



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

MISC. CIVIL APPLICATION NO. 74 OF 2010

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI AND PROHIBITION BY OMAR BAKARI**

-AND-

**IN THE MATTER OF: MOMBASA HIGH COURT MISC. APPL. NO. 329 OF 2009
BETWEEN SHEIKHA AHMED HASSAN AND OMAR BAKARI**

-AND-

IN THE MATTER OF: THE CIVIL PROCEDURE ACT (CAP 21, LAWS OF KENYA)

-BETWEEN-

REPUBLIC.....APPLICANT

-AND-

**THE DEPUTY REGISTRAR.....RESPONDENT
SHEIKHA AHMED HASSAN.....INTERESTED PARTY**

ex parte

OMAR BAKARI

JUDGMENT

By virtue of leave granted by this Court on **22nd June, 2010** the applicant filed the Notice of Motion dated **6th July, 2010**, brought under ss. 8 and 9 of the Law Reform Act (Cap. 26, Laws of Kenya) and Order **LIII**, rules 3 and 4 of the Civil Procedure Rules (in the old form). The application carried one main prayer:

“THAT an order of certiorari [do] remove into this Court for the purpose of [being quashed] the decision [and Orders] of Mombasa [High Court] Deputy Registrar.....issued on 11th June, 2010.....”

The applicant stated the following grounds in support of the application:

- (i) *the Deputy Registrar acted beyond his mandate;*

- (ii) *the Deputy Registrar was in breach of the rules of natural justice;*

- (iii) *the Deputy Registrar failed to follow the law, and the applicable rules;*

- (iv) *the Orders made were illegal.*

In the verifying affidavit filed at the leave stage, the *ex parte* applicant avers as follows: he was the defendant in **Civil Case No. 234 of 2008**; he filed an interlocutory application in that cause, which he lost, and he was ordered to pay costs to the interested party and another; the interested party thereafter had the costs taxed, and was seeking orders of execution; even as the interested party’s application was still pending, he filed a notice to show cause; although the *ex parte* applicant had a preliminary objection, the Deputy Registrar ordered that he be arrested; and indeed, the *ex parte* applicant was placed on bond to appear in Court within seven days for the purpose of paying up, or being committed to civil jail; but he avers that he was not given a hearing. The deponent deposes that the interested party has not given any reason why he should be committed to jail; but he apprehends that “*the Deputy Registrar has decided to have [him] committed to civil jail.*” The deponent further states: “*I am again apprehensive that I cannot get justice from the Deputy Registrar.*”

Counsel submitted that the effect of the Deputy Registrar’s decision of **11th June, 2010** is to have the *ex parte* applicant arrested and committed to civil jail. The *ex parte* applicant was the applicant in the application in **HCC Misc. Civil Application No. 234 of 2008**; he lost that application, and was ordered to pay costs. The interested party filed the bill of costs in a different Court file, **HCC Misc. Appl. No. 329 of 2009**, and obtained a certificate of taxation. The interested party sought execution under that file, upon which the *ex parte* applicant herein objected, and the objection was upheld; and there was no application for execution under the original file, **HCC Misc. Civ. Application No. 234 of 2008**. The interested party moved the Court by Notice of Motion of **4th February, 2010**, asking for the Order upholding the *ex parte* applicant’s objection to be reviewed – and that application is still pending. But even as that application remained pending, the interested party took out a second notice to show cause (dated **18th May, 2010**);

and this one is identical to the earlier notice to show cause which had been disallowed. When this second notice to show cause came up for hearing, a preliminary objection was raised, on the basis that the issue had already been dealt with, and in that respect, there was an application for review, pending. Now this preliminary objection, counsel submitted, was dismissed – without there having been any notice to show cause listed for hearing, or the *ex parte* applicant being given an opportunity to show cause: and the Deputy Registrar ordered that the *ex parte* applicant be arrested and committed to civil jail.

The Deputy Registrar's decision has aggrieved the *ex parte* applicant; for, while it is acknowledged that the applicant is indebted to the interested party, the interested party has adopted only one method of execution – “by way of committal to civil jail”.

Counsel submitted that the notice to show cause which has occasioned the *ex parte* applicant's grievance was issued under Order **XXI**, rule 18 which provides:

“Where an application for execution is made –

(a) more than one year after the date of the decree; or

(b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43 –

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him.”

The foregoing rule, counsel urged, does not provide for committal to civil jail; and so the Deputy Registrar, by ordering his arrest and committal to jail, without requiring him to show cause, had denied the *ex parte* applicant an opportunity to be heard and so there was a failure on the part of that Court to be guided by the principle of natural justice. As the applicant was not heard, counsel submitted, there was no finding made that was capable of resulting in a committal to jail.

Counsel submitted that the instant application is not an appeal; and that “*the applicant is not challenging the respondent's right to execute*”; “*what the applicant is challenging is the manner of arriving at the decision*”. Counsel urged that “*when the Court acts without hearing a party, such a Court acts without jurisdiction*”.

Learned counsel invoked Article 24 of the ***Constitution of Kenya, 2010*** which thus provides:

“(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.....”

One of the several fundamental rights and freedoms that may not be limited is stated in Article 25 (c) of the Constitution as “*the right to a fair trial*”.

Counsel submitted that “*the manner in which the applicant has been condemned and committed to prison is not only illegal, but also unreasonable*”. Counsel further urged: “*Committal to civil jail is a cruel and almost primitive form of execution. It is a last – resort procedure and there are conditions to be satisfied before it is resorted to. The Constitution seems to outlaw it, and there is no explanation as to why the interested party has chosen it*”.

For the Deputy Registrar [respondent], counsel submits that the decision being challenged was made on **11th June, 2010**, in **Mombasa HCCC No. 329 of 2009**: with the effect that the **ex parte** applicant is to be committed to jail for failure to pay a Judgment debt of Kshs. 279,171/00 due and owing to the interested party.

Counsel submitted that the instant application is frivolous, vexatious and an abuse of the process of the Court: for the **ex parte** applicant is aware he is the judgment-debtor in **HCC Misc. Appl. No. 329 of 2009** in which he is liable to pay the decretal sum. Counsel submits that the **ex parte** applicant has not paid up the moneys due “*in spite of being served with a notice to show cause why execution should not issue by the decree-holder dated 8th October, 2009*”.

Counsel urged that the Deputy Registrar had acted in accordance with the law; he had examined the evidence, and found that the **ex parte** applicant had failed to pay the required moneys – and so issued the warrant of arrest of **11th June, 2010**.

Counsel for the interested party submitted that, during the execution proceedings, the **ex parte** applicant had been represented “*throughout...from the time of arguing the bill of costs up to the time the warrant of arrest was issued. The applicant even raised a preliminary objection which was dismissed*”. On **20th May, 2010** the **ex parte** applicant was represented in Court, and applied for an adjournment to come up with a proposal for settlement of the costs as taxed. In these circumstances, counsel urged, “*the applicant was given a fair hearing*”: and “*the issue of the interested party executing on a different file [Mombasa HCC Misc. Appl. No. 234 of 2008] was never raised as the applicant was always aware that the costs being taxed were [in respect of] Mombasa H.C. Misc. Appl. No. 234 of 2008*”.

On the applicant’s contention that there is a pending application for review which is yet to be prosecuted, counsel submitted that the Order that was to be reviewed was in respect of Notice to Show Cause dated **2nd November, 2009** –and not the present Notice to Show Cause dated **18th May, 2010**. The learned Magistrate had ruled that the Notice to Show Cause of **18th May, 2010** was properly before the Court: and the applicant did not appeal against the ruling. The applicant had continued to participate in the proceedings, and even made an offer to pay the decretal amount on **15th June, 2010**; he, however, failed to discharge this undertaking, and this led to the committal order.

It is clear that the applicant’s gravamen relates to decisions taken by the Deputy Registrar within the broader context of High Court proceedings. Such a decision is, in my opinion, a decision **in aid of the process of the High Court**; and thus, if it should be erroneous in point of law, the normal recourse is **appeal**, rather than seeking quashing orders by way of **certiorari**. The consistent practice in relation to the judicial review jurisdiction, shows that the relief Orders granted are those of the High Court in regard to a **different** entity performing a public duty.

Counsel for the interested party has submitted that the **ex parte** applicant had constantly participated in the proceedings before the Deputy Registrar, and even made undertakings to pay up the decretal monies. This means there would have been no basis for an **appeal** against the decision of the Deputy Registrar; yet now, **judicial review proceedings** have been lodged to quash proceedings before the Deputy Registrar.

The evidence placed before the Court does not show the makings of any irregularity in the proceedings before the Deputy Registrar: and I have found no basis for the claims of irregularity or illegality.

It follows that there is no factual support to the submissions made by the **ex parte** applicant’s counsel, in the context of the rights and freedoms specified in the Constitution.

In short, no proper case has been placed before the Court which should occasion the making of judicial review orders.

The **ex parte** applicant’s Notice of Motion of **6th July, 2010** is dismissed, with costs to the interested

party.

DATED and DELIVERED at MOMBASA this 20th day of May, 2011.

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J. B. OJWANG

JUDGE