REPUBLIS OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

Miscellaneous Civil Application 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 …….…….....…… PLAINTIF

-VERSUS-

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

THE TREASURER, CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

THE DIRECTOR OF LEGAL AFFAIRS, CITY COUNCIL OF NAIROBI..3RD RESPONDENT

EX-PARTE……...….....……..GEORGE GIKUBU MBUTHIA

R U L I N G

By a Notice of Motion dated 26th September, 2011 the Ex-parte Applicant George Gikubu Mbuthia moved the court to make the following order:

"An order confirming sums due to the ex-parte applicant as at 3rd October, 2011 be made and the final

decree be sealed and signed by the Deputy Registrar"

The application was supported by an affidavit sworn by the Ex-parte applicant on 26th September, 2011 and was premised on the following grounds:

1. ***THAT, I am the ex-parte applicant herein and duly competent to swear this oath.***

2. ***THAT, on the 16th March, 2011 this Honourable Court ordered the Deputy Registrar to confirm the exact sum payable to me as at 31st March 2011. "Exhibit GGM 1".***

3. THAT, instead of verifying the correctness of the draft final decree filed on 29th March, 2011 the Deputy Registrar did mathematical analysis without consent of the parties and in violation of this Honourable Court's Order of 16th March, 2011* and *Order 21 Rule 8 of Civil Procedure Rules. Exhibit GGM 2 (a) and (b).

4. ***THAT, the "decree" as drawn by the Deputy Registrar is void and amounts to an abuse of the court process.***

5. THAT, what I have deponed hereto in support of the Notice of Motion is true to the best of my knowledge.

The application was opposed through a Replying affidavit sworn by Aduma J. Owuor on 6th October, 2011.

The application was argued before me inter-partes on 24th October, 2011. In his submissions, the applicant urged the court to make an order directing the Deputy Registrar to seal and sign the final decree as drawn by the applicant and filed in court on 27th September, 2011 since it is in his view the decree that complies with the law having been prepared by him as one of the parties in HCC.1874/1999 in compliance with order 21 Rule 8 (2) of the Civil Procedure Rules.

The decretal amount in the said decree was to cover total amounts due to the Applicant from the Respondent as at 3rd October, 2011. He maintained that the draft decree titled "**final decree"** prepared by the Deputy Registrar of the High Court and circulated to parties for approval or non-approval vide letter dated 8th July, 2011 was null and void ***abinitio*** as it was prepared by the court in contravention of order 21 Rule 8 (2) of the Civil Procedure Rules since the court was not a party in the proceedings. The said final decree was approved by the Respondent but was not approved by the applicant who marked it for settlement hence the current application. In addition, the applicant submitted that there was no agreement in writing between the parties authorizing the court to prepare a final decree for the parties which would have given validity to the final decree prepared by the Deputy Registrar under Order 49 Rule 3 of the Civil Procedure Rules.

Miss Nandwa for the Respondent in opposing the application submitted that the final decree drawn by the applicant which the applicant urges the court to adopt as the final decree in the suit is erroneous since it had included interest on costs and it had not been prepared in accordance with the directions given by Musinga, J in his rulings delivered on 10th December, 2010 and 16th March, 2011. She further claimed that the said final decree did not take into account sums already paid to the applicant amounting to Kshs.6,450,000/-.

Having considered the rival submissions by the parties in this matter, I wholly concur with the applicant that only parties to suits in the High Court are legally mandated by Order 21 Rule 8 (2) Civil Procedure Rules to prepare a draft decree and forward the same for approval to other parties in the suit and once it is approved with or without amendments, it is adopted as the final decree issued by the court, signed and sealed by the Deputy Registrar. I agree with the applicant that it would be against the law and in violation of Order 21 Rule 8(2) of the Civil Procedure Rules for a court of its own motion to prepare a draft decree

for approval/or non-approval by parties in a suit filed in the High Court. A final decree emanating from a draft decree prepared by the court of its own motion would be null and void and of no legal effect.

However, the decree prepared by the Deputy Registrar and forwarded to the parties herein vide letter dated 8th July, 2011 which is being challenged by the applicant was not a draft decree prepared under Order 21 Rule 8 (2) of the Civil Procedure Rules. It was to be the final decree expressly prepared by the Deputy Registrar in accordance with directions given by Musinga, J in his ruling delivered on 16th March, 2011. Towards the end of his ruling Musinga, J stated as follows:

"……. in the circumstances, the Deputy Registrar should confirm the exact sum payable upto 31st March 2011, enter judgment in terms of Order 49 Rule 2(b) of the Civil Procedure Rules and issue a final decree. In so doing, she will be guided by the approved decree of 29th May, 2006 and the ruling dated 10th December, 2010…."

The letter dated 8th July, 2011 addressed to the parties by the Deputy Registrar forwarding the said decree for their approval/or non-approval was in the following terms:

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We refer to the above matter and the Judge's ruling dated 16th March, 2011. In the said Judgment the Judge stated:

"The Deputy Registrar should confirm the exact sum payable upto 31st March, 2011 and enter judgment in terms of Order 49(2)b of Civil Procedure Rules and issue a final decree"

We have therefore prepared a decree in compliance with the above order, approved decree of 29th May 2006 and ruling dated 10th December 2010. The said decree is annexed to this letter.

Kindly do let us have the said decree approved or not approved within 7 days….."

A reading of the said letter leaves no room for doubt that the decree in issue had been prepared by the Deputy Registrar in compliance with the court's order in Ruling dated 16th March 2011, the approved decree of 29th May, 2006 and directions given in Musinga, J's ruling delivered on 10th December, 2010.

In his ruling delivered on 10th December 2010 Musinga, J held as follows:

"It is not the function of the court to do a mathematical analysis of the statements filed by the parties herein to determine the exact amount payable. What this court ought to do is to declare how the outstanding sum ought to be computed".

I respectfully agree.

However where the parties have failed to agree on the amounts payable and they seek the court's intervention to resolve the stalemate as happened in this case, the court has an obligation to compute the amounts due and payable to the decree holder.

Under Order 21 Rule 8(4) Civil Procedure Rules, the court is empowered to settle decrees for parties where there is disagreement between the parties and the courts intervention is required. In this case parties had failed to agree on amounts payable to the applicant and that's why court's intervention became necessary leading to the ruling delivered on 16th March, 2011.

It is instructive to note that parties had both approved the decree dated 29th May, 2006 meaning they had

consented to terms therein and the said decree was to form the basis for the computation of sums payable to the applicant in the final decree to be prepared in compliance with directions given in the ruling dated 16th March, 2011.

Having been prepared in compliance with the aforesaid court

order, I find that the decree prepared by the Deputy Registrar was valid and lawful save for the fact that it did not specify amounts awarded as costs and interest on such costs and amounts already paid to the applicant.

Though the Respondents had advanced the position that interest was not payable on costs, it is worth noting that in the decree approved by the parties and issued by the court on 29th May, 2006, costs of the suit was to be paid to the plaintiff (applicant herein) together with interest – ***see order No.4 thereof***. Though the rate of interest on cost was not disclosed, it is my finding that since the parties had agreed on interest at court rates on principal sums due till payment in full, the same rate should be adopted for calculation of interest on costs. I make this finding because the parties did not agree on interest rate payable on costs and they did not seek an interpretation of the same when they sought interpretation of interest rates payable on the principal sums due under Section 26 of the Civil Procedure Act which was the subject of the Senior Principal Deputy Registrar's ruling delivered on 17th March, 2010 which was adopted by Musinga, J in his ruling delivered on 10th December, 2010.

In view of the foregoing, I allow the application and hereby direct the Deputy Registrar to ascertain the amounts due and payable to the applicant upto 3rd October, 2011 specifying amounts payable as costs and interests thereon and taking into account amounts already paid to the applicant which the applicant admits amounts to Kshs.6,450,000. In computing the sums due, the Deputy Registrar will continue to be guided by the parties approved decree of 29th May, 2006 and once the sums due to the applicant are so ascertained, the Deputy Registrar will proceed to issue a fina l decree in this matter. It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 16th day of November, 2011

C. W. GITHUA
JUDGE

In the presence of:

…….. For Applicant

…….. For Respondents

C. W. GITHUA

JUDGE