



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**JUDICIAL REVIEW NO.29 OF 2012**  
**IN THE MATTER OF AN APPLICATION**  
**FOR AN ORDER OF MANDAMUS**  
**AND IN THE MATTER OF NAKURU CMCC NO.2728B OF 2003**  
**BETWEEN**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**MUNICIPAL COUNCIL OF NAKURU**  
**(TOWN CLERK).....RESPONDENT**  
**AND**  
**HARRISON INYANGALA KATAKA.....1<sup>ST</sup> SUBJECT**  
**JOHN KIRIKA KAMAU.....2<sup>ND</sup> SUBJECT**  
**GABRIEL NJOGU GATHUNGU.....3<sup>RD</sup> SUBJECT**  
**JOHN PETI LUSEKA.....4<sup>TH</sup> SUBJECT**  
**MUSA SHILINDWA ASUTSI.....5<sup>TH</sup> SUBJECT**  
**JAMES KARIUKI GIKONO..... 6<sup>TH</sup> SUBJECT**

**RULING**

By a notice of motion dated 24<sup>th</sup> May 2012, the six subjects seek that orders of mandamus do issue compelling the respondent (Municipal Council of Nakuru - Town Clerk) to pay them various sums of money awarded in **Nakuru CMCC No.2728B of 2003**.

This prayer is based on grounds that the respondent has to pay the subjects the respective decretal sums

and as a result, they have suffered. The subjects have demanded this saying it is a public duty owed to them by the respondents, and which demand has been met with refusal, failure or neglect.

In the verifying affidavit and statement of facts, the subjects state that they had filed a case **Nku CMCC No.2728B of 2003** against **Municipal Council of Nakuru**. Subsequently judgment was entered in their favour in various amounts together with interest at court rates. The decree was extracted and assessed costs were served upon the respondent. This yielded nothing hence the present application.

There was no response filed, and the matter was disposed of by way of written submissions filed by the subject's counsel. The subjects counsel submits that after decree was issued and a certificate of costs granted, the respondent did not pay the subjects their dues despite several reminders.

Counsel then states:-

**"Our feeling is that the respondents simply kept quite (sic) over the issue because it knew that the subjects are barred by statute from applying for attachment of the respondent's moveable properties."**

The respondent is said to have the full authority to pay the subjects.

The issues for determination therefore are,-

- (1) The place of judicial review as a means of executing court orders.
- (2) When should a court issue orders of mandamus?
- (3) The status of Municipal Council of Nakuru and how would orders made against it be realised.

### **Judicial Review**

This is really the law which governs judicial control of powers, functions and procedures of administrative authorities. As PLO Lumumba and P.O. Kakuma discuss in their text "**JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS IN KENYA**" - Law and Procedure, Judicial review is necessary where administrative agencies have amassed or shown excesses in exercise of their powers or lawful jurisdictions.

The question which arises in this application is, whether the applicants have demonstrated that the Municipal Council of Nakuru has run amok in exercise of its public functions. What administrative duty did the respondent have which it has failed to perform and should therefore be compelled to carry out? I think the kind of duty the respondent would have, has to be prescribed by law.

It is not very clear the background leading to the filing of CMCC No.2728B of 2003 - since the pleadings are not annexed. What is availed to this court is the extracted decree which shows the prayers that the respondent do pay the subjects their rightful retirement benefits, entitlements and proceeds accruing from NSSF arising out of the Collective Bargain Agreement between the subject's Workers Union and the respondent, and also pay general damages.

A global sum was then awarded, and it is not clear whether this encompassed each limb of the prayers sought, or whether it was just general damages for breach of contract, but the judgment was in favour of the subjects.

Be that as it may, it would appear that after serving an extract of the decree and certificate of costs, a demand for payment of the decretal sums, by a letter forwarding the decree and giving a breakdown of the sums due was made. It was some sort of information on the outcome of the matter. Thereafter, no other correspondence seems to have taken place in pursuit of realising the decree and it is incorrect for applicant to allege that despite several reminders which were sent to the respondent they did nothing to

that letter requesting for payment, elicited no response from the respondent.

### **When should orders of mandamus issue?**

This is an order which issues to an administrative authority to perform an imperative duty imposed upon it. In **R V Minister for Local Government & Another Exparte Mwachina [2002] 2 KLR 559**, the purpose of mandamus was defined as:-

**"To compel the performance of a public duty to the detriment of a party."**

Where an authority fails to implement an order of a tribunal or court, mandamus can be issued, compelling it to do so. In this scenario, the Municipal Council of Nakuru was a public body which had a duty to pay the subjects their dues as a way of satisfying the judgment.

I take note that although no execution option was attempted, there was a demand made. I can do no better than reproduce the observations made in the text by PLO Lumumba (supra) pg 68 that:-

**"Mandamus only issues when the affected person has demanded the performance of a PUBLIC duty, which demand has been met with refusal, failure or neglect."**

Although no negative response was communicated I can safely infer that by choosing to ignore the demand for payment, the respondent had refused, failed or neglected to pay the sums demanded.

### **Status of Municipal Council of Nakuru**

The entity as described no longer exists, subsequent to a shift on the legal status of Government in Kenya. The Constitution of Kenya introduced a devolved government through counties, replacing the local authorities as they then existed. The County Government Act does not have transitional provisions regarding pending actions and judgments against the then local authorities.

Although section 134(2) of the County Government Act provides that:-

**"All issues that may arise as a consequence of the repeal under sub section (1) shall be dealt with and discharged by the body responsible for matters relating to transition." The Transition Authority established under the Transition to Devolved Governments Act, does not have specific provisions vesting causes of action and judgment against local authorities.**

However a lifeline is offered by the Urban Areas and Cities Act No.73 of 2011 which contains transitional provisions at section 59 to the effect that:-

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

I adopt the views expressed by Majanja J in Milimani **JR Misc. Civil Appl. No.448 of 2006 R V Town Clerk of Webuye County Council and Another** (reported in [2014] eKLR) *that "this provision vests the power to proceed with and to defend actions and legal proceedings pending against defunct local authorities ..... What is clear .... is that proceedings commenced against or in existence are not extinguished by operation of law but continue to exist"*

The icing on this is expressly stated under section 33 of the Sixth Schedule of the Constitution of Kenya which provides for success of institutions, stating that:-

**"An office or institution established under the Constitution is the legal successor of the**

**corresponding offices or institution, established under the former Constitution or by an Act of Parliament in force, immediately before the effective date, whether known by the same or a new name.”**

Since the Municipal Council of Nakuru is no longer in legal existence, then to give effect and meaning to the applicant/ subject's pursuit of their rights, I order that order of mandamus do issue to:-

1) NAKURU COUNTY to pay to the subjects the various sums awarded in Nakuru CMCC No.2728B of 2003.

2) Costs of this application shall be borne by the respondents.

**Delivered and dated this 24<sup>th</sup> day of September 2014 at Nakuru.**

**H.A. OMONDI**

**JUDGE**