



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

JUDICIAL REVIEW NO. 4 OF 2017

REPUBLICAPPLICANT

VERSUS

B.R KIPYEGON SENIOR RESIDENT MAGISTRAT

KERICHO CHIEF MAGISTRATE'S COURT.....RESPONDENT

AND

ELIZABETH KARUMBO.....1ST INTERESTED PARTY

ESTHER GATETE.....2ND INTERESTED PARTY

BERNARD ONYANGO.....3RD INTERESTED PARTY

EX-PARTE SPERO AFRICA LIMITED

JUDGMENT

1. The ex parte applicant in this matter (hereafter ‘the applicant’) was the 3rd party in **Kericho Chief Magistrate’s Court Civil Suit No. 33 of 2012**. The suit involved a claim for damages in respect of personal injuries sustained by the plaintiff (1st interested party) following a road traffic accident that had occurred on 6th December 2010. In a judgment dated 27th September 2016, the court in that case entered judgment for the plaintiff. It found the 1st defendant (the 2nd interested party) vicariously liable for the omissions of the 2nd defendant (3rd interested party). The court, however, found that the 3rd party in the case, the present applicant, was liable to indemnify the 1st defendant in respect of any liability arising from the accident.

2. This decision prompted the applicant to file an application dated 24th October 2016 seeking that the court reviews the said judgment. By a ruling dated 18th January 2017, the court partly allowed the application for review. It set aside the judgment in respect of liability of the 3rd party to indemnify the 1st defendant, and directed that the 3rd party (the applicant) fixes the suit for hearing within 60 days from the date of the ruling.

3. The matter was fixed for hearing on 15th March 2017. However, on that day, Learned Counsel for the 3rd party, Mr. Kiiru, indicated that he was unable to proceed as he intended to amend his statement of defence in lieu of the review. Counsel for the other parties opposed the application for adjournment. The court declined to allow the application for an adjournment and directed that the parties prepare to proceed within the next one hour from then.

4. At 11.00 a.m., Counsel for the 3rd party was still not ready to proceed. He indicated his intention to call a witness who was not in court on that day, and sought an adjournment on the basis that the situation was beyond his control.

5. The court, however, declined to grant the adjournment, noting that it was opposed by the other parties and that the date had been taken by consent. The court further directed the parties to proceed with the matter in accordance with the judgment of the court and either execute and/or appeal where necessary. Thereafter, the court marked the matter as concluded.

6. It is against the decision of the court not to allow the application for an adjournment that the applicant sought leave to bring the present judicial review proceedings. In its application brought by way of Notice of Motion dated 21st April 2017 pursuant to leave granted on 12th April 2017, the ex parte applicant seeks the following orders:-

i. THAT the Honourable Court be pleased to grant an order of certiorari to remove to this Honourable Court and quash the decision, directive and orders of the Respondent made on 15th March 2017 in Kericho Chief Magistrates Civil Suit No. 33 of 2012 and all other consequential orders and/or directions made on 29th March 2017 flowing from the respondents orders and/or directions made on 15th March 2017.

ii. THAT the court be pleased to give such other or further orders as it may deem just and expedient.

iii. THAT the costs of this application be provided for.

7. The application was opposed by the interested parties, but there was no appearance for the respondent. The parties presented their respective cases on the basis of affidavits and written submissions.

The applicant's case

8. The applicant's case is set out in the application, the statutory statement dated 11th April 2017 and the affidavit sworn on 21st April 2017 by Mr. John Mburu Njoroge, the transport manager of the applicant, as well as his further affidavits sworn on 28th September 2017 and 19th October 2017. The applicant also filed submissions dated 5th October 2017 and submissions in reply to the 1st and 2nd interested parties's submissions dated 23rd October 2017.

9. Mr. Njoroge deposes in his affidavit to the essential facts relating to the civil suit before the trial court: that the 1st interested party had filed a suit seeking special and general damages together with costs as a result of an accident that occurred on 6th December 2010. The trial court (Hon. Ndururi, PM), had entered judgment in favour of the plaintiff and directed that the 3rd party was liable to indemnify the 1st defendant in respect of any liability arising from the accident for the use of the motor vehicle during the subsistence of a lease agreement.

10. The applicant had then filed an application for review and setting aside of the said judgment, and the court had, in a ruling dated 18th January 2017, set aside the judgment of the trial court only with respect to the issue of liability of the applicant to indemnify the 1st interested party. Mr. Njoroge further deposes that the court had directed that the applicant fixes the matter for hearing within 60 days of the ruling.

11. Mr. Njoroge further avers that on the day scheduled for the re-hearing, the 15th March 2017, Counsel for the applicant sought an adjournment on the basis that the witness expected was no longer available and the 3rd party would need time to get another witness, something which was beyond its control. Its second reason was that there was need to amend its defence in order to lay a basis for tendering new evidence. The court had, however, declined to allow the adjournment and had directed the parties to be ready to proceed at 11 a.m.

12. Mr. Njoroge further deposes that when the matter came up before the court at 11.00 a.m., the applicant's Counsel brought to the attention of the court the fact that it had not yet given directions on its application for amendment of its defence. The court had then directed that the parties proceed on the basis of the earlier judgment.

13. Mr. Njoroge avers that the court, in rendering its ruling, failed to recognize that the judgment on record had already been set aside by the ruling of 18th January 2017; that the rules of evidence dictated that under section 107 of the Evidence Act, the 2nd defendant and/or her witnesses was to begin followed by the 3rd party's witness; that there was an application for amendment which was not heard on merit and that a matter cannot be marked as concluded as parties have a right to choose the cause of action they wish to take.

14. It was his deposition that the court rendered the ruling of 15th March 2017 without giving the applicant an opportunity to be heard, and the ruling reeks of grave procedural impropriety and prejudice as the court failed to grant the applicant an opportunity to put forth its case.

15. The applicant further argues that there was material irregularity in issuing the said orders as the respondent was aware that the ruling of 18th January 2017 was still on record and had never been set aside, and the court ignored the application on record for amendment of the defence and condemned the applicant unheard. The applicant contends that the respondent failed to observe the principles of natural justice by directing the parties to proceed with the judgment on record and denied the applicant's right to be heard on merit.

16. In the submissions filed on its behalf, the ex parte applicant contended that the respondent violated the rules of natural justice by issuing the orders of 15th March 2017 without conducting the hearing between all the parties. The respondent had effectively denied the ex-parte applicant the right to be heard on the basis of new evidence. He relied on the decision in **Republic vs Chief Magistrate Milimani Commercial Court & 2 others Ex-Parte Violet Ndanu Mutinda & 5 others [2014] eKLR** and **Msagha vs Chief Justice & 7 others Nairobi HCMCA No. 1062 of 2004**.

17. It was his contention further that the ruling of Hon. Ndururi was that the matter was to be fixed for hearing in 60 days and not that it was to be heard and determined within 60 days, a fact that the court failed to appreciate.

18. The appellant submitted that the respondent's decision was materially irregular and failed to adhere to due process. In his view, the only way to reinstate the previous judgment was if it was procedurally set aside and/or reviewed. The court could not unilaterally set aside the orders on its own volition. Counsel relied on the decision in **Prime Salt Works vs Kenya Industrial Plastics Ltd [2001] E.A 528** for the proposition that no man shall be condemned unheard.

The 1st Interested Party's Case

19. In a replying affidavit sworn on 12th October 2017, the 1st interested party deposes that the present application is frivolous, vexatious and a waste of the court's time, is brought in bad faith and is deliberately intended to deprive her of the fruits of her judgment. It is her further contention that if the orders sought are granted, they will create great embarrassment to not only the judiciary but also the respondent.

20. It is the 1st interested party's case that the application for an adjournment having been rejected, the situation could not be rectified through judicial review. In her view, under the provisions of section 107 of the Evidence Act and Order 18 of the Civil Procedure Code, the burden lay on the applicant to prove that he was not liable to indemnify the 1st defendant/1st Interested Party.

21. It is her contention that the applicant has at all times devised delaying tactics and has not complied with the orders of the court, and the present application is no exception. The present proceedings were not merited and are an abuse of the overriding objectives of the court which requires just expeditious and fair disposal of suits.

The 2nd Interested Party's Case

22. The 2nd interested party filed a replying affidavit sworn on 28th July 2017. She deposes that the decision of the respondent was logical, lawful and within the discretion of the court. She deposes further that the applicant ought to have appealed against the decision of the respondent if it was dissatisfied with the said decision.

23. It was her averment that the Hon. Ndururi (PM) had directed that the matter be heard and determined within a set time frame which the applicant never complied with and never sought extension of. It is her deposition that the applicant was in contempt of court and had no audience with the court.

24. Learned Counsel for the 2nd interested party, Mr. Koko argues in submissions dated 17th October 2017 that the respondent was within the ambit of the law and had powers and discretion to make the orders that the applicant seeks to quash. It is his submission that there was nothing *ultra vires*, illegal or unlawful in the decision of the respondent. His submission was that if the applicant was dissatisfied with the decision of the court declining to grant an adjournment, he should have filed an appeal against the decision. In his view, judicial review should only be brought in the clearest of cases.

25. Counsel invited the court to examine the present application which in his view raises matters of fact which arose from an application for an adjournment which was disallowed by the respondent. In his view, this court has no jurisdiction to entertain such an application. Counsel relied on the decision in **Republic vs Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR** for the proposition that a court has no jurisdiction to determine a matter in which an applicant brings judicial review proceedings with a view to determining contested matters of fact and in effect urges the court to determine the merits of two or more different versions presented by the parties.

26. It was also Mr. Koko's submission that the court had the powers to make the decision it did in view of the absence of the evidence that was to be adduced. Further, that it was wrong for the applicant to name the respondent in judicial review proceedings. Counsel cited the decision in **Maina Gitonga vs Catherine Nyawira Maina & Another [2015] eKLR** in support of this submission.

Analysis and Determination

27. I have considered the pleadings of the parties and their respective submissions, as well as the authorities they rely on in support, and I take the following view of the matter.

28. The application before me arises from a fairly innocuous proceeding before the respondent in this matter. An application for adjournment metamorphoses into a full judicial review application to quash the proceedings. Two questions arise with regard to the matter. The first is whether the respondent's decision to deny an adjournment offended the rules of natural justice. The second is whether this judicial review application was the appropriate manner for challenging the decision of the respondent to deny the applicant an adjournment.

29. An application for judicial review, it bears repeating, is concerned not with the merits of the impugned decision but with the decision making process itself. In **Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** it was held that:

"...judicial review is concerned with the decision -making process, not with the merits of the decision itself...The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at" Did those who made the decision have the power, i.e. the jurisdiction to make it" Were the persons affected by the decision heard before it was made" In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters" These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."

30. In **Republic vs Attorney General & 4 Others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji (supra)**, the Court held as follows:

"Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account

irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved.”

31. An application for an adjournment in proceedings before a court, on the other hand, involves the exercise of discretion, based on the facts and circumstances of the case. In **Peter M. Kariuki vs Attorney General [2014] eKLR** the Court of Appeal considered the court’s discretion in an application for adjournment and stated as follows:-

“In SAVANNAH DEVELOPMENT COMPANY LTD V MERCANTILE COMPANY LTD, CA NO. 120 of 1992, this Court stated that there may be reasons for seeking adjournment of a case set down for hearing on a particular day and that where there are valid reasons to justify granting of an adjournment, the Court always has unfettered discretion to grant the adjournment. The Court further stated that elements to be taken into consideration in an application for adjournment include the adequacy of the reasons given for the application for adjournment; how far, if at all, the other party is likely to be prejudiced by the adjournment; and whether the other party can be suitably compensated by award of costs.”

32. The Court cited with approval the decision of the Supreme Court of Uganda in **Famous Cycle Agencies Ltd & Others vs Masukhalal Ramji Karia, (1995) Kampala Law Reports 100** in which that Court had expressed a similar view and stated:

“(The Supreme Court)...was of the same mind when it stated that granting an adjournment to a party is left to the discretion of the court and the discretion is not subject to any definite rules, but should be exercised in a judicial and reasonable manner and upon proper material. Such discretion, the court continued, should be exercised after considering the party’s conduct in the case, the opportunity he had of getting ready and the truth and sufficiency of the reasons alleged by him for not being ready.

33. In the matter before me, the applicant was aggrieved by the decision of the respondent not to grant it an adjournment. It was heard on the application but that application was rejected. As the cases cited above illustrate, whether or not to grant an adjournment involves an exercise of discretion, which involves consideration of the reasons that a party gives for seeking an adjournment. Thus, in considering whether the court exercised its discretion properly, this court would of necessity have to inquire into the merits of the case before the respondent.

34. In **Republic vs Chief Magistrate, Resident Magistrate’s Court at Nairobi-Milimani Commercial Court Ex-parte Safaricom Limited & 2 Others [2014] eKLR**, the court was dealing with a matter similar to the present case, in which the applicant was aggrieved by a decision of the trial court not to grant an adjournment. The court (Odunga J) expressed the following view:

31. In this case, it is contended that the applicant was denied an opportunity of being heard. However, from the applicant’s own affidavit and the record, it is clear that there was an opportunity afforded to the applicant to present its case. It was not prevented from doing so. What the applicant terms denial of a hearing was in fact the denial of an application for adjournment to enable the applicant avail the witness who was not available on the hearing day.

32. That the decision whether or not to grant an adjournment is an exercise of judicial discretion cannot be in doubt. When then do courts of law interfere with exercise of discretion" The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of Nyamu, J (as he then was) in Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.

35. The Learned Judge concluded as follows at paragraph 33:

33. However, where a discretion has been exercised, whether wrongly or rightly, it is my view that such exercise of discretion unless is shown to be illegal, irrational or unreasonable, goes to the merit of the decision and ought not to be made the subject of judicial review application since the effect of a judicial review court investigating such an exercise of discretion would be to find whether or not in the circumstances, the decision was merited and hence the judicial review court would be sitting on an appeal against the decision being challenged. Even on an appeal, the law is that the decision disallowing adjournment being within the Judge’s discretion an Appellate Court would be slow to interfere unless the discretion was not exercised judicially.”

36. In determining that the judicial review application before it was unmerited, the court expressed the view that although the applicant might have had a basis for an appeal, judicial review was not the appropriate remedy. It stated as follows:

“39. Having considered the foregoing, it is my view that whereas the applicant’s complaints may be a basis for an appeal, the said complaints do not warrant the grant of judicial review order of certiorari sought herein.”

37. I am in agreement with the sentiments of my brother Judge in the above matter, and I find that a similar situation obtains in this case. The respondent exercised its discretion, on the facts before it, to deny the applicant an adjournment. The applicant had obtained orders which required it to prosecute its case expeditiously. It had not done so. The court had considered its application for adjournment and found the reasons advanced to be without merit. What the applicant should have done is file an appeal against the decision.

38. In closing, I wish to make an observation about the joinder of the respondent, by name, in these proceedings. As observed by Mr. Koko for the 2nd interested party, it was wrong to name the Senior Resident Magistrate by name as a party with regard to proceedings that he

undertook in his capacity as a judicial officer. As was observed by the High Court in **Maina Gitonga vs Catherine Nyawira Maina & another [2015] eKLR**:

“It is undoubted that under the established doctrine of judicial immunity, a judicial officer is absolutely immune from a criminal or civil suit arising from acts taken within or even in excess of his jurisdiction. Judicial immunity is necessary for various policies. The public interest is substantially weakened if a judge or a magistrate allows fear of a criminal or civil suit to affect his decisions. In addition, if judicial matters are drawn into question by frivolous and vexatious actions, ‘there never will be an end of causes: but controversies will be infinite...judicial officers should not be put in a position which forces them to look over their backs every time they make a decision. Whenever a judicial officer has to make a decision, he should make such a decision in good faith and without fear that he will be taken to court for making the decision. Whenever a party wants to challenge the decision of a judicial officer by way of a judicial review, he should not make the judicial officer who made the decision a respondent...” (Emphasis added)

39. At any rate, the present judicial review application is, in my view, without merit, and is hereby dismissed with costs to the interested parties.

Dated Delivered and Signed at Kericho this 3rd day of July 2018

MUMBI NGUGI

JUDGE