



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**MISC CIVIL APPLICATION NO. 216 OF 2010**

**BLUESHIELD INSURANCE COMPANY LIMITED ..... APPLICANT**

**AND**

**THE CITY COUNCIL OF NAIROBI ..... RESPONDENT**

**AND**

**ACCOUNTING OFFICER OF THE COUNTY GOVERNMENT**

**OF NAIROBI (GREGORY MWAKINANGO).....RESPONDENT**

**RULING**

**Applicant's Case**

1. By a Notice of Motion dated 3<sup>rd</sup> November, 2015, the ex parte applicant herein, **Blueshield Insurance Company Limited**, substantially seeks an order that this Court be pleased to issue an order to commit to civil jail the accounting officer of County Government of Nairobi, **Mr Gregory Mwakinango** (being the representative or agent of the Respondent0 for a period of six months.
2. According to the applicant, on 10<sup>th</sup> April, 2014 this Court issued an order compelling the then Town Clerk of the Respondent to comply with the decree granted on 14<sup>th</sup> August, 2009 in Milimani HCCC No. 71 of 2006 between Arkchoice Insurance Brokers Limited and Blueshield Insurance Co. Ltd vs. The City Council of Nairobi.
3. By an application dated 3<sup>rd</sup> December, 2014 the Respondent sought leave to liquidate the said decretal sum amounting to Kshs 12,871,952.00 by way of instalment and the Court issued an order on 19<sup>th</sup> December, 2014 by which the Respondent was directed to liquidate the same by way of equal monthly instalment of Kshs 1000,000.00 with effect from 5<sup>th</sup> January, 2015 and on 5<sup>th</sup> day of each subsequent month till payment in full and in default execution to issue.
4. However, the Respondent failed to comply with the said order despite service thereof and subsequent demands for payment thereof. To the applicant the Respondent has no intention of settling the same unless the Court intervenes. The failure to settle the same, according to the applicant has exposed this Court to ridicule and disrepute hence amounting to contempt of Court. To the applicant it does not have any other means of enforcing the court order hence these proceedings.

**Respondents' Case**

5. In response to the application, the Respondents while appreciating the need to respect the rule of law and to respect and uphold the dignity and integrity of the Court by obeying, respecting and preserving its orders, stated that the City Council of Nairobi was replaced by the Nairobi City County, its successor which took over its responsibilities and functions.
6. It was contended that the County is constitutionally mandated to provide essential services including health, water, sanitation to over four million residents in the County using limited resources at its disposal and that in executing its mandate, the County must inevitably undertake a delicate balancing in meeting financial obligations. According to the Respondent, the County was yet to receive from the National Government its financial allocation under the **County Allocation of Revenue Act, 2014** hence ought not to be committed since it had not been shown that the County had deliberately refused to pay funds earmarked for payment since the Respondent does not incur personal liability in the circumstances.
7. It was contended that there is a Transitional Authority (hereinafter referred to as the Authority), a statutory body established under section 4 of the **Transition to Devolved Government Act, 2012, Cap 265A**, pursuant to section 15 of the Sixth Schedule of the constitution, with the general mandate of facilitating and coordinating the transition to devolved system of Government and also to prepare and validate the inventory of all existing assets and liabilities of Government, public entities and defunct local authorities. The said Authority, it was contended publicized a moratorium (which is still in force) on transfer on assets and liabilities as provided pursuant to section 35 of **Transition to Devolved Government Act, 2012** (hereinafter referred to as “the Act”) which stipulates that a state organ, public entity of local authority (defunct) shall not transfer assets of its liabilities during the transition period without seeking the approval of the Authority. It was contended that it is public notice that the said Authority advised the public to register complaints regarding payment of claims on liabilities particularly creditors of the defunct local authorities to enable the state organ to verify the liabilities and conclude on its nationwide audit of assets and liabilities of the defunct local authorities, before taking any action against a County Government.
8. It was averred that through a letter dated 11<sup>th</sup> December, 2014, the Transition Authority acknowledged that it was still verifying the assets and liabilities of the defunct local authorities to facilitate the transfer of these debts to the respective County Governments and advised the public to register complaints regarding payment of claims on liabilities particularly creditors of the defunct local authorities. According to the respondent, Phase One of the Transitional Phases as prescribed under the Fourth Schedule of the Act is still ongoing as the Transitional authority is yet to conclude its national verification and audit of assets and liabilities of defunct local authorities and thus the assets and liabilities are yet to be fully transferred to the County Government as described in Phase Two of the Transitional Phases and prescribed under the Fourth Schedule of the Act. It was contended that there has never been any agreement between the Respondent/Applicant and the national government to take over the mandate of the notional government to control assets and liabilities and in turn pay claims on unverified liabilities of the defunct local authorities that are in the custody of the national Government through the Transition Authority during the transition period.
9. In the respondent’s opinion, section 6 of the Sixth Schedule to the Constitution of Kenya vests in the national government, all rights and obligations however arising that the Government entered into with any party prior to the establishment of the Applicant on 4<sup>th</sup> March 2013 hence section 59 of the **Urban Areas and Cities Act** ought to be read in line with section 6 of the Sixth Schedule to the Constitution and section 4 of the Act, pursuant to section 15 of the Sixth Schedule of the Constitution, section 35 of the Act and Phase One of the Transitional Phrases as prescribed under the Fourth Schedule of the Act.
10. It was therefore the respondent’s position that as the assets and liabilities of the Respondent/Applicant are yet to be transferred by the national government by law, the national government is the proper party from which the Applicant/Respondent can legitimately claim payments of its liabilities which emanate from the defunct local authority, Nairobi City Council. According to the Respondents the interest of justice demands that the application be dismissed.

## **Determinations**

11. In their submissions, learned Counsel for the Applicant and the Respondent, **Mr Mugisha** and **Miss Said** respectively reiterated their respective clients' cases.
12. I have considered the issues raised herein. The issues raised by the Respondent herein were considered by this Court in Miscellaneous Application No. 354 of 2012 between **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi** in which the Court expressed itself as hereunder:

**“From the respondent’s own deposition, it is clear that the public notice that the Transitional Authority gave was to advise the public to register complaints regarding payment of claims on liabilities particularly creditors of the defunct local authorities to enable the state organ to verify the liabilities and conclude on its nationwide audit of assets and liabilities of the defunct local authorities, before taking any action against a County Government. [Emphasis added]...In this case not only has a judgement been given in favour of the ex parte applicant, but this Court has gone ahead to grant an order of mandamus compelling the respondent to satisfy the decree in question since execution proceedings cannot issue against the respondent. There is no longer a question of verifying the liabilities which seems to have been the Authority’s concern in the said notice. In my view the issue being raised herein ought to have been raised at the time of the hearing of the application for mandamus since the effect of the moratorium could have been to keep the finding of the respondent liable to satisfy the decree in abeyance. Once that stage was passed the horse had bolted and any attempt to close the stable thereafter would not serve any useful purpose.**

**I therefore do not see any reason why the respondent cannot comply with the orders of this Court.”**

13. I am still of the same view. This Court as was appreciated in the above case recognised that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up and that taking into account their debt portfolio as against their financial resources, it is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. However, in recognition of those circumstances, this Court on 18<sup>th</sup> December, 2014 directed that the decretal sum be paid in the manner set out hereinabove. It is clear that the said order was not complied with. That order however remains in force as it has not been set aside.
14. It is trite that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J** (as he then was) stated:

**“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.**

15. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990**. In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

**“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was**

discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt...The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice... Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court... Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail either the first or the second defendant”.

16. With respect to the orders of *mandamus* and the consequences arising therefrom, in High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Kosoro**, I expressed myself as hereunder:

“...the present case the *ex parte* applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting 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 judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement 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.”

17. Accordingly, the Court having granted an order of *mandamus* it is no longer merely one of settlement of a decretal sum, but that of compelling a public officer to carry out his/her statutory duty. Therefore the issue of the officer’s personal liability for the debts from a public body no longer arise. What then is in issue is the failure by the concerned officer to carry out a duty imposed on him/her by the law.
18. Having considered the issues raised herein, it is my view and I hold that there are no justifiable reasons why the application cannot succeed.
19. Accordingly, I direct the Secretary for the time being of the Nairobi County Government to appear before this Court to show cause why he/she should not be committed for contempt of Court.
20. The applicant will have the costs of these proceedings.

**Dated at Nairobi this 22<sup>nd</sup> January, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Mugisha for the Applicant**

**Cc Patricia**