



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Civil Appli 168 of 2007

**IN THE MATTER OF AN APPLICATION BY ROYAL INSURANCE COMPANY LIMITED
FOR ORDERS OF MANDAMUS**

AND

**IN THE MATTER OF THE LOCAL GOVERNMENTS ACT CHAPTER 265 OF THE LAWS OF
KENYA**

AND

**IN THE MATTER OF THE NAKURU CHIEF MAGISTRATE'S COURT CIVIL SUIT NO.2094
OF 2004 JUDGMENT DATED 27TH APRIL 2005**

BETWEEN

REPUBLIC.....APPLICANT

AND

TOWN CLERK MUNICIPAL COUNCIL OF NAKURU..... RESPONDENT

EX-PARTE: ROYAL INSURANCE COMPANY LIMITED

RULING

Before me is a Notice of Motion dated 26th March 2007 filed by M/s Mukite Musangi & Company advocates on behalf of the ex-parte applicant named as **ROYAL INSURANCE COMPANY LIMITED**. The respondent is the **TOWN CLERK MUNICIPAL COUNCIL OF NAKURU**.

The application was brought under Order LIII Rule 3 (1) of the Civil Procedure Rules and was said to be pursuant to leave granted on 8th March 2007. The orders sought are as follows-

- 1. THAT the Honourable court be pleased to issue an order of mandamus compelling the Town Clerk of the Municipal Council of Nakuru to satisfy the terms of the judgment in Nakuru CMCC No.2094 of 2004 and to pay the balance of the amount decreed therein being Kshs.793,517/30 in favour of the subject against the Municipal Council of Nakuru without any delay.***
- 2. THAT the costs of this application be provided for.***

The application was filed with a **SUPPORTING AFFIDAVIT** sworn on 26th March 2007 by

KENNETH KIMANI the Executive Manager of the applicant company. The application is grounded on the **STATEMENT** dated 27th February 2007 and the **VERIFYING AFFIDAVIT** sworn on 27th February 2007 by **KENNETH MWANGI**. The documents filed show that judgment was obtained in the subordinate court civil case, and the respondent had so far only paid Kshs.390,199/50, thus leaving unpaid an amount of Kshs.793,517/30.

The respondent filed a replying affidavit sworn by **ALBERT LEINA** the Town Clerk on 28th November 2007. It is deponed in the said affidavit, that the Municipal Council (of Nakuru) was aware of CMCC No. 2094 of 2004 and not CMCC No. 2360 of 2004. It was also deponed that it was not true that the Municipal Council had refused to pay, but that there were financial constraints which made the Council fail to honour instalment payments as consented to on 27th April 2005 in CMCC 2094 of 2004. It was deponed that the respondent was pleading or should be given more time to pay the outstanding amount.

On the hearing date Mr. Ochwo appeared for the applicant, while Mr. Mbeche appeared for the respondent. Mr. Ochwo made submissions in support of the application. Mr. Mbeche opposed the application, mainly on the basis that the applicants did not disclose that they had been paid a further Kshs.200,000/=. In addition, the application is opposed on the ground that the applicant has not proved under S.363 of Local Government Act (**Cap. 265**) that the Council has money and has refused to pay. It was also contended that the respondent has been barred to collect rates in High Court Application No.31 of 2009.

Having considered the application, documents filed and submissions of counsel for the parties, I am of the view that the debt owing is not disputed. If an additional instalment or instalments have been paid by the respondent, that merely reduces the debt owing, but does not discharge the respondent. I find no non-disclosure of material facts that would make this court make an adverse decision against the applicants.

On section 363 A of the Local Government (**Cap. 265**), same was not raised as a ground in the filed response of the respondent. In any event, I see no requirement in law that an applicant must prove that the Council has money to pay. It is in fact the respondent who should show their inability to pay debt, and that could possibly have consequences bordering on bankruptcy, which is not an issue here. The prudent thing is for the respondent who has a statutory obligation, to arrange payment, even if in instalments. There is no evidence in any case that the Council has ground to a halt financially. Court orders should be among the first debts to be paid.

I find that the defence of the respondent is a slam. It is not a sustainable defence by any standards. The respondent has failed to discharge his statutory duty. I find that the applicant has established a case for the grant of the judicial review orders of mandamus, to order him to perform his statutory duties. Consequently, I allow the application and order as follows

1. ***An order of mandamus be and is hereby issued compelling the Town Clerk of the Municipal Council of Nakuru to satisfy the terms of the judgment in Nakuru CMCC No.2094 of 2004 and to pay the balance of the amount decreed therein being Kshs.793,517/30 in favour of the exparte applicant against the Municipal Council of Nakuru without any delay.***

2. ***The respondent will pay the costs of this application tot eh applicant.***

Dated and delivered at Nairobi this 6th day of July, 2009.

GEORGE DULU

JUDGE

In the presence of-

Mr. Ochwo holding brief for Mr. Musangi for the applicant

Mr. Serem holding brief for Mr. Mbeche for the respondent

Kevin – Court Clerk.