



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 23 of 2011

IN THE MATTER OF SECTION 263(A) OF THE LOCAL GOVERNMENT ACT CHAPTER 265
OF THE LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

EX PARTE

DAVID NJOGU T/A D. NJOGU & CO. ADVOCATES

JUDGEMENT

1. By a Notice of Motion dated 23rd February, 2011 filed in this Court on 2nd March 2011 October 2012, the ex parte applicant herein, **David Njogu T/A D Njogu & Co. Advocates**, seeks the following orders:

1) That this Honourable court be pleased to issue an order of Mandamus compelling the Town Clerk City Council of Nairobi to cause and effect payment to the ex-parte Applicant out of the revenue and income of the City Council of Nairobi the sum of Kshs 179,018.00/= together with interest thereon at 14% per annum from 8th September 2010 until payment in full, being the balance due and owing from the decretal sum awarded to the ex-parte Applicant in CMCC 1231 of 2010 D. Njogu & Company Advocates – vs – City Council of Nairobi.

2) That costs of this application be provided for.

3) The Motion is based on the grounds set out in the statutory statement and verifying affidavit filed herein on 23rd February 2011.

4) According to the said documents, the applicant was retained by the respondent between 1999 and 2007 to render legal services on various matters which the applicant did. However, despite rendering fee notes to the respondent, the respondent did not settle the same hence the applicant filed his bills which were assessed in the total sum of Kshs 467,652.00. Following the failure to settle the same the applicant instituted CMCC No. 1231 of 2010 **D Njogu & Company vs. City Council of Nairobi** for recovery thereof and obtained a summary judgement in the total sum of Kshs 530,592.00 with interest at the rate of 14% per annum from 30th July 2010 till payment in full. The respondent, however, settled the sum of Kshs 351,574.00 leaving Kshs 179,081.00 outstanding which continues to attract interest at the same rate. By dint of section 263A of the Local Government Act the applicant is unable to execute the decree although the Town Clerk, City Council of Nairobi is statutorily obligated to cause and effect payment of the sums decreed by the Honourable Court to be paid to the applicant and this Court has jurisdiction to issue the orders sought herein.

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) I however note that since the sum of Kshs 351,574.00 had been paid, assuming the same was paid towards the settlement of the principle sum, the balance of the principal sum would be Kshs 116,078.00 which is the only sum for which interests is chargeable. This is due to the fact that interests cannot be charged on interests as opposed to the principal sum.

9) Accordingly I grant the mandamus sought to the extent that the Town Clerk of the respondent effects payment of the interests, if any, that accrued on Kshs 467,652.00 till the date of payment of Kshs 351,574.00 at the said rate of 14% and a further Kshs 116,078.00 being the balance of the principal sum plus interests at that rate from the date of the said payment till payment in full.

Dated at Nairobi this 1st day of March 2013

G V ODUNGA

JUDGE

Delivered in the absence of the parties.