

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MISC APPLICATION NO. 339 of 2005

DAVID NJOGU T/A D. NJOGU & CO. ADVOCATES.....PLAINTIFF

VERSUS

THE TOWN CLERK CITY COUNCIL OF NAIROBI.....RESPONDENT

RULING

This Ruling relates to an application by way of a Notice of Motion dated 16.03.2005 and filed in court on 17.3.2005. It seeks orders of Mandamus to compel the Respondent, the Town Clerk, City Council of Nairobi to pay to the Applicants the various sums of money detailed in the prayers, with interest at the rates stated in the application.

When this matter was urged before me on 2.06.2005; Mr. Kariuki, learned Counsel for the applicant urged the court to grant the prayers sought because firstly, the issues are not contested, and secondly this court has the jurisdiction to grant the orders under the provisions of section 263A(a) of the Local Government Act (Cap 265, Laws of Kenya).

Counsel also referred to paragraph 4 of the Replying Affidavit of one Geoffrey C.K. Kabsoleh, the Respondents Assistant Town Clerk Drawn and filed on 18.04.2005 in which the deponent avers that the Respondent is facing serious financial difficulties, and is unable to pay the aggregate decretal sum of Kshs 1,420,818.43 together with interest thereon at 9% in one lump sum. The Respondent proposed to pay the sum of Kshs 500,000/= per month as a down payment, and settled the balance at the rate of Kshs 150,000/= per month until payment in full.

The above proposal was not acceptable to the applicant who proposed that the balance of the dues claimed be paid at the rate of Kshs 300,000/= per month as the Applicant has been kept away from its fees, and has like the Respondent, pressing financial obligations which he has to meet. In response, Mrs. Ngala, learned Counsel for the Respondent relied upon the said Replying Affidavit of the said Assistant Town Clerk, the material part of which, that is, paragraph 4, I have already referred to above. Counsel told the court, and which was confirmed by Mr. Kariuki, learned Counsel for the Applicant, that the Respondent had already issued and sent to the Applicant a cheque for the sum of Kshs 607,753,95 on 31.05.2005 as partial payment of the sums due and the subject of this application.

The issue therefore is not whether the Applicant is entitled to the orders of **MANDAMUS** sought under the application for which I think, the Applicant is clearly entitled to these orders, but whether despite such orders, the Respondent may be allowed to pay the sums due by way of installments whether at the rate of Kshs 150,000/= per month or Kshs 300,000/= per month as urged by the Respondent's and Applicants Counsel respectively.

The application herein is premised upon the provisions of Order LIII, Rule 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, (Cap 21, Laws of Kenya) and SS 8 and 9 of the Law Reform Act, (Cap 26, Laws of Kenya). Rule 3 of Order LIII prescribes that an application for **MANDAMUS** shall be made by a Notice of Motion. The applicant has fulfilled this requirement. Section 8(2) of the Law Reform Act confers upon this court, the same jurisdiction conferred upon the High Court of England by Section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938 of the United Kingdom to make an order of Mandamus, Prohibition or Certiorari. Section 3A of the Civil Procedure Act, restates the Court's inherent power to make such orders as may be necessary for the ends of Justice or to prevent abuse of the process of court.

Section 263(3) of the Local Government Act, (Cap 265 Laws of Kenya) enjoins that all costs charges and expenses to which a Local Authority may become chargeable by reason of the prosecution or defence of any action, or under any action or under any judgment of any court shall be paid out of the revenues of such Local Authority. Section 263A(a) Prohibits the issue of any order of execution or attachment or any process in the nature thereof against the Local Authority or against the immovable property of the Local Authority or its vehicles, or its other operating machinery or fittings, but requires the Local Authority without delay to 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 to the moneys herein.

The parties asked me to exercise my discretion in this matter. Section 263A(a) compels the Clerk of the Local Authority to pay costs, charges and expenses to which a Local Authority may become chargeable by reason of the prosecution or defence of any action from the revenues of the Local Authority. Out of the aggregate sum of Kshs 1,420,818.43 the Respondent has demonstrated the good faith by issuing a cheque for nearly one half of the sums due. It is hoped that the said cheque shall upon presentation to the bank, be paid. On that basis therefore, there shall remain, a balance of Kshs 813,064.48 due and payable in addition to interest which is as yet to be computed thereon. So the balance may not therefore be Kshs 813,064.48.

Realizing as I do, that the Respondent herein like many Local Authorities, face serious financial problems, and have competing interests eating into their revenues, I would still grant to the applicant, the orders sought in its application dated 16.03.2005, but subject to the following modification.

The Respondent shall pay the balance of the decretal sums together with interest thereon by equal monthly installments at the rate of Kshs 200,000/= (Kenya shillings two hundred thousand), from the 30th day of June 2005 until payment in full.

There shall be orders accordingly.

Dated and delivered at Nairobi this 6th day of June, 2005.

M.J.A. EMUKULE

JUDGE