



**REPUBLIC OF KENYA**  
**HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS**  
**MISC CIVIL APPLI 315 OF 2005**

IN THE MAATER OF AN APPLCIATION BY PETER NJENGA MWANGI T/A NJENGA MWANGI & CO.  
ADVOCATES (THE APPLICANT) FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF H.C.C.C. MISCELANEOUS APPLICATION NO.1818 OF 2002

NJENGA MWANGI & CO. ADVOCATES

VERSUS

THE CITY COUNCIL OF NAIROBI

PETER NJENGA MWANGI

T/A NJENGA MWANGI & CO. ADVOCATES ..... APPLICANT

AND

TOWN CLERK, CITY COUNCIL OF NAIROBI

CITY TREASURER, CITY COUNCIL OF NAIROBI

CITY COUNCIL OF NAIROBI .....RESPONDENTS

**JUDGMENT**

Peter Njenga who trades as Peter Njenga Mwangi Advocates filed the Notice of Motion dated 20/4/05 seeking an order of mandamus to compel the Town Clerk, City Council of Nairobi. City Treasurer, City Council of Nairobi and the City Council of Nairobi to pay

in Kshs.1,33,399/= plus interest 24% p.a. from 3<sup>rd</sup> March 2003 till payment in full and that if they default they should be committed to civil jail for a period of not more than 6 months and that the Respondent meet the costs of this application. The application premised on the affidavit of the Applicant dated 22.6.04 and a statement dated 13.12.04.

Though the Respondent has been aware of this matter they have never filed any reply. Counsel who had been appearing for the Respondent did not attend the court for the hearing of the Notice of Motion. I have considered the affidavit in support of the application and I find no evidence contained therein to support the Notice of Motion. Order 53 Rule 1 (2) requires that the facts be contained in the verifying affidavit. Instead the Applicant has placed all the facts in the statement. In accordance with Order 53 Rule 1 (2) Civil Procedure Rule the statement should only contain the names of the Applicant, the relief sought and the grounds upon which the relief is sought. In this case the annexures are found in the statement which is irregular. The Court of Appeal confirmed this position in the case of **SILVANO ONEMA OWAKI V COMMISSIONER GENERAL, K.R.A. CA 45/00.**

The court said

***“We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for Judicial Review. That appears to be the meaning of rule 1 (2) of Order LIII. This position is confirmed by the following passage from the Supreme Court practice 1976 Vol. 1 at 53/1/07:***

***“The application for leave ‘By a statement’ The facts relied on should be in the affidavit (see R.V Wandsworth JJ ex parte Read 1942 1 KB.***

**281). The statement should contain nothing more than the name and the description of the Applicant, the relief sought, the grounds on which it is sought. It is not correct to lodge a statement of all the facts verified by an affidavit.”**

The Applicant has placed all the facts in the statement but not the affidavit as required by Order 53 Rule 1 (2). In the result there is no evidence to support the Notice of Motion and the same is incompetent and is hereby struck out with the Applicant bearing the costs.

**Dated and delivered this 22<sup>nd</sup> day of September 2009.**

**R.P.V. WENDOH**

**JUDGE**

**Present**

Mr. Ngaira for Applicant

No appearance for Respondents

Court clerk - Muturi