, it is difficult to assess whether there was express refusal or even implied refusal in the circumstances of this case because this evidence has not been presented in this court.
19. It is therefore my finding that that the applicant has not satisfied the above conditions. It follows that there is no basis at all for the Court to grant the order of Mandamus and at the same time I find no basis upon which I can issue a Notice to Show Cause upon the Respondent as requested. A Notice to Show Cause is always predicated on disobedience of a court order which must be established first. In the instant circumstances, there is no proof of this disobedience.
20. Given my findings and determination above, the net result is that the relief of Mandamus and the order of Notice to Show Cause sought and the order compelling the Respondent to pay the said sum cannot be issued in the circumstances of this case. Thus the application dated 11/04/2024 is hereby dismissed with no orders as to costs.



It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF OCTOBER 2024

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MOGENI J

JUDGE

In the virtual presence of:

Mr. Arum for Applicant

No appearance for Respondent

Caroline Sagina – Court Assistant

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MOGENI J

JUDGE

