



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

Misc Civ Appli 748 of 1996

IN THE MATTER OF AN APPLICATION FOR AN ORDER MANDAMUS

AND

**REPUBLIC –VERSUS- THE TOWN CLERK, KISUMU MUNICIPALITY EX-PARTE EAST
AFRICAN ENGINEERING CONSULSTANTS**

EAST AFRICAN ENGINEERING CONSULTANTS.....DECREE-HOLDER

VERSUS

MUNICIPAL COUNCIL OF KISUMU..... JUDGMENT DEBTOR

AND

CO-OPERATIVE BANK OF KENYA LTD, KISUMU BRANCH.....GARNISHEE

RULING

By an application dated 15th November 2006 the applicant has objected to this court's Order nisi issued on 21st November, 2006 against the Cooperative Bank of Kenya Kisumu upon application by the City council of Kisumu (the judgment debtor).

This court's attention has been drawn to the following authorities:

- (1) ***H.C. (KSM) 46/2005 SUSAN A. ALUOCH & OTHERS v MUNICIPAL COUNCIL OF KISUMU and The Cooperative Bank Of Kenya Ltd Kisumu*** where Hon Warsame J set aside an order nisi pursuant to the immunity against attachment conferred on the Local Authorities by s 263A of the Local Government Act Cap 255(LUK)
- (2) ***COMPWARE LTD v MUNICIPAL COUNCIL OF KISUMU HCC 287/2000*** where Hon Mr Justice Tanui had earlier invoked the same section 263A of the Local Government Act in a similar manner – ie on the basis of immunity
- (3) ***NATIONAL HOUSING CORPORATION v NAIROBI CITY COUNCIL v KENYA COMMERCIAL BANK HCCC 5404 1998*** where Mwera J reached the same holding
- (4) ***W.G. WAMBUGU & COMPANY v M.D. KENYA RAILWAYS CORPORATION HCC 804/01*** WHERE Lenaola Ag Judge made a similar holding

(5) **TOTAL (KENYA LTD) v KENYA RAILWAY CORPORATION** WHERE Ochieng J set aside an order nisi in respect of a similar immunity provision in the Kenya Railways Corporation Act LOK 397.

Even by virtue of the sheer force of numbers I am heavily outnumbered. The question is can I possibly go against such a galaxy of my own brothers. In retrospect, I do agree with them but for one or two additional reasons:

- (1) No such relief as garnishee proceedings is stipulated in the Act donating the jurisdiction i.e. the Law Reform Act
- (2) The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The State so to speak by the very act of issuing the orders frowns upon its own officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings
- (3) There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the mandamus order using this method. There is only one rider – an officer can only be committed where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment. An officer does not incur personal liability.

The Local Authorities Transfer Fund Act which provides funds to Local Authorities part of which should be used to pay debts, in my view does not provide for their attachment since s 263A of the Local Government prohibits it. It just enables the Local Authorities to honour their debt obligations including those covered by mandamus order. The Local Authorities have to pay as a matter of statutory duty or in the case of mandamus in obedience to the order from the State or the Republic. There is no provision in the LATF Act for attachment or execution.

In my holding judicial review jurisdiction is not subject to any other Act and I believe the Court of Appeal did so hold in the R v CCK case. The judicial review jurisdiction is not subject to the Local Government Act s 263A. I have so to speak reached the same decision but I have used a different path. For the same reason garnishee proceedings are both provided for under the Civil Procedure Act and Rules and the judicial review jurisdiction is sui generis and is not subject to this Act and Rules either. It is for this latter reason that I set aside the order nisi issued earlier and also dismiss the application. I make no order as to costs.

DATED and delivered at Nairobi this 16th day of March 2007.

J.G. NYAMU

JUDGE