



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

MISC CIVIL APPLI 527 OF 2006

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDER OF**

MANDAMUS

AND

IN THE MATTER OF: THE KENYA RAILWAY CORPORATION

BETWEEN

MUNICIPAL COUNCIL OF

MOMBASA.....APPLICANT

VERSUS

MANAGING DIRECTOR KENYA

RAILWAYS CORPORATION.....RESPONDENT

R U L I N G

By a motion filed pursuant to Sections 8 and 9 of the Law Reform Act and under Order LIII of the Civil Procedure Rules, Municipal Council of Mombasa, the ex-parte Applicant herein applied for an order of Mandamus to compel the Managing Director, Kenya Railways Corporation, the Respondent herein, to satisfy the decree issue by the R.M.'s court Mombasa vide Mombasa R.M.C.C.C. No. 1090 of 2001 between the Municipal Council of Mombasa and Kenya Railways Corporation. The Respondent opposed the motion by filing a replying and a further replying affidavit both sworn by A.K. Maina.

The ex-parte applicant stated the facts leading to the filing of this motion in the verifying affidavit of Karisa Iha, the Deputy town clerk. It is clear that the applicant had sued the Respondent claiming payment of Kshs.28,704,155/- being arrears of contributions in lieu of rates due to the applicant in respect of various properties owned by the Respondent situate within the Municipal Council of Mombasa. The Respondent and the applicant entered into a consent judgment on 31.5.2001 in the sum of Kshs.17,645,075/-. It is stated that the Respondent only paid a sum of Kshs.1,000,000/- and so far a total of Kshs.31,379,147/50 now stands unpaid. The applicant now seeks for an order of mandamus to compel the Respondent to settle the decretal sum.

The facts are not largely denied by the Respondent. The Respondent's is now accusing the applicant of taking too long to bring up such drastic measures. It is the averment of the respondent that parties are yet

to agree on the mode of payment to settle the decretal sum. It is also alleged that the Respondent is unable to satisfy the decree because it is making losses and that it is currently relying on government grants. There is an averment that the Respondent's Managing Director is not personally liable to pay the decretal sum but can only cause the same to be paid out of the revenue of the Respondent as provided for by Section 88(a) of the Railways Corporation Act.

I have considered the arguments of both sides as presented to this court. It is not denied that the decretal sum has not been settled in full. The Respondent's Managing Director is the person mandated by Section 88(a) of the Railways Corporation Act to cause to be settled the Respondent debts and or liabilities. The court of Appeal in the case of Kenya

nal Examination Council =vs= Geoffrey G. Njoroge and 9 others C.A. No. 266 of 1996 referred to Halsbury's Laws of England 4th Edition Vol. ... to state the scope and efficacy of an order of mandamus as follows:

“What do these principles mean? They mean that 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 the person who has a legal right to expect the duty to be performed “

In this case, it is conceded that the Respondent has the duty to cause the debt to be settled pursuant to Section 88(a) of Cap.397 Laws of Kenya. In view of that I find the motion well founded. It is allowed with costs to the applicant.

Dated and delivered at Mombasa this 29th day of June 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Khatib for the exparte Applicant .

N/A for Ndegwa for the Respondent.