



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPL. NO. 106 OF 2006

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW AND FOR AN ORDER
OF MANDAMUS
IN THE MATTER OF JUDGMENT IN NAKURU CMCC NO. 1662 OF 1994**

JOHN W. KARIUKI.....PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF NAKURU.....DEFENDANT

RULING

This Ruling relates to a Notice of Motion dated 3rd March 2006 which seeks the following orders -

(a) *an order of mandamus to compel the Town Clerk of the Municipal Council of Nakuru to immediately satisfy the entire judgment award made in the lower court in Nakuru CMCC No. 1662 of 1994 for the sum of Kshs 243,200/= plus costs and interest, and*

(b) *for costs of the application be provided for.*

The application was supported by the Affidavit of the ex parte Applicant John W. Kariuki, sworn on 3rd March 2006, and the grounds on the face thereof.

The Applicant's case is that he obtained judgment against the Respondent counsel on 12th January 2003, for the said sum of Kshs 243,200/= and the Respondent had by 14th February 2006, when the Applicant sought leave to bring the application the subject of this Ruling, not settled the said sum which had together with interest increased to Kshs 410,635/=. The sum now must be well in excess of the said sum of Kshs 410,635.

The application was opposed by the Respondent, not on the basis of fact, but upon technical grounds that -

(a) *the application is bad in law,*

(b) *the Respondent cannot be committed to civil jail over a liability by the employer,*

(c) *the application is misconceived, and*

(d) *the application cannot be sustained in law.*

Grounds (a), (c) and (d) are I think similar in substance. If an application is bad in law it means it cannot be sustained in law, (b) and if it is bad and cannot be sustained in law, it must mean it is misconceived, that is, to say, based upon a false or wrong premise or perception or simply lacking basis. The third ground of opposition is, to use the same expression, quite misconceived. The notice to the ex parte Applicant's application was that if any party fails to attend court on the date fixed for hearing, the matter may proceed, and orders made. That is not synonymous with saying that the Respondents' Town Clerk will be committed to civil jail, though that could eventually happen if there was persistent disobedience of court orders.

What the Applicant seeks is not an order to commit the Town Clerk to civil jail. The Applicant seeks an order of **mandamus** to compel the Town Clerk to do that which he is required by law to do. In law, **mandamus** is an order of the High Court to either the subordinate or lower court, or authority, body or person exercising quasi-judicial authority or a public body directing it to do a public or statutory duty or a certain act.

In this case, it is the duty of all Accounting Officers, to pay when due all outstanding liabilities of the government or other public authorities (*as public assets cannot be attached to meet civil liabilities, under the Government Proceedings Act, and (in this case, the assets of a local authority cannot be attached in execution under S. 263A of the Local Authorities Act, Cap. 265, Laws of Kenya).*

In this case and perhaps many others, it is quite outrageous that an order of court made in the year 2003 is still outstanding. It is gross injustice to a lowly paid and perhaps retired Council employee.

There is no explanation as to why the small sum decreed to be paid way back in 2003 is still unpaid. The Council decided to rely upon unhelpful technicalities. There was no challenge against the order by way of appeal or review. The orders of the lower court therefore remain valid and enforceable.

In the circumstances therefore there shall issue an **order of mandamus** directing the Town Clerk of the Municipal Council of Nakuru, to pay the Applicant John W. Kariuki the sum of Ksh 243,200/= plus costs and interest accruing thereon from 12th February 2003 till payment in full.

The Applicant shall also have the costs of the application herein.

Dated, signed and delivered at Nakuru this 18th day of March 2011

M. J. ANYARA EMUKULE
JUDGE