

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 512 OF 2008

REPUBLIC.....APPLICANT

VERSUS

TOWN CLERK MUNICIPAL COUNCIL OF MOMBASA...RESPONDENT

NISHA PRINTERS LTD.....EXPARTE APPLICANT

R U L I N G

Nisha Printers Ltd, the applicant herein, filed Mombasa H.C.C.C. No. 237 of 2007 against the Municipal Council of Mombasa, the Respondent herein, in which it prayed for judgment in the sum of Kshs.3,656,686 plus interest. On the 12th day of March 2008, the exparte applicant and the Respondent recorded a consent order for entry of judgment as prayed. Costs were taxed at Kshs.238,477/34 as evidenced in the certificate of taxation dated 19th September 2008. It would appear the applicant demanded for payment but the Respondent has neglected to satisfy the decree.

Pursuant to leave given by this court on 4th November 2008 the applicant took out the motion dated 13th November 2008 in which it prayed for an order of mandamus to issue against the town clerk of the Municipal council of Mombasa to compel him pay the decretal sum from the council revenue. The motion is the subject matter of this ruling. It is verified by the affidavit of Mukesh Natwarlal Mehta sworn on 12.11.08 when served with the motion the Respondent did not file any response to contradict the averments contained in the affidavit of Mukesh Natwarlal Mehta. When the motion came up for interpartes hearing, learned advocates agreed to have it disposed of by written submissions. In the submissions, the exparte applicant has urged this court to issue the order because the town clerk has refused to perform his duty to settle the decretal sum contrary to Section 263A of the Local government Act. The Council did not deny this assertion but instead beseeched this court to allow it settle the debt by installments since it is in financial doldrums.

I have considered the grounds set out on the face of the motion plus the facts deponed in the verifying affidavit. I have further taken into account the written submissions filed by learned counsels from both sides. Basically the applicant is seeking for an order of mandamus to compel the Respondent's clerk to settle the debt. The court of appeal expounded the scope and efficacy of the order of mandamus in **Kenya National Examination Council =vs= Republic Exparte, Geoffrey Gathenji Njoroge & 9 others C.A. No. 266 of 1996** (Unreported). At page 11, the Court of Appeal expressed itself as follows:

“An Order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

In the matter before this court, the Respondent has been accused of failing to perform his duty imposed by Section 263A of the Local Government Act. Section 263A (a) states as follows:

“Where any judgment 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 judgment or order, be awarded against the local authority to the person entitled to.”

It is apparent from the S.263A (a) 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. In paragraph 10 of the affidavit of Mukesh Natwarlal Mehta the deponent states as follows:

“10. That the Respondent apart from failing in his duty to settle the amount due to the applicant, is also defying a lawful court order of this court and as orders and judgments of this court are not issued and passed in vain, the Respondent ought to be compelled to obey the judgment and decree of this court by satisfying the same.”

It is curious to note the aforesaid averments were not controverted by the Respondent. The allegations in paragraph 10 are so grave that there was need for a reply. I treat the allegations to be the truth. That is to say that the town clerk has blatantly refused to settle the decretal sum. Having come to the above conclusion I am convinced the motion should be allowed. Consequently the motion dated 13th November 2008 is allowed as prayed with costs to the applicant.

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 Mr. Kinyua h/b Njenga for Respondent.