



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW 256 OF 2011

IN THE MATTER OF AN APPLICATION BY NORTH END TRAINING COMPANY LIMITED FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF MANDAMUS COMPELLING THE TOWN CLERK, CITY COUNCIL OF NAIROBI TO PAY THE DECRETAL SUM IN HIGH COURT CIVIL SUIT NUMBER 731 OF 2008 AS CONTAINED IN AN ORDER DATED THE 23RD OF AUGUST, 2011

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC.....APPLICANT

AND

PHILIP KISIA THE TOWN CLERK CITY COUNCIL OF NAIROBI...1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

EX-PARTE

NORTH END TRADING COMPANY LIMITED T/A KENYA REFUSE HANDLERS

JUDGEMENT

This judgment is an answer to the notice of motion dated 15th November, 2011 filed by North End Trading Company Limited (the Ex-parte Applicant) against Philip Kisia: The Town Clerk, City Council of Nairobi (the 1st Respondent) and City Council of Nairobi (the 2nd Respondent). In the application the Ex-parte Applicant prays for orders as follows:-

1. THAT this Honourable Court be pleased to grant the order of Mandamus directed at the 1st Respondent compelling him.

(i) To pay the Applicant the sum of Kenya Shillings 72,274,610/= being the Partial Decretal Sum plus costs (in High Court Civil Suit Number 731 of 2008) as contained in the Decree dated the 23rd of August, 2011; and

(ii) To grant the Applicant written permission to attach and/or distrain the property of the City Council of Nairobi in execution of the Partial Decree dated the 23rd of August, 2011 in order to realize the sum of Kenya Shillings 72,374,610/= being the Partial Decretal sum plus costs (in High court Civil Suit Number 731 of 2008)

2. THAT the costs of this application be proved for.

The application is supported by four grounds on its face namely:-

1. THAT consent judgment on the 18th of May, 2011 was entered partly in favour of the Applicant for the sum of Kenya Shillings 70,372,160/= plus costs to be paid to the Applicant by the 2nd Respondent;

2. THAT a Partial Decree on the 28th of August, 2011 was issued whereupon the Respondent was ordered to pay to the Applicant the sum of Kenya shillings 70,372,160/= plus costs.

3. THAT the law requires that no execution against the local authority shall be issued but the clerk of the local authority shall without delay cause to be paid out of the revenue of the local authority the decretal amount; and

4. THAT the 1st and 2nd Respondents have failed to honour both the Consent Judgment and the Partial Decree to the detriment of the Applicant, causing the Applicant grave financial and economic hardships, despite persistent demand made and notice of intention to institute legal proceedings given.

The application is also supported by a statement dated 26th October, 2011 and a verifying affidavit, plus annexures thereto, sworn on 26th October, 2011 by Hon. Elizabeth Ongoro, the Managing Director of the Ex-parte Applicant company.

The respondents replied to the application through an affidavit sworn on 19th December, 2011 by A. J. Owuor the 2nd Respondent's Acting Director – Legal Services.

The background of this case is straight forward. The Ex-parte Applicant herein instituted a claim against the 2nd Respondent vide Nairobi Milimani Commercial Courts High Court Civil case No. 731 of 2008. Subsequently on 18th May, 2011 a consent judgment was entered in which the 2nd Respondent was to pay the Applicant the sum of Kshs.70,372,160/= together with costs. The 2nd Respondent has however failed to pay the Ex-parte Applicant and that is why the Ex-parte Applicant has moved to this court seeking an order of mandamus to compel the 1st Respondent who is the executive officer of the 2nd Respondent to pay the decretal amount.

The respondents have not disputed the facts of the case. The respondents are only saying that the consent judgment did not specify the period in which the payment was to be made to the Ex-parte Applicant and that the 2nd Respondent is at the moment unable to generate sufficient revenue to meet the payment sought by the Ex-parte Applicant.

Once judgment was entered in the Nairobi Milimani Commercial Court C.C. No. 731 of 2008, the 2nd Respondent was expected to make payment without delay. If the 2nd Respondent was facing a financial crisis as alleged in its response, then it ought to have engaged the Ex-parte Applicant in negotiations concerning payment by installments. The 2nd Respondent however opted not to do anything until the time this cause was instituted by the Ex-parte Applicant. This is one case which clearly cries out for an order of mandamus directing the respondents to meet their financial obligations by paying the Ex-parte Applicant.

The Ex-parte Applicant has in prayer No. 1 of its notice of motion asked for two orders. The 1st limb of the prayer is for an order of mandamus directing the respondents to pay the Ex-parte Applicant the decretal amount plus costs in Nairobi Milimani Commercial Courts H.C.C.C. No 731 of 2008. This limb of the prayer is merited and it is allowed as prayed.

The 2nd limb of the prayer is for an order of mandamus granting the Ex-parte Applicant permission to attach the 2nd Respondent's property in execution of the consent judgment. The second limb of its 1st prayer cannot be allowed because this court cannot act in contravention of the law. The Ex-parte Applicant admits that the Local Government Act prohibits the issuance of any order of execution or attachment against a local authority or against its property. Why then does the Ex-parte Applicant want to lead this court into temptation? This court cannot issue orders that are meant to break the law. The court can only issue orders that support and affirm the laws of the land. The 2nd limb of the 1st prayer of the Ex-parte Applicant's notice of motion is therefore rejected and dismissed.

At the end of this case, one can see that the game is tied and that being so, I direct each party to meet own costs of the application.

Dated and signed at Nairobi this 27th day of March,2012 .

W. K. KORIR

JUDGE