



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL MISC. APPLICATION NO. 26 OF 2016

IN THE MATTER OF AN APPLICATION BY JOSHUA KASINA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE LAW REFORM ACT

AND

IN THE MATTER OF THE ORDER LIII OF THE CIVIL PROCEDURE RULE AND ALL ENABLING PROVISIONS OF LAW AND PROCEDURE

AND

IN THE MATTER OF HIGH COURT CIVIL CASE NO. 37 OF 2000 (MACHAKOS) JOSHUA KASINA VS. THE DISTRICT WORKS OFFICER MWINGI, SIMON KIERU, ATTORNEY GENERAL AND MWINGI TOWN COUNCIL

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT, CAP 265

AND

IN THE MATTER OF THE JUDICATURE ACT AND SUPREME COURT PRACTICE RULES

AND

IN THE MATTER OF AN APPLICATION TO COMMIT THE TOWN CLERK, MWINGI COUNTY COUNCIL TO CIVIL JAIL

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE TOWN CLERK

MWINGI TOWN COUNCIL.....RESPONDENT

COUNTY GOVERNMENT OF KITUI...INTERESTED PARTY/APPLICANT

JOSHUA KASINA.....EXPARTE APPLICANT

R U L I N G

1. In an application dated 7th April, 2016 the Exparte Applicant seeks leave to substitute the Town Clerk Mwingi Town Council, the Respondent herein with the County Governor, Kitui.
2. The application is premised on grounds that: The Respondent is an Entity that is defunct pursuant to the coming into force the **2010 Constitution** and repeal of the **Local Government Act, Cap 265** of the **Laws of Kenya** and coming into force of the **County Government Act No. 17 of 2012**; the County Government of Kitui is the successor of the Mwingi Town Council; the substitution sought will enable the Court to determine the real controversy between the parties.
3. In an affidavit in support of the application, **Joshua Kasina**, the Exparte Applicant deponed that he filed a suit against the District Works Officer, Mwingi and 2 Others in the year **2000** in **High Court Civil Case No. 37 of 2000**. Judgment was entered in his favour and he obtained a decree of a total sum of **Kshs. 1,460,765/=**. The Respondent, now defunct ignored to comply with the Court order which made him institute Judicial Review proceedings against it and subsequently the arrest of the Town Clerk, one **Mr. Antony Ndunga**. Following the devolved system the Town Council was succeeded by the County Government of Kitui.
4. In response the Interested Party filed grounds of opposition where it stated that the Application lacks merit, and is an abuse of the Court process; The Applicant's claim was never subjected to verification by the Transition Authority and as such it is not among the liabilities transferred to the Interested Party; The substitution will occasion prejudice to the Interested Party and loss of Public Revenue. They also disputed the fact that the Interested Party is the successor of the Mwingi Town Council.
5. The application was canvassed by way of oral submissions. **Ms. Mwinzi**, Counsel for the Exparte Applicant submitted that there was a properly arrived at Judgment by the Court which can only be executed when substitution is made. The County Government of Kitui is the successor of the Town Council of Mwingi and a proper party to the suit.
6. In response **Mr. Mwalimu** Counsel for the Interested Party opposed the application by arguing that the Exparte Applicant had not demonstrated the legal basis for applying for substitution of the Town Clerk with the County Government. Further, that the Town Clerk was a human being while the Interested Party is a legal personality. That if the Exparte Applicant sought to substitute the Town Clerk with the County Secretary it would make some sense. He argued that no provision of the law was cited to justify the application. That the subject was monetary claim that would be enforced against the equivalent of the Clerk Mwingi; or his successor but not his employer.
7. The Exparte Applicant sued the Town Clerk of Mwingi Town Clerk an Entity that is now defunct. Following the repeal of the **Local Government Act**, the **County Government Act** replaced it.
8. The **Urban Areas Act** which was enacted to provide for the criteria of establishing urban areas provides for pending actions and proceedings in Courts. **Section 59** of the stated Act provides thus:

“Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against the body established by law.”

County Governments established under the provisions of **Article 176** of the **Constitution** legally replaced the Local Authority whose Town Clerk was sued in this case. In the case of **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006 Majanja, J** stated that:

“The County is the legal established body unit contemplated under the law that takes the place of local authorities unless there is a contrary enactment. I therefore find and hold that the proceedings and judgment against Webuye Town Council and its officers must continue against Bungoma County which must now bear the burden of the judgment. The court cannot grant orders incapable of enforcement as the Town Council and its town clerk no longer exist. (See Minister of Land & 2 Others Exparte Kimeo Stores LTD (2011) eKLR, Kenya National Examination Council vs. Republic Exparte Geoffrey Gathengi Njoroge & Others CA Civil Appeal No. 266 of 1996.”

9. Looking at the background of this case the Exparte Applicant at the outset sued the District Works Officer, Mwingi and 2 Others. The Decree obtained against the Town Clerk Mwingi Town Council was not supposed to be satisfied by him as an individual but as a representative of the Town Council. In actual sense the Entity that was ordered to satisfy the debt was the Town Council, Mwingi. The Town Clerk as the Chief Officer was legally required to act. Having neglected to comply with the Court order, it was decreed that he be arrested and committed to Civil Jail. The order was made in **2012** when the Transition Authority was overseeing the devolved system of governance. It was the duty of the Authority to audit assets and liabilities in the defunct Municipal Councils. Its mandate came to an end. Whether or not the Authority verified this particular debt is not an excuse for the Successor of Mwingi Town Council to disregard payment of the same. The orders granted against the local authority must be enforced by the Successor who is the Interested Party herein.

10. It is argued by the Interested Party that the Exparte Applicant should have sought to substitute the Town Clerk with the County Secretary but not the County Government. In the case of **Argos Furnishers LTD vs. Municipal Council of Mombasa (2014) Kasango, J** stated thus:

“Even if the notice to show cause was issued without the amendment to substitute names in my view that would not be a reason for the secretary, County Government of Mombasa to fail to honour the notice because the same was clearly addressed to him with full knowledge that the County Government of Mombasa is now mandated to satisfy the decree in place of the defunct Municipal Council of Mombasa. I will nevertheless grant the plaintiff leave to amend the notice to show cause to reflect the names of Secretary, County Government of Mombasa in place of the defunct Municipal Council of Mombasa.”

11. Substituting the Town Clerk of Mwingi Council with the County Government of Kitui is inconsequential as the legal Entity mandated to satisfy the debt is the County Government of Kitui.

12. It was further argued that the provision of law cited does not justify the application. **Article 159(2)(d)** is very clear. Justice shall be administered without undue regard to procedural technicalities. The application cannot fail just because a wrong provision of the law is cited. What must be considered is the substance of the application.

13. Having considered the application in totality I find that the Interested Party is legally bound to satisfy the decree, being the Successor of the Mwingi Town Council. Therefore I grant the Exparte Applicant leave to substitute the Town Clerk Mwingi Town Council with the Respondent herein, County Government of Kitui. Costs of the application shall be in the cause.

14. It is so ordered.

Dated, Signed and Delivered at Kitui this 28th ay of July, 2017.

L. N. MUTENDE

JUDGE