



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

MISC. CIVIL APPLICATION NO. 58 OF 2010

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL

REVIEW

ORDER OF MANDAMUS

REPUBLIC OF KENYA.....

....APPLICANT

-VERSUS-

**TOWN CLERK, MUNICIPAL COUNCIL
OF MOMBASA.....**

....RESPONDENT

Ex Pare Applicant: CROWN PETROLEUM (K) LIMITED

JUDGMENT

The Notice of Motion dated **4th June, 2010** was brought under Order LIII (rules 1, 3) of the Civil Procedure Rules, Part VI of the Law Reform Act (Cap. 26, Laws of Kenya), and s. 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya). The application had one prayer:

*that an Order of Mandamus do issue compelling the Town Clerk, to pay Kshs. 515,082/00 with interest at the rate of 12% per annum as from **8th December, 2009** to the applicant, being party-and-party costs in High Court Civil Case No. 291 of 2008.*

The grounds are set out in the Statutory Statement filed on **7th May, 2010** and in the verifying affidavit filed on even date.

It is stated that the applicant had obtained an order against the respondent for payment of costs, and a certificate of taxation dated **8th December, 2009**; but the respondent has failed to remit the specified amount to the applicant, despite being requested to do so by a letter dated **15th December, 2009**.

Tubmun Otieno, the respondent’s Town Clerk, swore a replying affidavit on **14th July, 2010**, the essence of which may be summarized as follows: he is aware of the Deputy Registrar’s taxation ruling of **30th November, 2009** in HCCC No. 291 of 2008 — **Crown Petroleum (K) Limited v. Municipal Council of Mombasa & Another**, and of the fact that the amount taxed and due for payment was Kshs.

515,082/00; the respondent has financial constraints and is not yet able to pay up; he was asking that the respondent be allowed to pay by monthly instalments of Kshs. 50,000/=; if the respondent was compelled to pay the total taxed amount at once, this would “*cripple ... the Municipal Council of Mombasa*”; the respondent is at the moment settling other Court decrees; the respondent has not declined to pay up.

When this matter came up for hearing on **28th October, 2010** the *ex parte* applicant was represented by learned counsel **Ms. Muthee**, while the respondent was represented by learned counsel, **Ms. Langat**.

Ms. Muthee asked for grant of orders of mandamus, with costs. She urged that while the respondent’s Town Clerk had admitted being aware of the certificate of costs which he ought to have acted upon, he had taken no action. Although a consent had been filed in Court, on **2nd September, 2010** for the payment to be made in two instalments, no payment had been received by the *ex parte* applicant. Counsel urged that the applicable statute, the Local Government Act (Cap. 265, Laws of Kenya), placed a duty on the respondent to make suit payments as may be ordered by the Court.

Learned counsel cited relevant cases in which local authorities had been compelled to make payments as ordered by the Court hearing particular disputes: **David Njogu t/a D. Njogu & Company, Advocates v. The Town Clerk, City Council of Nairobi**, Nairobi H.C. Misc. Application No. 339 of 2005 [2005]eKLR(Emukule, J.); **Republic v. Town Clerk, Naivasha Municipal Council, ex parte Benson Muturi Kamande**, Nairobi H.C. Misc. Civil Application No. 1046 of 2007 [2008] eKLR (Dulu, J.).

Learned counsel **Ms. Langat** submitted that, while the respondent indeed had a duty to pay the costs as taxed by the Deputy Registrar, there were financial constraints inhibiting the discharge of this obligation. Counsel submitted that the respondent had major financial obligations to be met on a daily basis; that the respondent had a large wage bill; that the respondent was already paying up on several Court decrees. She asked that the respondent be allowed to pay by instalments. Counsel sought to rely on the **David Njogu** case as an instance in which instalmental payment was allowed; but **Ms. Muthee** had the riposte that the respondent had in that case shown good faith by writing a cheque; by contrast, such good faith had not been shown in the instant case.

By virtue of ss. 263 (3) and 263A (a) of the Local Government Act, a local authority’s obligation to pay up in accordance with Court decrees is recognized; and so, I cannot find in favour of the respondent in this case. As there is already a default in making payment in two instalments, I will make orders as follows:

- (1) An order of Mandamus shall issue compelling the Town Clerk, Mombasa Municipal Council to pay Kshs. 515,082/00 with interest at the rate of 12% per annum as from 8th December, 2009, to the applicant.**
- (2) The said payment shall be made in full by 31st March, 2011.**
- (3) The respondent shall bear the costs of this proceedings.**

DATED and DELIVERED at MOMBASA this 4th day of March, 2011.

J. B. OJWANG
JUDGE

Coram: **Ojwang, J**
Court Clerk: **Ibrahim**
For the Applicant: **Ms. Muthee**
For the Respondent: **Ms. Langat**