



REPUBLIC OF KENYA

High Court at Machakos

Miscellaneous Civil Application 388 of 2009

JOSHUA KASINA APPLICANT

V E R S U S

1. THE DISTRICT WORKS OFFICER, MWINGI

2. SIMON KIERU

3. ATTORNEY-GENERAL

4. MWINGI TOWN COUCILRESPONDENTS

R U L I N G

1. The *Ex Parte Applicant* herein JOSHUA KASINA, was, in **Machakos HCCC No 37 of 2000** (*Joshua Kasina – Vs – The District Works Officer, Mwingi & Others*), awarded general damages of KShs 200,000/00 and special damages of KShs 500,000/00, plus costs and interest, in a judgment delivered on 22nd June 2006. Decree was subsequently issued on 13th March 2008.

2. On 18th December 2008 the court in the present proceedings (Dulu, J) issued an order of **mandamus** directing the Town Clerk, Mwingi Town Council, to pay the decretal sum (then standing at KShs 1,636,056/00).

3. The *Ex Parte Applicant's* case in the present application (by **notice of motion dated 13th March 2009**) is that despite service of the order of 18th December 2008 the Town Clerk has “willfully ignored, refused and/or failed” to pay up the decretal sum. The *Ex Parte Applicant* therefore seeks the main orders-

(i) That a warrant of arrest do issue against the Town Clerk, Mwingi Town Council, and the same be executed by the Kenya Police.

(ii) That thereafter the said Town Clerk be committed to civil jail for six (6) months for contempt and disobedience of the court order of 18th December 2008, or in the alternative to pay such fine as the court may deem fit.

4. The application is stated to be brought under **section 5(1) of the Judicature Act, Cap 8. Section 3A** of the **Civil Procedure Act, Cap 21** is also cited.

5. There is a supporting affidavit sworn by the *Ex Parte Applicant* in which he has set out the history of the matter and his frustration at not being able to enjoy the fruits of his judgment.

6. The Respondent filed **grounds of opposition dated 13th October 2009**. Those grounds are -
- (i) That there is no evidence that the Respondent was served with an order endorsed with a penal notice.
 - (ii) That there is no evidence that the application for leave was served upon the Respondent.
 - (iii) That the application is bad in law.
7. I cannot find on the court record any replying affidavit.
8. On 4th June 2009 the court directed that the parties do file and exchange written submissions. I can see on the court record only submissions filed on behalf of the **Ex Parte** Applicant on 2nd September 2009. Apparently no submissions were filed on behalf of the Respondent.
9. Although the Respondent was represented at the hearing of the application no submissions were made on his behalf; the State Counsel then in court stated that he had no instructions.
10. I have considered the written and oral submissions made on behalf of the *Ex Parte* Applicant. I have also perused the court record.
11. After the present application was filed and fixed for hearing, the matter was mentioned a number of times in order to record a settlement. That must mean that if the Respondent had not initially been served with the order of 18th December 2008 with a penal notice duly endorsed thereon he subsequently became aware of possible consequences of disobedience of the court order. I therefore reject the first ground of objection to the application.
12. Regarding the application for leave to bring the contempt application, such applications are normally heard *ex parte*. It is only the substantive application that needs to be served. At the leave stage, the court needs to be satisfied, *prima facie*, that the order alleged to have been disobeyed was indeed issued and served. Any other issues arising would ordinarily be canvassed *inter partes* when the substantive application is heard. I therefore reject the second ground of objection.
13. The third ground of objection is that the application is bad in law. It has not been demonstrated how this is so, and I must reject that ground as well.
14. I am satisfied upon the material now before the court that the order of **mandamus** of 18th December 2008 with a penal notice endorsed thereon was duly served upon the Town Clerk, Mwingi Town Council. As at the time this application was heard the order had not been obeyed in that the decretal sum in Machakos HCCC NO 37 of 2000 had not been paid. If it has since been paid, well and good, but the court has not been told that it has indeed been paid.
15. If the decretal sum has not yet been paid, I find that the Town Clerk, Mwingi Town Council (whoever the person might be as the order was directed at the office of Town Clerk, not to any particular individual) is in contempt of the order of 18th December 2008.
16. I will therefore allow the application and direct that the Town Clerk, Mwingi Town Council (whoever the individual might be) be arrested forthwith and be committed to civil jail for six (6) months unless he or she pays fully the decretal sum in Machakos HCCC No 37 of 2000.
17. **The warrant of arrest shall be executed by the Officer Commanding Mwingi Police Station.** Upon arrest the Town Clerk shall be produced before the High Court at Machakos for appropriate orders to be made.
18. Costs of this application are awarded to the Ex Parte Applicant.

19. Those will be the orders of the court.

20. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But I thank God that I am much better now.

DATED AT NAIROBI THIS 1ST DAY OF AUGUST 2012

H.P.G. WAWERU

JUDGE

COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY

OF SEPTEMBER 2012

ASIKE-MAKHANDIA

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JUDGE