REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 687 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF HIGH COURT PETITION NO. 113 OF 2015

(CONSTITUTIONAL AND HUMAN RIGHTS DIVISION)

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF HUMAN RIGHTS

AND

IN THE MATTER OF BOUNDARY DISPUTE BETWEEN TURKANA, BARINGO AND WEST POKOT COUNTIES

AND

IN THE MATTER OF MISCELLANEOUS CAUSE NO. 1 OF 2017

REPUBLIC.....APPLICANT

VERSUS

BARINGO COUNTY GOVERNMENT.....1ST RESPONDENT

THE COUNTY SECRETARY, BARINGO COUNTY.....2ND RESPONDENT

CHIEF OFFICER, FINANCE/COUNTY TREASURER,

BARINGO COUNTY.....3RD RESPONDENT

***EX PARTE:* KTK ADVOCATES**

RULING

By a chamber summons dated 18 March 2020, filed in this Honourable Court under Order 45 Rule (1) (3) and Order 53 Rule 1 of the Civil Procedure Rules, 2010, Sections 8 & 9 of the Law Reform Act, cap. 26 and Article 53 of the Constitution, the applicant sought for prayers that:

1. The application be certified as urgent and be heard on priority basis.

2. Leave do (sic) issue to the applicant to apply for an order of mandamus directed at the respondents compelling them jointly and or

severally to pay within Thirty (30) days to the ex parte applicant the sum owing on account of judgment dated 2 November 2017 and decree dated 23 November 2017 in High Court Miscellaneous Cause No. 1 of 2017 together with taxed costs with interest and further interest now accruing on the judgment debt.

3. In default of payment as above execution against the 2nd and 3rd respondents to proceed according to law.

4. The decree issued on 23 September 2019 emanating from the judgment of this Honourable Court delivered on 24 July 2018 be reviewed by finding that reasonable notices have issued to the respondents to comply with the judgment dated 2 November 2017 and decree dated 23 November 2017 but they have continued to out rightly refuse to settle the same to date.

5. The decree issued on 23 September 2019 emanating from the judgment of this Honourable Court delivered on 24 July 2018 be reviewed by finding that the respondents have willfully and expressly declined and or neglected to pay the decree as all notices and letters by the applicant to the respondent to pay the monies owed have gone unanswered.

5. The decree issued on 23 September 2019 emanating from the judgment of this Honourable Court delivered on 24 July 2018 be reviewed by finding that the respondents have exercised willful and implied refusal through unreasonable delay by not settling the judgment dated 2 November 2017 and decree dated 23 November 2017 in its entirety for they have opted to make derisory payments to the applicant as and when they wish.

7. The decree issued on 23 September 2019 emanating from the judgment of this Honourable Court delivered on 24 July 2018 be reviewed by finding that the Applicant has satisfied the grant of an Order for mandamus noting that there is no other adequate remedy available to the applicant for the judgment has not been satisfied two (2) years later.

8. Any other orders that the Honourable Court may deem fit and just to grant.

9. Costs of this application be provided for."

In the verifying affidavit sworn on 18 March 2018 in support of the application, Mr. Donald B. Kipkorir swore that he is an advocate of this Honourable Court and, in that capacity, he was instructed to represent the respondents in Nairobi High Court Petition No. 113 of 2015 in a suit filed against them by Turkana County Government. The suit was eventually concluded in favour of the respondents.

The applicant then submitted his fee note for settlement; the respondents, however, neglected or refused to settle as a result of which the applicant filed a bill of costs in High Court Miscellaneous Application No. 1 of 2017.

The Bill was taxed at Kshs. 17,570, 907.08.

The respondents disputed the bill and filed a reference to this Court. At the same time, the applicant filed an application seeking judgment against the respondents in terms of the certificate of taxation. The outcome of the reference and the applicant's application was that the reference was dismissed while judgment was entered in favour of the applicant against the respondents.

On 15 December 2017, the applicant applied for an order for mandamus but that application was dismissed on 24 July 2018 on the ground that it was premature. Two years have since lapsed but that the respondents have not settled the decree in spite of several demand notices having been sent to them.

The 2nd respondent swore a replying affidavit denying the applicant's allegations that the respondents have refused to pay the applicant for services rendered. Contrary to the applicant's assertions, the respondent had paid him or his firm of advocates a total of Kshs. 16, 500,000/= as at 8 June 2020 when he swore the affidavit. This payment had been made by way of instalments that were paid as follows:

i. Kshs. 4,000,000/= was paid in July 2016

ii. Kshs. 3,000,000/= was paid in November 2018

iii. Kshs. 4,000,000/= was paid in June 2019

iv. Kshs. 3,000,000/= was paid in October 2019

v. Kshs. 2,500,000/= was paid in February 2020.

Accordingly, the only amount that was outstanding as at this date was Kshs. 1,070,907/=. Of the total amount paid, the applicant, had acknowledged having received the sum of Kshs. 12,105, 542/=. Having so acknowledged the respondent swore that the applicant was deliberately misleading the court that he had not been paid any amount at all.

After the respondents filed their replying affidavit, the applicant filed a supplementary affidavit basically admitting that out of the decretal sum, he had been paid the sum of Kshs. 12,105, 542/=; he also acknowledged having been paid another sum of Kshs. 4,000,000/= but that since this sum was paid before the bill of costs was filed, it could not have been meant to offset the taxed bill or any part thereof.

As it is apparent in the chamber summons, the applicant reiterated in his submissions that, besides other prayers, he was seeking an order for

mandamus against the respondents; to quote the applicant, he submitted as follows:

> **"My Lord, in respect of KTK ADVOCATES, the Ex parte Applicant herein, we submit as follows in support of our application dated 18.03.20 filed on even date seeking an Order of Mandamus directed at the Respondents jointly and/or severally compelling them to pay within Thirty (30) Days to the Applicant in the sum of Kshs. 17,570,907.08 plus interest at Court rate from 08.06.17 till payment in full subject to review of the Order of Court in Judicial Review Application No. 687 of 2017 delivered on 24.07.18."**

The applicant proceeded to chronicle the events that culminated in a judgment in his favour for the sum of Kshs. 17,570,907.08 and, in the process, rehashed the averments made in the statement of facts and his depositions in the verifying affidavit.

On the question of payment of Kshs. 4,000,000/=, the applicant urged that the taxing master was aware that the deposit had been made before arriving at the figure of Kshs. 17, 570,907.08 as the sum due to the applicant. Again, it is an issue that had been raised and disposed of in several applications which the respondents had filed either contesting the taxation or urging for settlement of the decree in instalments. The applications were dismissed and, more pertinent to the question whether the sum of Kshs. 4,000,000/= had been resolved, it was his submissions that it was *res judicata*.

As far as the question of the respondent's budgetary constraint is concerned, the applicant urged that his fee was less than 0.32% of the allocation of funds made to the 1st respondent during the 2018/2019 financial year and it did not matter that only Kshs. 5,000,000/= of the total budget was set aside for legal services.

The applicant also urged that his initial application for an order of mandamus was dismissed on 24 July 2018 for the reason that the respondents had not been given sufficient time to respond. He sought to have the dismissal order reviewed. He cited **Wangechi Kimita v Wakibiru Mutahi [1985] eKLR (Pages 1-5)** and **Nairobi City Council V Thabiti Enterprises Limited [1997] eKLR (Pages 6- 23)** where it was held that the Court has unfettered discretion to review its own decrees or orders for any sufficient reason. On the same point, the applicant invoked the decision in **Sadar Mohamed vs. Charan Singh and Another {1963} EA 557 (Pages 11-15).** And again in Mulla on the Code of Civil Procedure where it has been stated that the expression 'any other sufficient reason'means a reason sufficiently analogous to those specified in the rule.

Be that as it may, the applicant intimated that in dismissing the initial application the court must have got the facts wrong. To quote him on this point the applicant submitted as follows:

> **"The Applicant never took action immediately after the Five (5) Days to which the Court placed reliance on to find that no reasonable time was given to the Respondents notwithstanding all the other tests for issuance of Order of Mandamus having been met by the Applicant. My Lord save for the pending litigation occasioned by Respondents' numerous applications which were dismissed by Honorable Court, our application for Mandamus was properly before Court and factoring that the first demand issued and lasted 14 days past the Five (5) Days' Notice to filing the Judicial Review Application. My Lord, the Applicants should not be punished for existence of litigation occasioned by the Respondents to avoid paying debt. The Applicant had no control over the active litigation. We humbly submit that there are sufficient reasons to review the Order of the Court made in Judicial Review Application No. 687 of 2017 and pray that the Court exercises its unfettered discretion to warrant issuance of order of mandamus."**

Nonetheless, the applicant went further and urged that the circumstances have since changed as the respondents have had reasonable time to settle the decretal amount and therefore the court ought to review its earlier decision dismissing the applicant's motion. Over and above the two years that have lapsed since the dismissal of the motion, the Applicant also issued the respondent with another notice of thirty days within which to comply and pay the decretal amount in full. He cited **Republic v Baringo County Government & 2 others Ex parte KTK Advocates [2018] eKLR** and the Canadian case of **Apotex Inc. vs. Canada (Attorney General) 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.)** for the argument that the applicant has met the threshold for grant of the order of mandamus.

And on the question of *res judicata*, the applicant urged that this question had been litigated upon before the taxing master and before the Hon. Justice Mativo in **Miscellaneous Cause No. 1 of 2017; KTK Advocates v Baringo County Government [2017]** where the court is said to have held that the payment of the Kshs. 4,000,000/= was factored in by the taxing master during taxation. He cited numerous cases where it has been held that *res judicata* simply denotes that once a case has been decided it cannot be heard or regurgitated afresh. Among these decisions are **Civil Appeal 223 of 2013, Court of Appeal; William Koross (Legal personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others University [2015] eKLR; Lal Chand vs. Radha Kishan, AIR 1977 SC 789**; **Civil Appeal Number 22 of 2014; John Florence Maritime Services Limited & another Vs. Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR, and Karia & Another v the Attorney General and Others [2005] 1 EA 83**.

Also cited was **Henderson v Henderson [1843] 67 ER 31** and **Kamunye & others v Pioneer General Assurance Society Ltd [1971] E.A. 263**, where it was held that courts will not open the same subject which might have been brought forward in a previous case but which was not brought forward and, that *res judicata* bars subsequent proceedings involving the same issue as has been finally and conclusively decided by a court of competent jurisdiction; it is a doctrine that puts and an end to litigation.

On behalf of the respondents it was submitted that since the entire sum due from the respondents had been paid, there was neither factual nor legal basis for the order of mandamus. And in this regard the learned counsel for the applicant cited the decisions in **Republic v Governor Kajiado County Ex - parte Gabriel Gachigo Marigi [2018] eKLR,** where it was held that for this relief to be given, the applicant must, firstly, satisfy the court that there has been an abuse of discretion of legal duty imposed by law; secondly, the public officer has unreasonably neglected to perform that public duty; and, thirdly there is inadequate remedy to redress the violation or infringement of a right.

He also cited the decision in **Kenya National Examinations Council vs Republic Ex-parte Geoffrey Gathenji Njoroge & Others [1997]**

eKLR where the Court of Appeal discussed at length what the order of mandamus entails. Generally speaking, the court held that this particular order would compel the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform that particular duty; however, if the complaint is that the duty has been wrongfully performed, not in accordance with the law, mandamus will not issue mainly because this kind of relief cannot quash what has already been done.

Based on this understanding, it was urged, the application cannot be granted in terms sought by the applicant. The respondents have not just admitted owing the applicant but that they have substantially settled his dues. As a matter of fact, were it not for other competing financial commitments they would have settled the decretal sum in a lump sum.

As far as the application for the order for review under Order 45 of the Civil Procedure Rules is concerned, it was submitted for the respondents that the applicant does not deserve this order because, there is no error or mistake apparent on the face of the record and neither has a new matter or evidence discovered. In any event, there are no sufficient reasons whatsoever to warrant the orders for review. In this regard the learned counsel for the respondents relied on the decisions in **National Bank of Kenya —vs- Ndungu Niau Civil Appeal No.211 of 1996 f 1995-981 2 EA 249** and **Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR**.

My understanding of the application before court is that it is, or rather it ought to be an application for leave to file a substantive motion for the order of mandamus under order 53 Rule 1(1) of the Civil Procedure Rules. That rule reads as follows:

> ***1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.***

And as to how that leave should be sought, Rule 1 (2) prescribes the form and the procedure as follows:

> **(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.**

The jurisdiction of this Court to grant these orders is, of course, found in Part VI of the Law Reform Act, cap. 26 which is the parent Act; it provides the legal basis for the prerogative orders. The section which is pertinent for our purposes reads as follows:

PART VI – MANDAMUS, PROHIBITION AND CERTIORARI

> **8. Orders of mandamus, prohibition and certiorari substituted for writs**
>
> **(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.**
>
> **(2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, (1 and 2, Geo. 6, c. 63) of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.**
>
> **(3) …**
>
> **(4) …**
>
> **(5) …**

It is clear from section 8(1) that the jurisdiction to entertain proceedings for order of mandamus, prohibition or certiorari is neither civil nor criminal; it is a special jurisdiction otherwise referred to as jurisdiction *sui generis*. That notwithstanding, section 8(2) removes any doubt that this court has such jurisdiction to grant any of the three orders of judicial review.

The statutory basis for the Order 53 of the Civil Procedure Rules is section 9 of the Law Reform Act. As far as it is relevant to the present application, the pertinent parts of that section provide as follows:

> **9. Rules of court**
>
> **(1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court—**
>
> **(a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;**
>
> **(b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;**
>
> **(c) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.**

Looking at these legal provisions, it is apparent that no application for any relief other than the application for leave to file a substantive application for orders of judicial review can be made under order 53 Rule 1 as read with section 9 of the Law Reform Act. In the same breath, owing to the unique jurisdiction with which this court is endowed in an application for judicial review orders, no other application under any of the other Civil Procedure Rules can be combined with an application under order 53 either for leave to apply for all or any of the judicial review orders or the application for the substantive orders.

The application before court is a mixed grill of prayers under Order 53 and Order 45 of the Civil Procedure Rules. Of the six or so main prayers, only one is seeking leave to apply for the judicial review order of mandamus; the rest are seeking a review of the judgment delivered by this Honourable Court on 24 July 2018 according to which the applicant's application for an order of mandamus against the respondents was dismissed.

The approach taken by the applicant is obviously contrary to Sections 8 and 9 of the Law Reform Act; it is also contrary to Order 53 of the Civil Procedure Rules. To the extent that the application has flouted these explicit provisions of the law, it is incompetent.

That aside, assuming that all that the applicant was praying for was an order for review under order 45, would that kind of order be available to him?

As much as I understand the applicant's application, if the application for review of the judgment of 24 July 2018 was to be allowed, he would thereby be entitled to an order for leave to apply for the order for mandamus. It is not suggested that the prayers for review are alternative to the prayer for leave to apply for mandamus and therefore in answering the question posed, I consider the two sets of prayers, as intertwined, in some way.

As earlier noted, judicial review proceedings are special and are, by and large, subject to no other procedural rules than those prescribed in order 53 of the Civil Procedure Rules and, of course, any of the provisions the Law Reform Act relating to procedure. It follows that, if, for one reason or the other, one is dissatisfied with an order or a decree of the Court in judicial review proceedings he cannot proceed against such an order or decree as if it is of a kind of any of those contemplated under order 45 of Civil Procedure Rules. In the event of such dissatisfaction the only recourse would appear to be to lodge an appeal against the order or decree; this is what I gather from section 8(5) of the Law Reform Act; it says as follows:

> **8. (5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.**

I understand this section to say that the only option available to party aggrieved by an order in an application for a Judicial Review order is to appeal against the order, if he is inclined to; the Act does not provide for a window to invoke order 45 of the Civil Procedure Rules.

The Civil Procedure Act itself is clearer that Section 80 which is the substantive provision of law which provides for review is restricted to proceedings under that Act; Judicial Review proceedings are certainly not proceedings under the Civil Procedure Act and for this very reason, section 80 would not apply to judicial Review proceedings which are only subject the Law Reform Act. That section reads as follows:

> **80. Review**
>
> **Any person who considers himself aggrieved—**
>
> **(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
>
> **(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit. (Emphasis added).**

It is clear from this section that the subject of the application for review must be a decree or order from which an appeal is allowed under the Civil Procedure Act; an order or a decree flowing from a judgment in a judicial review application would be excluded because it is not an appeal allowed by the Civil Procedure Act; rather, it is an appeal allowed by the Law Reform Act.

I am aware that in **Nakumatt Holdings Ltd versus Commissioner of Value Added Tax (2011) eKLR,** the Court of Appeal has held that as much as a judicial review order is not subject to the review proceedings under Order 45 of the Civil Procedure Rules, the court has residual jurisdiction in exercise of its inherent power to correct its own mistakes particularly where such mistakes are so glaring that they cannot be ignored. However, in the present application, the applicant is not invoking the inherent jurisdiction of this court; he is relying on Order 45 of the Civil Procedure Rules and the decisions where this rule has been successfully invoked.

More importantly, it has not been demonstrated that in arriving at the decision it did, this court made any mistake or there is an error apparent on the face of the record. What I gather from the applicant's argument and, in particular, from the excerpt of his submissions which I have quoted hereinbefore, is that, in dismissing the applicant's motion, this Honourable Court neither appreciated the evidence nor the law properly and hence arrived at the wrong decision.

Assuming the applicant is right, neither of these reasons can be grounds for review; if the applicant is of the firm view that the court misapprehended the law or misdirected itself on facts, or that its decision was patently wrong, a proper recourse would have been to appeal against that decision.

In **Abasi Balinda versus Fredrick Kangwamu & Another (1963) E.A 558** a court was asked to review its order on costs on the ground that the court was alleged to have taken an erroneous view of the evidence and of the law relating to the question of whether a returning officer was a necessary party to an election petition. The court (Bennet, J.) appreciated that **section 83** of the Uganda Civil Procedure Ordinance (equivalent to **section 80** of our **Civil Procedure Act**) conferred upon the court jurisdiction to review its own decisions in certain circumstances and **order 42** (which is equivalent to **order 45** of our **Civil Procedure Rules**) prescribed the conditions subject to which and the manner in which the jurisdiction should be exercised. In interpreting that jurisdiction and in the process, dismissing the applicant's application, the court cited with approval a passage from **Commentaries on the Code of Civil Procedure by Chitaley & Rao (4th Edition), Vol. 3 page 3227,** where the learned authors explained the distinction between a review and an appeal and had this to say;

> **"a point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or law is no ground for review though it may be a good ground for an appeal"**

Again, our own Court of Appeal explained this much better in **National Bank of Kenya Ltd versus Njau (1995-1998) 2EA 249 (CAK)**; at page 253 of the judgment, the Court said: -

> **"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. <u>It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground for review</u>." (Underlining mine).**

That said, I would still have been hesitant to grant leave to the applicant to pursue an order mandamus even if the application was properly before court. I say so because although it was only insinuated in the prayer for the leave that the amount owing is Kshs. 17,570,907.0 it came out clearly in the applicant's submissions that this is the amount whose payment was sought to be enforced in the applicant's bid for the order of mandamus.

But when the respondents filed their replying affidavit, it turned out that indeed a substantial part of the decretal sum had been paid. It is only then that the applicant admitted in a supplementary affidavit, certainly sworn in response to the respondents' replying affidavit, that he had in fact been paid Kshs. 12,105,542.98.

There can never be any doubt that the fact of this payment was material to the applicant's application yet it was not disclosed until the respondents brought it to the fore. It is reasonable to conclude, in these circumstances, that the applicant suppressed a fact material to his application; it was a material fact for the obvious reason that the order sought is for settlement of a decree that had substantially been settled; were it not for the fact that the court ordered that this application be heard inter partes, leave would probably have been granted to apply for mandamus for payment of sums of money that had already been paid.

It must be noted that judicial review orders are discretionary and among the factors that the court will certainly consider in withholding or granting such reliefs are the applicant's conduct and motive. (***See R versus Commissioners of Customs & Excise, ex parte Cooke (1970) 1 ALL ER 1068)***. No doubt that the same factors would be equally relevant in an application for leave; the statement of facts which is filed alongside the application for leave and the affidavit verifying the facts are the same documents that would be filed with the substantive motion and it is on the basis of those documents that leave would normally be granted. It follows that non-disclosure of a material fact in an application for leave would not speak well of an applicant's conduct or his motive; it would, at the very least, eventually have a negative bearing on the substantive motion itself, if leave is granted.

In the final analysis, I find and hold that this application is not only incompetent but it also has no merits at all. It is hereby dismissed with costs,

Signed, dated and delivered on 22 January 2021

Ngaah Jairus

<u>JUDGE</u>