Associated Autmobile Distributors (K) Ltd v Mombasa County Government; Oanda & another (Contemnor) (Application 53 of 2006) [2024] KEHC 6262 (KLR) (Judicial Review) (31 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6262 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION 53 OF 2006

J NGAAH, J

MAY 31, 2024

BETWEEN

ASSOCIATED AUTMOBILE DISTRIBUTORS (K) LTD ..... APPLICANT

AND

MOMBASA COUNTY GOVERNMENT ..... RESPONDENT

AND

EVANS OANDA MOMBASA COUNTY EXECUTIVE MEMBER (FINANCE) ..... CONTEMNOR

GLORIA MWASI, CHIEF OFFICER MOMBASA COUNTY GOVERNMENT ..... CONTEMNOR

RULING

1. Before court is the applicant's motion dated 16 January 2024. It is expressed to be filed under section 5(1) of the *Judicature Act*, cap. 8, Articles 10, 73 and 159 of the *Constitution*. The applicant seeks the following orders:

> " 1. That the Application herein be Certified Urgent, to be determined on priority basis, and heard *ex parte* in the first instance.
>
> 2. That Pending the Hearing and Determination of the Application herein, the Respondent be Ordered to deposit in Court or to a joint interest earning Account in the name of the Applicant's Advocates and the Respondent's elected Advocate, a total sum of Kenya Shillings Sixty-Seven Million, Five

Hundred and Fifty- Seven Thousand, Six Hundred and Fifty-Seven and Fifty-Nine Cents (Kes. 67,557, 859.92/-).

3. That the Honourable Court be pleased to issue a Notice against the current County Executive Committee Member for Finance and the Chief Officer - Finance, Mombasa County Government to show cause why they should not be committed to serve 6 months imprisonment for failing to pay the Applicant the sum of Kshs. 17, 751, 529.10/- plus interest, by way of monthly instalments of Kshs. 1,000,000/- as Ordered by the High Court in Civil Suit No. 1311 of 2000 on 4th April 2008 which amount (as at 31st January 2024) having accrued interest, shall stand at Kenya Shillings Sixty-Seven Million, Five Hundred and Fifty-Seven Thousand, Six Hundred and Fifty-Seven and Fifty-Nine Cents (Kes. 67, 557, 859.92/-).

4. That the Honourable Court be pleased to issue a warrant of arrest against the named 1st and 2nd Contemnors herein, being the current County Executive Committee Member for Finance and the Chief Officer - Finance, Mombasa County Government (or any individuals found to be holding the Offices of the County Executive Committee Member for Finance and Chief Officer – Finance, Mombasa County whether on acting capacity or permanent basis at the time of the issuance of the orders herein), to be committed to civil jail for failing to pay the Applicant the sum of Kshs. 17, 751, 529.10/- plus interest, by way of monthly instalments of Kshs. 1,000,000/- as Ordered by the High Court in Civil Suit No.1311 of 2000 on 4th April 2008 which amount (as at 31st January 2024) having accrued interest, shall stand at Kenya Shillings Sixty-Seven Million, Five Hundred and Fifty-Seven Thousand, Six Hundred and Fifty-Seven and Fifty-Nine Cents (Kes. 67, 557, 859.92/-).

5. That any Arrest Warrant issued by this Court pursuant to the Application herein be directed at the DCIO Mombasa County and the OCS Mombasa Central police Station for execution within 14 days of service upon them of the extracted Arrest Warrant and the Order herein.

6. That the Honourable Court be pleased to order and or direct the Respondent, through the offices of the County Executive Committee Member for Finance, Mombasa County and the Chief officer – Finance, Mombasa County Government to pay the Applicant the sum of Kenya Shillings Sixty-Seven Million, Five Hundred and Fifty-Seven Thousand, Six Hundred and Fifty-Seven and Fifty- Nine Cents (Kes. 67, 557, 859.92/-), (plus interest at Court rates until payment in full) being the decretal amount (inclusive of accrued interest to 31st January 2024) in High Court Civil Suit No.1311 of 2000 (Associated Automobile Distributors (K) Ltd Vs Municipal Council of Mombasa); and

7. That the Respondent be Ordered to issue a letter (within 24 Hours of Service of the Order herein) to the Cabinet and Principal Secretaries, Ministry of the National Treasury and Planning, and the Auditor General, Notifying the said offices of the Decretal Amount awarded in High Court in Civil Suit No. 1311 of 2000 on 4th April 2008 which amount (as at 31st January 2024) having accrued interest, shall stand at Kenya Shillings Sixty-Seven Million, Five Hundred and Fifty-Seven Thousand, Six Hundred and Fifty-Seven and Fifty-

Nine Cents (Kes. 67, 557, 859.92/-) confirming the said Judgement Debt to be a Pending Bill and a copy of the said letter be placed in the Court file herein.

8. That costs of this application be borne by the 1st and 2nd Contemnors in their personal capacity."

The application is supported by the affidavit of Benjul Gudka who is a director of the applicant company.

2. According to Gudka, on or about 21 July 2000 the Applicant filed, in this Honourable Court, civil suit No. 1311 of 2000 against the Respondent seeking a payment of Kshs.13, 541, 815. On 10 March 2004 a consent Judgement was entered in favour of the Applicant in the sum of Kshs.13, 541, 815/= together with costs and interest at court rates from the date of default.

3. The Defendant undertook to pay the judgment debt by monthly installments of Kshs.500, 000/= commencing 11 April 2004 and thereafter on the 11th day of each succeeding month until payment in full.

4. On 22 September 2006, an order of Mandamus was issued against the Town Clerk of the predecessor of the Respondent to pay the Applicant Kshs.14, 369, 625.25 together with further accrued interest at court rates (12% per annum) from 1 August 2004 until payment in full. On or about 21 March 2010 a warrant of arrest was issued against the Town Clerk, Municipal Council of Mombasa to be arrested and committed in civil jail for failing to pay instalments in the sum of Kshs.1, 000, 000/= per month as ordered on 4 April 2008.

5. On 8 January 2019, the Respondent entered into another Consent with the Applicant through its Advocates and went ahead to pay a total of Kenya Shillings Four Million, One Hundred and Fourteen Thousand and Eighteen Cents Ten (Kes. 4, 114, 018. 10) as a partial payment towards the judgement debt as was confirmed by the then Mombasa County Executive Committee Member for Finance in her letter of 6th May 2020.As at 31January 2024, Mombasa County Government owed the Applicant Kenya Shillings Sixty-Seven Million, Five Hundred and Fifty-Seven Thousand, Six Hundred and Fifty-Seven and Fifty-Nine Cents (Kes. 67, 557, 859.92/-).

6. The Accounting Officer of Mombasa County Government, the County Executive Officer for Finance, Maryam A. Mbaruk, was even found to have been in Contempt of Court and an arrest warrant was issued against her on 19 December 2018 for failing to remit the Judgement Debt. The arrest warrant was in force when she left office and she was replaced by Evans Oanda the current Mombasa County CEC of Finance.

7. No response was filed to the application. Although Mr. Gudka swore a further affidavit "in response to the respondent's affidavit dated 12th April 2024" there is no such affidavit that has been filed either at the registry or on the Case Tracking System portal.

8. In an earlier application by the applicant seeking to commit the Inspector General of police to prison for failure to enforce warrants of arrest against the County Executive Committee Member for finance for the County Government of Mombasa I noted, inter alia, that when the County Government failed to settle the decretal sum, contempt proceedings were commenced against one Maryam Abdillahi Mbaruk. A warrant of arrest was issued against her on 19 December 2018 thereby implying that she must have been found to be in contempt of court. As at 22 July 2022 when I rendered my ruling, the warrant of arrest had not been executed.

9. I also held that the alleged contemnor was no longer in office and therefore, even if the orders sought in the application were granted, they would no longer serve any useful purpose. In particular, I noted as follows:

> "In considering the merits of the applicant's application, my attention has been drawn to the deposition by Kitonyi to the effect that the 1st contemnor is no longer a County Executive Member for Finance in the County Government of Mombasa. No evidence has been produced to the contrary and all the applicant said in a further affidavit is that the contemnors should have not provided any evidence that the 1st contemnor no longer serves in her position as the Executive Committee Member for Finance. To be fair to the applicant, once the contemnors alleged that the 1st contemnor has ceased holding the office in issue, the burden shifted to the applicant to prove otherwise. In the absence of such proof, the court will presume that the 1st contemnor is no longer the County Executive Committee Member for Finance in the Mombasa County Government.
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> And if this is the position, then the substratum out of which the instant application arises no longer obtains. I say so because I suppose the reason for issue of warrant against the 1st contemnor was, if she purged her contempt and settled the decretal sum as per the order of mandamus served upon her, she would not be committed to civil jail.
>
> But would she be considered to be in contempt of court if she no longer serves the County Government in the same position in which she would have complied with the court order? Put differently, can she be said to be in contempt of court if she does not have the mandate to make the payments in settlement of the court decree? My answer to this question would be in the negative and that being the case, her arrest at this time would of no consequence."

10. The application was dismissed but I noted that the mandamus order had not been complied with and it was upon the applicant to make the appropriate application for issue of a fresh warrant of arrest. I noted:

> "That said, it is common ground that the decree has not been settled and the applicant cannot be left without a remedy. The mandamus order subsists and has to be complied with by the holder of the office of the County Executive Committee for Finance of the Mombasa County Government.
>
> It is incumbent upon the applicant to make the appropriate application for issue of a fresh warrant of arrest."

11. In this application, the applicant appears to have taken cue and now seeks issue of a warrant of arrest against the current holders of the offices of County Executive Committee Member of the Mombasa County Government and the Chief Officer of Finance.

12. Going by my earlier ruling, I see no reason why the application should not be granted at least to the extent of issuing a fresh warrant of arrest against the current holders of these offices. Accordingly, warrants of arrest are hereby issued for arrest of County Executive Committee Member for Finance and the Chief Officer - Finance, Mombasa County Government to show cause why they should not be committed to jail for six months or for such other period that the court may prescribe, not exceeding six months. The warrants shall be executed by the Officer Commanding Station, Mombasa Central Police station. It is so ordered.

SIGNED, DATED AND DELIVERED ON 31 MAY 2024

NGAAH JAIRUS

JUDGE