



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Case 1033 of 2008

GEORGE GIKUBU MBUTHIA.....APPLICATION

Versus

NAIROBI CITY COUNCIL.....DEFENDANT

RULING

Before me is the application dated 20th January 2009 filed by the ex parte Applicant, George Gikubu Mbuthia who comes under the inherent powers of this court. He seeks the following orders against the Respondent:

- A. That the entire proceedings commenced by Notice of Motion dated 29th September 2006 be set aside ex debito justitiae;
- B. That the Respondent be bared from filing any papers or addressing this court;
- C. That the Notice of appearance and Grounds of objection filed by Wachira Nderitu and Co. Advocates and replying affidavit sworn on 14th February 2007 by the Respondent's Director of legal affairs be expunged from the record.
- D. Costs be paid by the Respondent.

The grounds upon which the application is premised are found in the body of the application. The application is also supported by an affidavit sworn by the Applicant on 20th January 2009.

The application was not opposed as no papers were filed. The Counsel who appeared on behalf of the Respondent had nothing to say.

Briefly, the background of this case is that the ex parte Applicant filed the Notice of Motion dated 21st September 1998 seeking an order of mandamus for payment of Kkshs.11,797,551/45. On 30th September 1998 a judgment was entered on behalf of the Applicant against the Respondent as prayed. Thereafter, some payments were made but the Applicant is of the view that all sums have not been made. On 29th September 2006, the Applicant filed the application dated 29th September 2006 seeking leave of the court to institute contempt proceedings against the Town Clerk City Council of Nairobi and costs. It was based on the grounds that the Respondent had failed to pay the full decretal as per court order of 1st October 1998. That the Respondent had paid Kshs.12,823,025/= but had been left with a balance of Kshs.2,246,767/=. The matter was heard and it transpired that the parties have not agreed on the exact sum payable. Whereas the Applicant denied the Respondent had not fully paid, the Respondents were of

the view that they had overpaid the Applicant.

The court on 12th March 2007 ruled that the issue was one of accounts and directed the Deputy Registrar (DR) to reconcile the figures which he did. Again the Applicant was dissatisfied with the said decision of the DR. The applicant filed an application for review of the DR's order and this court directed the same to be heard by the DR. It is that order of the Registrar that the Applicant and others made on 27th March 2007, 14th October 2008 by the DR, and further orders of 3rd August 2007 and 12th November 2008 to be null and void ab initio and of no effect.

The grounds upon which this Applicant is brought are that;

- 1) The supervisory jurisdiction conferred on the High Court by statute cannot be delegated to the DR;
- 2) That the work of the DR is not specifically stated under the Law Reform Act and Rules made under Order 53 Civil Procedure Rules and that the order made by the DR render this proceedings a nullity;
- 3) That the orders made on 12th March 2007 and 27th March 2007 and 14th March 2008 directed at the DR in these proceedings and those given by the DRs on 3rd August 2007 and 12th November 2008 are all null and void;
- 4) That there was no appeal against the order of mandamus given on 1st October 1998 and the Respondent was statutorily barred from filing a notice of appearance and replying affidavit on 14th February 2007 and should not have been heard;
- 5) That the order of mandamus cannot be challenged in execution proceedings.

It is the Applicant who filed the Notice of Motion dated 29th September 2006 which he seeks to set aside. It is absurd for a party to move the court by an application and later when he is dissatisfied with orders made in consequence to that application to seek to set the proceedings aside just because he did not get the results he wanted. The court cannot allow its process to be used in such a manner and in my view that amounts to an abuse of the court process. If the Applicant is dissatisfied with the court's orders emanating from that application he could have appealed to the Court of Appeal.

The Applicant rightly points out that there is no provision for the duties of the DR in the Law Reform Act or under Order 53 Civil Procedure Rules which is the substantive as well as procedural law relating to Judicial Review. The same provisions do not provide any where what happens to the case after the court gives judgment. For example who assesses costs? Though there are no such provisions on the process of execution, there is a fall back on the practice under the Civil Procedure Act and Rules. The Applicant has not told this court who was supposed to calculate the interest payable on the sums claimed. Obviously it would not be the judge unless there was an appeal. The court noted that in the application dated 29th September 2006 the dispute was an issue of accounts because the Respondent claimed to have paid some monies and what was left was calculation of the interest on the balance of the decretal sum. That is why the DR was asked to calculate. Although the Applicant did not agree with the calculation, he never challenged it by way of appeal then. It is 2 years since and that he wants the court's orders and the whole proceedings set aside.

My understanding of the jurisdiction under Order 53 Civil Procedure Rules and S. 8 and 9 of the Law Reform Act is that the court will grant leave to commence Judicial Review proceeding; an order of stay if deserved, orders of mandamus certiorari and prohibition after hearing the Notice of Motion. These duties cannot be performed by a DR and the DR in this matter never purported to act in that capacity. The DR was only performing the ministerial administrative duties of execution and this case is distinguishable from **MISC 1133/02. REP V REGISTRAR OF SOCIETIES EX PARTE JUSTUS NYAGAYE** where a DR had recorded a consent judgment that had adversely affected the Interested Parties who were

not party to the consent order. That is not the position in this case. The DR merely dealt with the matter in execution of the mandamus order that had been granted by this court.

As regards the prayer that the documents filed by the Respondents be declared as nullities ordinarily in Judicial Review, party can be heard even when they have not filed any papers. In this case, though no papers were filed by the Respondent, after judgment papers were filed during the execution of the order due to issues of calculation of interest which had arisen. I would see no basis for declaring the said documents as nullities.

I have noted that though the Applicant contends that Judicial Review is a special jurisdiction, he goes ahead and invokes the Civil Procedure Rules in his grounds 4 and 5. He cannot have his cake and eat it.

In conclusion, I find the application by the Applicant to have no basis, lacks any merits and is an abuse of the court process as the court has been held up on the same issue over and over again and wants this court to keep going round in circles. Litigation must come to an end and this court declines to grant the prayers sought. The Applicants will bear the costs.

Dated and delivered this 27th day of May 2009.

R.P.V. WENDOH

JUDGE

Present

George Gikubu Mbuthia

Muturi: Court Clerk