



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

**-BETWEEN-**

**REPUBLIC ..... APPLICANT**

**-AND-**

**TOWN CLERK, MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENT**

**ex parte**

**SHIMANZI ENTERPRISES LIMITED**

**JUDGMENT**

On 9<sup>th</sup> July, 2009 the applicant obtained leave to move the Court for judicial review orders, and on 28<sup>th</sup> July, 2009 filed a Notice of Motion praying that:

***“An order of mandamus be issued directed at the Town Clerk, Municipal Council of Mombasa in accordance with section 263A(a) of the Local Government Act, Chapter 265 Laws of Kenya [compelling him to pay] to the applicant the sum of kshs. 5,106,707/40 together with further accrued***

**and accruing interest at Court rates (12% per annum) from 1<sup>st</sup> May, 2008 until payment in full, being the decretal amount in Mombasa H.C.C.C. [No.] 236 of 2007 (Shimanzi Enterprises Limited –V- Municipal Council of Mombasa) at the High Court in Mombasa”.**

The applicant asked the Court to provide for the costs of the application.

The general grounds founding this application are stated as follows:

- (i) judgment for the applicant against Municipal Council of Mombasa was entered on 12<sup>th</sup> March, 2008;**
- (ii) respondent has failed to satisfy the judgment in accordance with the decree issued on 17<sup>th</sup> October, 2008;**
- (iii) the Municipal Council of Mombasa and the Town Clerk of Municipal Council of Mombasa continue to withhold the decretal sum, without any justification;**
- (iv) the Town Clerk has acted and is continuing to act without any power, in withholding the exercise of his public duty, and is not carrying out his public duty and making the said payment to the applicant;**
- (v) due demands have been made, and despite the said demand, the Town Clerk has refused and continues to refuse to carry out the aforesaid public duty to make the payment to the applicant;**
- (vi) no other remedy exists under the law, to make or compel the said Town Clerk to carry out his aforesaid public duty, or to compel or obtain payment for the aforesaid sum except by way of application for mandamus;**
- (vii) the applicant should not be denied his lawful rights.**

The evidential basis of the application is set out in the depositions of **Mukesh Natwarlal Mehta**, the Managing Director of the applicant company, made on 28<sup>th</sup> July, 2009. He depones that the High Court sitting at Mombasa, on 12<sup>th</sup> March, 2008 entered judgment for the applicant, against Municipal Council of Mombasa in HCCC NO. 236 of 2007 and the said judgment was founded on a recorded consent.

The respondent was then served with a notice requiring satisfaction of the decree. The respondent failed to pay the amount of the decree, and failed to agree on costs necessitating the applicant applying for taxation of costs. It is deponed that, notwithstanding visits made to the respondent’s office, in pursuit of the matter, no payment has been forthcoming except for “promises that the respondent shall pay as soon as enough revenue has been collected”. It is deponed that the respondent had issued a cheque for Kshs. 862,069/= in part-payment, but the outstanding balance remains unpaid.

The respondent filed grounds of opposition contending that “the applicants’ application is misconceived and bad in law”; that the application does not establish any cause of action as against the respondents; that the application is “scandalous” and an “abuse of Court process brought in bad faith”; that the application “should therefore be dismissed with costs”.

Grounds of objection, of course, carry no evidential value, and are bare contentions which must be developed in the context of evidence, record and suasion, so as to have credibility and weight, bearing upon the disposition of a cause. I will be assessing this point, in the light of the submissions made before me.

Learned counsel **Mr. Kiarie**, for the applicant, urged that the Town Clerk had failed in his obligations as contemplated by s. 263A(a) of the Local Government Act (Cap. 265, Laws of Kenya). The said s. 263A(a) of the Act thus provides:

**“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 thereto”.**

Learned counsel noted that the respondent made no reply to the evidential point, that the parties undertook to agree on levels of instalmental payment by the Municipal Council; not only did the Municipal Council not avail itself to the reaching of such agreement, it paid but one instalment, and no other. Counsel urged that the applicant was entitled to the prayers sought, and he called in aid the authority of **Republic V. Town Clerk of the Municipal Council of Mombasa, ex parte Nisha Printers Ltd.** H. Ct at Mombasa, Misc. Civ. Application No. 512 of 2008. In that case **Sergon, J** considered the effect of s. 263A(a) of the Local Government Act aforesaid, and thus held:

**“It is apparent from 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”.**

Learned counsel urged that in the instant case, there had been a delay of one-and-a-half years and the decretal sum has yet to be paid, and the said delay had no explanation.

Counsel submitted that the applicant had, indeed, established a cause of action, and that there was a public duty resting on the respondent herein which had not been performed; and the Town Clerk who had only filed grounds of opposition to the application, had not come to say he is proposing a particular scheme of payment.

The applicant’s focused prayer was not to any extent, met with a rebutting response; **Mr. Owino** who held brief for **Mr. Mwangi Njenga**, for the Town Clerk, merely recalled that grounds of opposition had been filed and served, but made no submission other than the statement that the matter before the Court was **res judicata**.

It is not at all clear that the matter before the Court is **res judicata**; on the contrary, a compelling case has been made that the Town Clerk has yet to comply with the Court’s decree, requiring him to make the indicated payments to the applicant. Since no evidentiary material at all has emanated from the Municipal Council, it follows that no excuse has been urged before this Court for the failure to pay decretal sums in accordance with the terms of s. 263A(a) of the Local Government Act. That enactment was not passed in vain; it certainly imposed public duties on the Town Clerk. It is to be held, and I so hold, that the Town Clerk is in breach of a clear public duty, to the detriment of the applicant.

I hereby order that an order of **mandamus** do issue to the Town Clerk, Municipal Council of Mombasa, compelling him to pay out of the revenue of the Municipal Council of Mombasa the sum of Kshs. 5,106,707/40 together with accrued and further accruing interest at Court rates, as from 1<sup>st</sup> May, 2008 until payment in full, being the decretal amount in Mombasa HCCC No. 236 of 2007 (**Shimanzi Enterprises Limited V. Municipal Council of Mombasa**) at the High Court in Mombasa.

The respondent shall pay the applicant’s costs in this application.

**Orders accordingly.**

**DATED and DELIVERED at MOMBASA this 16<sup>th</sup> day of October, 2009.**

**J. B. OJWANG**

**JUDGE**

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Applicant: *Mr. Kiarie*

For the Respondent: *Mr. Owino holding brief for Mr. Mwangi Njenga*