REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION 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

BETWEEN

REPUBLIC..APPLICANT

VERSUS

BARINGO COUNTY GOVERNMENT..........................1ST RESPONDENT

THE COUNTY SECRETARY,

BARINGO COUNTY..2ND RESPONDENT

CHEIF OFFICER, FINANCE/COUNTY

TREASURER, BARINGO...3RD RESPONDENT

AND

KTK ADVOCATES...EX PARTE APPLICANTS

JUDGMENT

1. Pursuant to the leave of the Court granted on **14th** December 2017, the *ex parte* applicant moved this Court by way of Notice of Motion dated **15th**December 2017 expressed under the provisions of Order **53** Rules **3** of the Civil Procedure Rules, 2010, seeking :- ***(a)*** *An order of Mandamus directed at the Respondents and compelling them jointly and or severally to pay within five (5) (sic) to the ex parte applicant, KTK Advocates, the sum of Ksh. 17,570,907.08 due to and owing on account of judgment dated 02.11.17 and decree dated 23.11.17 in High Court Misc. Cause No. 1 of 2017 together with taxed costs with interest and further interest now accruing on the judgment debt;* ***(b)*** in default of payment as above, Notice to issue against the second and third Respondents to show cause why they should not be committed to

civil jail for contempt; **(c)** *Any other order the honourable Court may deem fit and just to grant;* ***(d)*** Costs of this application be provided for.

2. The application is premised on the grounds contained in the statement dated **14th** December 2017, namely; ***(a)*** *the ex parte applicant duly instructed by the Respondents represented them in Nairobi Petition No.* ***113*** *of 2015;* ***(b)*** *subsequently the ex parte applicant submitted its fee note to the Respondents who neglected/refused to settle prompting the ex parte applicant to file a Bill of costs in Court which was taxed at* ***Kh. 17,570,907.08; (c)*** *that the Respondents unsuccessfully challenged the taxed Bill in Court by way of a reference;* ***(d)*** *the ex parte applicant successfully applied for judgement as per the Certificate of Costs;* ***(e)*** *despite having been served with the decree and demand, the Respondents have refused, failed and or neglected to settle the amount.*

3. Also in support of the application is the verifying affidavit of **Mr. Donald Kipkorir** reiterating the foregoing grounds. Annexed to the affidavit is a copy of the ruling dated **2nd** November 2017, Decree dated **23rd** November 2017 and a demand letter dated **27th** November 2017.

4. The record shows that on **4th** April 2018, the Respondents were granted the last opportunity to file and serve their response to the application within seven days, in default, the applicant would proceed to file and serve submissions with liberty to the Respondent theirs within a similar period. Pursuant to the above directions, the applicant filed their written submissions on **25th** April 2018, but the Respondents did not file any response or submissions as directed by the Court. Instead, what was filed is a document dated **7th** May 2018 entitled ***"notice of change of Advocates,"*** but page of the said document contains details which are totally irrelevant to this case or the application under consideration.

5. Perhaps I should mention that Courts directions serve a useful purpose and must be complied with. Their primary aim is to ensure that the business of the court is run effectively and efficiently. Invariably this leads to the orderly management of courts' rolls, which in turn brings about the expeditious disposal of cases in the most cost-effective manner. Parties are obliged to comply with courts directives including filing their documents to facilitate expeditious disposal of cases. Where a party decides to ignore Courts directions, he does so at his own peril because the wheel of justice will continue to move. After all it is a constitutional imperative that in exercising its authority, the Courts and tribunals shall be guided by the principles enumerated in Article **159 (2)** of the Constitution among them justice shall not be delayed.

6. At the hearing of the application, **Mr. Kipkorir** adopted on his written submissions. The crux of his submissions is that the only way the *ex parte* applicant can enforce the judgment is by way of *Mandamus*, or a notice to show cause why the Respondents should not be committed to civil jail. He relied on *R vs County Secretary, Nairobi City County & Another ex parte Wachira Nderitu Ngugi & Co Advocates*[1]in which the Court citing authorities reiterated that where a party has no other option of enforcing a judgment, mandamus would issue otherwise a successful party will be left holding a barren decree, and that access to justice cannot be said to have been realized when persons in whose favour judgments have been decreed by Courts of competent jurisdiction cannot enjoy the fruits of the judgment.

7. **Mr. Ogolla** for the Respondent submitted that this application is premature because in at the time it was filed, there was a pending application for Review in J.R. Misc. No. **1** of 2017 in which the decree arose and that the applicant has not demonstrated actual or implied refusal to pay the decretal sum taking into account that during the period in question, the parties were still litigating in Court over the same issue.

Issues for determination.

8. Upon analysing the opposing facts presented by the parties, I find that only one issue falls for determination, namely:- ***Whether the applicant has established grounds for this Court to issue an order of mandamus and the Notice to Show Cause prayed for.***

9. It is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.[2] *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. Originally a common law writ, *Mandamus* has been used by courts to review administrative action.[3]

10. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either**.[4]

11. Mandamus is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

12. In the present case, the complaint arises out of a decree arising from taxed costs in Misc App No. **1** of 2017. This Court has had the benefit of handling several applications in the said file among them a reference under the Advocates Remuneration Order filed by the Respondents herein. This Court also has handled concurrently with this application, yet another application by the Respondents filed in the said file as late as **25th** May 2018 seeking *inter alia a stay of execution of the Certificate of Taxation and the consequential decree pending issuance of the objection notice to the Taxing officer and the response thereto and enlargement of the time within which to file a written notice of objection to the taxing officer against his decision vide ruling delivered on 8th June 2017.*

13. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Apotex Inc. vs. Canada* (*Attorney General*),[5] and, was also discussed in *Dragan vs. Canada* (*Minister of Citizenship and Immigration*).[6] The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. *The Applicants have satisfied all conditions precedent; and*

b. There must have been:

(i) *A prior demand for performance;*

(ii) A reasonable time to comply with the demand, unless there was outright refusal; and

(iii) An express refusal, or an implied refusal through unreasonable delay;

(iv*) No other adequate remedy is available to the Applicants;*

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

14. Clearly, there has been active litigation over the same decree. As late as **25th** May 2018, the Respondents filed an application in Court which was heard concurrently with the present application. This is clear evidence that the dispute is still active in Court. *Mandamus* cannot issue while the matter in dispute is still subject to ongoing litigation.

15. On the test of what constitutes a reasonable notice before *Mandamus* can issue, annexed to this applicants is a letter dated **27th** November 2017 giving the Respondents **5** days to pay the decree in default, execution would issue. One of the requirements enumerated above is "a reasonable time to comply with the demand. It is my view that **5** days is not a reasonable time. It is not even shown when the letter was delivered and when the **5** days start to run. Even if we are to assume the Respondents were given **5** clear days, I am afraid, the 5 days cannot be said to be reasonable notice within which the Respondents would be expected to act.

16. The other test is "an express refusal, or an implied refusal through unreasonable delay." *First*, as I have concluded above, *"unreasonable delay'* has not been established in the present case. *Secondly,* an express refusal or even implied has not been established. The parties were litigating in Court. *Mandamus* can only issue where it is clear that there is *wilful* refusal or *implied* and or *unreasonable* delay.

17. Applying the above tests to the facts and circumstances of this case, I find and hold that the applicant has not satisfied the above conditions. It follows that there is no basis at all for the Court to grant the order of *Mandamus*.

18. Flowing from my above finding, it is also my conclusion that there is no basis upon which this Court can issue a *Notice to Show Cause* upon the Respondents as requested. In any event, such an application ought to be expressed under Section **30** of the Contempt of Court Act[7] and in my view ought not be made as an alternative to the prayer of *Mandamus.* This is because for the notice to show cause to issue, the disobedience of the Court order must be established first. It follows that it would have been appropriate for the applicant to pursue an order of *Mandamus* first and if it is disobeyed, then move the Court under the Contempt of Court Act[8] for the Notice to Show Cause and ultimately committal for Contempt.

19. In view of my determination and findings herein above, the conclusion becomes irresistible that both the relief of *Mandamus* and the order of *Notice to Show Cause* sought cannot issue in the circumstances of this case. It follows that this application is fit for dismissal. The effect is that the orders sought herein are hereby refused and the application dated **15th** December 2017 is hereby dismissed with no orders as to costs.

Orders accordingly

Signed, Dated and Delivered at **Nairobi** this **24th** day of **July** 2018

JOHN M. MATIVO

JUDGE

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[1] {2016}eKLR.

[2] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[3]W. G. & C. Byse, Administrative & Review Law, Cases and comments 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[4] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review, 53 GEO. IJ. 19, 25-26 (1964).

[5] 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

[6] 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff’d 2003 FCA 233 (CanLII), 2003 FCA 233).

[7] Act No. 46 of 2016.

[8] Ibid.