



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**JUDICIAL REVIEW NO. 22 OF 2019**

**IN THE MATTER OF:**

**STATE CORPORATIONS ACT CHAPTER OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF:**

**LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA SECTIONS 8 & 9**

**AND**

**IN THE MATTER OF:**

**JUDICIAL REVIEW ORDERS OF MANDAMUS**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**VERSUS**

**KENYA FERRIES SERVICES LIMITED .....1<sup>ST</sup> APPLICANT**

**ACCOUNTING OFFICER.....2<sup>ND</sup> APPLICANT**

**AND**

**MADALE TRACKING**

**COMPANY LIMITED..... EX PARTE APPLICANT/1<sup>ST</sup> RESPONDENT**

**AFRICAN MERCHANT ASSURANCE**

**COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

**The Application**

1. The 1<sup>st</sup> Applicant herein Kenya Ferry Services Ltd was sometime in 2014 sued vide High Court Civil Suit No 114 of 2014 by the 1<sup>st</sup> Respondent Madale Tracking Co Ltd after one of the motor vehicles belonging to the 1<sup>st</sup> Respondent plunged into the ocean while boarding a ferry owned by the 1<sup>st</sup> Applicant. The 1<sup>st</sup> Applicant had at that particular time taken out insurance policy with the 2<sup>nd</sup> Respondent Amaco Insurance Co Ltd. Consequently, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents entered into a consent to settle the suit by payment of monthly installments of the decretal amount arising out of the damages awarded from the accident. The failure to settle the terms of the consent led to this court ruling rendered on 12/5/2020 and which allowed the 1<sup>st</sup> Respondent to attach the Applicant’s property in satisfaction of the outstanding amount.

2. It is against that backdrop that the application before court was filed on 2/9/2020 seeking for the following orders;

**i. Spent**

**ii. Spent**

**iii. Spent**

**iv. spent**

**v. The honourable court be pleased to vacate or set aside the ex parte judgement in default of appearance issued in this matter together with its decree herein dated 12/5/2020**

**vi. That the proclamation notice dated 17/8/2020 be set aside**

**vii. That this judicial review proceedings against the Kenya ferry services ltd be dismissed with costs for non-disclosure**

### **Response**

3. The application was opposed by the replying affidavit of one **Jonas Madale** the director of the 1<sup>st</sup> Respondent company. He averred that the Applicant had been served with judicial review proceedings on 6/9/2019 and the same were acknowledged; that judgement had been entered in favour of the 1<sup>st</sup> Respondent at the sum of Kshs 6,139,140/=; that by consent it was agreed that the sum was to be paid in installments and in case of any default the respondent was at liberty to execute and further that the Applicant had paid a total of Kshs 3,500,000/= and leaving a balance of Kshs 5,585,000/=.

4. The deponent further stated that the application was frivolous and misconceived and had been brought in bad faith as the judgement subject of the execution had not been set aside and neither had the consent been appealed against or set aside. It was stated that the 2<sup>nd</sup> Respondent was entitled to step into the Applicant's shoes and indemnify them from third party claims. The Respondent prayed that the application be dismissed with costs.

### **Submissions**

#### **Applicant's submissions**

5. Mr. Wachira learned State counsel for the Attorney General submitted that the underlying execution was subject of a consent agreement between the 1<sup>st</sup> Respondent/Ex parte Applicant's counsel and the 2<sup>nd</sup> Respondent and the action of attaching the 1<sup>st</sup> Applicant was illegal and contrary to the doctrine of privity of contract. That the element of full disclosure of facts led to failure of candour on part of the Applicant and hence the judicial review orders sought could not obtain. Reliance on the importance of full disclosure was placed on **Brinks-Mat Ltd v Elcombe and Others [1988]3 All ER 188**.

6. Counsel submitted that the judicial review application had not been served upon the Applicant and the orders of 12/5/2020 had been obtained ex parte. Counsel submitted that the Applicant being a public entity relied on funding from the exchequer and hence could not clear the decretal amount all at once and without being allocated funds for such use in its budget. It was further stated that the court lacked jurisdiction to deal with the issues as was outlined in the plaint and the same ought to be declared a nullity by the court.

#### **1<sup>st</sup> Respondents Submissions**

7. Mr. Kibara for the 1<sup>st</sup> Respondent submitted that this court lacked the requisite jurisdiction to issue the orders prayed for as the same had been exhausted by the orders of mandamus earlier on issued and hence the court was functus officio. Section 8[3] and [5] of the Law Reform Act were cited in support. It was submitted that the Applicant could only ventilate its case at the Court of Appeal. Several decisions were quoted in support of the said issue.

8. The 1<sup>st</sup> Respondent further stated that a consent judgement can only be set aside if the applicant proves that the same was obtained fraudulently or by failure to disclose the same to the concerned parties. That the Applicant herein had however failed to prove they had not been served with the judicial review proceedings. The Respondent claimed that they had on the other hand proved that service had been affected upon the Applicant. Counsel submitted that the court in this instance was not clothed with the jurisdiction to settle disputes between private parties with contractual obligations upon each other, and that judicial review orders could only obtain in public law remedies and could not be used to enforce private contracts. The court was urged to dismiss the application with costs to the Respondents.

### **Determination**

9. Upon consideration of the Notice of Motion application dated 2/9/2020 including the supporting affidavit, response thereto parties submissions and the various case law and statutes mentioned by both parties, the following are the issues for determination:

**i. Whether or not this court has the jurisdiction to grant the orders sought**

**ii. whether or not the orders sought can obtain**

10. It is noteworthy that vide a ruling dated 12/5/2020 this court issued orders of mandamus compelling the Applicant to pay the decretal amount owing to the 1<sup>st</sup> Respondent which amounted to Kshs 5,285,000/. The said ruling is subject of the application herein for setting aside the orders of mandamus and dismissal of the said judicial review application. This fact raises the question on whether or not this court has the jurisdiction to set aside orders it had earlier on issued in satisfaction of the decree herein. This court's jurisdiction in determining judicial review applications is set by section 8 of the Law Reform Act and section 53 of the Civil Procedures Rules. The procedure for challenging judicial review orders as granted by the High Court was outlined in **Judicial Commission of Inquiry Into Goldenberg Affair & 3 Others v Kilach[2003]249** where the Court of Appeal with approval applied the principles cited in the case of **Republic v Secretary of State Exparte Herbage[1978] 1 ALL ER342** where it was stated:

**viii. "The appropriate procedure for challenging leave granted ex parte under RSC order 53 rule 3 to apply for judicial review was either by an application under the inherent jurisdiction of the court to the judge who granted leave or by way of an appeal under the general appellate jurisdiction conferred by section 16[1] of the supreme court act 1981..."**

11. In the instant case, it has been submitted by the Applicant that the orders for leave for judicial review proceedings were granted ex parte and with no disclosure of material facts. The prayer to set aside the said orders has been made and the same has been opposed by the 1<sup>st</sup> Respondent who states that this court has no jurisdiction to issue the same. This court is guided by the holding of the Court of Appeal in **Civil Appeal No 257 of 2003 Aga Khan Education Service Kenya v Republic through Ali Seif & 2 Others and the Attorney General** where it was stated;

**"So once there is an arguable case, leave is to be granted and the court, at that stage is not called upon to go into the matter in depth. Again, by their very nature ex parte orders are provisional and can be set aside by the judge who has granted it. Of course, if the judge who granted leave cannot sit for one reason or another, then another judge would be perfectly entitled to hear the application to set aside the grant of leave for the jurisdiction is available to all judges of the superior court"**

12. From the foregoing it is clear that this Court has the power to review its orders. The said orders can be reviewed under the judge who made the said orders or through an appeal to a higher court which in this instance is the Court of Appeal. Further in **Republic v Vice Chancellor Moi University & 3 Others Exparte Benjamin J Gikenyi Magare [2018] eKLR** the court pronounced itself as follows;

**"Jurisdiction to vary or set aside the orders of this honourable court is one which is sparingly exercised and the reason for invoking that jurisdiction must be specified and must be on solid basis"**

13. In the instant case no sufficient grounds have been set forth for this court to review the mandamus orders it earlier on issued. The Applicant pleaded that service was not effected upon them but have not offered proof to cement the said claim. The 1<sup>st</sup> Respondent has on the other hand tendered evidence before this court in support of the fact that service was effected upon the Applicant. With that, the issue of vacating and or setting aside the orders earlier on obtained is settled.

14. On whether or not the orders sought can obtain, the court in **Nairobi HC Misc. Civil Case No 1133 of 2002 In the Matter of An Application by Justus Nyangaya & Others** observed at page 9:

**"However, the courts have set aside ex parte orders obtained in judicial review proceedings following non-disclosure of material facts, concealment of material documents and misrepresentation".**

15. It has been submitted by the Applicant herein that the 1<sup>st</sup> Respondent is guilty of material non-disclosure as they failed to disclose that they entered into an agreement with the 2<sup>nd</sup> Respondent herein. That the failure to make full disclosure meant that the mandamus application was an abuse of the court process and therefore the court could not exercise its discretion in favour of the 1<sup>st</sup> Respondent. The Respondent on the other hand submitted that the Applicant had failed to demonstrate that the orders issued had been obtained by non-disclosure of material facts and documents or an abuse of the court process.

16. This Court has perused the replying affidavit by the 1<sup>st</sup> Respondent herein through one **Jonas Madale**. Attached is an affidavit of service by one **Maita Dzitu Mwangome** who states that on 6/9/2019 he served copies of a notice of motion upon the Kenya Ferry Services. That the same were received by a secretary at the directors' office. A copy of the received notice of motion is further attached on the replying affidavit. It is clear that the applicant herein was duly served and was well aware of the proceedings against it.

17. It is trite law that there is no provision of the law on execution against the government save for orders of mandamus that can be obtained through judicial review proceedings. However, it is also clear that a state corporation is not automatically subject to government proceedings. However, there is no sufficient reasons to enable this Court vacate the mandamus orders herein, and I am satisfied that there was no concealment of material facts. The upshot is that the application herein lacks merit and is hereby dismissed. Parties to bear their own costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF JULY, 2021.**

**E. K. OGOLA**

**JUDGE**

Ruling delivered via MS Teams in the presence of:

Mr. Gakuo for Ex parte Applicants

No appearance for Respondent

Ms. Peris Court Assistant