



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 1115 OF 2003**

**PATRICK ATENYA ASITIBA.....1<sup>ST</sup> PLAINTIFF**

**PHANICE ONDECHE ASITIBA.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**CITY COUNCIL OF NAIROBI.....DEFENDANT**

**RULING**

1) The subject matter of this ruling is the motion dated 8/2/2019 taken out by the Plaintiff/Applicants whereof they seek for the following orders inter alia:

***1. THAT this Honourable Court be pleased to certify this matter as urgent, heard ex-parte and service be dispensed with in the first instance.***

***2. THAT pending the hearing and determination of this application it be and it is hereby ordered that a NOTICE TO SHOW CAUSE does issue against the COUNTY SECRETARY OF THE NAIROBI CITY COUNTY to show cause why he should not have committed to CIVIL JAIL for disobeying a lawful court order dated 17<sup>th</sup> December 2018***

***3. THAT upon hearing and determination of this application the Honourable Court be pleased to order and it is hereby ordered the arrest and COMMITAL to CIVIL JAIL OF THE COUNTY SECRETARY OF THE NAIROBI CITY COUNTY for a period of SIX MONTHS for disobeying a lawful court order dated 17<sup>th</sup> December 2018.***

***4. THAT the costs of this application be paid by the Respondents.***

2) The Plaintiffs filed the affidavit of Wangira Okoba, their advocate in support of the motion. When served, the Defendant filed a notice of preliminary objection to oppose the motion.

3) When the motion came up for interpartes hearing, learned counsels appearing in the matter made oral submissions. The Plaintiffs urged this court to grant them the orders sought arguing that on 19/10/2017, this court entered Judgment in the sum of Ksh. 12 Million plus costs and interest against the City Council of Nairobi.

4) It is stated that a decree was extracted and served upon the County Secretary of Nairobi County. Despite having been served, the Respondent did not satisfy the decree thus prompting the Plaintiffs (Applicants) to obtain orders of Mandamus directing the County Secretary to settle the decretal sum. It is said that the order of Mandamus was served upon the Respondent but still the Respondent has not settled the decree. The Plaintiff / Applicant are now before this court seeking to have the Respondent's County Secretary show cause why he/she should not be punished for the failure to settle the Respondent's debts.

5) In Response to the Plaintiffs/Applicants arguments the Respondent , filed a notice of preliminary objection arguing that the County Secretary is not a party to these proceeding hence he/she cannot be issued with a notice to show cause leave alone being punished.

6) The Respondent is a County Government established under Article 176 of the constitution of Kenya, 2010 making it a legal entity that can sue or be sued in its own capacity. Mr. Odhiambo learned advocate for the Respondent argued that the role of the County Secretary is basically administrative and does not include collection and payment of debts of the county.

7) Having considered the rival submissions, it is apparent that the Respondent does not dispute the fact that the decree has not been settled. It

does not also dispute the fact that an order of mandamus was issued, served and the same has not been obeyed. The main ground of objection is that the County Secretary is not a party to these proceedings and that the office is not the one to settle the County debts.

**8)** It is clear from the provisions of section 44 (3) of the County Government Act that the officer holding the office of the County Secretary is the accounting office of the County Government. The Plaintiffs therefore, cited the relevant office in the application.

**9)** The sticky issue which was raised by the Respondent which in my view appears legitimate is the fact that the office holder or office of the County Secretary has not been made a party to the application. It was important to do so because the orders being sought have to be directed at the holder of such an office. However, the failure to enjoin such a holder as a party to the application is not fatal since the court can suo moto issue orders directing the applicants to provide the names of the officer holder and have them served with process.

**10)** In the end, I find prayer (ii) (original 2) of motion to be the most appropriate order to grant at this stage. Consequently, a notice to show cause is hereby issued to be served personally upon the current office holder of the County Secretary of the Nairobi City to show cause on 28/2/2020 why he/she should not be committed to Civil jail for disobeying orders of mandamus issued on 17/12/2018. Costs of the motion is awarded to the Plaintiff.

**Dated, signed and delivered at Nairobi this 13<sup>th</sup> of December, 2019.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... 1<sup>st</sup> for the Plaintiff

..... 2<sup>nd</sup> for the Plaintiff

.....for the Defendant