



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

JUDICIAL REVIEW APPLICATION NO. 1 OF 2013

REPUBLIC.....APPLICANT

-VERSUS-

**THE COUNTY SECRETARY, MURANG'A COUNTY
GOVERNMENT.....RESPONDENT**

ex parte:

Stephen Thiga Thuita

JUDGMENT

By a Notice of Motion dated 8th March, 2012 and amended on 17th October, 2013 and which was brought under **Order LIII** of the Civil Procedure Rules, the *ex parte* applicant sought an order for mandamus to compel the town clerk of the then Municipal Council of Murang'a to pay the applicant the sum of **Kshs. 49, 635/=** being the amount of costs awarded to him in **Murang'a Principal Magistrates Court Civil Case No. 267 of 2003**.

The affidavit verifying the facts was sworn by the applicant's counsel the applicant deposed that his client obtained judgement in a civil suit against the municipal council of Murang'a and was awarded costs which the council had neglected, refused and or ignored to settle.

The Notice of Motion application was not opposed as the grounds of objection which were filed on behalf of the previous respondent were in respect for the chamber summons dated 5th October, 2011 seeking leave to apply for the order for mandamus. The application was heard *ex parte* and the leave granted. The grounds filed by the respondent would appear to have been belated; it would have been appropriate for the respondent to raise those grounds in an application to set aside the leave if he aggrieved by it.

Having said that, one issue that could possibly be argued in an application to set aside the leave and which could also be taken in considering whether the motion should be granted is the issue of the appropriate deponent to the affidavit in support of the motion.

The affidavit verifying the facts relied upon was sworn by counsel for the appellant. This appears to be improper in view of the provisions of **Order 53 rule 1 (1) and (2)** of the **Civil Procedure Rules** which clearly provide that:

1. (1) No application for an order for mandamus, prohibition or certiorari shall be made unless leave thereof has been granted in accordance with this rule.

(2) An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds upon which it is sought, and by affidavits verifying the facts relied upon.

My understanding of these rules, more particularly sub rule (2) thereof is that the applicant whose name and description is given in the statement of facts is the same person who should swear the affidavit or affidavits verifying those facts; the affidavit cannot be sworn by any other person. Without such an affidavit by the applicant it cannot be said that there is an application or no proper application before court for judicial review orders. It therefore follows that the omission of the applicant's affidavit verifying the facts on which he relies in pursuit of the relief for a judicial review order of mandamus is fatal to his application.

This is an issue that could have been canvassed at leave stage particularly where a party, such as the then respondent, aggrieved by the grant of leave would want to apply to set it aside. In my view, it is also an issue that can properly be raised in determining the substantive motion mainly because the affidavit or affidavits in support of the chamber summons seeking for grant of leave are the same affidavits which are adopted in support of the substantive motion and therefore scrutiny of the legality of those affidavits does not end with the grant of leave.

One other issue merits mention in this judgement. The applicant initially applied and obtained leave for an order for mandamus against the town clerk, Municipal Council of Murang'a. The motion named the town clerk as the respondent; however, the applicant amended the motion and substituted the town clerk with the county secretary of the County Government of Murang'a. I suppose this amendment was informed by the presumption that the county Government of Murang'a carried over the liabilities of the Municipal council of Murang'a. This presumption however is not supported by any legal provision I know of and none was shown to me.

The closest law that appears to address the devolution of assets and the assumption of liabilities of the local authorities prior to their extinction is the **Transition to Devolved Government Act, Chapter 265A**, of the Laws of Kenya. With the emergence of the County Governments, the assets and pre-existing liabilities of the now defunct local authorities were to be shared between those county governments and the national government. The body that was established to work out how this distribution was to be done was the Transition Authority which is created under section 4 of the Transition to Devolved Government Act. Among its functions set out in **section 7** of that Act, the Transition Authority is required to prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities. Once this is done it is upon the Transition Authority to come up with the criteria to determine the transfer of previously shared assets, liabilities of the government and local authorities. As at the time this application was argued, there was no evidence and none was brought to the attention of the court that such a criteria is now in place as contemplated under the Transition to Devolved Government Act. Without this criteria, it would be premature to attribute the local authorities' pre-existing liabilities to the county Governments.

It follows that even if the applicant's motion was properly before court, there would still be no basis to hold the county government of Murang'a responsible for liabilities which were hitherto attributed to the Municipal Council of Murang'a.

For the reasons I have given, I am inclined to conclude that the applicant's amended notice of motion dated 17th October, 2013 is not only defective but it also misconceived. It is dismissed except that parties will bear their on costs.

Signed, dated and delivered this 12th day of March, 2014

Ngaah Jairus

JUDGE