



IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO.66 OF 2011

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO
COMMENCE JUDICIAL REVIEW RELIEFS OF MANDAMUS**

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT (CAP 265 L.O.K.)

AND

**IN THE MATTER OF NAKURU HCC MISC. APPLICATION NO.396 OF 2008, 379 OF 2008, 398
OF 2008, 399 OF 2008, 400 OF 2008, 401 OF 2008, 402 OF 2008, 403 OF 2008, 404 OF 2008, 405
OF 2008, 406 OF 2008, 407 OF 2008, 408 OF 2008 AND 409 OF 2008**

BETWEEN

DOMINIC MUKUI KIMATTA

T/A KIMATTA & COMPANY ADVOCATES.....APPLICANT

VERSUS

THE CLERK, MUNICIPAL COUNCIL OF NAKURU.....RESPONDENT

RULING

The firm of Kimatta and Company Advocates was retained and rendered legal services in various court matters on behalf of the respondent, the Municipal Council of Nakuru. The applicant having rendered the aforementioned services to the respondent, the latter has declined and/or neglected to settle the applicant's fees amounting to Kshs.510,317.10 due and owing to the applicant, who has brought this judicial review application for the order of mandamus to compel the respondent to settle the debt in question.

The applicant has averred that there have been several demand notices to the respondent which have been ignored. That the respondent is under a statutory to pay the sum.

The application was argued *ex parte* after the respondent, despite service failed to respond or attend court when the application came up for arguments.

An order of mandamus shall issue to compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. Is the respondent

under a duty to pay; is that a public duty imposed on it by a statute?; has it failed to perform that duty to the applicant's detriment?

Section 263A of the **Local Government Act** provides that:

“263A. 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.”

(Emphasis supplied)

The above provision is significant in this application in two ways. The applicant cannot enforce the fees by way of execution. But more importantly, the respondent, through its Clerk is under a statutory duty to settle all lawful claims against the respondent without delay. Certificates of taxation in respect of all the cases involved are annexed to the affidavit. Those certificates constitute an order in terms of **Section 263A** of the **Local Government Act**.

The failure by the respondent to pay this debt over several years is in clear violation of the statute and is without justification. The applicant has suffered prejudice as a result of the delay or failure to pay.

In the result, it is ordered that mandamus shall issue and the respondent is hereby compelled to perform its public/statutory duty in terms of **Section 263A** aforesaid with regard to the applicant's claim against it.

Costs to the applicant.

Dated, Signed and Delivered at Nakuru this 1st day of March, 2012.

W. OUKO

JUDGE