



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Miscellaneous Civil Application 689 of 2006

**IN THE MATTER OF: AN APPLICATION BY ROSHINA TIMBER MART FOR LEAVE
TO FILE FOR THE ISSUE OF ORDER OF MANDAMUS**

AND

**IN THE MATTER OF: EXECUTION PROCEEDINGS IN THE SENIOR
RESIDENT
MAGISTRATE'S COURT AT MOMBASA – CIVIL CASE NO. 1977 OF 2005**

AND

**IN THE MATTER OF: NATIONAL WATER CONSERVATION
AND PIPELINE CORPORATION**

RULING

This is an application by Roshina Timber Mart (hereinafter “*the Ex Parte applicant*”), for leave to apply for an order of mandamus to compel M/S National Water Conservation and Pipeline Corporation (hereinafter “*the Respondent*”), to pay balance of the decretal amount together with costs and interest awarded in the Mombasa Senior Resident Magistrate’s Court Civil Case No. 1977 of 2005. The application has been brought under the provisions of Order LIII Rule 11 of the Civil Procedure Rules and is based on the ground that despite the said judgment having been entered in the said case in favour of the Ex-parte applicant, the Respondent has failed to make good the said judgment. The application is supported by a Statutory Statement and an affidavit sworn by the advocate of the Ex parte applicant. Annexed to the said statement is a copy of the decree issued in the said case.

Under sub-rule (2) of Rule 1 of Order LIII, an application for such leave is usually applied for ex parte but the Ex parte applicant served this application upon the Respondent which responded by filing an affidavit in opposition through its legal officer, one Margaret Ochieng. In the affidavit it is deponed that all rights, powers, duties and liabilities of the Respondent were, on 1st July 2005, transferred to and vested in the Coast Water Services Board and the decretal amount in the said case is payable by and enforceable against the said Board. The Respondent therefore contends that leave should not be granted as sought as the said judgment, decree and costs are payable by Coast Water Services Board.

Notwithstanding that leave has to be applied for ex parte, the respondent has participated in these proceedings throughout. Even when the application was listed for hearing before me on 29th September 2009 the respondent was represented having been served by the ex parte applicant. I could not deny the respondent the right to be heard despite opposition from counsel for the ex parte applicant.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. It is settled that, the judicial review jurisdiction of the High Court is invoked when a challenge is made against the decision making process of an inferior tribunal or other decision making body amenable to orders of judicial review. If a challenge is made against the merits of the decision, the right forum is the normal civil jurisdiction of the court. In this case, the Ex parte applicant seeks leave to apply for an order of mandamus to compel the Respondent to pay it sums decreed in the Senior Resident Magistrate's Court. What the Ex parte applicant seeks to achieve by the said order is simply to recover his monetary claim as ordered by the Senior Resident Magistrate. There is no doubt that the order sought is concerned with the decision making process of the Respondent. However, there is no evidence that the Ex parte applicant has ever sought to execute the decree in the Senior Resident Magistrate's Court in the normal manner under the provisions of the Civil Procedure Rules. The granting of leave to apply for orders of judicial review is not automatic even though the application is made ex parte.

It is now settled that, where there is an alternative remedy, the alternative should be applied unless special circumstances are demonstrated. The Ex parte applicant has not so demonstrated. I have found no such circumstances (see **Republic – v – Epping & Harlow General Commissioners Ex parte Goldstraw [1983] 3ALL ER 257**).

Before concluding this matter, I am impelled to comment on the manner this application has been prosecuted. The application as already stated should have proceeded ex parte. It was filed way back in June 2006 and there is absolutely no reason why it should have taken more than three (3) years to be concluded. The procedure may have originally been intended by the ex parte applicant to obtain quick payment. That was an unnecessary gamble.

In the end, I decline to grant the leave sought. The Ex parte applicant's application dated 9th May 2006 and lodged on 13th June 2006 is dismissed with no order as to costs. It is so ordered.

DATED AND DEIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mokaya holding brief for Aboo for the Applicant and Obura for the Respondents.

F. AZANGALALA

JUDGE

24TH NOVEMBER 2009