



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 10 OF 2012
THE TOWN CLERK MUNICIPAL COUNCIL OF
MOMBASA.....APPELLANT/APPLICANT

VERSUS

MAKUPA CHEMIST

LIMITED.....RESPONDENT

Coram:
Mwera J.
Kibara for Applicant
Kioko for Respondent
Court Clerk Furaha

RULING

By a notice of motion dated 19th June, 2012, the appellant sought orders to stay proceedings following an order the deputy registrar made on 21st May, 2012 in HCCC 39/2002.

During arguments it transpired that the said order followed a notice to show cause (NTSC) directed to the applicant council in respect of a debt it owes the respondent.

Mr. Kibara told the court that a contempt application was filed in this court but before it was heard the court instead directed that a notice to show cause do issue to the applicant's Town Clerk to state why execution should not issue against the council. That a similar procedure had once issued in HCCC 39/2002 but Mr. Omburah, Deputy Registrar, had been convinced that as per section 263A of the Local Government Act, that course to execute did not apply to the applicant. And because this court had directed a similar course of execution to proceed once again the applicant had raised a preliminary objection under section 263A in which it was overruled by Mr. Ekhubi, citing this court's order to issue another notice to show cause. This application is to stay proceedings until the appeal against that dismissal by Mr. Ekhubi, is heard.

After hearing both sides what came through is that the applicant was adjudged to owe money to the respondent. A decree was issued on 20th July, 2009. It did not pay up. A notice to show cause issued and Mr. Omburah upheld the argument that that course of execution was barred under the said section 263A. The respondent then applied for an order of mandamus to command the applicant's Town Clerk to pay the adjudged sum. Okwengu J., as she then was, issued such an order. Still payment was not forthcoming. Then the respondent filed an application to cite the applicant's Town Clerk for

contempt. Before the proceedings for contempt got under way, the Town Clerk intimated that he would make payment. He did nothing and that is when the “*second*” notice to show cause was directed to issue.

From all the foregoing, execution as against the applicant local authority and by notice to show cause in the present case is not available in terms of section 263A of the Local Government Act. It was so held by Mr. Omburah and so by law it could not be ordered once again so as to prompt the proceedings before Mr. Ekhubi.

Accordingly, the proceedings before Mr. Ekhubi leading to the ruling of 21st May, 2012 were a nullity in law. They are now set aside.

What remains is that the parties should set down the application for contempt for hearing in the next twenty eight (28) days. The applicant’s Town Clerk to be present in court when that application is heard.

Delivered on 24th July, 2012.

J.W. MWERA

JUDGE