



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

MISC. APPLICATION NO. 89 OF 2015.

DEROS CONSTRUCTION CO. LTD. ::::::::::::::::::::::::::::::: APPLICANT.

VERSUS

THE SECRETARY

COUNTY GOVERNMENT OF VIHIGA:::::::::::::::::::::::::::::RESPONDENT.

RULING.

1. The application before me is by way of Notice of Motion dated 16th November, 2015. It is brought under the provisions of order 53 rules 3 (1) (2) (3) (4), 4 (1) (2) (3) 5 and 6 of the Civil Procedure Rules, 2010

It seeks the following orders:-

- i. *The honourable court be pleased to issue orders of mandamus compelling the Secretary County Government of Vihiga to pay the applicant the decretal sum awarded in Kakamega High Court Civil Case No. 25 of 2007 on the 22nd day of September, 2008 amounting to Ksh. 5,966,229.40 interest inclusive;*
- ii. *The honourable court be pleased to order the Secretary County Government of Vihiga to deposit Ksh. 5,966,229.40 in the client account of Momanyi Manyoni and Company Advocates at Equitorial Commercial Bank, Kakamega branch account number 0402025902 for onward transmission to the applicant;*
- iii. *The respondent be ordered to pay the applicant the costs of the application.*

2. The application is based on the following grounds:-

- i. *The honourable court gave judgment in favour of the applicant in Kakamega High Court Civil Case No. 25 of 2007;*
- ii. *The then Vihiga Municipal Council paid part of the decretal sum and declined to pay the balance;*
- iii. *The County Government of Vihiga took over the assets and liabilities of the Vihiga Municipal Council;*
- iv. *The County Government of Vihiga should be ordered to pay the applicant the balance of the decretal sum and interest thereon;*
- v. *The Secretary County Government of Vihiga should be compelled to pay the applicant the balance of the decretal sum and interest since the Secretary is the Accounting Officer of the County Government;*
- vi. *The applicant shall suffer irreparable loss unless the above orders are granted;*
- vii. *It is in the interest of justice that the above orders be granted.*

The applicant's submissions

3. At the hearing of the application, Mr. Manyoni, learned counsel for the applicant informed the court that he served the Secretary, County Government of Vihiga with a hearing notice on 26th January, 2016 and filed an affidavit of service thereof on 1st February, 2016.
4. He submitted that judgment was entered against the respondent, the Vihiga Municipal Council which paid part of the decretal amount. The County Government of Vihiga took over the assets and liabilities of the Vihiga Municipal Council. It was submitted that the Secretary of the Vihiga County Government is the Accounting Officer and that is why the applicant was praying for orders of Mandamus to be issued against it. The application was supported by the supporting affidavit dated 16th November, 2015 and the list of documents filed on 27th October, 2015. Mr. Manyoni informed the court that the respondent filed no response whatsoever. He prayed for the application to be allowed.

Determination of the application

The issue for determination is if the applicant has made out a case for the grant of the orders of mandamus.

5. The applicant's application is supported by the affidavit of Timothy Owase Tabuke, the Managing Director of the applicant Deros Construction Company Limited.
6. In paragraphs 1 & 2 of his affidavit, he deposes that he was awarded a contract by the Vihiga Municipal Council in the year 2007 to maintain the Lunyerere Kigama Road vide Road Works contract No. MC/KRB/2007/07/T3. The Vihiga Municipal Council declined to pay him the balance that was remaining after completion of the work.
7. In paragraph 4 thereof, he avers that he filed a case being Kakamega High Court Civil Case No. 25 of 2007 against Vihiga Municipal Council to pay the balance of the decretal sum and that judgment was entered in his favour.
8. He states in paragraphs 7 & 8 of his affidavit that the County Government of Vihiga took over the assets and liabilities of Vihiga Municipal Council and should be compelled to pay the balance of the decretal sum and interest now amounting to Ksh. 5,966,229.40.
9. In paragraph 10 of the said affidavit, he prays for orders to compel the Secretary County government of Vihiga to pay him the balance through the firm of Momanyi Manyoni & Company Advocates.
10. I have perused the court file and ascertained that pursuant to the judgment entered against the respondent on 22nd September, 2008, later on, Lady Justice Thurairaja Rajasingh, on 27th September, 2012, ordered the Clerk Vihiga Municipal Council to pay the applicant a liquidated sum of Ksh. 4,133,000/= plus costs and interests. The above orders were however not complied with which has necessitated the applicant to apply for orders of Mandamus.
11. In **Republic vs. Kenya National Examinations Council exparte Gathenji Njoroge & 9 others [1997] eKLR**, the Court of Appeal cited the following passage with approval, from Halsbury's Laws of England, 4th Edition, Volume 1 at page 111 from paragraph 89 –

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in

cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

12. In the case of **Jidiraph Kamau & Another vs. the Attorney General, Mombasa H.C. Miscellaneous Application No. 40 of 2000**, it was held that:-

“Mandamus is a peremptory order requiring the respondent to perform a specified public duty, it does not lie for breach of a private obligation even if such obligation is owed with other public law duties to an applicant but whether a duty is to be enforced by mandamus depends on whether the duty as expressed or implied gives the applicant the right to complain. Its purpose is to compel the performance of a public duty or any act contrary to or evasive of the law. It does not lie against a public officer as a matter of course. There are bars and limitations. Courts are reluctant to direct a writ of mandamus against the executive officers of a Government unless some specific act or thing, which the law requires to be done, has been omitted. Courts proceed with extreme caution in granting of the writ, which would result in interference by the judicial department with the management of the executive department of the Government. The conditions for its grant are that it must be shown that the public officer has failed to perform his duty; that the court would not grant mandamus where there is an alternative remedy available to the applicant; and that it may be refused if the enforcement of the order will present problems like lack of adequate supervision.”

13. In the instant case, there is a valid court order on record showing that the respondent owes the applicant the sum claimed which has by now escalated to Ksh.5,966,229.40 due to accrued interest. Taking into account the above factors, I allow the application dated 16th November, 2015.

14. The orders that ensue are:-

- i. *An order of Mandamus compelling the Secretary County Government of Vihiga to pay the applicant the decretal sum awarded in Kakamega High Court Civil Case No. 25 of 2007 on 22nd day of September, 2008 which amounts to Ksh. 5,966,229.40, inclusive of interest;*
- ii. *The Secretary County Government of Vihiga is ordered to deposit the said amount in the client account of Momanyi Manyoni & Company Advocates at Equatorial Commercial Bank, Kakamega branch within 45 days from today’s date for onward transmission to the applicant; and*
- iii. *Costs to the applicant.*

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this **27TH** day of **MAY**, 2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the Applicant.**

..... **for the Respondent.**

.....**Court Assistant**