



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISC. APPLICATION NO. 53 OF 2006**

**ASSOCIATED AUTOMOBILE DISTRIBUTORS (K) LTD ..... APPLICANT**

**VERSUS**

**MUNICIPAL COUNCIL OF MOMBASA ..... RESPONDENT**

**RULING:**

1. This matter was first initiated before this Court on 2.2.2006. It is now over 12 years since leave of court was granted to the applicant Associated Automobile Distributors (K) Ltd to institute proceedings against the then Town Clerk of the Municipal Council of Mombasa, by Hon Wendoh - J. and so far, several judges have handled this matter some still in the service while others have since retired.

2. The substantive Notice of Motion as filed on 22.2.2006 sought for Judicial Review Orders of Mandamus to compel the Respondent the then **MUNICIPAL COUNCIL OF MOMBASA** to settle decree in NRB HCC No. 1311/2000 between the same parties hereto. The decree was for KShs.14,369,625/25 together with interest at 12% p.a. from 1.8.2004 until payment in full.

3. On 12.11.2004 Parties had entered initial consent in the Milimani HCCC 1311/2000, where they agreed that the Respondent would settle the decretal sum on/or before 28.2.2005 in full and that in default the whole sum shall become due and payable forthwith and the plaintiff shall be at liberty to enforce payment in terms thereof. The consent was recorded and adopted by Hon. Azangalala – J., (as he then was). Certificate of taxation dated 30.7.2004 shows that KShs.331, 227/= was taxed as costs of that suit and Decree was given on 10.3.2004 and issued on 23.4.2004. There is evidence on record that prior to the filing of these Judicial Review proceedings, the Applicant had pleaded with the Respondent to settle the decree to no avail. The cause of action arose in the years 1998/1999, which is nearly 20 years ago.

4. On 7.3.2008 this Court (Dulu – J.) recorded a consent between the parties to the effect that *“By consent that the Respondent Town Clerk Municipal Council of Mombasa shall pay a cheque of KShs.1,000,000/= drawn by the Municipal Council of Mombasa today 7.3.2008.*

*The matter be mentioned on 4<sup>th</sup> April 2008. In the meantime the Respondent will give proposals for the payment of the balance of the outstanding. Today’s costs to the Applicant.”*

5. On 4.4.2008 when the matter came up for mention, it was reported that the 1 million had been paid and that on that day four cheques of 1 million, 500,000/= 250,000/= and 250,000/= each dated 3.4.2008 had been issued to the Applicant’s Counsel. The balance was said to be agreed to be settled in equal monthly instalments of KShs. 1 million each commencing on 15.5.2008 and thereafter on the 15<sup>th</sup> day of each succeeding month until payment in full and in default of any one instalment on its due date, the whole amount then outstanding shall become due and payable forthwith, and a warrant of arrest shall issue against the Town Clerk of the Municipal Council of Mombasa.

6. Further, that if any of the cheques that had been handed in on that date would not be cleared, a warrant of arrest against the Town Clerk would issue. That was on 4.4.2008 which is now a few weeks to the tenth year.

7. On 11.1.2013 the Respondent filed a Notice of Motion under Certificate of Urgency seeking stay of execution of orders of 10.3.2010 ordering for the arrest of the Respondent’s Town Clerk and all consequential orders made thereto in execution of decree in Nairobi HCC 1131/2000 be stayed and the said Town Clerk be admitted to free bond pending the hearing of the application. The Respondent also sought for review and/or variation and/or discharge of the orders of 10.3.2010 and all consequential orders made thereto.

8. That application was placed before Hon. Majanja – J., under Certificate of Urgency and the Learned Judge declined an *ex parte* stay of the Respondent’s arrest on account of ***“in view of the length of time it has taken to settle the debt.”*** It is worth noting that the impugned warrants of arrest were issued pursuant to consent orders of 4.4.2008. They are dated 21.3.2010. It is further worth noting that the Respondent never and has never prosecuted its application above dated 9.1.2010 and filed in court on 11.1.2013 and on 6.5.2015 Hon. Korir – J., directed the Deputy Registrar to issue dismissal Notice for 17.6.2015 but there is no record of proceedings thereafter until 1.2.2017 when this court was confronted with an application dated 23.1.2017 filed under certificate of urgency by the applicant seeking that NTSC

against the County Executive Committee Member of Finance, Mombasa County be issued to show cause why he should not be committed to serve 6 months imprisonment for failing to pay the applicant KShs.17,751,529.10 plus interest, by way of instalment of Sh. 1 million with interest as ordered on 4.4.2008, which amount stood then at 37,574,282; that a warrant of arrest do issue for arrest of the said CEC and he be committed to Civil jail for failing to pay the said sum; that the said CEC be ordered to pay KShs.37,574,282 plus interest until payment in full.

9. The record shows that the Respondents despite being served with that application for Notice to Show Cause never appeared on 22.2.2017 when the matter came up for interpartes hearing and the court granted the prayer for Notice to show cause to issue. The Court however, declined to grant the prayers Nos. 3 and 4 on account that prayers 1 the 2 would only be available after the Respondent had been shown to have failed to comply with the NTSC prayer No. 2. The Court further in declining to grant prayer 4 observed that it was a replica of the Decree and contempt proceedings which were subject of the NTSC proceedings.

10. After the application for NTSC was dispensed with, and which Orders have never been sought to be set aside or varied, the Respondent filed a Preliminary Objection to the proceedings. It is dated 20.3.2017 contending that the judgment sought to be enforced was Statute barred pursuant to **Section 4 (4) of the Limitation of Actions Act**. Mr. Otieno counsel for the Respondent claimed that albeit judgment was entered on 10.3.2004 and subsequent steps taken including mandamus to compel settlement, but that the last action was on 15.3.2012 when warrants of arrest were issued but later, no action had been taken to move the court. He claimed that therefore 12 years had lapsed from 10.3.2004 and that proceedings for NTSC were instituted on 27.1.2017 well after 12 years hence the court could not entertain the NTSC. It was also claimed that the claim on interest on judgment was also Statute barred under **Section 4 (4) of the Limitation of Actions Act** because the calculation had run until after a period of 12 years.

11. It was also alleged that the proceedings for NTSC were contrary to **Section 30 of the Contempt of Court Act** as the Order of the court was issued on 4.4.2008 and that the application had not been served on the Attorney General and the person to be summoned to appear before Court to show cause. Further, that the NTSC was issued on 22.2.2017 but was not served in accordance with **Section 30 (2) of the Contempt of Court Act**.

12. In a ruling dated 16.10.2017 this Court overruled the Respondent's Preliminary Objection and restated its earlier order of 22.2.2017 ordering the relevant CEC of Mombasa County Government to appear before court to show cause on a date to be fixed by the Deputy Registrar 30 days after such service of NTSC in accordance with **Section 30 (1) of the contempt of Court Act**. The court also found that a NTSC was not a Contempt of Court proceeding.

13. On 22.11.2017 the Deputy Registrar issued a NTSC directing the CEC to appear before this Court on 23.1.2018 (*erroneously typed as 2017*). That NTSC was served on 20.12.2017 on the CEC as received on his behalf by Jimmy, Director Legal Affairs of the Respondent. However, the record shows that on 8.11.2017 the Respondent filed Notice of appeal to challenge the Ruling of this Court made on 15.10.2017, nearly one month later.

14. The Respondent then approached this Court on 17.1.2018 seeking for stay of proceedings herein pending the hearing and determination of the appeal.

15. The Applicant/Respondent claims that the intended appeal has high chances of success and that it is in the interest of Justice that the application be granted failure to which the ends of Justice would be subverted. The Respondent also claims it intends to prosecute its appeal expeditiously and that it was willing to abide by any conditions set by this Court for grant of the orders sought. The Application is supported by the affidavit of Jimmy Waliaula, the Director, Legal Services of the County Government of Mombasa County.

16. In a Replying affidavit sworn by Beful Gudka on 22.1.2018 and filed in Court on the same day, the Applicant opposes the application by the Respondent seeking stay of these proceedings pending appeal and deposes that the purported Notice of Appeal is defective because (1) it was filed out of time on 8.11.2017, 23 days after the date of Ruling on 16.11.2017.(b) The Notice of Appeal being filed out of time without leave of Court is defective and has no legal consequence as it ought to have been filed within 14 days of the date of the decision against which it is desired to appeal, as set out in the Court of Appeal Rules hence there is no appeal pending and that as there was no Memorandum and Record of Appeal or drafts thereof annexed or served on the Applicant.(c)That the Application for copy of proceedings dated 5.12.2017 was filed 50 days after the decision was delivered contrary to **Rule 82 of the Court of Appeal Rules**, and nearly a month after Notice of Appeal was filed in Court on 8.11.2017 hence the intended appeal is a non-starter as the Memorandum and Record of appeal ought to have been filed by 8.1.2018 in accordance with **Rule 82 of the Court of Appeal Rules**.(d) That the Respondent having failed to serve the application for proceedings upon the applicant cannot rely on the proviso to **Rule 82 of the Court of Appeal Rules**.(e) That the Respondent is in the habit of filing numerous pleadings in a bid to frustrate these proceedings and/or delay Justice as shown by the fact that its CEC has not bothered to appear before Court as directed. (f)That the Applicant filed an application for stay of previous orders on 11.1.2013 which it has never argued to date hence the Respondent has no intent of concluding this matter and that therefore the application before the Court an abuse of Court process and a ploy to avoid the show cause hearing as the applicant continues to suffer an affront to its Constitutional Rights by the Respondent never ending mischief in this matter.

17. It was contended that the application is a complete afterthought as it was conveniently filed only 6 days to the hearing of the NTSC and after 92 days from the date when this court delivered its ruling hence the Respondent does not deserve the orders sought since it collects revenue in Billions and has the means to settle the decree as per its annual budget and Development Plan annexed hence this application for stay should be dismissed.

18. The Parties' Advocates urged the application for stay orally with Mr. Akello advocate prosecuting the Application and reiterating the contents of the Motion and affidavit in support thereof, urging the Court to grant stay in order to contest this Court's ruling dated 16.10.2017. Further, that if these proceedings continue then the appeal will be rendered nugatory. He maintained that the appeal was filed on 8.11.2017 and a letter written to the Deputy Registrar asking for proceedings.

19. On whether the Notice of Appeal was filed within time, it was submitted that the provisions of **Section 33 of the contempt of Court Act**

allows the Applicant/Respondent to appeal and to stay proceedings which raise weighty issues of law. It was further submitted that the Replying affidavit mentions the merits of the appeal which is outside the jurisdiction of this Court.

20. In response, Mr. Murage, Counsel for the *ex parte* Applicant submitted relying on his client's replying affidavit and contending that **Section 33 of the contempt of Court Act** is clear and that there is no point of law in issue as there is no document relating to the appeal. He maintained that the Notice of appeal was filed 23 days after the impugned ruling and the application for stay lodged 92 days after the ruling which is sought to be stayed hence there is inordinate delay. That the Applicant does not mention security. It was contended that a stay would condemn the parties to *status quo* to prevent the applicant from enjoying fruits of its successful litigation. Further that no detriment had been demonstrated if stay is not granted since there is no appeal filed hence the application for stay should be dismissed with costs.

21. Mr. Mbogo holding brief for Mr. Akello in the intervening period after Mr Akello had left the court room temporarily with leave of the court submitted in rejoinder that on the timelines for appeal, **Section 33(4) (b) of the Contempt of Court Act, 2016** allows filing of appeal within 60 days and that on security being offered, there was no need since it is a NTSC which is being challenged and that the Respondent being a Public body cannot run away from this Court's Jurisdiction.

22. On filing of documents it was submitted that they can be filed in the main Appeal and be canvassed in the Court of Appeal hence stay should be granted as sought.

#### **DETERMINATION:**

23. I have considered the foregoing and having provided the historical background to this old age matter, the main issue for determination is whether the application for stay of these proceedings pending appeal is merited. None of the parties referred this court to any case law applicable in applications of this nature.

24. In an Application for stay of execution of proceedings pending appeal, the Applicant is required to demonstrate that the intended appeal is arguable and further, that unless the application is allowed, the intended appeal, if successful, would be rendered nugatory.

25. The Application must also be brought timeously, stay of proceedings or for stay of execution being discretionary.

26. The Applicant/Respondent asserts that it has an arguable appeal but there are no draft grounds or draft Memorandum of Appeal. Nonetheless, this Court not being the Appellate Court that shall consider the intended appeal may not delve into the arguability of the intended appeal. However, the Applicant under **Section 33-35 of the contempt of Court Act** can only appeal to the Court of Appeal in proceedings under the Act, on points of Law only, and those points of law, it is important that they be disclosed in a draft Memorandum of Appeal. No such draft Memorandum was annexed to the affidavit in support.

27. The Applicant merely asserted that it has an arguable case with a high chance of success and that it is in the interest of justice that the orders of stay are granted, then that the appeal shall be rendered nugatory unless stay is granted.

28. The *ex parte* Applicant also raised the issue of the Notice of Appeal having been filed outside the 14 days stipulated in **Rule 82 of the court of Appeal Rules**. The Respondent contended that with a submission that **Section 39 of the Contempt of Court Act** stipulates that an appeal to the Court of Appeal shall be lodged within 60 days hence the Notice of Appeal is validly filed within the stipulated period. I have no doubt that the Notice of Appeal was filed in time.

29. The Court notes that prior to the orders of 16.10.2017 there was no other order staying these proceedings wherein warrants of arrest had been issued against the CEC for the Respondent.

30. The order of 16.10.2017 was also further to the order of 22.2.2017 which latter order was a Notice to show cause against the CEC Finance to explain why contempt proceedings could not be commenced against him for disobeying orders of mandamus issued by this court by consent of the parties.

31. On the other hand, the orders of 16.10.2017 were 'negative' orders in the sense that they were orders dismissing the Preliminary Objection, raised by the Respondent to the Execution proceedings commenced against its CEC Finance for alleged disobedience of the consent orders issued by this court. The NTSC order had already been issued on 22.2.2017 and the court in the Ruling of 16.10.2017 was only reemphasizing that order. The Court was also clear that a warrant of arrest was issued way back in 2010, which warrant had never been challenged. The Respondent filed an application in 2013 but never Prosecuted it to date. It therefore follows that the consent orders of 4.4.2008 by Dulu – J., which gave the applicant leeway to execute by way of warrant of arrest in the event that Respondent defaulted on the consent, are still in force, hence the Respondent cannot claim that the proceedings are Statute barred. The Respondent's prayer for stay is a general prayer for stay of proceedings pending appeal and not seeking for stay of the execution of the order of NTSC issued on 22.2.2017 as reiterated on 16.10.2017 by this Court.

32. In my humble view, assuming the order of 16.11.2017 were under challenge, they merely dismissed the Preliminary Objection. Such negative order is incapable of execution or enforcement. What was and still is, available for execution is the order of 22.2.2017 for NTSC as restated in the order of 16.10.2017. However, as there is no prayer for stay of Execution of the Ruling of 22.2.2017 and 16.10.2017 with regard to the NTSC, there is principally nothing to be stayed pending appeal (See executive **Estates Ltd V. Kenya Posts & Another [2005] 1. E.A. 53**).

33. On the other hand, what may render the success of an appeal nugatory must be considered within the circumstance of each particular case. Long delay and inconvenience in for example recovering money which has already been paid out is a relevant consideration (See **Reliance Bank Ltd Vs. Norlake Investments Ltd (2002) 1 E.A. 232, and Nation Media Group and Others Vs. John Joseph Kamotho & 3 others Case No. Nai. 108/2000**. In **The Standard Bank Ltd Vs. G.N. Kagia T/A Kagia & Co. Advocates Civil Appl. No. Nai.**

193/2003 the Court of Appeal stated:

***“If the Applicant’s appeal ultimately succeeds, either wholly or partially, such success will not be totally effectual if the Applicant will not easily recover the money it paid and if it has to institute other Civil proceedings to recover the money such an eventually should in the interest of justice be taken into account.”***

34. The Respondent merely stated that if stay is not granted, the appeal shall be rendered nugatory. It was not demonstrated how the appeal if successful would be rendered nugatory. Furthermore, the application for stay of proceedings, as correctly pointed out by the exparte applicants Counsel, was filed 92 days after the orders of 16.10.2017 and nearly one year after the orders of NTSC were issued on 22.2.2017. Stay orders are discretionary orders, if the Respondent was dissatisfied with the proceedings which gave rise to the NTSC orders, it could not have waited all that long to file an application for stay of proceedings generally as opposed to seeking to stay a specific order which, if enforced would adversely affect the outcome of the intended appeal and thereby render it a pious explorer in the Judicial process.

35. Delay defeats equity. The Applicant to these Judicial Review proceedings has waited since 2004 for Justice. Justice delayed is justice denied. The Respondent has on the other hand been looking for every opportunity to evade settling decree of this Court which was issued on the basis of consent of both parties in 2008, 4<sup>th</sup> April 2008, to be specific. Surely, that decree could not have lapsed even assuming that there was no action or steps taken by the Applicant to enforce it between 4.4.2008 and 22.2.2017 when the NTSC was issued against the CEC – Finance.

36. The CEC was ordered to appear before the Court to show cause why contempt proceedings should not be commenced against him or further for failure to honour the decree of the Court. Instead of obeying that order of the Court, the respondent came up with a Preliminary Objection which was dismissed on 16.10.2017 and they took their sweet time from 22.2.2017, and later 16.10.2017 before purporting to seek stay of these proceedings pending appeal.

37. In my humble view, the Respondent is not deserving of the discretionary orders of this Court for stay of proceedings. It is interested in letting the Applicant continue holding a barren decree which was drawn by consent and which was partially settled leaving a significant amount due for settlement and despite further consents for settlement by instalment of Kshs one million (Kshs 1,000,000,000) every 1<sup>st</sup> day of the succeeding month until payment in full, the Respondent reneged and wants the Court to protect it against flouting of clear consent orders. This is a Court of Law that respects Rule of Law. To stay these proceedings as sought is in my view, to promote impunity and anarchy. Court orders must be obeyed first before a party can seek discretionary orders of the court.

38. This Court has no hesitation therefore in finding and holding that the Respondent is hell bent to frustrate the Applicant so that the latter does not reap its fruits of a valid judgment. The Respondent’s Application is brought in bad faith. It is intended to delay and deny Justice to the exparte Applicant and escalate costs which will be met by the public, regrettably, owing to accruing interest and costs. Such ill-conceived intentions cannot be enforced by this Court.

**39. Accordingly, I find and hold that the Application for stay of proceedings pending appeal is devoid of merit. The same is hereby dismissed with costs to the exparte Applicant.**

**Dated, Signed and Delivered at Nairobi This 27<sup>th</sup> Day of September, 2018.**

**R. E. ABURILI**

**JUDGE**