REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR. MISC. CIVIL. APPLICATION NO.640 OF 2006

IN THE MATTER OF: AN APPLICATION BY GEORGE GIKUBU MBUTHIA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW AND FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF: HIGH COURT CIVIL SUIT NO.1874 OF 1999

AND

IN THE MATTER OF: LOCAL GOVERNMENT ACT, CAP 265 LAWS OF KENYA

BETWEEN

REPUBLIC ……..…….....……..APPLICANT

AND

THE TOWN CLERK CITY COUNCIL OF NAIROBI…….....…….1ST RESPONDENT

THE TREASURER CITY COUNCIL OF NAIROBI…….....……..2N RESPONDENT

THE DIRECTOR OF LEGAL AFFAIRS CITY COUNCIL OF NAIROBI…3R RESPONDENT

EX-PARTE

GEORGE GIKUBU MBUTHIA

R U L I N G

The Exparte Applicant has approached this court by way of a Notice of Motion dated 21st November, 2011 seeking the following orders:

A. THAT, the Honourable Court be pleased to review and set aside *ex debito justitiae* **its Orders made on 16th November 2011.**

B. THAT, the prayers in the Notice of Motion dated 26th September 2011 be granted.

The application is supported by an affidavit sworn by the applicant on 21st November 2011 and annextures thereto. It is premised on the grounds stated on the face of the application whose main thrust is that the orders made by the court in a ruling delivered on 16th November 2011 were a nullity in law and should be set aside because they were partly based on contents of a replying affidavit sworn by Aduma J. Owuor on behalf of the respondent which had not been served on the applicant by the time the application giving rise to the said orders was heard interpartes. It was the applicant's contention that consequently the said orders were given against the rules of natural justice as the applicant was not given an opportunity to be heard on the replying affidavit.

The applicant also contends that the said orders were also a nullity as the draft final decree prepared by him for approval or disapproval by the respondent was not returned to him marked ***"for settlement"*** and he was not issued with a notice by the Deputy Registrar under order 21 Rule 8 (4) of the Civil Procedure Rules. It is the applicant's view that the court had no legal authority to compute sums payable to him and draw a final decree for the parties as this would be contrary to Order 21 Rule 8(2) of the Civil Procedure Rules.

The application was opposed through a replying affidavit sworn by Karisa Iha the respondent's Deputy Director of Legal Affairs.

In the replying affidavit, the respondent depones that the instant application just like other applications filed by the applicant in the past is an abuse of the court process as it does not establish any ground that would warrant review or setting aside of the orders complained of.

The respondent however admitted in paragraph 5 of the replying affidavit that it had inadvertently failed to serve the applicant with its replying affidavit opposing the applicant's Notice of Motion dated 26th September 2011 which was the subject of the orders issued on 16th November 2011 but also maintained that the applicant having been served with written submissions by the respondent on 19th October 2011 was aware that a replying affidavit sworn by Aduma J. Awuor had been filed in the matter since there was a reference to the said replying affidavit in the submissions. The respondent further argued that since the applicant was aware that he had not been served with the said replying affidavit, he ought to have raised objections in that regard on 24th October 2011 when the application was argued interpartes. It was then the respondent's prayer that the instant application be dismissed with costs for lack of merit.

Both parties made submissions before me on 16th January 2012 which I have carefully considered.

This being an application seeking review of the court orders issued on 16th November 2011, I find that the only issue for determination by this court is whether the applicant has satisfied the requirements set out in Order 45 of the Civil Procedure Rules (CPR) which enumerates grounds upon which a court can review its judgment or orders.

Order 45 of the Civil Procedure Rules provides that any person who is aggrieved by a decree or order against which no appeal has been preferred can apply for review of the said decree or order if he has discovered a new and important matter or evidence which after due diligence was not within his knowledge or could not be produced by him at the time the decree or order was made or that there is a mistake or error on the face of the record or for some other sufficient reason.

In this case, I am satisfied that the applicant has totally failed to meet the threshold set by Order 45 of the Civil Procedure Rules for review of the orders in question.

Even though the respondent has admitted that it inadvertently failed to serve the applicant with its replying affidavit, I find that the claim that the applicant was served with the respondent's written submissions on 19th October 2011 has not been disputed by the applicant. I have perused the said written submissions and I concur with M/s Nandwa Counsel for the respondent that the submissions clearly stated that the respondent was relying on the replying affidavit sworn by Aduma J. Owuor on 6th October 2011.

It therefore follows that the applicant who has impressed me as a man who has good analytical and communication skills and is obviously not illiterate must have noted from the written submissions that the respondent had filed a replying affidavit which had not been served on him by the time the application was heard interpartes on 24th October 2011. Consequently, this was a fact or matter that was within the applicant's knowledge or which he would have been able to ascertain with due diligence before 24th October, 2011 when application was scheduled for hearing and take appropriate remedial action. The applicant was in my view not candid with the court when he submitted that he was not aware of the filing of the said replying affidavit by the time the application was argued interpartes. It is my finding that he became aware of the existence of the replying affidavit on 19th October, 2011 when he was served with the respondent's written submissions.

On 24th October 2011, the respondent did not object to hearing of the application on grounds that he had not been served with the respondent's replying affidavit. Instead he proceeded to argue the application and never raised the issue in his submissions. The applicant cannot now turn around and seek to have the orders that the court made subsequent to that hearing reviewed or set aside relying on grounds that he had opportunity to raise in the first instance either before or during the hearing of the motion. In any event as is apparent from the ruling delivered on 16th November 2011, this court only made a casual reference to the said replying affidavit. It was not the basis of the court's decision and the court would have reached the same conclusion it did even if the said replying affidavit had not been filed.

In the circumstances, I find that failure of the respondent to serve the replying affidavit on the applicant did not occasion any prejudice on the applicant and it cannot form the basis of reviewing the aforesaid court orders.

The applicant's argument that failure to serve him with the replying affidavit before hearing proceeded constituted a breach of the rules of natural justice is hollow since the applicant chose to proceed with the hearing knowing he had not been served with the same and both parties were fully heard on the application before court delivered its ruling.

Having considered the application, I also find that the applicant has not alleged that there are any errors of law or fact or mistakes on the face of the ruling delivered on 16th November 2011 which would warrant review of the therein and having gone through the said ruling, I did not come across any.

From the foregoing I am satisfied that the applicant has failed to demonstrate that there is sufficient cause or that any of the requirements specified in Order 45 Civil Procedure Rules are applicable in this case to warrant review of the orders issued by this court on 16th November, 2011.

It is obvious from the way the application is drafted especially Prayer (B) that the applicant was simply dissatisfied with the court's decision and instead of applying for review of the court orders, he should have utilized the leave granted to him on his application on 16th November 2011 to appeal against the ruling. It is infact incomprehensible that the applicant in Prayer (B) moved the court to make orders in terms of prayers made in Notice of Motion dated 26th September, 2011 which was the subject of the orders sought to be reviewed. The complaint that the final decree prepared by the Deputy Registrar was unlawful and void ***abinitio*** was substantively deliberated upon during the hearing of that application interpartes and this court made findings on the same in the ruling being challenged by the applicant. If the applicant was aggrieved by the court's decision on prayers sought in the application dated 26th November 2011, the only remedy available to him was that of appealing against the court's decision to the Court of Appeal. Trying to sneak in an appeal before the same court that gave the orders being challenged is

obviously a blatant abuse of the court process.

It is important to note that this case which was filed way back in Year 2006 about 5 years ago for enforcement of a decree issued in HCC.1874/99 is basically settled and the only aspect that is still outstanding is the computation of total sums payable to the applicant by the respondent. Parties have apparently failed to agree on this point and this is the issue that this court sought to resolve in the orders made in the ruling delivered on 16th November, 2011.

The delay in the final determination of the case including execution of the decree in this suit has been caused by the applicant who has constantly filed a multiplicity of applications all seeking court's intervention in the computation of sums due and payable to him by the respondent.

In the interest of justice, the court must protect its process from being abused by litigants who for some reason are minded to elongate litigation unnecessary. There must be an end to litigation.

For all the foregoing reasons, I find and hold that the applicant has totally failed to prove that any or sufficient grounds exist to warrant the review of this court's orders issued on 16th November 2011. In the circumstances, I find that the Notice of Motion dated 21st November 2011 has no merit and it is hereby dismissed with costs to the respondent.

Dated, **Signed** and **Delivered** by me at Nairobi this 24th day of January 2012.

C. W. GITHUA

JUDGE

In the presence of:

Florence – Court Clerk

Applicant present in person

M/s Nandwa for Respondents