



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Miscellaneous Civil Application 10 of 2011

**IN THE MATTER OF: APPLICATION BY MASOSA CONSTRUCTION COMPANY LIMITED
FOR JUDICIAL REVIEW (MANDAMUS)**

AND

IN THE MATTER OF: LOCAL GOVERNMENT ACT, CHAPTER 265, LAWS OF KENYA

AND

IN THE MATTER OF: KISII HCCC NO.67 OF 2007

AND

IN THE MATTER OF THE DECREE DATED 23RD MARCH 2010

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE CLERK, MUNICIPAL COUNCIL OF KISII 1ST RESPONDENT

MUNICIPAL COUNCIL OF KISII 2ND RESPONDENT

EX-PARTE

MASOSA CONSTRUCTION COMPANY LIMITED

RULING

1. Leave to institute the notice of motion dated 3rd February 2011 was granted to the ex parte applicant on 2nd February 2011. Pursuant to the said leave, the ex parte applicant filed the notice of motion seeking an order of judicial review in the nature of mandamus to issue against the respondents herein, compelling them to satisfy and/or settle the decree of this honourable court made on 23rd day of March 2010 in favour of the ex-parte applicant vide KISII HCCCNO.67 OF 2007, currently standing in the sum of Kshs.33,250,315/10 inclusive of costs and interests.

2. The application is supported by the 19 grounds that are stated on the face of the motion itself whose gist is that notwithstanding the determination of Kisii HCCC No.67 of 2007 on the 23rd day of March 2010 in favour of the ex parte applicant, the 1st respondent has failed, neglected and/or refused to perform public duty imposed upon it and that by so failing in its duty, the said 1st respondent is in breach and/or violation of the provisions of **section 263 of the Local Government Act, Chapter 265 of the Laws of Kenya**. The section reads:-

“263(1) Where a local authority deems it expedient for the promotion or protection of the interests of the inhabitants of its area, it may prosecute or defend any legal proceedings.

(2) (Repealed by 5 of 1974, s. 11)

(3) All costs, charges and expenses to which a local authority may be put or with which a local authority may of any such action or under the judgment of any court shall be paid out of the revenues of such local authority.”

3. The motion is also supported by the affidavit of Maxwell Okemwa Mogere who is the Managing Director of the Ex-parte applicant company herein, the Statement of Facts, Verifying Affidavit together with the notice. The Supporting Affidavit amplifies and fortifies the 19 grounds stated on the face of the application. The deponent prays that the orders sought be granted, as to do otherwise would prejudice the ex parte applicant.

4. The notice of motion was duly served upon the respondents, whereupon a Replying Affidavit sworn by William Kipchirchir Chepkwony was filed on 30th June 2011 in opposition to the application. The respondent also filed a notice of preliminary objection through the firm of Bosire Gichana & Co. Advocates dated 9th August 2011. The grounds of the preliminary objection are that:-

1. *The applicant’s application is incompetent and premature in that:-*

- a) *the decree and certificate of costs have not been served upon the Town Clerk of the 2nd respondent;*
- b) *The certificate or order against local authority has not been extracted and/or served.*
- c) *The title attributed [to] the 1st respondent is non-existent.*

2. *The application is bad in law and does not lie.*

5. A Further Replying Affidavit by William Kipchirchir Chepkwony was filed on 21st October 2011 and on the 27th October 2011, the ex parte applicant through Maxwell Okemwa Mogere filed a Further Supporting Affidavit to which he annexed copies of documents issued by the 2nd respondent in which the said 2nd respondent described itself as Kisii Municipal Council. All these Further Affidavits were admitted by consent of the parties entered into on 27th October 2011. On that same day, the parties herein agreed to file and exchange written submissions on both the preliminary objection and the substantive motion as earlier ordered on 3rd October 2011. The submissions together with relevant authorities were duly filed, and I have carefully read the same.

6. Briefly the undisputed facts of this case are that on or about 8th August 2000, the 2nd respondent, under the style and name of KISII MUNICIPAL COUNCIL invited tenders from various companies and/or organizations for the purpose of widening, grading, gravelling and culverting selected roads within the Kisii Municipality. In answer to the said tender invitation, the ex parte applicant purchased the tender documents and subsequent thereto, the Ex parte applicant was awarded the tender which was worth the sum of Kshs.40,814,000/=. The ex parte applicant did part of the work for which he was contracted but the contract was terminated before completion. On termination, the 2nd respondent herein issued a final

certificate in favour of the ex parte applicant, but the said 2nd respondent declined and/or refused to make the payments. The refusal by the 2nd respondent to pay drove the ex parte applicant to file Kisii HCCC NO.67 of 2007 which was eventually decided in favour of the Ex parte applicant. The respondents have refused to settle the decretal sum, hence these proceedings.

7. The substantive motion and the preliminary objection were argued together in the submissions. The respondents/objectors framed the following 3 issues for determination:-

a) *Have the respondents deliberately refused or neglected to perform a public duty which has amounted to an infringement of the legal right of the ex parte applicant?*

b) *Is the Ex parte applicant's application premature and incompetent?*

c) *Does the application lie as against the respondents?*

8. On the other hand, the Ex parte applicant through his advocates M/s Oguttu Mboya & Co. Advocates framed the following 4 issues for determination:-

i) *Whether or not the 2nd respondent herein is separate and distinct from Kisii Municipal Council;*

ii) *Whether the 2nd Respondent can avoid the lawful and binding contract entered into by herself and the ex parte applicant, pursuant to invitation to tender;*

iii) *Whether the preliminary objection has basis;*

iv) *Whether the respondents have failed to perform a statutory duty.*

9. The nature of preliminary objections being what it is, I shall first deal with the preliminary objection whose grounds have already been set out elsewhere in this ruling. Counsel for the respondents submitted that no execution process can issue or done against a local authority as provided under **section 263A** which provides as follows:-

“263A. Notwithstanding anything to the contrary in any law –

(a) where any judgment or order has been obtained against a local authority, no execution or attachment or process in the nature thereof shall be issued against the local authority or against the immovable property of the local authority or its vehicles or its other operating equipment, machinery, fixtures or fittings, but the clerk of the local authority shall, without delay, cause to be paid out of the revenue of the local authority such amounts as may be the judgment or order, be awarded against the local authority to the person entitled thereto;

(b) no immovable property of the local authority or any of its vehicles or its other operating equipment, machinery, fixture or fittings shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the clerk of the local authority.”

10. It was contended that if an appeal is lodged against a decision then the appeal automatically operates as a stay of execution, and that the instant application can only be granted upon hearing and determination of the appeal, and that in the circumstances, the respondents are at liberty to suspend any payment until the appeal against the judgment and decree is heard and determined.

11. For the Ex parte applicant, it was contended that the preliminary objection cannot stand first because the 2nd respondent clearly described herself as KISII MUNICIPAL COUNCIL as well as preparing the tender documents in that name. It was also contended that having contracted with the ex parte applicant under the style and name of KISII MUNICIPAL COUNCIL, the 2nd respondent cannot now be heard to

say that the Ex parte applicant did not correctly describe her, for if that were to be so, the 2nd respondent's action would amount to approbating and reprobating at the same time. Reliance was placed on **sections 1A, 1B and 3A** of the CPA and on the following two cases:-

- *Town Council of Awendo –vs- Nelson Oduor Onyando & 13 others – Court of Appeal (Application) No.161 of 2010 (unreported).*
- *Republic –vs- Communications Commission of Kenya [2001] 1 EA 199.*

12. In the **Town Council of Awendo** case (above) where the appellant sought to have the appeal struck off merely because the notice of appeal was lodged in the name “**Awendo Town Council**” and not in the name of Town Council of Awendo, Court of Appeal held that such an argument would in this day and age, run counter to the provisions of **Article 159 (2) (d)** of the **Constitution of Kenya, 2010**. The sub article provides that the courts, in exercising judicial authority shall be guided by the following principles –

(a) -----

(b) -----

(c) -----

(d) *justice shall be administered without undue regard to procedural technicalities; and*

(e) -----

The court held that it would not let the appellant therein to “**wriggle out of its obligations to the applicant if the appeal were to fail.**”

13. In the instant case, the respondents are trying to wriggle out of their obligations to the ex parte applicant should the instant application succeed. In any event, and as ably argued by counsel for the ex parte applicant, the trial court heard submissions from parties herein and it is clear from the proceedings that the respondents herein acknowledged and admitted the contract between the 2nd respondent and the ex parte applicant whether the 2nd respondent was described as “**Municipal Council of Kisii**” or “**Kisii Municipal Council.**” It is also clear from the proceedings that the issue of the name of the 2nd respondent was raised and adjudicated upon by the trial judge in Kisii HCCC No.67 of 2007, and it is not within the mandate and/or power of this court to revisit the issue. First I would be sitting on appeal on the decision of a court of concurrent jurisdiction and two because **section 7** of the CPA forbids me from doing so. **Section 7** of the CPA provides as follows:-

“7. No court shall try any suit or issue in which the matter directly and

substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. (1) – The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2) – For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3) – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4) – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5) – any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6) – Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

14. In light of the above provisions, I find and hold that the preliminary objection does not have any merit.

15. As to the issue of whether or not the respondents have refused and/or neglected to perform a public duty, the respondents contended that what there is, is lack of funds to pay and not a refusal to pay. It was also contended that the applicant has not demonstrated that the respondents have refused and/or neglected to perform such a statutory duty and that in any event, the ex parte applicant cannot purport to command the duty in question to be carried out in a specific way. Reliance was placed on the case of Joseph Makau Ndambuki –vs- The City Council of Nairobi – Nairobi HC Misc. Application No. 488 of 2006. What the submissions by counsel for the respondents’ amount to is whether the order of mandamus can be granted in this case.

16. It was submitted on behalf of the ex parte applicant that the respondents herein are statutory bodies created under the **Local Government Act, Cap 265 Laws of Kenya** and required to carry out statutory duties and responsibilities as defined under the Act. It was also argued that pursuant to the provisions of the said Act, the 1st respondent is obliged to exercise due diligence and reasonable dispatch in the performance of his duties. That in the instant case, the 1st respondent who was duly served has not acted with due diligence and further that the respondents’ applications for stay of execution both in the superior court and the Court of Appeal were allowed on terms and dismissed respectively. Counsel relied on the provisions of **Article 47 of the Constitution of Kenya, 2010** and on the case of Kenya National Examination Council –vs- Republic & 10 others – Court of Appeal Civil Appeal NO. 266 of 1996 (unreported). The case sets out the circumstances under which an order of mandamus can issue. The Court of Appeal turned to Halisburys Laws of England 4th Edition Volume I at P.111 from paragraph 89 where the learned treatise says the following:-

“The order of mandamus is of a most extensive remedial nature, and is,

in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

17. The Court of Appeal also referred to paragraph 90 of the same treatise headed “the mandate” where it is stated as follows:-

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

18. In the instant case, the respondents do not deny that they are indebted to the ex parte applicant vide

the judgment and decree in HCCC No.67 of 2007. The reason given by the respondents for not honouring their obligation is that there are no funds. In my humble view it is not the duty of the ex parte applicant to know where the money to pay him shall come from. The respondents are under a duty to ensure that funds are available to meet their obligations as provided under the Local Government Act.

19. In the circumstances of this case therefore, I find that the preliminary objection by the respondents against the Ex parte applicant's notice of motion dated 3rd February 2011 lacks merit and the same is dismissed. As for the notice of motion, I am persuaded that the order sought is merited and the same is accordingly allowed in terms of prayer (2) thereof namely an order of Judicial Review in the nature of mandamus shall now issue against the respondents herein, to compel the said respondents to satisfy and/or settle the decree of this honourable court made on the 23rd day of March 2010 in favour of the Ex-parte applicant, vide Kisii HCCC No.67 of 2007, currently standing at Kshs.33,250,315/40 inclusive of costs and interests. Costs of this application shall be borne by the respondents jointly and severally.

20. Lastly, the delay in delivering this ruling is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012.

21. It is so ordered.

Dated and delivered at Kisii this 12th day of September, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Oguttu-Mboya (present) for Ex-parte Applicant

Mr. G.S. OKoth for Bosire Gichana for Respondents

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.