



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 1735 OF 2004**

**IN THE MATTER OF AN APPLICATION BY M/S MBIGI NJUGUNA & CO. ADVOCATES  
FOR AN ORDER OF COMMITTAL AND SEQUESTRATION FOR CONTEMPT OF COURT.**

**AND**

**IN THE MATTER OF CONTEMPT OF ORDERS OF MANDAMUS MADE ON 6<sup>TH</sup> MAY  
2005 BY THE HON. JUSTICE NYAMU J. IN HIGH COURT MISC. APPLICATION NO. 1735  
OF 2005 AT NAIROBI.**

**BETWEEN**

**MBIGI NJUGUNA & CO. ADVOCATES.....APPLICANT**

**VERSUS**

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

**RULING**

1. By a notice of motion dated 20<sup>th</sup> February, 2013 and filed in court on 22<sup>nd</sup> February 2013, the applicant who is also the main applicant in this matter, the law firm of Mbigi Njuguna & Co. Advocates sought from this court the following orders:

1. Spent

2. That this suit be consolidated with Nairobi HCC Miscellaneous No. 308 of 2006 for the purposes of taking accounts.

3. That all the money deposited as a refund of decretal sum in Nairobi HCC Miscellaneous Application No. 308/2006 be held or retained in court subject to further orders of this court and hearing of this application.

4. That once accounts are taken and the sum due to the applicant determined, the money deposited in the said Nairobi HCC Miscellaneous No. 308 be ordered to be released to the applicant.

5. That upon release of the said money to the applicant, the judgment debtor be asked to show cause why the property of the judgment debtor should not be attached by way of sequestration for continued contempt of court order of mandamus given on 6<sup>th</sup> May 2005.

6. That this court make such other or alternative orders as it deems fit.

7. That the respondent be condemned to pay costs of this application.

2. The application is predicated on the grounds that:

a) The respondent was ordered by an order of mandamus given on 6<sup>th</sup> May 2005 to pay to the applicant the decretal sum of kshs 775,994.95 together with costs and interests.

b) That the respondent paid only a part of the decretal sum leaving a balance of shs 506,567 as of 17<sup>th</sup> November 2008 which sum has continued to attract interest at court rates and stood at courts rates and stood at kshs 772,211 as of 17<sup>th</sup> January 2013.

c) The respondent had promised to address the issue of the outstanding balance back in March 2011 but has continued to neglect the issue.

d) On 23<sup>rd</sup> March 2012, kshs 244,628 was deposited into account for the benefit of the respondent herein as accounts were being taken relating to execution of a decree in Nairobi HCC Miscellaneous No. 308 of 2006 wherein the respondent is a judgment debtor.

e) The respondent has now applied for release of the said sum to itself without satisfying the amount owing in the decree in this case.

f) Unless orders are given immediately, the said amount will inevitably be removed from court and be unavailable for attachment.

g) That both cases relate to a balance of legal fees owed by the respondent to the applicant and the respondent has failed to pay in disobedience of orders of mandamus.

h) That it is necessary that the two matters are dealt with together so as to erase disharmony and conclusively finalize the accounts between the parties.

3. The motion is further supported by an affidavit sworn by Dominic Njuguna Mbigi on 20<sup>th</sup> February 2013 reiterating the grounds as above reproduced while deposing that albeit the respondent paid the principal sum in September 2006 after a mandamus order made on 6<sup>th</sup> May 2005, it refused to pay the interest and costs and that on 14<sup>th</sup> April 2008, Honourable Dulu J. who heard contempt application directed the Deputy Registrar to ascertain the amount still owing and costs to be taxed.

4. That on 4<sup>th</sup> June 2008 the Deputy Registrar ascertained the outstanding amount of shs 349,516.63 and costs were taxed at kshs 136, and that as at 24<sup>th</sup> November 2008 the outstanding amount was shs 506,567.

5. That despite writing to the respondent demanding for shs 648,406 on 1<sup>st</sup> March 2011, the respondent responded that they will ascertain the accounts and revert but have not hence the outstanding sum as at 17<sup>th</sup> February 2013 was shs 772,211 using 12% court rate.

6. That meanwhile, the respondent was compelled by the court vide decree in Nairobi HCC Miscellaneous 308/2006 to pay to the applicant proceeds of a decree and that after execution, the judgment debtor claimed to have overpaid the decretal sum and applied for refund of excess hence the applicant was ordered to deposit kshs 244,628 as a condition for stay pending appeal of some adverse orders.

7. That later, the order for stay of execution were discharged leaving the amount available for

collection from court.

8. That the respondent now has applied to court for release of the money to itself.

9. That the said sums are attachable because the respondent still owes the applicant decretal sum hence it is necessary to consolidate the matters so that comprehensive accounts are taken in both matters and the actual sum due from the respondent to the applicant be ascertained and that since the respondent has refused to pay the outstanding sums despite clear court orders, its property be sequestered for satisfaction of the balance outstanding after taking of accounts.

10. The application was not opposed by the respondent despite service upon the latter and substitution of the then defendant Nairobi City Council with the City Council of Nairobi.

11. On 5<sup>th</sup> November, the applicant filed submissions in support of his application while reiterating the depositions and grounds reproduced in this ruling. No decided cases or statutory provisions were relied on.

### **Determination**

12. I have carefully considered the applicant's application dated 20<sup>th</sup> February 2013, the grounds, supporting affidavit, annexures and submissions filed by the applicant.

13. In my view, the issues for determination are whether the applicant is entitled to the orders sought.

14. There is no dispute that the respondent owes the applicant interest and costs in this matter, after settling the principal sum. There is also no dispute that in HCC 308/2006 which is between the same parties herein, the respondent claimed that it has overpaid the applicant herein hence the order for depositing of shs 244,628 into court for the benefit of the respondent until accounts are taken relating to execution in that matter wherein the respondent is the judgment debtor.

15. The only question is whether the court should consolidate the two matters for purposes of taking accounts and if so, whether the applicant is entitled to the rest of his prayers.

16. Order 11 Rule 3(1) (h) of the Civil Procedure Rules provides for consolidation of suits in appropriate matters. The purpose of consolidation of suits is with a view to furthering the expeditious disposal of the cases and to ensure case management.

17. The principle of consolidation of suits was restated in **Stunberg and Another Vs Pot geiter EA [1970] 323** that:

*“ Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.”*

18. In **Prem Lalla Naliaka & Another vs Chandi Prasad Sikaria [2007] 2 SC of India case 551** it was stated:

*“It cannot be disputed that the court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the court combined or united and treated as one cause or matter.*

*The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the court and it appears to the court that some common questions of law or fact arises in both or all the suits or that the rights of relief claimed in the suits are in respect of or arise out of*

***the same transaction or series of transactions; or that of some other reason it is desirable to make an order consolidating the suits.”***

19. In **Law Society of Kenya V The Centre for Human Rights and Democracy**, SC Pet 14/2013 the Supreme Court of Kenya stated :

***“ The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantages towards the party that opposes it.”***

20. Therefore, is this case amenable to consolidation with HCC Miscellaneous Application 308/2006? In deciding whether or not to consolidate matters, the court must be guided by the following principles:

***1. Whether the same question of law or fact arise in both cases.***

***2. Whether the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transactions.***

***3. Whether any party will be disadvantaged or prejudiced or whether consolidation will confer undue advantage to the other party.***

21. In the instant case, it has not been stated that the two files concern a common issue or issues arising from the same transaction or series of transactions. It was upon the applicant to say so in his affidavit and annex evidence of what the other matter was all about as this court did not have the opportunity of handling that other matter. What is not in dispute, however, is that both matters concern a decree for monies owed to the applicant advocate by the respondent client.

22. It is alleged that in both cases, execution of the respective decrees for taxed costs was pursued by way of mandamus and it was alleged that in HCC Miscellaneous 308/2006, the applicant was overpaid hence, the order that he pays into court what was considered to be excess money in order for accounts to be undertaken.

23. On the other hand, in the present case it is clear that the decree has not been settled in that there is some outstanding sum after payment of the principal sum, leaving out interest and costs.

24. Although there is a claim that the respondent owes money to the applicant in both the cases, there is no evidence that the two cases arise out of the same transaction or series of transactions.

25. Further, it is clear that if the consolidation of the two cases is done the respondent will be disadvantaged as the consolidation will confer undue advantage to the applicant since no accounts have been done in the HCC Miscellaneous 308 of 2006. I say so because where there is a decree, a party has many ways of enforcing that decree.

26. Attachment of debts is one such way of enforcing a decree. It is also known as Garnishee proceedings as stipulated under Order 23 of the Civil Procedure Rules, where the decree holder applies for Garnishee Order to attach monies owed to the judgment debtor by a third party. This is not what the applicant herein is seeking and even if that were to be the case, it is clear that the accounts in HCMISC 308/2006, have not been taken hence it is not clear whether the respondent will be found to owe the applicant any monies or at all, in that matter, capable of being recovered and or how much would be due to the applicant.

27. It would be speculative to consolidate these two matters and order for accounts when the debt in this matter is clear whereas the debt in HC Miscellaneous 308/2006 is not clear as it is subject to some other legal process of taking of accounts as ordered by the court. In any event, the applicant can,

after the taking of accounts, still recover what is due to him in the HCMISC308 of 2006 as proceeds to recover what is due and owing in this matter.

28. Another mode of executing decree is by way of notice to show cause particularly where mandamus has already issued. In this case, the respondent is now covered by the Government Proceedings Act, Cap 40 Laws of Kenya and therefore its property cannot be attached in execution of decree. In the event of default of settlement after notice to show cause, the applicant can apply for committal of the accounting officer of the respondent to civil jail for a period not exceeding six months. The applicant can also invoke the provisions of section 4 of the Contempt of Court Act No. 46 of 2016 which defines contempt of court to include, in civil proceedings, any willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given by the court. It therefore follows that prayer No. 5 of this application is not one of those modes of execution of decree against the County Government.

29. The two files are different and proceeded separately. It would not be appropriate to consolidate them now for convenience of the applicant when the two matters proceeded separately and when there are other efficacious ways of executing decree for balance of the decretal sum in the present case.

30. As the money in HCC Miscellaneous Application 308/2006 is not readily available for Garnishee, and as the Garnishee proceedings have an established procedure to be followed under Order 23 of the Civil Procedure Rules, it is appropriate that the applicant herein moves the court in the appropriate way for recovery of what he is lawfully entitled to and goes ahead to move the court for appropriate orders in the HCC Miscellaneous Application 308/2006, and in this case, separately, the same way he approached the court separately for recovery of monies owed to him.

31. It is for the above reasons that I do not find the application herein merited and I therefore decline to grant the same. The application dated 20th February 2013 is hereby dismissed. As the respondent did not put up any defence to the application, I make no orders as to costs.

Dated, signed and delivered at Nairobi this 7th day of February 2017.

**R.E. ABURILI**

**JUDGE**

In the presence of:

Miss Chelangat h/b for Mr Njuguna for applicant

N/A for Respondent

CA: George