



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 256 of 2012

IN THE MATTER OF: AN APPLICATION BY MUCIIMI MBAKA & CO. ADVOCATES
FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS

AND
IN THE MATTER OF: LOCAL GOVERNMENT ACT
BETWEEN

MUCIIMI MBAKA & CO. ADVOCATES.....APPLICANT

VERSUS

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

JUDGMENT

The application for determination by this court is the Notice of Motion dated 16th July 2012 filed by the Exparte Applicant Muciimi Mbaka and Co. Advocates (*hereinafter referred to as the Applicant*) which 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 pay to Muciimi Mbaka & Co. Advocates Kshs.4,863,864.21 together with costs and interest thereon in satisfaction of the decrees issued by this honourable Court in:-

- (a) Miscellaneous Civil Application Number 759 of 2009 (Nairobi Civil side), and
- (b) Miscellaneous Civil Application Number 358 of 2010 (Milimani Commercial and Tax Division)

2. **THAT** costs of this application be provided for.

The application is premised on grounds stated in the statutory statement dated 22nd June 2012 and is supported by the verifying affidavit sworn by Muciimi Mbaka on the same date.

The application is opposed through grounds of opposition filed by the Respondent on 21st July 2012. The Respondent is the Town Clerk of the City Council of Nairobi.

The Applicant's case is elaborately spelt out in the grounds supporting the motion and in the verifying affidavit sworn by Muciimi Mbaka whose firm of advocates is the Exparte Applicant in this

case. He stated that between the Year 1999 and 2009, he rendered legal services to the City Council of Nairobi by representing it in various civil suits filed both at the High Court and in the subordinate courts.

In the Year 2009, the Applicant filed bills of costs for taxation in the High Court Civil Division in Misc. Civil suits Nos.758, 759, 760, 777, 779, 799, 804, 805, 806, 807, 809, 819, 820, 821, 822, 823, 824, 825, 826 and 827 all of Year 2009.

In Year 2010, the Applicant also filed bills of costs in Milimani Commercial and Tax Division in High Court Misc. suits Nos.358, 359, 360, 361, 362, 363, 364, 365, 366, 438, 439, 440, 441, 442, 443 and 444 all of Year 2010.

The bills of costs were taxed and certificates of taxation issued which were forwarded to the Respondent's Council for payment. The Respondent refused to pay the amounts claimed .

It is the Applicant's case that he subsequently applied for consolidation of the bills filed in the High Court Civil Division into one suit and those filed in the Commercial and Tax Division into another suit. The matters filed in the Nairobi High Court Civil Division were consolidated into Misc. Civil Suit No.759 of 2009 and judgment was entered in favour of the Applicant against the City Council of Nairobi in the sum of Kshs.3,113,886.66. A decree to that effect was issued on 8th February 2012.

The matters at the Milimani Commercial and Tax Division were consolidated into Misc. Civil Suit No.358 of 2010 and judgment was entered in favour of the Applicant against the City Council of Nairobi in the sum of Kshs.1,749,977.55. A decree was issued to that effect on 9th February 2012.

The two decrees are annexed to the verifying affidavit and are marked as exhibits "MM2". They show that the total decretal amount awarded to the Applicant against the City Council of Nairobi is in the sum of Kshs.4,863,864.21 together with costs and interests.

On 17th February 2012, the Applicant wrote to the Respondent forwarding the two decrees and demanding payment of the total sums specified therein. By the time of commencing these proceedings payment had not been effected.

The Respondent did not file any replying affidavit in response to the Applicant's claim but purported to make statements of fact in the grounds of opposition filed on 27th July 2012.

I think it is important to note at this juncture that grounds of opposition are supposed to raise objections to an application on points of law only. If the Respondent wanted to dispute the factual basis of the Applicant's application, he ought to have filed a replying affidavit. The Respondent , in his wisdom ,chose not to do so in this case.

Be that as it may, the Respondent's case is that the City Council of Nairobi was not indebted to the Applicant for the sums claimed since it had not retained the Applicant to represent it in the various Civil Cases filed at the High Court Nairobi. The Respondent claimed that the decrees obtained by the Applicant and served on the Respondent through letter dated 17th February 2012 were fraudulent as the Respondent was never served with the pleadings of the alleged High Court cases giving rise to the taxed costs. In the circumstances, the decrees could not be honoured.

Having carefully considered the pleadings herein and the written submissions filed by advocates on record for the parties, I find that it is not disputed that the Respondent was served with decrees issued in High Court Misc. Civil Appn.No.759 of 2009 and Misc. Civil Appn. No.358 of 2010 through letter dated 17th February 2012 and by the time the Applicant commenced these proceedings payment had not been effected.

The Respondent's claims that the Applicant is not entitled to payment of the sums decreed in annexures marked MM2 as he was not instructed to represent the City Council of Nairobi in various suits

and that the decrees had been obtained fraudulently are misplaced and cannot be given any weight by this court. They are mere allegations with no probative value since they were not statements made under oath. As indicated earlier, the Respondent did not file a replying affidavit in this case.

Secondly, the claim that the Applicant had no instructions to represent the Respondent in the various civil suits specified in the pleadings herein ought to have made before the Deputy Registrar in opposition to the taxation of the Applicant's bill of costs and not before this court.

The Respondent's further claim that the two decrees were obtained fraudulently cannot be entertained because the Respondent ought to have contested the validity or otherwise of the decrees in the suits in which they were issued so that if proved to have been fraudulently obtained appropriate orders would be made. There is no evidence availed to this court to show that the Respondent had at any time contested the validity of the said decrees.

As matters now stand, the Applicant has presented this court with two decrees issued by the High Court showing that the City Council of Nairobi is indebted to the Applicant in the total sum of Kshs.4,863,864.21 together with costs and interest. There is no evidence to show or suggest that the two decrees were not validly issued by the High Court. I have perused the said decrees and have noted that they both bear a stamp endorsed by the Deputy Registrar, High Court of Kenya.

Having made the foregoing findings, I now wish to consider whether the Applicant is entitled to the order of mandamus as sought in this case.

An order of mandamus is issued to compel the performance of a public duty or a duty imposed by statute where there has been failure to perform the said duty to the detriment of an aggrieved party.

A Local Authority has a legal obligation and a public duty to satisfy decrees issued against it and the person entrusted with this task is the Clerk to the Local Authority who according to Section 129(1) of the Local Government Act is the Chief Executive and Administrative Officer in-charge of coordinating the operations of a Local Authority.

The Respondent herein is the Clerk to the City Council of Nairobi, the Local Authority against which the decrees exhibited herein were issued. The Applicant's demand for payment in letter dated 17th February 2012 has to date not been complied with and the sums in the said decrees are still outstanding.

Section 263A of the Local Government Act requires the Clerk of a Local Authority to pay without delay sums awarded in a judgment or order to the person entitled out of the revenue of the Local Authority.

As the Respondent has failed or refused to pay the Applicant the monies decreed in annexures "MM2", it is evident that he is in blatant breach of the express duty imposed on him by statute to satisfy decrees issued against the City Council of Nairobi out of the revenues generated by the Council. I do not see any reason why the Respondent should not be compelled to pay the Applicant without delay, the decretal sums due out of the revenue of the City Council of Nairobi.

I am therefore satisfied that the application dated 16th July 2012 is merited and it is hereby allowed. An order of mandamus is consequently issued to compel the Respondent to pay the Applicant a total sum of Kshs.4,863,864.21 together with costs and interest as specified in decrees issued in Misc. Civil App.No.759 of 2009 and Misc. Civil App.No.358 of 2010.

The applicant is also awarded costs of the application.

DATED, DELIVERED and SIGNED this 6th day of **November** 2012.

C.W. GITHUA

JUDGE

In the presence of:

Florence - Court Clerk

N/A for Applicant

Mr. Amadi for Respondent