



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

**Misc Appli 272 of 1995**

**Karen & Lang'ata District Association.....APPLICANT**

**VERSUS**

**City Council of Nairobi & another.....RESPONDENT**

**RULING**

March 12, 1999, Lesiit J delivered the following Ruling.

Every time I hear the two counsel in this case in the many times they appeared before me on it, I usually get impressed by the eloquence and ability in which they espouse the diametrical views in the positions they take yet one of them must be wrong and the other right. This application is no exception. It is an application by Karen Lang'ata District Association dated 29-5-98 made under Notice of Motion dated 29-5-98 made under Notice of Motion based on SS 3A,34 and 89 of the Civil Procedure Act and S.5 of the Judicature Act. It is supported by the affidavit of the Associations' Acting Chairman Mr Mike Mills sworn on 25-5-98. The prayers in the Motion are:-

1. ---
2. That the Town Clerk and the City Treasurer of the City Council of Nairobi be committed to civil jail for six months or other period as to the court may be just and fitting in the circumstances of the case, for being in contempt of the order of the Court made on 27<sup>th</sup> January, 1998 and duly issued by the High Court of Kenya at Nairobi.
3. THAT pending the establishment of a special rates fund for the area of the Karen & Langata District Association by the City Council the order for Status quo shall continue to be observed and the members of the Karen & Langata District Association may continue to pay rates into the special account maintained by the Association and the City Council shall recognise such payment to the Association as payment properly made for all purposes including the issue of rates clearance certificates.
4. THAT ad interim there be a stay on the charging of any interest chargeable on rates payable by the residents of the Association's area paying rates into the Association's special rates Account.
5. THAT pending the establishment of the special rate fund by the Civil Council of Nairobi as ordered by the Court on 27<sup>th</sup> January 1998, the City Council of Nairobi do fully and accurately account to the Karen & Langata District Association the persons or rat payers in the area of the Association who have

paid their rates to the City Council since that date and the amounts paid and the Association also shall account to the City Council of Nairobi the rates paid to the Association.

Ground No 2 was abandoned at the hearing.

The gist of the case by the applicant is that on 27-1-98 this court ordered through issue of mandamus the City Council of Nairobi to establish a special rate fund for the administrative area covered by the Karen Lang'ata District Association. The applicants complain that the Council has failed to start a fund as was ordered and instead are asking the rate payers to pay the charges notwithstanding. They have said that in their own accounts' report the Council acknowledged the fact that their (the Council's) accounts were not properly kept and the Associations members feel that rather than pay their money into such doubtful State they should keep it themselves and by so doing they claim there is an order by this Court for status quo which has not been discharged and which supports that position and also that if the Council is refusing to start a special fund then they (the Council) are in contempt, and so in addition to than being punished the Council should not be allowed to benefit from its contempt by receiving revenue from Lang'ata Karen Association members. Their fear is enhanced by the muddle shown by the Council by the demands the council is making for payment even from members who have in fact made those payments. Mr Mwenesi Learned Counsel for the Applicant abandoned prayer<sup>2</sup> of the Application leaving only grounds 3,4 and 5 of the Motion. He said the Court ordered establishment of Special Rate Fund but notwithstanding the Council is saying they are the ones to collect fund and not Lang'ata /Karen Association. He thinks this is like asking the Association to disobey an order of this Court and he relied on the Court of Appeal decision in Civil Application No NAI 103/98 The Pharmacy & Poison Board vs Sipri Pharmecenticals Ltd which says that a Courts order must be obeyed until set aside. The Applicants are ready to pay unless they know what Fund account they are paying into. Unless that is done the status quo as at 27-1-98 should continue.

Miss Kittony learned counsel for the Respondent relying on the affidavit of John O. Ongele sworn on 24-6-98 said that the order over prayer C was for the establishment of rate fund but she challenged the status quo now demanded by the Applicants as being ambiguous as it could not continue after 27-1-98. She said the Council does not deny establishment of Special Fund and in fact they are about to do it but she said the Karen Lang'ata Association cannot collect rates as the same can only be done by the Municipality as a rating authority.

The issue as I see here is whether the Ruling of mandamus compelled the Council to do a Statutory duty and if so which one. Secondly where the council fails to comply with the order as requested should the Applicant succumb and acquiesce in the defied order.

In this case both sides agree that the ruling commanded the establishment of a Rate Fund. The decree reads in part (2) –

“THAT an order of Mandamus do and is hereby issued to compel the Minister for Local Government to exercise the powers conferred by S 246(1) of the Local Government Act to direct the first Respondent to perform the duties imposed upon it by the Local Government Act and other Written laws for the benefit of the Applicants and for the purposes of proper accountability to the electorate in the Applicants area.”

These directions have not been given by the Minister. If they had been given in accordance with the order such directions would show what action would be taken incase of default to comply with it. This has put the Applicants in an embarrassment because having obtained the order, the Minister and the Council have done nothing to comply. The result is that the Council is saying to the Applicant, “you have the order now, but it means nothing as we shall do what you complain about anyway and force you to comply even though what you are to comply with the is an illegality”. This is improper. All local authorities should justify the exercise of their powers by reference to law and statute. Miss Kittony did not argue any exemption clause in the Local Governments Act Cap 265 that would absolve them from obeying the Court order. If this was to be a judgment that could be executed then the Act provides at S263A that execution would be done and such decretal amount would be paid from the Revenue of the Council.

There is nothing stated anywhere that would redress a situation where a prerogative order is not

disobeyed by the Council and what happens to the Applicant. I cannot see that this Court or any court would allow its order to be flouted. That only only be done by appeal Court on nullifying the original order, but the Respondent here did not appeal against that order.

The order which was given earlier before the case was heard was a Consent Order when both sides agreed on 17-5-96 that status quo as at then would remain until further orders. The reason was that the Applicant Association was worried that as at the 31<sup>st</sup> of May 1996 they would be in breach of some regulation since they were keeping revenue from their members in an account and not delivering it to the Council. This consent order had the effect of maintaining that situation and when the ruling was read on 27-1-98 that order was not discharged, and I think it can only be discharged if mandamus is obeyed or discharged by consent. My view is that in so far as the order of mandamus remains unperformed, I think that consent order should remain otherwise it would make the ruling of the Court be in vain, and make those who have complied be victims for obeying the law. This would not be the policy of the law.

The order must remain otherwise the judgement of the court would be in vain.

Under S34 of the Civil Procedure Act it is provided:-

34. (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.”

Miss Kittony argued persuasively that the Council cannot be ordered to do anything by depriving it of its Statutory right to collect rates. She said that it is only the local authority that can collect rates but what should be understood is that at this stage the Court does not question the validity of the Decree or the decision. The Court would assume that a valid Decree exists. Otherwise then there ought to be a distinct suit. Under the Rating Act Cap 267 and Valuation for Rating Act Cap 266 the Local Authority is the one to assess and impose rates, but here the question is not about imposing rates but opening of Rate Funds as is required in Cap 265 i.e SS 216, 217 or 218.

The upshot of all this is that the Mandamus order should be carried out before the consent order can be discharged which would mean that Karen Langata Association would continue holding the collected funds for rates from its individual members on account until a Special Rate Fund account is opened by the City Council wherein the said amount would be accounted into. It is unlawful act to pay rates to the Council towards a non-existent account or to one unknown by law.

Each party to bear his own costs of this application.

March 12, 1999

Lesiit, J