



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 53 OF 2006

**IN THE MATTER OF AN APPLICATION BY ASSOCIATED AUTOMOBILE
DISTRIBUTORS(k) LTD FOR LEAVE TO APPLY FOR ORDERS FOR MANDAMUS
DIRECTED AT THE TOWN CLERK, MUNICIPAL COUNCIL OF MOMBASA**

AND

**IN THE MATTER OF THE TOWN CLERK OF THE MUNICIPAL COUNCIL OF
MOMBASA AND SECTION 263 OF THE LOCAL GOVERNMENT ACT(CAP 265), LAWS
OF KENYA.**

AND

**IN THE MATTER OF THE SATISFACTION OF A DECREE IN THE HIGH COURT CIVIL
SUIT NO. 1311 OF 2000 AT MILIMANI, NAIROBI (HON. JUSTICE AZANGALALAL) AND
THE SATISFACTION OF A CERTIFICATE OF COSTS IN THE ABOVE MATTER
CERTIFIED BY THE DEPUTY REGISTRAR OF THE HIGH COURT AT NAIROBI ON
THE 30TH DAY OF JULY,2004.**

ASSOCIATED AUTOMOBILE

DISTRIBUTORS (K) LTD.....APPLICANT

VERSUS

TOWN CLERK, MUNICIPAL

COUNCIL OF MOMBASA.....RESPONDENT

RULING

1. On 25th January 2017, the applicant Associated Automobile Distributors (K) Ltd filed a notice of motion under Section 5(1) of the Judicature Act, and Article 159 of the Constitution seeking for orders that:

a.

b. The court be pleased to issue a notice against the county executive committee member for Finance, Mombasa County to show cause why he should not be committed to serve 6

months imprisonment for failing to pay the applicant the sum of kshs 17,751,529.10 plus interest, by way of monthly installments of kshs 1,000,000 as ordered by the High Court in Civil suit No. 1311 of 2000 on 4th April 2008 which amount now stands at kshs 37,574,282.

c. That the Honourable court be pleased to issue a warrant of arrest against the County Executive Committee member for Finance, Mombasa County to be committed to civil jail for failing to pay the applicant the sum of kshs 17,751,529.10 plus interest, by way of monthly installments of kshs 1,000,000 as ordered by the High Court in CC NO. 1311 of 2000 on 4th April 2008 which amount now stands at kshs 37,574,282.

d. That the court be pleased to order and or direct the County Executive Committee Member of Finance, Mombasa County to pay the applicant the sum of kshs 37,574,282 (plus interest until payment in full) being the decretal amount (inclusive of accrued interest to 31st December 2016 in High Court Civil suit No. 1311 of 2000 (Associated Automobile Distributors (K) Ltd Vs Municipal Council of Mombasa).

e. That costs of the application be provided for.

2. The application is premised on 21 grounds on the face thereof and supported by an affidavit sworn by Bejul Gudka, the applicant's Director and annexed thereto are several exhibits which include a plaint in HCC 1311 of 2000; decree issued on 23rd April 2004 dated 10th March 2004; certificate of taxation dated 30th July 2004; warrant of arrest given on 21st March 2010; a supplementary affidavit sworn by J.N. Mwangi, legal officer, Mombasa County on 17th June 2013.

3. In response to the notice of motion, the respondent filed a notice of preliminary objection dated 20th March 2017 and a replying affidavit sworn by Hazel Koitaba on 20th March 2017.

4. According to the respondent, the court herein lacks jurisdiction to enforce the judgment/decree and that the proceedings herein are statute barred pursuant to the provisions of Section 34 of the Contempt of Court Act No. 46 of 2016. herein pursuant to Section 4(4) of the Limitation of Actions Act, Cap 22 Laws of Kenya.

5. That the applicant's claim for interest on judgment is barred pursuant to the provisions of Section 4(4) of the Limitation of Actions Act which states that

“ No arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the dated on which the interest became due.”

6. That the notice to show cause issued herein is contrary to the mandatory provisions of Section 30 (2) and (5) of the Contempt of Court Act No. 46 of 2016;

7. That the execution proceedings herein are contrary to the express provisions of Section 12(b) of the Inter-Governmental Relations Act No. 2 of 2012 as read with Clause 2(1) and (2) of the Kenya Gazette Notice No. 858 of 2017; and that therefore the suit is misconceived and an abuse of the due court process.

8. The parties advocates argued the preliminary objection by way of oral arguments on 22nd March 2017 hence this ruling which could not be delivered immediately as the court was engaged in urgent matters related to pre election disputes.

9. According to the respondent as argued by Mr Otieno advocate, the judgment sought to be enforced is statute barred. Reliance was placed on Section 4(4) of Limitations of Actions Act and **Civil Appeal No. 124 of 2003 Sebastian Nyamu vs Gilbert Kabeere M' mbijiwe (Nyeri CA).**

10. It was argued that judgment having been entered on 10th March 2004, the subsequent steps taken

by the applicant to enforce the judgment including mandamus to compel the then Town Clerk of the respondent, was on 15th March 2012 when warrants of arrest were issued but later no action was taken to move the court.

11. That therefore 12 years having lapsed from 10th April 2004 to 10th March 2016, the Notice to show cause proceedings taken on 27th January 2017 were taken well after 12 years hence this court cannot entertain Notice to show cause which is premised on an application made after 12 years of the judgment.

12. It was further submitted that the interest on judgment is also statute barred under Section 4(4) of the Limitation of Actions Act as it has been calculated until after a period of 12 years yet the limitation period is 6 years. Reliance was placed on **Patrick Kimani Nganga vs Kenya Power & Lighting Company Limited [2016] e KLR**.

13. The respondent's counsel narrated that the application herein violates Sections 30 and 34 of the Contempt of Court Act, 2016; that the application for contempt of court was never served upon the Attorney General and or personally upon the individual to be summoned to appear before the court, which omission is not a mere technicality.

14. It was also submitted that despite the notice to show cause having been issued on 22nd February 2017, the same was not served in accordance with Section 30(2) of the Contempt of Court Act hence the court should allow this preliminary objection.

15. In response, Mr Murage counsel for the applicant submitted that the preliminary objection was filed late when the notice to show cause was slated for hearing. He relied on the case of **Amin Mohamed Hassan v Zahra Mohamed [2009] e KLR**.

16. That the application having been granted, the respondent had come too late in the day with a preliminary objection. That the Notice to show cause had already been argued and orders granted hence the preliminary objection could not hold any substance. It was further argued that what was before the court was not execution proceedings. That the action to action or enforce the judgment was taken in 2006 while contempt of the court law came into effect in January 2017 hence the law does not act retrospectively.

17. Reliance was placed on the **Council of Governors v Kenya Medical Practitioners and Dentists Union and 10 others [2017] e KLR** where the court held that the new Act could not act retrospectively.

18. It was argued that in this case, the respondents were already found to be in contempt of court and warrants of arrest issued upon which they applied for stay of those warrants and hence they cannot claim that the court lacks jurisdiction. Further, that twelve years would run from 2008 to 2020.

19. On the procedure for recovery of decretal sum against the respondent reliance was placed on **Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County**.

20. It was submitted that the last action in this matter was taken on 11th January 2013 after a warrant of arrest hence the preliminary objection was without any substance.

21. In a brief rejoinder, Mr Otieno submitted on behalf of the respondent that they were properly on record; that the order to commit the applicant to prison was made before 12th January 2017, before the commencement of the Contempt of Court Act and that this application was made after commencement of the Contempt of Court.

22. It was further submitted that the Notice to show cause is pursuant to the judgment hence it is the enforcement of that judgment that was the subject of these proceedings.

DETERMINATION

23. I have considered the preliminary objection by the respondent as argued by Mr Otieno advocate supported by the statutory and case law cited. I have given equal consideration to the applicant's opposition and both parties advocates' submissions and authorities relied on.

24. The issues for determination are:

- 1) *Whether the preliminary objection raised has any merit;*
- 2) *What orders should the court make.*
- 3) *Who should bear costs of the preliminary objection?*

25. On whether the preliminary objection raised has any merits, it is important to first determine whether the preliminary objection as raised is a pure point of law as stipulated in the **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd [1969] EA 696** wherein Sir Charles Newbold stated;

***“A preliminary objection is in the nature of what used to be a demurer. It raised a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts have to be ascertained or if what is sought is the exercise of judicial discretion.*”**

The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

26. The grounds raised in the preliminary objection herein is that the proceedings herein are statute barred by Section 4(4) of the Limitation of Actions Act; that the notice to show cause issued herein is contrary to the mandatory provisions of Section 30(2) and (5) of the Contempt of Court Act; that these proceedings are statute barred pursuant to Section 34 of the Contempt of Court Act; and that the execution proceedings herein violate Section 12(b) of the Intergovernmental Relations Act No. 2 of 2012 as read with Clause 2(1) and (2) of the Kenya Gazette notice No. 858/2017.

27. In the supporting affidavit sworn by Hazel Koitaba the County Executive Committee member for Finance of the County Government of Mombasa on 20th March 2017, paragraph 3 and 4 admit the existence of HCC 1311 of 2000 by the applicant against the respondent and at paragraph 5, it is conceded that the applicant moved the court by way of mandamus to compel the then Town Clerk of the now defunct Municipal Council of Mombasa to settle the decree.

28. He also concedes that on 22nd February 2017 this court issued a notice to show cause to the County Executive Committee Finance to attend court on 22nd March 2017 to show cause why they should not be committed to civil jail for failing to pay the decretal sum.

29. The deponent then goes on to claim that he has never been made aware of the judgment against the respondent to enable it settle liabilities of the former Municipal Council of Mombasa hence the notice to show cause which is time barred should be dismissed.

30. In my humble view, pleading a statute of limitation is a pure point of law which can be raised as a preliminary objection. The only question is whether these proceedings are statute barred or in violation of any statute as cited by the respondent's counsel.

31. The court notes that on record is a decree made on 10th March 2004 in HCC 1311/2000 and on 2nd February 2006. Judicial Review proceedings were commenced before this court in this file for mandamus to compel respondent's predecessor and office holder to settle the decree in HCC 1311 of

2000. The applicant also sought for a warrant of arrest against the then Town Clerk in default of payment of the decretal sum with interest. Leave to apply was granted by Wendoh J on 2nd February 2006 and the applicant was granted 21 days from 2nd February 2006 to lodge the substantive notice of motion.

32. The substantive notice of motion was filed on 22nd February 2006 and annexed to the supporting affidavit is an order made on 12th November 2004 by the Honourable Justice Festus Azangalala (as he then was) for payment of the decretal sum by the then Town Clerk, and in default, enforcement to be effected.

33. On 22nd September 2006 Honourable Nyamu J (as he then was) issued the Judicial Review orders of mandamus directed at the then Town Clerk of Mombasa Municipal Council to settle the decretal sum in HCC 1311/2000 together with interest at 12% per annum from 1st August 2004 until payment in full.

34. The order of mandamus which is the substantive decree in this matter, as made on 22nd September 2006 has never been set aside.

35. On 16th August 2007 the applicant sought by way of notice of motion a warrant of arrest to issue against the then Town Clerk of the respondent council for nonpayment of shs 14,369,625/25 as decreed on 22nd September 2004 by Azangalala J pursuant to decree made on 10th March 2004 issued on 23rd April 2004 (annexed) and certificate of taxation dated 30th July 2004 for shs 331,227 (annexed).

36. On 4th April 2008 an order by consent of the parties was issued by the court to the effect that shs 2,000,000 was paid vide the 4 named cheques of shs 250,000, 500,000 and 1,000,000 each and the balance was to be defrayed in equal monthly installments of kshs 1,000,000 from 15th May 2008 until payment in full, and on the 15th day of each succeeding month and in default, a warrant of arrest was to issue against the Town Clerk of Mombasa Municipal Council.

37. Following the above consent order, there was default and so the warrant of arrest was issued on 26th June 2008 against the Town Clerk and reissued on 21st, March 2010, 6th July 2010 and 14th July 2010.

38. On 11th January 2013 the respondent filed a notice of motion seeking for stay of orders made on 10th March 2010 and all consequential orders made thereto in execution of decree in Nairobi HCC 1131/2000. The orders in question directed for the arrest of the defendant Town Clerk.

39. The applicant/respondent also sought for a free bond and review/variation or discharge of the orders of 10th March 2010.

40. In the supplementary affidavit sworn on 17th June 2013 by J. Mwangi, the legal officer of f the respondent, he claimed that the respondent never owed any monies to the applicant and that the applicant was out to defraud the respondent hence, the reason why they abandoned Nairobi HCC 1311/2000 to execute the decree using the current suit where nobody would query the validity of the entire process and the manner in which the applicant got its orders to execute.

41. Mr Mwangi also claimed that the execution of decree was suspect because no notice to show cause why execution should not issue was served on the defendant.

42. There was no allegation that the decree or these proceedings are statute barred.

43. On 11th January 2013 Majanja J certified the application by the respondent as urgent but noted

that :-

“ In view of the length of time it has taken to settle the debt, I decline to stay any proceedings or arrest. The matter shall be heard inter partes on 21st January 2013. The Town Clerk to attend court on that date.”

44. On 21st January 2013 Odunga J mentioned the matter and fixed it for 21st February 2013 for further orders. On the latter date the learned judge placed it for 9th May 2013 for further orders. The matter kept being mentioned until 18th February 2015 when the learned Korir J ordered the application dated 9th January 2013 to be heard on 6th May 2015 and when there was no appearance by advocates for the parties, the court ordered the Deputy Registrar to issue dismissal notice for 17th June 2015.

45. There is no record for 17th June 2015. The next action was 25th January 2017 when the notice of motion seeking notice to show cause and warrant of arrest against County Executive Committee member for Finance was sought.

46. The application was placed before me on 1st February 2017 under certificate of urgency. I certified it as urgent and directed service upon the respondent for inter partes hearing on 22nd February 2017.

47. On 22nd February 2017 only the applicant's counsel attended court. There is an affidavit of service sworn by Jane Abwoga Rodis on 9th February 2017 showing service of the application upon the respondent's counsel O.M. Robinson & Company Advocates on 7th February 2017.

48. The court was satisfied as to the service of the application upon the respondents and after hearing Mr Juma counsel for the applicant, I granted prayer No. 2 that notice to show cause do issue against the respondent's County Executive Committee for Finance to show cause why he should not be committed to serve 6 months for failing to pay to the applicant the decretal sum plus interest now standing at shs 37,574,282. I declined to grant prayers 3 and 4 and gave reasons.

49. The above order of notice to show cause is still on record and no application has been filed challenging its issue.

50. It therefore follows that with the earlier orders of 10th March 2010, 21st March 2010; 6th July 2010 and 14th July 2010 being validly on record; and as the application of 9th January 2013 has never been canvassed to overturn the orders of 10th March 2010; and as the orders of 22nd February 2017 of notice to show cause are validly on record, the respondent cannot emerge from nowhere and claim that the proceedings herein are statute barred or that they offend certain statutory provisions of the law cited.

51. Furthermore, from the chronology of events detailed in this ruling, as per the clear record, the respondent has all along been aware of the judgment subject of these proceedings but in some instances pretended not to be aware and or being liable in any way to the applicant.

52. The respondent has not even sought to set aside the judgment and decree in HCC 1311/2000. It cannot therefore claim that these proceedings are an attempt to defraud it or that they are statute barred.

53. In addition, the respondent has not sought to set aside or challenge the orders of 22nd February 2017. It follows that the preliminary objection is not only an afterthought but misconceived, frivolous and vexatious. The respondent wishes to rely on procedural technicalities to defeat the course of justice which attempt is thwarted by application of Article 159(2) (b) and (d) of the Constitution. Justice delayed

is justice denied.

54. Under Article 262 of the Constitution and the Sixth Schedule – Transitional and consequential provisions, Section 7 is clear that: (1) all laws in force immediately before the effective date continues in force and shall be construed with the alteration, adaptation, qualifications and exceptions necessary to bring it into conformity with the Constitution.

2) If, with respect to any particular matter-

- a) A law that was in effect immediately before the effective date assigns responsibility for that matter to a particular state organ or public officer; and
- b) A provision of this Constitution that is in effect assigns responsibility for that matter to a different state organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.
- c) All Local Authorities established under the Local Government Act Cap 265 Laws of Kenya existing immediately before the effective date shall continue to exist subject to any law that might be enacted.
- d) An office or institution established under this Constitution is the legal successor of the corresponding office or institution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.

55. From the above transitional and consequential provisions of the Constitution, it is clear that the County Government of Mombasa is the successor of the Municipal Council of Mombasa and therefore all existing rights and liabilities immediately before the effective date would automatically be assumed by the latter which is the County Government.

56. There is sufficient evidence that the respondent was aware of the liability as demonstrated by the consent orders made in 2013 wherein it undertook to settle the decretal sum of shs 1,000,000 in monthly installments after paying the initial 2 million.

57. A decree which is in the process of being executed and which has not been lying idle for the alleged 12 years period stipulated in Section 4(4) of the Limitation of Actions Act cannot be statute barred and therefore the respondent's preliminary objection on this aspect is not only absurd but frivolous and vexatious. It is also raised in bad faith and intended to abuse the court process and to deny justice to the applicant thereby rendering a decree of the court useless.

58. Furthermore, there was no contempt of court proceeding initiated in this case after the coming into force of the Contempt of Court Act in January 2017. The notice to show cause issued on 22nd February 2017 was a follow up of the orders earlier on issued by the court compelling the settlement of the decree and as ordered by consent on 4th April 2008 by Dulu J, which latter orders were clear that a warrant of arrest would issue if there was default. Those orders have never been set aside. It cannot therefore be said that these proceedings are generally violating the Contempt of Court Act as there is no application for contempt placed before this court for consideration.

59. A notice to show cause is not a contempt application. The allegation that the execution proceedings herein offend Section 12 (b) of Intergovernmental Relations Act as read with Clause 2 (1) and (2) of Gazette Notice No. 858 of 2017 is irrelevant for purposes of these proceedings and the preliminary objection raised herein.

60. The County Government is governed by the Government Proceedings Act and therefore no execution by way of attachment and sale of its assets can be levied. The only means by which a decree against a County Government can be enforced is Judicial Review proceedings. In this case, there is on record a valid order of mandamus against the County Government of Mombasa.

61. Enforcement proceedings for the order of mandamus were commenced by way of notice to show cause and a warrant of arrest issued way back in 2010. The respondent cannot feign ignorance of those orders which are on record and which have not been successfully challenged by it.

62. For all the above reasons, I find that the preliminary objection taken against these proceeding in misguided, frivolous, vexatious and an abuse of court process. The same is dismissed with costs to the applicant.

63. The respondent's Executive Committee Member responsible for finance to be given 30 days' notice to appear before this court and show cause why the decree herein for mandamus cannot be enforced by way of committal to civil jail for contempt of court. The Deputy Registrar to issue Notice as stipulated in section 30(1) of the Contempt of Court Act. A date for notice to show cause to be fixed by the Deputy Registrar before a judge after service of the said Notice to show cause.

Dated, signed and delivered in open court at Nairobi this 16th day of October, 2017.

R.E. ABURILI

JUDGE