



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR. MISC. APPLICATION NO.108 OF 2008

IN THE MATTER OF: AN APPLICATION BY PATRICK WAMBUA MUTISO FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF MANDAMUS AGAINST THE TOWN CLERK, CITY COUNCIL OF NAIROBI AND CITY COUNCIL OF NAIROBI

AND

IN THE MATTER OF: SECTION 263A OF THE LOCAL GOVERNMENT ACT (CAP.263) AND THE ENABLING PROVISIONS OF THE LAW

BETWEEN

REPUBLIC.....

.....APPLICANT

-VERSUS-

**THE TOWN CLERK NAIROBI CITY COUNCIL.....1ST
RESPONDENT**

**NAIROBI CITY COUNCIL.....
2NDRESPONDENT**

AND

**EX-PARTEPATRICK
WAMBUA MUTISO**

J U D G M E N T

Following a chamber summons application dated 17th April, 2008 and filed in court on even date, the ex-parte applicant Patrick Wambua Mutiso was granted leave to institute judicial review proceedings against the respondents herein namely the Town Clerk, City Council of Nairobi and City Council of Nairobi for orders of mandamus.

Pursuant to grant of leave by Dulu, J on 24th April 2009, the applicant filed a notice of motion dated 13th May, 2009 seeking the following orders:

- 1. THAT this Honourable Court be pleased to issue an order of mandamus directed to the respondents Town Clerk City Council of Nairobi and City Council of Nairobi compelling them to forthwith and without delay cause to be paid to the applicant the decretal sum of Kshs.131,325/- plus the accrued interest of Kshs.410,170.20/- thereof making an accrued sum of Kshs.541,504/- as**

at 31st January, 2009 and such further accruing interest as the said decretal sum until in full and final payment in terms of the court order dated 1st October, 1999 by Honourable Senior Resident Magistrate Ms Matheka (*as she was then*) in CMCC No.8602 of 1996 at Milimani Commercial Courts (*Patrick Wambua Mutiso –vs- Nairobi City Council*).

2. The Town Clerk and/or the Chief Executive Officer of the City Council of Nairobi, in default of complying with the said order under paragraph 1 herein above be arrested and committed to prison to serve for a period not exceeding (6) months and/or such other period/penalty as the Honourable Court may find fair and just.

3. That the costs of this Application be provided for.

4. All such other orders as the Honourable Court would deem fair and just to grant in the circumstances.

The application was premised on grounds and facts stated in the statutory statement and depositions in the verifying affidavit sworn by the applicant and annexures thereto.

Though served with the pleadings herein as evidenced by the affidavit of service sworn by Kamau L.W. an advocate practicing in the firm of C.N. Kihara & Company Advocates, the respondents did not file any response to the applicants notice of motion or written submissions as directed by the Court on 26th May, 2009. In the circumstances, the applicant's notice of motion is unopposed.

Having considered the said application and from the uncontraverted facts in the applicants verifying affidavit, it is clear that the applicant had sued the 2nd respondent in CMCC No.8602 of 1996 at the Milimani Commercial Courts and following a consent recorded by the parties, he was awarded Kshs.131,325 all inclusive together with interest at 14% per annum and costs of the suit. There is a decree issued against the 2nd respondent in favour of the applicant in the said suit on 1st October, 1999 exhibited as annexure PWM2 to the verifying affidavit.

The applicant has complained that despite many demands to the

1st respondent the accounting officer of the 2nd respondent to settle his claim, the 1st respondent has consistently for 7 years refused and/or failed to settle the decretal amount without giving any reason for such refusal or failure. The applicant further contends that this refusal by the 1st respondent to settle the decretal amount has occasioned him injustice as he has been unable to enjoy the fruits of his judgment.

As stated earlier, the respondents did not file any response to the applicant's notice of motion. Instead their counsel attended the court on 4th November, 2009 and claimed that the respondents were in the process of settling the applicant's claim.

When the application came up for hearing on 31st October, 2011, only the applicant was represented. There was no appearance for the respondents though they had been duly served with a hearing notice as can be seen from the affidavit sworn+ by Arthur Chakaya on 21st October, 2011. On the said hearing date, Mr. Kihara counsel for the applicant submitted that the respondents had not settled the decretal amount in full but had paid part payment in the sum of Kshs.283,181.

Under the Local Government Act, (*hereinafter referred to as the Act*) the 1st respondent as the accounting officer of the 2nd respondent had a statutory duty to settle the decretal amount awarded to the applicant in CMCC 8602 of 1996. This statutory duty is imposed by Section 263A (a) of the Act which states as follows:

“where any judgement 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, by the judgement or order, be awarded against the local authority to the person entitled thereto”.

It is patently clear from the undisputed facts in this application that despite numerous demands by the applicant to the respondents to settle the decretal sum as can be seen from the demand letters exhibited as annexures PWM4 – PWM8, the 1st respondent has refused and/or failed to perform his statutory duty which required him to settle the applicant’s claim in full from the revenues of the 2nd respondent without unreasonable delay.

The copy of decree issued in CMCC 8602 of 1996 shows that the decree was issued way back on 1st October, 1999 and todate about 11 years thereafter it has not been settled in full. No reason at all has been given by the 1st respondent to explain his failure to perform his aforesaid statutory duty for such a long time.

From the foregoing, it is clear that this is an appropriate case for issuance of orders of mandamus to compel the 1st respondent to perform his public duty of settling debts owed by the 2nd respondent to the Applicant which duty is imposed by statute.

In the circumstances, I allow the application and issue orders of mandamus as prayed in prayer 1 less the amount already paid as admitted by the applicant’s counsel (Kshs.283,181). I decline to make any orders in line with prayer 2 since I do not find it appropriate to make speculative orders. Court orders are meant to be obeyed but in the event that they are disobeyed, a successful litigant is always at liberty to move the court appropriately to ensure compliance with Court orders. The applicant is also awarded the costs of this application.

Dated, Signed and Delivered by me at Nairobi this 5th day of December 2011

C. W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk

..... for Applicant

..... for Respondents