



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Miscellaneous Civil Application 512 of 2008

REPUBLIC.....PROSECUTOR

-AND-

THE TOWN CLERK, MUNICIPAL

COUNCIL OF MOMBASA.....RESPONDENT

-EX PARTE-

NISHA PRINTERS LIMITED.....APPLICANT

JUDGMENT

The applicant, by the Application Notice dated 8th March, 2010, sought as the main prayer that –

“Tubmun Otieno, The Town Clerk, Municipal Council of Mombasa, be committed to jail for a period not exceeding two years for wilful disobedience of the Court order given or recorded on 21st May, 2009.”

It was stated that the applicant had obtained judgment by consent of the parties in HCCC No. 237 of 2007, ***Nisha Printers Limited v. The Municipal Council of Mombasa***; that it was the duty of the respondent as the principal officer of the defendant to pay and settle the decree in the above-mentioned suit, as clearly spelt out in s. 263A of the Local Government Act (Cap. 265, Laws of Kenya) but the defendant did not; that the applicant applied for and obtained an order of mandamus compelling the respondent as Town Clerk of the Municipal Council of Mombasa, to pay and settle out of the revenue of the Mombasa Municipal Council, in respect of the said judgment and decree in HCCC No. 237 of 2007, together with interest at 12% per annum as from ***1st May, 2008*** until payment in full, together with costs which were taxed at ***Kshs. 109,343/40***; that the said order was served on the respondent on 17th November, 2009 and the respondent refused to obey and comply with the same, and did not acknowledge receipt of the order until ***19th January, 2010***; that the respondent has deliberately disobeyed the said Court order and has not shown the inclination to comply with the same and continues to hold this Court in contempt and, unless the respondent is punished by way of committal to civil jail for a term not exceeding two years, he will continue with the said contempt of this Court, and the dignity and authority of this Court will be at risk in all cases that come before the Court in view of the respondent’s disobedience; that the respondent’s failure to obey the said Court order is deliberate and malicious, as the respondent has on behalf of the Municipal Council of Mombasa been collecting revenue and settling debts and bills in line with his own choice and priority but has chosen to ignore the settlement of the decreed sum herein; and that, the dignity and authority of this Court is to be respected by all people, and it is thus necessary that the respondent be committed to jail for contempt of Court, for a period not exceeding two years.

The evidence in support of the application is contained in the affidavit of ***Kiarie Kariuki***, Advocate dated 26th February, 2010 and

annexed to the application of that date for leave to file the instant application; it is a straightforward affidavit showing the manner in which the respondent has failed to comply with the terms of the Order of mandamus issued by the Court, in High Court Miscellaneous Civil Application No. 512 of 2008, on 21st May, 2009.

Learned counsel **Mr. Kiarie Kariuki** submitted that the respondent has not contested the facts carried in the application, and has filed no replying affidavit despite personal service being effected: and thus the respondent remains quietly in contempt of the orders of the Court. Counsel urged that the High Court, by virtue of the Judicature Act (Cap. 8, Laws of Kenya), has the power to mete out the necessary punishment. That statute, in s.5 (1) thus provides:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of Court as is for the time being possessed by the High Court of Justice in England.....”

Learned counsel asked this Court to order that the Town Clerk be committed to civil jail, as the Local Government Act (Cap.265), s. 263A placed the obligation to pay on the local authority, and the duty to pay up had accrued when the Court made its orders. The relevant provision, s. 263A (a) of the Local Government Act thus provides:

“...where any judgment or order has been obtained against a local authoritythe 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 judgment or order, be awarded against the local authority to the person entitled thereto.....”

It follows, counsel urged, that the respondent was required to comply with the terms of the Act, and more urgently, with the terms of the Court order – but he failed to do so and gave no account regarding his failure to comply. Counsel submitted that the respondent had blatantly disobeyed the order of the Court, and that to-date he was still collecting revenues but declining to make payment to the applicant as ordered.

The respondent had filed grounds of opposition to the instant application, on 19th April, 2010 in which he contended as follows:

- (i) ***“the applicant’s application is misconceived and bad in law”;***
- (ii) ***“the applicant’s application does not establish any cause of action as against the respondent”;***
- (iii) ***“the applicant’s application is thus scandalous, [and] [an] abuse of Court process and [is] brought in bad faith as against the respondent”;***
- (iv) ***“the applicant’s application should therefore be dismissed with costs”.***

Of these grounds of opposition, **Mr. Kariuki** submitted that they contained nothing to weaken the case for granting the prayer for committal; the respondent is under statutory duty to pay; there was no bad faith in the application as alleged.

But the respondent’s counsel, **Mr. Were**, urged that the said grounds of opposition were all meritorious; and in particular, that the applicant was in error in bringing the application against the Town Clerk rather than against the Town Treasurer.

Mr. Kariuki’s reply was that s. 263A of the Local Government Act which imposed upon local authorities the obligation to pay debts as decreed in Court decisions, focused the initiative on the clerk, and not on the treasurer: and hence the application had been directed at the correct person.

The law which governs the payment of judgment-debt by Kenya’s local authorities is the Local Government Act, section 263A. The relevant decision of the Court, in this matter, was delivered by **Mr. Justice Serگون** on **21st May, 2009**; and the learned Judge in issuing orders of **mandamus** had thus stated the position in law:

“It is apparent from s. 263A (a) [of the Local Government Act] that a public duty is imposed on the Town Clerk to settle any judgment – sum from the revenue of the local authority. The law uses the term ‘shall’, thus leaving no discretion on the part of the respondent to delay the settlement of the decree. In the matter before this Court, there is a consent judgment which remains unsettled. Where this Court is satisfied that the Town Clerk has simply refused or neglected to pay the judgment sum, it shall issue the order of mandamus to compel the Town Clerk to perform the statutory duty”.

I did not find any merits at all in the case made for the respondent. The statutory obligation bearing on the respondent is crystal-clear; the High Court made peremptory orders requiring the respondent to do his duty as required by law; the respondent made reluctant steps to respond to this application, by filing grounds of opposition which had no merit, but were simply facetious; the respondent’s counsel was hard put to identify even one legal ground that could safeguard his case in this matter.

So the Town Clerk is in breach of the terms of s. 263A of the Local Government Act, and when the Court admonishes him and commands him to comply, he merely wishes away the institution of the High Court and its binding orders. This is the apotheosis in the defiance of the orders of the Court; it is a tell-tale case of contempt of Court. It cannot be allowed, and this Court, by virtue of its contempt powers as set out in s. 5(1) of the Judicature Act (Cap. 8, Laws of Kenya), will express its displeasure by ordering as follows:

- 1. The Town Clerk of the Municipal Council of Mombasa, Mr. Tubmun Otieno, is hereby committed to serve a jail term for up to 24**

months, so long as he will not have purged his contempt by complying with the Orders made on 21st May, 2009.

2. The jail term imposed hereby takes effect from today 10th June, 2010.

3. The respondent shall bear the applicant's costs in this application.

DATED and **DELIVERED** at

MOMBASA this 10th day of June, 2010.

J. B. OJWANG

JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Applicant: *Mr. Kiarie Kariuki*

For the Respondent: *Mr. Were*