

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 57 OF 2017

PROF. TOM OJIENDA & ASSOCIATES.....APPLICANT

-VERSUS-

NAIROBI CITY COUNTY.....RESPONDENT

RULING

The applicant's application is the motion dated 25 June 2019 seeking for the following orders:

- 1. That this honourable court be pleased to enter judgment of the applicant against the respondent for the sum of Kshs. 977,141/= (Kenya shillings Nine Hundred and Seventy-Seven Thousand, One Hundred and Forty-One Only) against the respondent on (sic) as it appears in the certificate of taxation dated 3rd October, 2018 with interest from the date of taxation and upon filing of this application until payment in full.**
- 2. That the honourable court to allow the Applicant to execute the judgment herein against the Respondent, Nairobi City County.**
- 3. That the costs of this application be provided for."**

The application is supported by the affidavit of Prof. Tom Ojienda sworn on 25 June 2019. In that affidavit it has been deposed that on 27 May 2018, this honourable court made an order in Judicial Review Miscellaneous Application No. 57 of 2017 according to which the respondent was ordered to pay the applicant the sum of Kshs. 977,141/=.

This sum arose out of the advocate-client bill of costs in Judicial Review Application No. 433 of 2009 in which the applicant had represented the respondent. The figure represented the taxed costs for which a certificate of taxation dated 3 October 2018 had been issued by the Deputy Registrar of this Honourable Court. It is the applicant's case that despite several efforts to have the respondent settle this decretal sum, it has failed to do so hence the orders sought in the present application.

The respondent opposed the application and filed a replying affidavit to that effect; the affidavit was sworn by David Oseko, the respondent's director of legal services.

According to Oseko, the respondent does not out rightly deny that the decretal amount is owing but that it requires time to undertake an internal audit 'to protect public funds.'

Besides the anticipated internal audit, Oseko has also sworn that the respondent is in the process of seeking a general moratorium against the creditors who, like the applicant, are demanding costs. This apparently is being done in **High Court Petition No. 11 of 2018; Nairobi City County & Another versus The Hon. Attorney General & Others.**

Nonetheless, the respondent is willing to settle the pending decrees subject to 'requisite approvals'. In short, the respondent needs time to ascertain the amounts owing to avoid the risk of double payments.

The applicant submitted that as long as the certificate of taxation dated 3 October 2018 has not been set aside, he is entitled to the orders sought. Counsel cited section 51 (2) of the Advocates Act, cap. 16 according to which this honourable court is empowered to enter judgment in the sum of the certified by the taxing master; that section reads as follows:

- 51. (2) *The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.***

This section was applied in **Musyoka and Wambua Advocates versus Rustam Hira Advocate (2006) eKLR** where it was held that the court has discretion to enter judgment on a certificate of taxation which has not been set aside or altered. entry of such a judgment was held to be one way of recovery of taxed costs provided by law in addition to filing of suit.

Other cases cited are **Ahmednasir Abdikadir & Company Advocates versus National Bank of Kenya Limited (2006) eKLR** cited with approval in **Gichuki King'ara & Compnay Advocates versus Mugoya Construction & Engineering Ltd and A.M. Kimani & Company Advocates versus Kenindia Assurance Company Limited (2006) eKLR** for the argument that in the absence of any order of stay, setting aside or alteration by the court of a certificate of costs, or unless there is a dispute on retainer, then it is proper for the court to enter judgment

in accordance with section 51(2) of the Advocates Act.

On the respondent's behalf it was submitted that the amount due is not necessarily in dispute but counsel reiterated that the respondent is in the process of ascertaining genuine claims against the respondent and at the same time seeking 'a general moratorium' against creditors. It was also urged that the respondent's failure to pay taxed costs is not intentional but it is due to factors beyond its control.

The learned counsel for the respondent cited the decision in **Wachira Nderitu, Ngugi & Company Advocates versus the Town Clerk, City Council of Nairobi, Miscellaneous Application No. 354 of 2012** where it was held that a judgment debtor, in this case the City Council of Nairobi, may require time to settle claims against it, including decretal sums, until such a time that its cashflow can support settlement of such claims.

Looking at the respondent's response and even after considering its submissions, I am unable to find any valid reason why the applicant's motion should not be allowed. Unlike the applicant who has furnished this honourable court with both factual and legal basis for the entry of judgment against the respondent as prayed in his motion, the latter has not provided alternative legal position that would persuade the court from allowing the applicant's application.

Most importantly, the decretal sum is not in dispute and the process through it was arrived at has also not been challenged. While it may be true that the respondent is undertaking audit of its affairs and is also seeking a moratorium of some sorts, it must be understood that neither of these things is in law capable of staying the enforcement of the decree against the respondent.

In a nutshell, there should not be any debate on whether the applicant is entitled to the order of mandamus; accordingly, the applicant's motion dated 25 June 2019 is allowed in terms of prayer (1). The applicant shall also have costs of the application. Orders accordingly.

DATED, SIGNED AND DELIVERED ON 5TH MARCH 2021

Ngaah Jairus

JUDGE