



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 393 of 2012

IN THE MATTER OF: AN APPLICATION BY JANE NJOKI MWANGI FOR AN  
APPLICATION FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF: JUDGMENT AND DECREE DATED 12<sup>TH</sup> OCTOBER 2012 IN THE  
HIGH COURT OF KENYA AT NAIROBI PETITION NO.166 IN JANE NJOKI MWANGI -VS-  
CITY COUNCIL OF NAIROBI & KEZIAH WAITHERERO

AND

IN THE MATTER OF: TOWN CLERK, CITY COUNCIL OF NAIROBI

*BETWEEN*

JANE NJOKI MWANGI.....APPLICANT

*VERSUS*

CITY COUNCIL OF NAIROBI.....RESPONDENT

**J U D G M E N T**

The Exparte Applicant herein Jane Njoki Mwangi (*hereinafter referred to as the Applicant*) commenced judicial review proceedings against the Respondent the Town Clerk, City Council of Nairobi by way of a Notice of Motion filed on 1<sup>st</sup> November 2012 seeking an order of Mandamus to compel the Respondent to satisfy the decree issued by the High Court of Kenya at Nairobi in Petition No.166 of 2009.

The application is supported by a statutory statement dated 29<sup>th</sup> October 2012 and a verifying affidavit sworn by the Applicant on even date.

It is the Applicant's case that she was the successful litigant in petition No.166 of 2009 in which judgment was entered in her favour against the City Council of Nairobi in the sum of Kshs.25,112,500 together with costs and interest at court rates with effect from 18<sup>th</sup> March 2009 until payment in full – *see judgment which is part of annexures marked JNM*. A decree was subsequently issued on 12<sup>th</sup> October 2012 and the Applicant avers that despite demand made to the Respondent to settle the decretal amount, the Respondent has neglected to satisfy the decree hence the current proceedings.

The application is opposed. The Respondent filed grounds of opposition on 26<sup>th</sup> November 2012 in which he opposed the Applicant's motion on the following grounds:

1) THAT the applicant has not shown any substantial ground to warrant the Grant of the Orders sought herein.

2) THAT the application is incurably defective in that the same is not supported with any competent verifying affidavit.

3) THAT the application is further defective in so far as no leave has been granted to the applicant to commence judicial review application herein.

4) THAT the application has been lodged prematurely since no bill of costs has been filed and taxed and hence no certificate of costs has been issued.

5) THAT the application is premised on an incompetent and defective decree.

In compliance with orders of the court, both parties filed written submissions stating their respective positions in this matter.

I have carefully considered the application and the parties' rival submissions.

According to the Respondent's submissions, the Respondent has opposed the motion on grounds that the application is premature as there is a pending application for review of J. Musinga's judgment in Petition No.166 of 2009 and that the current application should be stayed pending the outcome of the said application for review.

The Respondent also claims that the decree sought to be enforced is defective as it was not allegedly extracted in terms of the judgment sought to be enforced by the current proceedings.

The Respondent appears to have abandoned the grounds he had filed on 26<sup>th</sup> November 2011 in opposition to the application since none of them featured in the submissions filed in support of the Respondent's case.

I have considered the said grounds of opposition and in my view all of them are misconceived and devoid of merit.

It is clear from the record of proceedings that the Applicant obtained leave from this court to commence the current proceedings on 29<sup>th</sup> October 2012. It is also clear that the application is supported by a competent verifying affidavit sworn by the Applicant on 29<sup>th</sup> October 2012.

With due respect to counsel for the Respondent, I find no merit in the submissions that the decree sought to be enforced is defective and that the application is premature. I have looked at the said decree which is annexed to the Applicant's pleadings and I am satisfied that it corresponds to the terms of the judgment delivered by Musinga, J in Petition No.166 of 2009. The allegation that there is an application for review of the said judgment which is pending determination by the court has not been substantiated by any evidence. In support of this allegation the Respondent referred the court to a notice of appeal which was filed by the Applicant herein on 18<sup>th</sup> June 2012. A notice of appeal is different from an application for review. There is no evidence to show that there is any pending application for review of Musinga J's judgment.

The filing of a notice of appeal is just an expression of a party's intention to file an appeal against a decision rendered by a court which intention can subsequently be abandoned or actualized. In this case the Applicant appears to have abandoned her intention to appeal against the judgment delivered by Musinga J on 31<sup>st</sup> March 2011 otherwise she would not have filed the current application.

It is important to note that the Respondent has not disputed the Applicant's claim that he was duly served with the decree sought to be enforced herein and that demands for payment in satisfaction of the said

decree have not been complied with. In short the Respondent has admitted that despite being aware of the decree issued in favour of the Applicant against the City Council of Nairobi, he has neglected or refused to satisfy the same. It is worth noting that the Respondent has not made any claim that it had lodged an appeal against the judgment entered in favour of the Applicant. It is therefore safe to conclude that there is no appeal pending in this matter.

Section 263A of the Local Government Act is very clear. It requires the Clerk of a Local Authority to pay without delay sums awarded in a judgment or order to the person entitled out of the Revenues of a Local Authority. The judgment sought to be enforced in these proceedings is a judgment obtained by the Applicant against a local authority namely the City Council of Nairobi in which the Respondent serves as the Town Clerk.

Considering that the Respondent has admitted to having failed to satisfy the decretal amount despite being served with demands for payment, I find that the Applicant has proved that the Respondent has failed to perform his public duty which is imposed by statute to pay the Applicant the sums awarded in the decree issued in Petition No.166 of 2009 out of the revenues of the City Council of Nairobi.

An order of mandamus issues to compel performance of a public or statutory duty where it is proved that a person or body charged with the responsibility of performing the duty in question has failed, refused or neglected to perform the said duty to the detriment of the aggrieved party.

In view of the foregoing, I am satisfied that the Applicant has demonstrated that she is deserving of the order of mandamus sought in Prayer 1. I find the application dated 31<sup>st</sup> October 2012 merited and it is hereby allowed. I consequently issue an order of mandamus directed at the Town Clerk of the City Council of Nairobi compelling him to pay the Applicant Kshs.25,112,500 together with costs and interest at court rates as specified in the decree issued by this court on 12<sup>th</sup> October 2012.

**Dated, Signed and Delivered** by me at Nairobi this **30<sup>TH</sup>** day of **JANUARY** 2013.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

.....Court Clerk

..... for Applicant

..... for Respondent