



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

JUDICIAL REVIEW NO. 3 OF 2019

CONSOLIDATED WITH JR. NO. 4 & 5 OF 2019

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY THE WAY OF AN ORDER OF MANDAMUS

AND

IN THE MATTER OF: SECTION 8 & 9 OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

REPUBLIC.....APPLICANT

VERSUS

1. THE COUNTY GOVERNMENT OF EMBU

2. THE CHIEF OFFICER, FINANCE, EMBU COUNTY

3. COUNTY EXECUTIVE COMMITTEE MEMBER,

FINANCE, EMBU COUNTY GOVERNMENT.....RESPONDENTS

EX PARTE MANNYONGE WANYAMA & ASSOCIATES ADVOCATES

RULING

1. The *Ex Parte* Applicant’s motions all dated 25th July 2019 seek in the main an order of *Mandamus* directed at the Respondents to compel them to pay fees due on the 3 causes. The genesis is the instructions the Respondents gave the *ex parte* Applicant in defending it in various causes before this court being Nyeri ELRC 280 of 2016, 279 of 2016 and 281 of 2016. The *ex parte* Applicant taxed the bills and now seeks to have the order to compel the Respondents to pay. The applications were urged after the parties were unable to agree on the payments. The *ex parte* Applicant filed submissions as well as authorities in support of the motions. The Respondents are opposed to the grant of the orders of *mandamus* and in response filed Replying Affidavits and submissions as well as authorities.

2. The *ex parte* Applicant set out the genesis of the dispute and the efforts thereafter to secure payment which was stayed pending an intermission when the Respondents were desirous of settling the dues. The court record details the attempt at resolving the matters. The *ex parte* Applicant in her submissions asserts that after defending the Respondents in the 3 cases proceeded to file her 3 advocate-client bills of costs and thereafter taxed them for an amount of Kshs. 437,960.91 in respect of Cause No. 279 of 2016, Kshs. 676,535.19 in respect of Cause No. 280 of 2016 and Kshs. 552,618.21 in respect of Cause No. 281 of 2016. The *ex parte* Applicant submitted that under Section 21(1) of the Government Proceedings Act there is a requirement to serve an order for costs duly taxed in respect of which the *ex parte* Applicant seeks payment. The *ex parte* Applicant submits that under Section 21(4) of the Government Proceedings Act the only recourse it has to realize its costs is through an order of *mandamus* as sought in the motions before the court. The *ex parte* Applicant cites the case of **Republic v Attorney General ex parte Italbuild Imports Ltd [2017] eKLR** where Odunga J. (as he then was) stated

...in the present case the ex parte applicant has no other option of realising the fruits of his judgment since he is barred from

executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that has been awarded is realised. Unless something is done, he will forever be left babysitting 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 judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment 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.

The *ex parte* Applicant submitted further that the debt was legal fees for acting for the Respondents dating to 2017 and the Respondents allude to the same being factored in the 2019/2020 financial year budget. It submits that it should be remembered that the amount relates to legal fees and relying on the case of **Republic v Principal Secretary State Department of Interior, Ministry of Interior & Coordination of National Government & Another ex parte Salim Awadh Salim & 2 Others [2018] eKLR** submitted that the payment of the sum decreed is not conditional on budgetary allocation. Regarding who is to be liable for the costs of the proceedings now before the court, the *ex parte* Applicant submits that the Respondents are liable as it is the action of the Respondents that have prompted the motions and costs follow the event. The *ex parte* Applicant cites the case of **Morgan Air Cargo Limited v Enterprises Limited [2014] eKLR** and submits that she is entitled to the sums sought in each of the Judicial Review applications being payment of the advocate-client bills of costs as well as costs of the motions.

3. The Respondents on their part assert that *mandamus* is a discretionary remedy which a court may refuse to grant even when the requisite grounds for it exist. The Respondents argue that a court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstance obtaining. The Respondents assert that the discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. The Respondents cite the cases of **Kenya National Examinations Council v Republic ex Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** and the case of **Republic v Receiver Manager, Imperial Bank Limited (In Receivership) Kaushik Natwarlal Thakkar ex parte Applicant [2018] eKLR** were cited where the Mativo J. held

The first test is whether the Respondent in the circumstances of this case has refused to perform its legal duty. In my view, it has not refused to act. It acted and has given a reason for its decision. The reason offered is that it invoked sections 33(7) and 36 of the Act. Judicial Review does not deal with merits of a decision. It deals with legality of a decision and the process of arriving at the decision. The Respondent cannot be accused of refusal to pay when it acted pursuant to the above provisions. It was a serious error for the ex parte applicant to ignore the above provisions and invoke Judicial Review jurisdiction. Mandamus cannot issue against clear provisions of the law. Differently stated, mandated cannot issue where a party has acted legally.

26. *The other test is "an express refusal, or an implied refusal through unreasonable delay." First, as I have concluded above, I am unable to conclude that there was an express or implied refusal in view of the circumstances discussed above. Differently stated, none of the above conditions has been satisfied for Mandamus to issue. Mandamus can only issue where it is clear that there is wilful refusal or implied and or unreasonable delay and where a legal right is clear or has been established. Applying the above tests to the facts and circumstances of this case, I find and hold that the ex parte 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.*

The Respondents submitted that for *mandamus* to issue the applicant must establish that there is an express, or implied refusal through unreasonable delay. It argues that *mandamus* can only issue where it is clear that there is willful refusal or implied refusal and or unreasonable delay. The Respondent posits that on the strength of the cases the question that begs an answer is whether the *ex parte* Applicant has demonstrated the Respondents legal refusal to act. The Respondents position is that the 1st Respondent has not ignored, refused or neglected to make payments in settlement of the *ex parte* Applicant's bill of costs. The Respondent asserts that the reasons advanced cannot amount to express refusal or implied refusal through unreasonable delay. The Respondents argue that the *ex parte* Applicant has not satisfied the conditions precedent for *mandamus* to issue. The Respondents argue that the certificate of costs was served on 25th January 2019 and by April 2019 the *ex parte* Applicant had already commenced judicial review proceedings to compel payment without affording the Respondents reasonable time to process the payment. The Respondents thus urge the dismissal of the motions with costs to the Respondents as there is no basis at all to grant the order of *mandamus*.

4. The grant of the order of *mandamus* is a relief available to a party who seeks to compel a government official to do what parliament has decreed him to do. It is a discretionary power that is exercised by courts to compel a Government official to act. In this case, the *ex parte*

Applicant seeks *mandamus* to compel the Respondents meet the obligation emanating from the suits in which she defended the Respondents. It is not contested that services were rendered at the behest of the County Government of Embu. What is asserted by the Respondents is that a certificate of costs was served in January 2019 and the Respondents hauled to court by April 2019 for failure to meet the obligation. As the matter emanated from previous proceedings before court whose chronology is laid out, the court will rehash some of the salient parts to put these rival contentions in perspective. The *ex parte* Applicant represented the Respondents in 3 suits in January 2017 though the suits were filed in 2016, late 2016 to be precise. Upon the conclusion of the matters, the *ex parte* Applicant filed her advocate-client bills of costs on 24th October 2018. The bills were taxed on 28th November 2018 and a certificate of taxation issued on 16th January 2019. The Judicial Review motions for leave were filed on 16th April 2019 and were served upon the Respondents on 16th April 2019 as ordered by the Court. Upon service, the matter was mentioned pending the resolution of the non-payment of the fees. The *ex parte* Applicant states that on 24th April 2019, the Respondents wrote a letter asking the *ex parte* Applicant to stay the hearing of the chamber summons application slated for 16th May 2019 as they wished to pay the sum and that the same had been included in their budget. That explains why on 16th May 2019 Miss Muriungi for the *ex parte* Applicant sought to defer the matter awaiting payment and the court set 30th May as the date for mention. Come 30th May 2019 no appearance was made and the court set 30th June 2019 for mention and condemned the parties to settle the mention fees as a result of the unnecessary mention forced upon the court. The application was fixed for hearing on 15th July 2019 whereat Miss Muriungi appeared for the *ex parte* Applicant and leave was granted to the *ex parte* Applicant to file the substantive motion. Subsequently the Respondents did file a response to the Judicial Review applications and the submissions above were made. From the assertions by the Respondent there is no delay in their view in settling the decree. On the part of the *ex parte* Applicant however, it is argued that there has been delay in settling the sums due. **Black's Law Dictionary Ninth Edition** defines delay as follows:- *the act of postponing or slowing*. Given the definition the Respondents have delayed in settling the debt due and *mandamus* can indeed be sought. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. The Respondents are under a duty to settle the debt occasioned by their instructions for the *ex parte* Applicant's services. In the response no compelling reason has been advanced as to why the orders should not issue. I hereby direct as follows:-

i. There be and is hereby issued an order of *Mandamus* directed at the Respondents jointly and severally to pay the *ex parte* Applicant taxed costs of Kshs. 437,960.91 in respect of Cause No. 279 of 2016, Kshs. 676,535.19 in respect of Cause No. 280 of 2016 and Kshs. 552,618.21 in respect of Cause No. 281 of 2016 within 30 days of this order.

It is so ordered.

Dated and delivered at Nyeri this 5th day of December 2019

Nzioki wa Makau

JUDGE