



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 354 OF 2012**

**IN THE MATTER OF: AN APPLICATION BY WACHIRA NDERITU, NGUGI & CO.  
ADVOCATES FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS.**

**AND**

**IN THE MATTER OF:**

- 1. THE HIGH COURT MISC. APPLICATION 631 OF 2009.**
- 2. THE HIGH COURT MISC. CIVIL APPLICATION NO. 632 OF 2009**
- 3. THE HIGH COURT MISC. CIVIL APPLICATION NO. 538 OF 2009**
- 4. THE HIGH COURT MISC. CIVIL APPLICATION NO. 360 OF 2011**
- 5. THE HIGH COURT MISC. CIVIL APPLICATION NO. 361 OF 2011**

**WACHIRA NDERITU, NGUGI & CO. ADVOCATES.....APPLICANT**

**VERSUS**

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

**JUDGEMENT**

1. By a Notice of Motion dated 15<sup>th</sup> October 2012 filed in this Court on 15<sup>th</sup> October 2012, the ex parte applicant herein seeks the following orders:

**1. That an order of mandamus now be issued and the same be directed to the Town Clerk, City Council of Nairobi.**

**2. That the Town Clerk, City Council of Nairobi shall comply by paying to the applicant within seven (7) days the sum of Kshs. 31,333,689.83 being the decretal sum payable to the applicant in respect of the High Court Misc. Civil Application Nos. 631, 632 and 538 of 2009 and 360 and 361 of 2011 respectively.**

**3. That in default, notice to show cause do issue against the town Clerk, City Council of Nairobi for him to show cause why he should not be cited for contempt of court.**

**4. That the costs of this application be provided for.**

2. The Motion is based on the grounds set out in the statutory statement and verifying affidavit filed herein on 25<sup>th</sup> September 2012. According to the said documents, by decrees variously issued by this Honourable Court, the respondent was ordered to pay the applicant a total sum of Kshs

- 31,333,689.83 which sum of money remains unpaid to date. The ex parte applicant has annexed to the verifying affidavit copies of the said decrees.
3. Despite being served with the application the respondent neither filed any documents in opposition to the Motion nor appeared at the hearing of the Motion.
  4. In their submissions, the applicants contended that in light of the provisions of section 263A of the Local Government Act, Cap 265, Laws of Kenya, the only recourse available to a decree holder is to apply for mandamus against the Chief Officer of the local officer of the local authority, and upon obtaining such orders, the decree holder will be at liberty to apply for committal of the Chief Officer if the order of mandamus is not complied with.
  5. Section 263A of the *Local Government Act, Cap 265, Laws of Kenya* provides as follows:

*Notwithstanding anything to the contrary in any law—*

*(a) where any judgment or order has been obtained against a local authority, no execution or attachment or process in the nature thereof shall be issued against the local authority or against the immovable property of the local authority or*

*its vehicles or its other operating equipment, machinery, fixtures or fittings, but the clerk of the local authority shall, without delay, 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 thereto;*

*(b) no immovable property of the local authority or any of its vehicles or its other operating equipment, machinery, fixture or fittings shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the clerk of the local authority.*

6. Therefore the law as it stands presently is that no execution can be levied against the property of a local authority in settlement of a decree in a civil case and hence the only recourse available to a decree holder is to apply for *mandamus* against the Chief Officer of the Local Authority, and upon obtaining such orders, the decree holder will be at liberty to apply for committal of the Chief Officer if the order of *mandamus* is not complied with. See **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441** where it was held:

**“The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/ and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the *mandamus* order using this method. There is only one rider – an officer can only be committed where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...Local Authorities Transfer Fund Act, which provides funds to local authorities, part of which should be used to pay debts does not provide for their attachment since section 263A of the Local Government Act prohibits it. It just enables the Local Authorities to honour their debt obligations including those covered by a mandamus order. The Local Authorities have to pay as a matter of statutory duty or in the case of mandamus in obedience to the order from the state or the Republic. There is no provision in the LATF Act for attachment or execution”.**

7. Having considered the material on record and in the absence of any impediment, I do not see why the respondent should not be compelled to perform its statutory duty by settling the sums due from it to the applicant..

8. In the result I allow the application the Notice of Motion dated 15<sup>th</sup> October 2012 and direct the respondent to pay the applicant the sum of Kshs 31,333,689.83 within 30 days and in default the applicant be at liberty to take out notice to show cause against the Clerk to the defendant as sought in prayer 3 thereof. The applicant will also have the costs of the Motion.

**Dated and Delivered at Nairobi this 4<sup>th</sup> day of February 2013**

**G V ODUNGA**

**JUDGE**

Delivered in the presence of Mr Nderitu for the applicant.