



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Miscellaneous Civil Application 511 of 2008

**IN THE MATTER OF: AN APPLICATION BY SHIMANZI ENTERPRISES
LIMITED FOR LEAVE TO APPLY FOR AN
ORDER OF MANDAMUS DIRECTED AT THE
TOWN CLERK, MUNICIPAL COUNCIL OF
MOMBASA**

AND

**IN THE MATTER OF: THE TOWN CLERK OF THE MUNICIPAL
COUNCIL OF MOMBASA AND SECTION 263A OF
THE LOCAL GOVERNMENT ACT (CAP 265)
LAWS OF KENYA**

AND

**IN THE MATTER OF: SATISFACTION OF THE DECREE IN MOMBASA
HIGH COURT CIVIL CASE NO. 236 OF 2007
(SHIMANZI ENTERPRISES LIMITED –VS-
MOMBASA MUNICIPAL COUNCIL)**

BETWEEN

REPUBLIC

VERSUS

THE TOWN CLERK,

MUNICIPAL COUNCIL OF MOMBASARESPONDENTS

R U L I N G

Shimanzi enterprises Ltd., the applicant herein, took out a motion dated 13th November 2008 pursuant to the provisions of Order LIII rule 3 of the Civil Procedure rules in which it sought for an order of Mandamus to be issued against the Town Clerk, Municipal council of Mombasa, the Respondent herein to compel him to pay to the applicant a sum of Kshs.6,805,287/60 together with interest at the rate of 12% p.a. from 1st May 2008 until full payment. The motion is supported by the affidavit of Natwarlal Mehta sworn on 30th October 2008. The Respondent did not file any response despite having been served with the motion.

When the motion came up for interpartes hearing, learned counsels appearing in this dispute agreed to file written submissions to dispose of the application.

I have considered the grounds set out on the face of the motion and the facts deponed in the affidavit filed in support. I have further taken into account the written submissions filed by both learned counsels. The facts leading to the filing of this motion can easily be traced from the uncontroverted facts deponed in the affidavit of Mukesh Natwarlal Mehta. The applicant herein filed Mombasa H.C.C.C. NO. 236 of 2007, against the Municipal Council of Mombasa in which it claimed for judgment in the sum of Kshs.3,900.801/- plus interest. Learned Counsels on both sides appeared before the Hon. Mr. Justice Azangalala on 12th March 2008, whereupon a consent judgment was recorded in part as follows:

“IT IS HEREBY ORDERED BY CONSENT

- 1. That judgment is entered for the plaintiff against the Defendant for the sum of Kshs.3,900,810/-**
- 2. That the said sum of Kshs.3,900,801/- shall attract interest at court rates from August 2006 until payment is full.**
- 3. That the costs of the suit be to plaintiff.**
- 4. That there be a stay of execution pending the agreement of the parties on the instalments.”**

It would appear costs were taxed at Kshs.242,721/44 and a certificate of taxation was issued to that effect on 12th September 2008. So far, the Respondent has only paid to the applicant a sum of Kshs.862,069/- vide Cheque No. 000782 issued on 10th April 2008. A decree was issued on 17th October 2008 directing the Respondent to pay the applicant a sum of Kshs.3,900,810/- with interest at court rates plus costs. The Respondent has failed to pay as directed. This prompted the applicant to take out these proceedings. It is said that the Respondent, has failed to perform his statutory duty under S.263A of the Local Government Act.

In the submissions filed by Mwangi Njenga, the Respondent’s Advocate, the Municipal council seeks for an order to liquidate the decretal sum by monthly instalments because the council at the moment is undergoing economic downturn. I have taken into account those submissions. It is important at this stage to consider the competency of the motion before determining the merits of the same. The exparte applicant appeared before the Hon. Mr. Justice Njagi on 4/11/2008 whereupon it obtained the following order of leave which was extracted as follows:

“That the applicant be granted leave to apply for an order of Mandamus directed to the town clerk, Municipal Council of Mombasa to compel him to pay out of the revenue of the Municipal Council of Mombasa in accordance with S.263A(a) of the Local Government Act to the applicant in the sum of Kshs.6,805,287/60 together with further accrued and accruing interest at court rate (13% p.a.) from 01.05.2008 until payment in full being the decretal sum in H.C.C.C. 237 of 2007 (Nisha Printers Ltd –vs- Municipal Council of Mombasa) at the High Court in Mombasa within 21 days

from 4/11/2008.”

In the summons dated 30th October 2008, the ex parte applicant applied for the following order:

“That the applicant be granted leave to apply for an order of Mandamus directed to the Town clerk, Municipal council of Mombasa to compel him to pay out of the revenue of the Municipal Council of Mombasa in accordance with Section 263A (a) of the Local government Act to the Applicant the sum of Kshs.4,022,605 together with further accrued and accruing interest at Court rates (12% per annum) from 1st April 2008 until payment in full being the decretal sum in H.C.C.C. 236 OF 2007 (Shimanzi Enterprises Limited –vs- Municipal council of Mombasa) at the High Court in Mombasa”.

It is obvious that the extracted order of leave is at variance with that applied for. The order applied for related to the decree issued in **Mombasa H.C.C.C. 236 of 2007, Shimanzi Enterprises Ltd –vs- Municipal council of Mombasa** and is for the recovery of Kshs.4,022,605/- whereas the extracted order for leave is in respect of the decree issued in Mombasa **H.C.C.C. No. 237 of 2007, between Nisha Printers Ltd –vs- Municipal Council of Mombasa** for the recovery of Kshs.6,805,287/60.

In the motion before this court the applicant has applied for the following order:

“An order of mandamus be issued directed at the Town clerk, Municipal council of Mombasa to compel him to pay out of the revenue of the Municipal Council of Mombasa in accordance with Section 263A (a) of the Local Government Act, chapter 265 Laws of Kenya to the Applicant the sum of Kshs.6,805,287/60 together with further accrued and accruing interest at Court rates (12% per annum) from 1st May 2008 until payment in full being the decretal amount in Mombasa HCCC 237 of 2007 (Nisha Printers Limited –vs- Municipal council of Mombasa) at the High Court in Mombasa.”

It is apparent from the motion that the order sought is at variance with the order applied for at the leave stage. It is also obvious that the applicant is seeking to obtain for an order of mandamus to compel the Respondent to pay it a decretal sum arising from Civil proceedings which it was not a party. It is clear from the above sequence of events that the motion does not comply with the provisions of order LIII rule 4(1) of the Civil procedure rules. It is also clear that the applicant herein is not entitled to recover the decretal sum arising from Civil proceedings it was not a party to. The entire application is muddled up that I can safely say that the same is fatally incompetent thus available for striking out which I hereby order. I shall award no costs to the Respondent because there are no serious objections mounted against the motion.

Dated and delivered at Mombasa this 21st day of May 2009.

J.K. SERGON

J U D G E

In open court in the presence of Mr. K. Kariuki for Applicant and Kinyua h/b Njenga Mwangi for Respondent.