



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Civil Appeal 185 of 2009

K.C. BANK LTD.....APPLICANT

VERSUS

THE TOWN CLERK COUNTY COUNCIL OF MERU.....RESPONDENT

R U L I N G

The ex parte applicant by an application dated 1st December 2009 brought under O. LIII Rule 4 of Civil Procedure Rule and Section 3A of Civil Procedure Act, seeks the following orders:-

- 1. THAT an order of mandamus by way of Judicial Review directed to the Town Clerk, County Council of Meru do issue compelling him to satisfy the decree and certificate of costs dated 9th July 1998 issued by the Chief Magistrate's Court, Milimani Commercial Courts, Nairobi in CMCC No. 8298 of 1996, Kenya Commercial Bank Limited vs. Meru County Council & Harun Gikundi for Kshs. 80,479/= plus costs and interest.***
- 2. THAT in default of satisfying the said decree and certificate of costs plus interest at court rates from the date of filing the suit mentioned in prayer 1 above, being 15th November 1996, till payment thereof in full, the town Clerk, County Council of Meru being the Chief accounting officer of the county council of Meru be committed to civil jail.***
- 3. That costs of this application be provided for.***

The applicant filed notice of application for mandamus dated 17th April 2009 at the High Court on 17th April 2009 together with statement of facts and affidavit verifying the facts relied upon. The notice to registrar was served on the same day. The Registrar acknowledged service by stamping and signing at the back of the notice. That the applicant filed affidavit of service of the notice of application for mandamus with the Registrar of the High Court of Kenya at Nairobi on 6th May 2009. On 6th May 2009 the ex parte applicant filed an application at Nairobi High Court seeking the following orders:-

- 1. THAT this Honourable Court be pleased to grant leave to the applicant to file proceedings for an order of mandamus by way of judicial review directed to the Town Clerk County of Meru and the***

Permanent Secretary, Ministry of Local Government.

2. THAT costs of this application be provided for.

That before the application could be heard the ex parte applicant applied to amend statement of facts. The amended statement of facts were filed on 7th July 2009.

On 12th November 2009, the application dated 6th May 2009 was granted by Hon. Lady Justice Gacheche and ex parte applicant ordered to file the substantive application at Meru High Court and the court file was ordered transferred to Meru High Court for appropriate action. The substantive motion was filed at Meru High Court on 2nd December 2004. The 1st respondent upon service being effected upon him, he filed a notice of preliminary objection on points of law. The 1st respondent's preliminary objection on points of law states as follows:-

1. That the order of mandamus sought by the ex parte applicant is misconceived and the same is incompetent and an abuse of the court process, since the satisfaction of a civil decree against the 1st respondent is not a public duty that an order of mandamus can compel the 1st respondent to perform.

2. That the Civil Procedure Act Part III provides for modes of execution for civil decrees and therefore, the order of mandamus sought against the 1st respondent cannot issue.

3. That the decree sought to be enforced is statute barred.

The ex parte applicant in its application dated 1st February 2009 is seeking an order of mandamus by way of judicial review to compel the 1st respondent, who is Town Clerk, to County Council of Meru, to satisfy the decree and certificate of costs dated 9th July 1998 issued by the chief magistrate's court, Milimani Commercial Courts, Nairobi, in CMCC No. 8298 of 1996, **Kenya Commercial Bank Limited vs. Meru County Council & Harun Gikundi** for Kshs. 80,479/= plus costs and interest. The ex parte applicant also sought that in default of compliance with prayer 1an order be issued in terms of prayer 2 of the ex parte applicant's application committing 1st respondent into civil jail. The affidavit in support is deponed upon by the ex parte applicant's counsel to which the plaint, decree, certificate of costs, correspondence and other relevant documents are annexed. There is no dispute that the ex parte applicant has a valid court judgment, decree, and certificate of costs. The decretal amount is against the interested party, County Council of Meru and its employee one Harun Gikundi.

The application is against the 1st respondent as a chief accounting officer of interested party, the County Council of Meru. It is not against 1st respondent in his individual party. The learned counsel for 1st respondent Mr. Mwirigi strongly opposed the application. He argued that a civil debt against the interested party – (County Council of Meru) cannot amount to a public duty for 1st respondent to settle. He submitted and such an order of mandamus which is an order to compel a public officer to perform public duty cannot avail to the ex parte applicant. That Kenya Commercial Bank Ltd is not owed any public duty and 1st respondent cannot therefore avail the relief sought. He submitted also the Civil Procedure Rules and civil Procedure Act provides modes of execution. That the ex-parte applicant has not demonstrated that it has exhausted other procedures of execution before filing this application and as such he submitted the application is misconceived. The counsel further argued that the ex parte applicant's application offends the provisions of Order LIII Rule 1 (2) of Civil Procedure Rules. He argued the application for leave ought to be accompanied by statement of facts and affidavit verifying those facts. That the affidavit in support is sworn by an advocate who has not exhibited an authority to swear the affidavit on behalf of the ex-parte applicant.

The ex-parte applicant counsel in response submitted that it is conceded that an application of execution of a decree against a local authority cannot be by way of attachment of property and is what has necessitated this application. That there is notice to the Registrar which is duly served. The notice he submitted was accompanied by a statement of facts and affidavit. The counsel argued that the affidavit by

an advocate was proper as it is not on contested matters of facts but on matters within the knowledge of the advocate.

On authority the counsel submitted that he has had authority and there is no legal requirement that the authority be in writing nor is it supposed to annexed. He submitted that there was no contrary evidence that was exhibited to show that the advocate did not have authority.

I have perused the ex parte applicant's application from the ex-parte stage up to time of filing of notice of motion and I am satisfied that the notice to the Registrar was properly served. That leave was properly granted. The decree in this matter was issued on 9th July 1998 and the application for judicial review commenced on 17th April 2009 before twelve years had expired from the date of judgment.

Under Section 4 (4) of the Law of Limitations Act (Cap 22) it is provided:-

“4 (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

In my view of the foregoing the judicial review proceedings were commenced before 12 years had expired from the date of the decree dated 9th July 1998.

The 1st respondent is a Town Clerk for County Council of Meru; which is under the Ministry of Local Government. The Town Clerk is a civil servant and chief accounting officer of the County Council Meru. The 1st respondent is a public officer whereas the interested party is a public body.

Under Section 129 (1) and (2) of the Local Government Act, (Cap 265) the status, powers and duties of Town Clerk and Clerk of the Municipal Council is well spelled out. Section 129 (1) and (2) of the Local Government Act provides:-

“129 (1) The town clerk of a municipal council and the clerk of every other local authority, shall be the chief executive and administrative officer of the local authority of which he is the town clerk or the clerk, as the case may be, and shall have the general responsibility of co-ordinating the whole of the work of the local authority.

(2) In the discharge of the functions of his office he shall have all the powers and duties conferred and imposed upon the town clerk or the clerk, as the case may be, by this Act or any other written law and, in particular, but without prejudice to the generality of the foregoing, he shall have the powers and duties assigned to him by, and be responsible for the matters specified in, Part 1 of the Third Schedule, and such other duties as may be assigned to him by the local authority of which he is the town clerk or the clerk, as the case may be.”

Further, under third schedule part 1 under 4, 6, 7, 8, 9 and 11 statutes, powers, duties and responsibilities of Town Clerk are provided as follows:-

“4. He shall advise the mayor or chairman of the local authority, as the case may be, on all matters appertaining to those offices.

6. He shall have the duty of ensuring that the business of the local authority is carried out with order, regularity and expedition in accordance with the by-laws, regulations, resolutions and standing orders of the local authority.

7. He shall have the responsibility for the general correspondence of the local authority.

8. Where any document will be a necessary step in legal proceedings on behalf of the local authority, he shall sign such document unless any written law otherwise requires or authorizes, or the local authority shall have given the necessary authority to some other person for the purpose of such proceedings.

9. He shall have the conduct of such negotiations on behalf of the local authority as the local authority may require.

11. He shall, where legally qualified so to do, give general legal advice to the local authority, and, whether legally qualified or not, to officers of the local authority on questions arising with regard to their official duties and obligations.”

The Town Clerk and the interested party have public duty as per provisions of the Local Government Act that they should discharge in course of their duties. The breach of such duty gives rise to a right of action. The court with jurisdiction is empowered to do justice by granting the order of mandamus as an ancillary remedy. In the case of **Haji Yusuf Mutenda & 2 others vs. Haji Zakaliya Muguyiasoka & others** [1957] E.A. 391, Lewis J. as he then was stated:-

“In cases where there is a duty of a public or quasi-public or nature, or a duty imposed by statute, in the fulfillment of which some other person has an interest, the court has jurisdiction to grant a mandamus to compel the fulfillment.”

In view of the submissions by counsel before me and after considering the contents of the affidavit by the ex parte applicant, I find that it has been established that there is a duty of public or a duty imposed by statute against the interested counsel in the fulfillment of which the ex parte applicant has an interest. The counsel for ex parte applicant and the counsel for the respondent have agreed that the properties of the interested council cannot be attached and ex parte applicant has no other remedy open to it other than proceeding by way of an application for mandamus. This court can only refuse to grant an order of mandamus if it is satisfied there is another remedy open to the applicant. I am from the submissions by counsel for both parties satisfied that the ex parte applicant has no other way through which it can recover the decretal sum save by an order of mandamus.

In the circumstances, the application dated 1st December 2009 is allowed and the ex parte applicant obtain an order of mandamus on the following terms:-

- 1. That an order of mandamus by way of judicial review be and is hereby directed to the Town Clerk, County Council of Meru compelling him to satisfy the decree and certificate of costs dated 9th July 1998 issued by chief magistrate’s court, Milimani Commercial Courts, Nairobi in CMCC No. 8289 of 1996 Kenya Commercial Bank Ltd. vs. Meru County Council & Harun Gikundi for Kshs. 80479/= plus costs and interest.**
- 2. That the Town Clerk, County Council of Meru, in default of satisfying the said decree and certificate of costs plus interest at court rates from the date of filing the suit mentioned under No.1 above being 15th November 1996 till payment in full being the chief accounting officer of the County Council of Meru be committed to civil jail.**
- 3. Costs of this application to the ex parte applicant.**

Dated at Meru this 26th March 2012.

**J.A. MAKAU
JUDGE**

Delivered in open court in the presence of:-

1. Mr. Mokuu for Wambua for applicant
2. Mr. Kioga h/b for Mr. Mwirigi for the respondent

J.A. MAKAU
JUDGE