Republic v Baringo County Government & 2 others; Advocates (Exparte) (Application 687 of 2017) [2024] KEHC 4369 (KLR) (Judicial Review) (26 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4369 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION 687 OF 2017

J NGAAH, J

APRIL 26, 2024

BETWEEN

REPUBLIC .... APPLICANT

AND

BARINGO COUNTY GOVERNMENT .... 1ST RESPONDENT

COUNTY SECRETARY, BARINGO COUNTY .... 2ND RESPONDENT

CHIEF OFFICER, FINANCE/COUNTY TREASURER .... 3RD RESPONDENT

AND

KTK ADVOCATES .... EXPARTE

RULING

1. M/s KTK Advocates' (hereinafter "the advocates") advocate/client bill of costs was taxed at Kshs.17, 570,907.08. In an application by the advocates dated 28 June 2017 and filed in court on 3 July 2017, the advocate's sought judgment for the taxed amount, against client. This information is apparent in a ruling delivered by this Honourable Court (Mativo, J, as he then was) on 24 July 2018.
2. The application for judgment was made under section 51(2) of the *Advocates Act*, cap. 16 which provides that the certificate of the taxing officer by whom any bill has been taxed shall be final as to the amount of costs covered thereby and that the court may make such order in relation thereto as it

thinks fit including an order that judgment be entered for the sum certified to be due with costs. The application was allowed in terms that:

> " That judgement be and is hereby allowed in favour of the applicant herein KTK Advocates against the respondent Baringo County Government in the sum of Kshs.17,570,907.08 plus interest at court rates from the date of taxation".

3. Baringo County Government was also ordered to pay cost of the application.

In order to enforce payment of the decretal sum, the advocates moved this Honourable Court for an order of mandamus. This was by a motion dated 29 June 2021. I rendered a ruling on the application on 28 January 2022 and noted as follows:

> " Looking at the affidavit of both Kipkorir and Komen, there is nothing much that this court is called upon to resolve. The parties are in agreement that the decree which the applicant holds has only been party settled. The trouble with the applicant's application is that the outstanding amount is not specified and this would certainly present some difficulty in enforcing the order of mandamus it is granted in the firm in which it is sought. But as noted, the respondents do not deny owing the applicant. It is only that, like the applicant, they have not stated clearly how much of the decree is outstanding. If only to bring to a halt the numerous litigations on the subject of settlement of the decree, I will issue the order of mandamus on condition that it will only be enforced once parties have taken account and agreed on the outstanding amount. Parties will bear their respective costs. I hasten to add that considering the terms upon which the applicant's application has been allowed, parties will be at liberty to apply. Orders accordingly."

4. The advocates then proceeded to file an application dated 14 July 2022 in which the main prayer was as follows:

> " 2. That a notice to show cause does issue to the respondents, County Secretary, Chief Officer Finance and County Treasurer, to show cause why contempt of court proceedings should not be commenced against them for the disobedience of orders of this Honourable court given on 28.01.2022".

I dismissed the application on 25 September 2023, because in exercise of their right of 'liberty to apply' the advocates purported to make an application before the deputy registrar for the registrar to make a determination on the outstanding amount due to the advocates. In my ruling, I established as follows, among other things:

> " It is evident from Mr. Kipkorir submissions that what was before the Deputy Registrar was "a statement of accounts" and not a bill of costs for taxation. Is to whether a statement of accounts could be presented before the deputy registrar as an application for determination is another question altogether but the point here is, contrary to what is represented in the 'certificate of costs; there was no taxation on 31st May 2022".

5. Be that as it may, the deputy registrar then proceeded to make a ruling, noting that the applicant had, in his "statement of accounts" sought Kshs.19,946,374.46 as the outstanding amount. She also noted that there was nothing filed by the respondents in opposition to the applicant's "statement of accounts". The deputy registrar then allowed the applicant's application and stated that "the statement of account dated 18/4/2022 is hereby confirmed and the file marked as closed".

6. In dismissing the course taken by the advocates before the deputy registrar, I was clear that the parties need not have made an application before the deputy registrar in exercising their right to liberty to apply. In particular, I noted as follows:

> " Now, if the court had to make a determination on the aspect of the order (that is the order of mandamus) it is the judge, and not the deputy registrar who could possibly make that determination".

7. By according the parties liberty to apply, the court did not thereby cede its judicial authority to the deputy registrar. Certainly, the court did not direct any of the parties to appear before the deputy registrar to resolve any misunderstanding that may require the determination of this Honourable Court. It follows that the application by the applicant before the deputy registrar was a non-starter.

8. Against this background the advocates have now moved this Honourable Court by way of a motion dated 13 December 2023 in which they seek the following orders:

> " 1. That, this application be certified urgent and service be dispensed in the first instance.
>
> 2. That, this Honourable Court be pleased to review the ruling and orders issued by the Honourable Justice J. Ngaah on 25.09.23.
>
> 3. That, upon review of the said ruling and orders a Notice to Show Cause does issue to the Respondents, County Secretary, Chief officer-Finance and County Treasurer, to show cause why contempt of Court Proceedings should not be commenced against them for disobedience of orders of this Honourable Court issued on 28.01.22.
>
> 4. That, this Honourable Court does issue such orders as it may deem fit to grant in the interests of justice.
>
> 5. That, the costs of this application be provided for".

9. The application is expressed to be brought under sections 1A, 1B and 3B and 80 of the *Civil Procedure Act*; section 3(2) of the High Court (Practice and Procedure) Rules. The application is supported by the affidavit of Mr. Donald B. Kipkorir, the proprietor of the applicant firm of advocates. In the affidavit, Mr. Kipkorir has sworn that:

> " 6. . That, the Applicant filed and served upon the Respondents a Statement of Accounts dated 18.04.22 which they failed to respond to. (I attach hereto a copy of the statement of accounts marked ("DBK-2").
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> 7. That, further, the Respondent neglected to attend the court session on 31.5.22 before the Honourable Deputy Registrar Registrar for settlement of accounts.
>
> 8. That, the Deputy Registrar acknowledged that the Respondents had been properly served with the Statement of Accounts and mention notice thereby confirming the accounts.
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> 9. That, the Applicant subsequently filed an application dated 14.07.22 which was subsequently dismissed on 25.09.23 by Honourable Justice J. Ngaah. (I attach hereto a copy of the ruling marked "DBK-4" and order marked "DBK-5".).

> 10. That, we inadvertently extracted Certificate of Taxation pursuant to the ruling of 31.05.22 instead of order.
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> 11. That, in support of the said application, I attached the wrongly extracted Certificate of Taxation marked "DBK-6".
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> 12. That, I have subsequently extracted the correct order which is attached hereto and marked "DBK-7".
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> 13. That, I seek review of the dismissal of 25.09.23 as dismissal was owing to my inadvertent attachment."

10. With due respect to the learned counsel, the application dated 14 July 2022 was not dismissed because the applicant had extracted a certificate of taxation instead of an "order". It was dismissed because the learned deputy registrar did not have jurisdiction to entertain any application made pursuant to this Honourable Court's order upon grant of the order of mandamus that any of the parties was at 'liberty to apply'.

11. Any application made pursuant to this order could only be made before a judge. If the judge felt, for instance, that it was necessary for the deputy registrar to do the computations of the outstanding amount, assuming parties did not agree, an order to that effect would be given by the judge with directions on what each of the parties was expected to file.

12. The net effect of my ruling of 25 September 2023 was that the proceedings before the deputy registrar on 31 May 2022 were a nullity and, therefore, of no legal consequence. It does not, therefore, matter that the applicant has extracted what he has described as a "correct order" instead of a certificate of taxation from those proceedings. To the extent that the instant application is based on the outcome of impugned proceedings before the deputy registrar, it is a nullity too.

13. If I may go back to the order of mandamus issued in favour of the advocate, it was on terms that it would "only be enforced once parties have taken accounts and agreed on the outstanding amount." What I gather from the applicant's application is that parties are not agreed on the outstanding amount. In the absence of such an agreement, the onus is on the applicant to move the court appropriately, on the strength of the order of "liberty to apply" for enforcement of the order of mandamus. Once moved the court will make an appropriate order.

14. Without the agreement of the parties or without an appropriate order from this court, contempt of court proceedings against the respondents would be premature at this stage.

    And even if the proceedings were properly before court, it does not appear the applicant has met the pre-requisites of making such an application for contempt. For instance, there is no evidence that the alleged contemnors have been personally served with the order they are alleged to be in contempt of and, even then, the order is not endorsed with the penal notice.

    For the reasons I have given, I hereby dismiss the applicant's application. I make no order as to costs.

DATED, SIGNED AND DELIVERED ON 26 APRIL, 2024.

NGAAH JAIRUS

JUDGE