



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 526 OF 2000**

**JITEGEMEE SACCO LTD. .... PLAINTIFF**

**- Versus -**

**MUNICIPAL COUNCIL OF MOMBASA ..... DEFENDANT**

**RULING**

Jitegemee Sacco Ltd. (the Applicant) is the decree holder in this case. According to the application dated 16th January 2004 there is a balance of the decretal sum of Sh. 77,397,874.50 due to it from the Municipal Council of Mombasa (the Council), the judgment debtor in this case. Judgment was entered by consent but the Council did not honour the payment arrangements agreed upon. Consequently the Applicant applied for execution by way of arrest of the Town Clerk of the Council and a warrant of arrest was issued by the Deputy Registrar on 16th May 2003. The matter ended up before Etyang J. (as he then was) who ruled that that mode of execution was in contravention of Section 263A of the Local Government Act Cap 265 of the Laws of Kenya. He therefore set aside the warrant of arrest.

The Applicant then applied for an order of mandamus which Sergon J. granted on 7th October 2003. The Council still did not pay. The Applicant has now filed a notice of motion expressed to be brought under Section 3A of the Civil Procedure Act, the Local Government Act (without citing any particular section) and Order 21 of the Civil Procedure Rules also without citing any rule in that order. The application seeks inter alia for orders:-

**“That Mr. Rashid Mwakiwi and Mr. Joel Too who are the Town Clerk and the Town Treasurer of the Municipal Council of Mombasa, respectively, be committed to civil jail and be released only after they pay over to the Applicants Advocates the sum of Sh. 77,397,874.50 in compliance with the two rulings issued by this court dated 7th October 2003 and 30th July 2003.”**

The Council, and in particular its two named officers are not amused by this application. Through their Advocates they have filed a Preliminary Objection on three grounds namely:-

**“1. That by dint of Section 263A of the Local Government Act Cap 265 Laws of Kenya the Notice of Motion Application before court clearly contravenes the mandatory provisions of the said Act which stipulates that no execution proceedings can be commenced and/or enforced against a local authority.**

**2. That the Notice of Motion Application dated 16th January 2004 is RES JUDICATA and cannot be proceeded in that ... since the court has already ruled and disposed off similar**

**substantive matters raised in the present application the effect of which renders the court FUNCTUS OFFICIO.**

**3. That the application as drawn is fatally defective both in procedure and form.”**

Mr. Kibara for the Council argued the Preliminary Objection and submitted that the application dated 16th January 2004 is nothing but execution of the decree against the Council which is forbidden by Section 263A of the Local Government Act. He also argued that the matter is *res judicata* a similar application having been decided on by Justice Etyang. Citing the authority in the case of **Kanororo River Farm Ltd. & Others =Vs= National Bank of Kenya Limited Nairobi HCCC No. 699 of 2001** in which it was held that the doctrine of *res judicata* applies both to applications as well as suits Mr. Kibara also argued that the matter is *res judicata* and I should therefore strike out the application. He also took issue with the form of the application. He said that since it was brought under Order 21 it should have been made by Chamber Summons and not by Notice of Motion. According to him it is fatally defective and should be struck out. He cited the case of **Kenfreight (E.A.) Ltd. =Vs= Phoneway (E.A.) Ltd. Mombasa HCCC No. 181 of 1997** as the authority for this proposition.

In reply Mr. Gikandi submitted that the Notice of Motion dated the 16th January 2004 is not an application for execution but one flowing from the order of mandamus. It is an application seeking to enforce the order of mandamus issued by Justice Sergon. As such by virtue of Order 50 Rule 1 the application is properly brought by way of Notice of Motion.

I wish to dispose of the last ground as to whether the application as drawn in form and substance is fatally defective. Is an application required under the rules to be brought by Chamber Summons but is instead brought by Notice of Motion fatally defective? My answer to that is no. Order 50 Rule 11 of the Civil Procedure Rules provides:-

**“Where an application which is authorized to be made in court is made in chambers, the judge may either adjourn the application into court or hear it in chambers.”**

After quoting this provision and Rule 10 of the same Order the Court of Appeal in **Johnson J. Kinyanjui & Another =Vs= Rachael W. Thande & Another Civil Appeal No. 284 of 1997 (C.A.)** stated:-

**“It can be seen that no application is to be defeated by use of wrong procedural mode and a judge has the discretion to hear it either in court or in chambers.”**

Following this Court of Appeal decision in **Microsoft Corporation =Vs= Mitsumi Computer Garage Ltd. [2001] 1 E.A. 127 at 132** Ringera J. stated that:-

**“... I am of the firm view that it is in the overall interests of justice that procedural lapses should not be invoked to defeat applications unless the lapse goes to the jurisdiction of the court or substantial prejudice is caused to the adverse party.”**

I respectfully agree with these views. Failure to bring the application herein by Chamber Summons does not go to the jurisdiction of the court. It has also not caused any prejudice to the Council.

In view of the said Court of Appeal decision in **Johnson Joshua Kinyanjui** case (supra) the case of **Kenfreight (E.A.) Limited =Vs= Phojeway (E.A.) Ltd. Mombasa HCCC No. 187 of 1997** is no longer good law. In the same vein the Ugandan cases of **Sahia Namukasa =Vs= Yosefu Bukya [1966] E.A. 433** and **George Kigoya =Vs= Attorney General of Uganda [1966] E.A. 463** (which in any case are not binding) are also not good law in Kenya.

I therefore overrule the Council's last ground of objection that the application brought by Notice of Motion instead of by Chamber Summons is fatally defective.

On the ground that the matter is *res judicata* I agree with Mr. Kibara that the doctrine of *res judicata* applies to both suits and applications whether they are final or interlocutory - **Kanorero River Farm Ltd. & Others =Vs= National Bank of Kenya Ltd. Nairobi HCCC No. 699 of 2001 (UR)**

I do not agree with Mr. Gikandi that the application herein is seeking to enforce the order of mandamus issued by Justice Serگون. If it was it could not have been brought under Order 21 or made any reference to the Order of Justice Etyang of 30th July 2003. It is a disguised application for execution and the same does not only offend the provisions of Section 263A of the Local Government Act but is *res judicata*. Accordingly I uphold the Preliminary Objection by the Council's Advocates and strike out with costs the Applicant's Application dated the 16th January 2004.

DATED this 18th day of February 2004.

D.K. Maraga

Ag. JUDGE