



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**APPLICATION NO. 687 OF 2017**

**REPUBLIC.....APPLICANT**

**VERSUS**

**BARINGO COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY SECRETARY,**

**BARINGO COUNTY.....2<sup>ND</sup> RESPONDENT**

**CHIEF OFFICER, FINANCE/COUNTY TREASURER,**

**BARINGO COUNTY.....3<sup>RD</sup> RESPONDENT**

**EX PARTE:**

**KTK ADVOCATES**

**RULING**

The motion before court is dated 29 June 2021 filed under section 8 of the Law Reform Act and Order 53 Rule 3 of the Civil Procedure Rules. The primary prayer is couched as follows:

***“That an order of mandamus do issue directed at the respondents and compelling them jointly and/or severally to pay within thirty (30) days to the Applicant, KTK Advocates, the sum owing on account of judgment dated 02.11.17 and decree dated 23.11.2017 in High Court Miscellaneous Cause No. 1 of 2017 together with taxed costs with interest now accruing on the judgment debt.”***

According to the verifying affidavit sworn by Donald B. Kipkorir in support of the application, he obtained a decree against the 1<sup>st</sup> respondent for the sum of Kshs. 17,570,908.0 in Miscellaneous Cause No. 1 of 2017.

The respondents, according to Kipkorir, have only settled part of the decree. To quote the learned counsel in paragraph 9 of his affidavit:

***“That despite being served with the decree and demand for payment, the respondents have only settled part of the taxed costs.”***

It is his case that since the respondents are insulated from execution, the applicant has no other means of enforcing payment of the balance of the decretal sum except through an order of mandamus.

The respondents opposed the application and filed a replying affidavit sworn on their behalf by Francis Komen, the County Secretary of the 1<sup>st</sup> respondent. The depositions in the affidavit, however, are more or less an admission that indeed the applicant is owed by the 1<sup>st</sup> respondent. Komen has sworn inter alia that:

***“8. That I am aware of my own knowledge that the County Government of Baringo has not refused to settle the decretal sum to warrant application for orders of mandamus to compel her to pay the sums; the respondents are willing and have put in place every effort to settle the sums in full.***

*9. That because of our willingness to liquidate the decretal sum and being alive to the financial budgetary position of the Baringo County Government, we approached the court in Misc Cause No.1 of 2017 vide a notice of Motion dated 28<sup>th</sup> September 2018 and sought to be allowed to pay the same by way of instalments but our application was dismissed by the court as can be gleaned from the ruling annexed to the applicant's verifying affidavit.*

*10. That I am aware of my own knowledge that the respondents herein have made tremendous efforts to liquidate the decretal sum and I wish to confirm that the applicant herein is guilty of material non-disclosure of facts for the respondents have settled to the greatest portion of the decretal sum.*

*11. That as at 18<sup>th</sup> June 2021 the applicant's application for mandamus dated 18<sup>th</sup> March 2020 similar to the current application, was pending before this honourable court the respondents had paid the ex parte applicant herein a total of Kshs. 16,500,000 and was only Kshs. 1,070,907 short of settling the decretal sum a fact which the applicant has by design opted not disclose to this Honourable Court.*

*20. That from the foregoing, it is evident that the respondents have made enormous payments to the ex parte applicant with a view to settling the decretal sum and are determined to full settle the decretal sum.*

*24. That we do not dispute the outstanding balance of the decretal sum and respectfully submit to the discretion of this Honourable Court to allow the respondents time to settle the full amount without having to undergo the process of litigating the matter endlessly."*

Looking at the affidavits of both Kipkorir and Komen, there is nothing much that this court is called upon to resolve. The parties are in agreement that the decree which the applicant holds has only been partly settled.

The trouble with the applicant's application is that the outstanding amount is not specified and this would certainly present some difficulty in enforcing the order of mandamus if it is granted in the form in which it is sought. But as noted, the respondents do not deny owing the applicant. It is only that, like the applicant, they have not stated clearly how much of the decree is outstanding.

If only to bring to a halt the numerous litigations on this subject of settlement of the decree, I will issue the order of mandamus on condition that it will only be enforced once parties have taken accounts and agreed on the outstanding amount.

Parties will bear their respective costs. I hasten to add that considering the terms upon which the applicant's application has been allowed, parties will be at liberty to apply. Orders accordingly.

**SIGNED, DATED AND DELIVERED ON 28<sup>TH</sup> JANUARY 2022**

**Ngaah Jairus**

**JUDGE**