



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Judicial Review 696 of 2009**

**IN THE MATTER OF: AN APPLICATION SEEKING JUDICIAL REVIEW ORDERS**

**IN THE MATTER OF: ORDER LIII OF THE CIVIL PROCEDURE RULES**

**BETWEEN**

**REPUBLIC.....APPLCIANT**

**- VERSUS -**

**PHILIP KISIA, THE TOWN CLERK,  
CITY COUNCIL OF NAIROBI.....1<sup>ST</sup> RESPONDENT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> RESPONDENT**

**EX PARTE: BESPOKE INSURANCE BROKERS LIMITED**

**J U D G E M E N T**

Bespoke Insurance Brokers Ltd. got judgement against the City Council of Nairobi, 2<sup>nd</sup> Respondent in Milimani HCC 590/05 on 27/10/2008 for a sum of Kshs.27,276,431.30/= and costs and interest, being commissions due and payable to the Applicant for Insurance Brokerage Services which were provided by the Applicant, to the 2<sup>nd</sup> Respondent. In an attempt to settle the claim, the 2<sup>nd</sup> Respondent made a payment of Kshs.12,000,000/= leaving a balance of Kshs.36,276,431/=. That the Respondent later filed C.A. 117/09 seeking leave to file appeal but the same was withdrawn on 26/10/2009. Despite several demands and reminders (GWM 2) no payments have been made. Despite intervention by the Ministry requesting the 2<sup>nd</sup> Respondent to pay up, there has not been any payment. That has prompted the filing of this application in which the Applicant prays that the court do issue an order of mandamus to compel the 2<sup>nd</sup> Respondent to pay.

The application was opposed and N.M. Mung'alla the Acting Director, Legal Affairs of the 2<sup>nd</sup> Respondent swore an affidavit dated 16/4/2010 and submissions were filed on 3/5/2010. In the replying affidavit, Mr. Mung'alla deponed that the 2<sup>nd</sup> Respondent has appealed against the decision of the superior court in CA 117/09 and the same has not been determined. That the Applicant failed to disclose some material facts that they had attempted to have the judgement set aside

because their advocate failed to attend court and the court heard the matter ex parte. He further deponed that the Applicant has not disclosed that there are several other applications pending in the same matter dated 8/7/09 and CA 7/07. That the Applicant has engaged in delaying CA 117/09 by filing the application dated 18/6/09, which they later withdrew on 3/7/09, another application filed on 8/7/09 which is yet to be prosecuted and CA 7/07 which remains unprosecuted. Further to the above, it is also contended that the Notice of Motion is premature in that the costs have not been taxed because the bill of costs filed in Milimani HCC 590/05 is pending to date. According to the 2<sup>nd</sup> Respondent, the part payment that was made was based on misrepresentation and on a skeleton file.

In their submissions, the Respondents also contend that the Notice of Motion is incompetent in that it does not comply with Order LIII Rule 4 which bars the filing of further affidavits unless it is with the leave of the court. Counsel relied on **H.Misc. 3/2003 REP. – VS – CHAIRMAN LTD.** It was also urged that the Notice of Motion offends Order 53 Rule 1 (2) in that the facts are contained in the statement instead of the verifying affidavit and reliance was made on **CA. 45/05 COMMISSIONER GENERAL K.R.A. – VS – SILVANO ONEMA OWAKI** where the Court of Appeal confirmed that it is the verifying affidavit which is of evidential value in a Judicial Review application but not the statement. Lastly, it is the Respondent's contention that the prayers sought in the statutory statement are at variance with the orders sought in the Notice of Motion which offends Order 53 Rule 4 (1). Reference was made to **REP. – VS. – PS. MINISTRY OF PLANNING AND NATIONAL DEVELOPMENT H.MISC. 1124/05** where the court held that the prayers sought in the Notice of Motion must comply with the terms of leave granted.

The Respondent objects to the filing of the further affidavit dated 21/12/2009 in that it failed to comply with Order 53 Rule 4 (1) CPR. That rule requires the Applicant to rely on the affidavit or affidavits filed with the chamber summons when seeking leave, to support the Notice of Motion. If there is need to file any further affidavits, leave of the court must be sought. In **AFRICAN AUTO SUPPLIES LTD. (supra)** the court did observe that a further affidavit filed without leave of court was tantamount to being struck off. In the instant case, I find that the further affidavit dated 21/12/09 is properly on record because on 17/12/09 when the court granted leave to the Applicant, it also gave leave to the Applicant to file a further affidavit annexing the plaint and judgement in Milimani H.MCC 590/05 and the Applicant duly complied with the order. The further affidavit was filed within fourteen (14) days as directed.

The second objection raised by the Respondent is that the Applicant did not comply with Order 53 Rule 1 (2) in that there are facts contained in the statement. I have perused the statement and verifying affidavit of the Applicant. Though some facts are contained at Para C of the statement, the Applicant has fully set out the facts in support of its case in the verifying affidavit. It is true that Rule 1 (2) does not require any facts to be in the statement and I will therefore strike out the facts set out at Para C 1 – 5 of the statement but will find the application to be proper.

As to whether there are no grounds in the statement, the Applicant has stated at Para C 6 – 10 of the statement that the sums claimed remained unpaid and mandamus issues where a public body or officer fails or neglects to perform their duty. I find that there are grounds contained at Para C 6 – 10 upon which judicial orders of mandamus can be issued if proved to be appropriate.

The other objection raised was in respect of the prayers sought in the statement and Notice of Motion being at variance. Rule 4 (1) requires that the relief sought in the Notice of Motion be the same as that contained in the statutory statement. In the instant case, the relief sought in the statutory statement was as follows:-

***“An order for mandamus compelling the Town Clerk, City Council of Nairobi, to pay the decretal sum outstanding at Kshs.36,276,431/30 as at the date of the hearing (in High Court civil case 590/2005) as contained in a decree issued on 27/10/2008.”***

The order sought in the Notice of Motion is as follows:-

***“Judicial Review by way of an order for mandamus compelling the Town Clerk, City Council of Nairobi, to pay the decretal sum outstanding at Kshs.36,276,431/30 as at the date of filing thereof together with interest thereon till payment in full pursuant to the decree issued in Milimani HCC No. 590/2005 on 27/10/2008.”***

I do note that whereas in the statement there was no prayer for interest on the sum claimed, in the Notice of Motion, there is a prayer for the substantive sums and for interest thereon from the date of filing. The decree issued on 27/10/08 was for Kshs.27,914,768/10 plus interest at court rates. So by the Applicant seeking interest on Kshs.36,287,431/30 from the date of filing, was claiming a different sum of money all together. This is because Kshs.36,276,431/= sought in the statement must be inclusive of interest. I do agree that the prayers set out in the statement and Notice of Motion are at variance and the Notice of Motion therefore offends Order 53 Rule 4 (1) CPR.

Utmost good faith is required of an Applicant who approaches the court for Judicial Review orders and failure to disclose material facts to his case would disentitle one to the discretionary orders of Judicial Review. **Michael Fardham** in his Book **JUDICIAL REVIEW HANDBOOK 5<sup>th</sup> Edition** says as follows:-

***“Claimants duty of candour’.***

***Judicial Review claimants have always been under an important duty to make full and frank disclosure to the court of material facts, and known impediments to Judicial Review. (e.g. alternative remedy, delay, adverse authority, statutory ouster) . . .”***

In the instant case, the Applicant contended that there is no stay pending in Court of Appeal except the application filed in CA. 117/09 seeking extension of time within which to lodge the record of appeal and the same had been withdrawn on 26/10/09. It was not disclosed that the Applicant had filed an application in the same appeal dated 8/7/09 which is yet to be prosecuted and that there is yet another CA. 7/07 that has not been prosecuted by the Applicant or that there is still pending a bill of costs in Milimani HCC 590/05. At the time the Applicant came to court, they had been invited to take a date in CA. 117/09 for hearing of the appeal. (NMM 1 b). Though an appeal would not be a bar to Judicial Review generally, the court has to have all the facts before it to determine whether in the circumstances of the case, it is expedient for the Applicant to proceed with the appeal first or with the Judicial Review application. In the instant case the sums claimed are colossal and are supposed to be paid from public funds to the Applicant. It is important for the court to have a clear understanding that if the appeal succeeds the Applicant would be in a position to repay

the said sums. I find that the Applicant withheld some important information that should have been before the court when leave was sought regarding the existence of other cases.

As to whether the application is premature because costs have not been taxed, I do not agree. Once one has judgment, the execution process can commence and taxation of the bill of costs can be done separately or later provided the judgement sum is ascertained. I would not agree with the position taken by the Respondent that because the bill of costs is pending, then the application is premature.

According to the Respondent, the sums now due and owing as per annexure GWM 9, is Kshs.22,279,739/43, and that the sum claimed does not feature anywhere. I have seen the statement exhibited to the Applicants affidavit sworn by Geoffrey, in reply and dated 26/1/10. It is apparent that several payments have been made towards settling of the sums claimed even after this application had been filed, the latest being on between 6/3/2010 and 23/4/2010. One wonders whether the Respondent's contention that the payments were made on a skeleton file since 2006 is correct. From the time they started making payments, it should have been noticed that the claim is not genuine.

Judicial Review remedies are discretionary in nature and maybe denied even when deserved. Having considered all the issues above, I am of the view that an order of mandamus can not issue at this stage even if deserved because not all facts were disclosed to the court for consideration and to enable it arrive at a fair decision. The Notice of Motion is incompetent and this may be a case where the parties should have tried to pursue the appeal first before seeking an order of mandamus. For the above reasons, I decline to grant the orders sought. I strike out the Notice of Motion dated 21/12/09 with no orders as to costs.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2010.**

**R.P.V. WENDOH**  
**JUDGE**

**Present:-**

Ms. Mumbi – Applicant

Ms. Sewe – Respondent

Muturi – Court Clerk