



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.561 OF 2009**

**FRANCIS MWANGI MAINA ..... 1<sup>ST</sup> CLAIMANTS**

(Being the Chairman of Nairobi City Council Retirees Welfare  
Association and suing on behalf of members of the Association)

**DOMINIC VINCENT MAMBE ONYANGO ..... 2<sup>ND</sup> CLAIMANTS**

(Being the Treasurer of Nairobi City Council Retirees Welfare  
Association and suing on behalf of members of the Association)

**VERSUS**

**THE CITY COUNCIL OF NAIROBI .....1<sup>ST</sup> RESPONDENT**

**THE TOWN CLERK OF THE**

**CITY COUNCIL OF NAIROBI ..... 2<sup>ND</sup> RESPONDENT**

**THE CITY TREASURER OF THE**

**CITY COUNCIL OF NAIROBI ..... 3<sup>RD</sup> RESPONDENT**

**THE LOCAL AUTHORITY PENSION TRUST FUND .....4<sup>TH</sup> RESPONDENT**

**AND**

**CO-OPERATIVE BANK OF KENYA LTD .....GARNISHEE**

**RULING**

1. By application and Notice of Motion dated 17<sup>th</sup> august 2016 the Claimants are seeking for orders that;

1. ...

2. An Order nisi do issue that monies held to the credit of the 1<sup>st</sup> respondent/judgement debtor now known as the Nairobi City County Government in deposit account Numbers 01141232396601 and 01141232396600 at the Cooperative Bank of Kenya Ltd, city Hall Branch Nairobi be and are

hereby attached to settle and or satisfy the balance Decretal Sum of Kshs.25, 234,975.00 as at 6<sup>th</sup> July 2016 together with interest at court rates (12% per annum) costs of this claim and costs of this Garnishee Proceedings.

3. The 1<sup>st</sup> respondent/judgement debtor now known at Nairobi City County Government be restrained by a temporary injunction from operating, withdrawing funds in cash, cheque, real time gross settlement and or electronic transfer from its account Numbers 01141232396601 and 01141232396600 at the Cooperative Bank of Kenya Ltd, city Hall Branch Nairobi pending the hearing and determination of this application, Garnishee Proceedings, further court orders and or directions.

4. A Garnishee Order do issue to compel the Cooperative Bank of Kenya Ltd, City Hall Branch Nairobi to pay the applicants/Claimants s/decree holders a sum of Kshs.25, 234,975 together with costs of the garnishee proceedings through the applicants/Claimants /decree holders' Counsel's Account Number [particulars withheld] in the name of Achola Jaoko & Co. Advocates at the Cooperative bank of Kenya Ltd, City hall Branch Nairobi.

5. The costs of this application be provided for.

2. The application is supported by the annexed affidavit of Dominic Mambe Onyango and on the grounds that the 1<sup>st</sup> Respondent as the judgement debtor has failed to settle a substantial outstanding sum of Kshs.25, 234,975.00 being the balance of decretal sum awarded on 5<sup>th</sup> May 2014 together with costs at Kshs.1, 020,895.00 awarded on 5<sup>th</sup> December 2014 plus interests at 12% per annum. There are colossal deposits of revenue into the 1<sup>st</sup> Respondent account at account Numbers 01141232396601 and 01141232396600 at the Cooperative Bank of Kenya Ltd, city Hall Branch Nairobi. There is part payment of Kshs.15, 000,000.00 there is a balance owing of Kshs.25, 234,975.00. The Respondent issued cheque Number 10734 for Kshs, 5,000,000.00 but this was stopped before payment.

3. That the monies due relate to the applicants as retirees from the 1<sup>st</sup> Respondent and will gravely suffer if the payments are not effected.

4. In reply, the Respondents filed the Replying Affidavit of Dr Robert Ayisi the acting County Secretary and avers that the application is *sub-judice* and or *res judicata* since the issue in the present application is directly and substantively in issue in the previous application dated 30<sup>th</sup> September 2015. There is a consent executed by the parties on 16<sup>th</sup> December 2015 which consent was adopted as an order of the court and in favour of the Claimants for Kshs.29, 654,496.00. The payment terms were agreed at instalments.

5. That as part of the consent judgement, Kshs.10, 000,000.00 was to be paid by March 2016 and Kshs.19, 654,469.00 was to be paid by Kshs.2, 000,000.00 instalments per month all ending at 5<sup>th</sup> February 2017. The Claimants have since received Kshs.10, 000,000.00 per the consent and the Respondents are committed to pay the balance due by January 2017.

6. That where the Claimants found the Respondent to have failed to obey a court order, the right thing to do was to apply for contempt proceedings as held in **JSC versus Speaker of the National Assembly & Another [2013] eKLR**. That garnishee proceedings cannot be sustained against a county government as held in **Kilimanjaro Safari Club Limited versus Governor Kajiado County (in place of County Councils of Ol Kajiado) [2014] eKLR**.

7. The Garnishee filed Replying Affidavit of Charity Makunyi the Branch Manager, City Hall Branch of the Garnishee and avers that, account numbers 01141232396601 and 0114123236600 held with them belong to the 1<sup>st</sup> Respondent and the account holds sufficient funds to satisfy the decretal sum of Kshs.25, 234,975.00. The garnishee is in a position to honour any order as the subject debtor's account has sufficient funds to settle the debt.

8. Ms Makunyi also avers that the applicant should meet the garnishee costs of Kshs.15, 000.00.

9. The parties also made their oral arguments in court.

### **Determination**

10. The current application is premised on the failure by the Respondents to pay the decretal sum following consent judgement and orders of 15<sup>th</sup> December 2015. This consent order was arrived at following the application of the Claimants dated 30<sup>th</sup> September 2015. There is non-compliance with the terms of the consent order hence the current application seeking to attach the respondents' accounts and funds therein held by the garnishee. As such, it cannot be a case of *sub-judice or res judicata*. The current application by the Claimants has its context within the consent order that has since been dishonoured by the respondents. The Respondents cannot now hide behind the sub judice or res judicata rules to avoid settling the due debt owing from them following a valid court order.

11. The Respondents admit that since 16<sup>th</sup> December 2015 they have only paid Kshs.10, 000,000.00 to the Claimants s. The consent order set out terms that of the total decretal sum due at kshs.29,654,469.00, it was to be paid through monthly instalments with the first such instalment being paid within 7 days and before 30<sup>th</sup> December 2015 at kshs.5,000,000.00; the 2<sup>nd</sup> instalment of Kshs,3,000,000.00 by 15<sup>th</sup> January 2016; 3<sup>rd</sup> instalment of kshs.2,000,000.00 by 15<sup>th</sup> February 2016; and the balance of Kshs.19,654,469,00 to be settled by equal instalments of Kshs,2,000,000.00 by every 5<sup>th</sup> day of each month until payment in full and commencing 5<sup>th</sup> March 2016.

12. The parties also agreed by consent that in default of any instalment, execution was to issue. I take it both parties were happy with the consent order and as such, the court adopted it as the order of the court based on its agreed terms.

13. Noting the garnishee order is since lifted, this does not in any way remove the Respondents from their debt. The dues owing can still be pursued and the consent order recognised the right to execute in default.

14. The Respondents have since paid kshs.10, 000,000.00. This only covers the dues owing and payable as at 15<sup>th</sup> February 2016 in accordance with the consent order. As such;

March 2016 instalment of 2,000,000.00 is owing;

April 2016 instalment of 2,000,000.00 is owing;

May 2016 instalment of 2,000,000.00 is owing;

15. June, July, August, September, October and November in statements of 2,000,000.00 each are owing to this date. All the outstanding dues amount to Kshs.18, 000,000.00. Such monies are due and owing and should be paid forthwith as the balance due is awaited and based on the terms of the consent order.

16. The orders of the court should not be issued in vain. The consent judgement as the order of the court should not be made to cause the Claimants further pain, expense and go round in circles as they await the Respondent to reply what is due and owing. It is absurd to read the reply by Dr Ayisi at his paragraph 10;

*That I have been advised by the said advocate on record for the 1<sup>st</sup> – 3<sup>rd</sup> Respondents which advice I verily believe to be sound that in any event, if the Claimants are of the view that a court order has not been obeyed, it is trite law that in the instance they should have filed contempt proceedings rather than filing the present application.*

17. Does this then imply that had the Claimants applied for contempt proceedings the Respondent would have paid the owing dues? Far from it, such dues are owing and should be paid without forcing the

Claimants into the expense of filing the current application or any other application for contempt. The court process should not be abused by any party, a Respondent or otherwise. These averments only go to demonstrate that the Respondent is hell-bent in frustrating the Claimants and unless the court intervenes, the payment of owing dues shall not be effected as per the consent order and judgement of 15<sup>th</sup> December 2015.

18. The Claimants have since 2009 been pursuing justice. Judgement was finally delivered on 5<sup>th</sup> March 2014. On 5<sup>th</sup> December 2014 the costs due were assessed. The Respondent did not honour the judgement leading to the Claimants' application dated 30<sup>th</sup> September 2015 and out of which a consent order was filed. Litigation should come to an end.

**In conclusion therefore; the Claimants s' application is allowed in the nature that the Respondents shall pay the sum due and owing to this date [November 2016 instalment] all at Kshs.18, 000,000.00 together with attendant costs herein and within the next 7 days failure to which execution shall issue.**

**Had the Respondents honoured the consent order of 15<sup>th</sup> December 2015, this application would not have been necessary. As such the Respondents shall meet the garnishee costs of Kshs.15, 000.00.**

**Mention in 14 days to confirm compliance.**

Delivered in open Court at Nairobi this 25<sup>th</sup> day of November 2016.

**M.MBARU JUDGE**

In the presence of:

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