



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

JUDICIAL REVIEW APPLICATION NO.1 OF 2019

REPUBLIC.....APPLICANT

VERSUS

CLERK TO COUNTY ASSEMBLY OF KERICHO.....1ST RESPONDENT

THE COUNTY ASSEMBLY OF KERICHO.....2ND RESPONDENT

AND

RESOLUTION INSURANCE CO. LTD.....INTERESTED PARTY

RONALD KIRUI.....EX-PARTE

JUDGMENT

1. Before me is a Notice of Motion dated 25th March 2019 brought by Ronald Kirui under Order 53 Rule 3(1) of the Civil Procedure Rules and section 8 and 9 of the Law Reform Act seeking the following orders –

1. An order of certiorari to remove to this court for the purpose of being quashed the decision of the Clerk County Assembly of Kericho revoking the appointment of the ex-parte applicant as a liaison person for Resolution Insurance Limited.
2. An order for prohibition to restrain the respondents from further appointing any other agent on the notice of 13th February 2019 to replace the ex-parte applicant's name and stop any payments of agency commission till the matter is heard and determined.
3. An order that the ex-parte applicant be deemed to be only person appointed and be paid his commission amounting to Kshs.2,586,334/= being 10% of the net insured sum with net tax of Kshs.258,633/= leaving him with Kshs.2,327,701/= working on the principal amount of Kshs28,863,339/=.
4. A declaration that the decision by the respondents to revoke the appointment of the ex parte applicant as a representative to Kericho County Assembly is illegal, egregious and unlawful hence void and of no effect.
5. An order for costs.

2. The application is grounded on the supporting affidavit, statutory statement and verifying affidavit filed with the application for leave to file judicial review proceedings as required by law. It was deponed in the verifying affidavit that the ex-parte applicant was a licensed insurance broker who was appointed in 2018 and also 2019 as the liaison person for medical services provided to staff and members of the County Assembly of Kericho through Resolution Insurance Ltd, but was informed by his manager Mr. Kilonzo that his appointment had been arbitrarily revoked by the respondents under mysterious circumstances, which meant that he would lose his insurance commission, thus necessitating filing of this judicial review application.

3. In response to the application, the 1st and 2nd respondents filed a replying affidavit sworn by Martin Epus the 1st respondent on 17th May 2019 in which it was deponed that the 1st and 2nd respondents were not privy to the agreement on fees, and in any case the remedy therein would be grounded on the law of contracts and not judicial review proceedings, that there was no contract of employment between the ex-parte applicant and the 1st and 2nd respondents, that the appointment of the ex-parte applicant as liaison officer came too late when the interested party had already done the bidding and become successful, that the ex-parte applicant was picked (not appointed) on a friendly basis but was rejected as the County Assembly had its own internal arrangements and did not require a liaison officer, that the ex-parte applicant had not tendered evidence on the alleged payment of Kshs.25,863,339/= by the 2nd respondent to the interested party, and that it was not possible to determine the amount of Kshs.2,327,704/= said to be payable to the ex-pate applicant, and lastly that the agreement

between the ex-parte applicant and the interested party under Article 17 thereof provided that any dispute shall be referred to arbitration of three arbitrators.

4. On their part, the interested party Resolution Insurance Ltd in response filed an affidavit sworn by James Wanjohi its General Manager Commercial Business on 24th April 2019 in which it was deposed that the ex-parte applicant was irregularly appointed by the County Assembly of Kericho as agent and was thus rejected by the interested party as there already existed an internal agent who initiated and procured the award of tender and was entitled to payment of commission that the relationship between the ex-parte applicant and the interested party was contractual and thus not subject to judicial review, that the ex-parte applicant had not placed before the court any evidence showing that it solicited or participated in placing the business, and that the Notice of Motion herein was an attempt by the ex-parte applicant for conferment of unjust enrichment.

5. The ex-parte applicant filed a supplementary affidavit he swore on 30th May 2019 and a further supplementary affidavit he swore on 19th July 2019 insisting that he had solicited for the placing of the insurance business, and that he had been appointed procedurally as the insurance agent both for 2018, and now for 2019.

6. By consent of counsel on record, the matter proceeded by way of filing written submissions which counsel elected not to highlight.

7. With regard to the said written submissions, the ex-parte applicant through counsel M/s Kemboy & Cosmas Advocates filed submissions on 24th May 2019 and relied on several case authorities. The thrust of the submissions was that the ex-parte applicant was not given a chance to be heard before termination of services, and as such the ex-parte applicant had met the threshold for grant of the judicial review prayers sought herein.

8. The 1st and 2nd respondents on their part filed their written submissions on 23rd May 2019 through counsel M/s J K Kirui & Company Advocates contending that the award of tender for medical insurance cover was sought through advertisement for tenders and that since the interested party had sent to the County Assembly (2nd respondent) a letter rejecting the appointment of the ex-parte applicant as its agent, that issue fell under the contract law of agency with the interested party, and the ex-parte applicant could thus not blame the 1st and 2nd respondent through judicial review proceedings. Reliance was placed on a number of court decisions.

9. The interested party on their part filed written submissions through counsel M/s Wanjiku & Wanjiku Associates on 18th June 2019 in which they gave a summary of the surrounding circumstances of the matter. They relied on decided court cases as well as the Fair Administrative Actions Act and the Insurance Act (Cap.487) and contended that this was a contractual and not a judicial review matter.

10. I have considered the pleadings and the documents relied upon, as well as the submissions of the parties.

11. This is a judicial review application brought by the ex parte applicant against the clerk to County Assembly Kericho (1st respondent) and the County Assembly of Kericho (the 2nd respondent). Resolution Insurance Company Ltd was named by the ex-parte applicant as interested parties. I note that though no order was directly sought against the interested parties, from the facts and issues disclosed in court, the decision of this court will affect them.

12. In my view, the first issue is whether the ex-parte applicant was appointed as insurance agent and by whom. I have seen the letter dated 10th January 2019 signed by Martin Epus Clerk to the County Assembly of Kericho addressed to the General Manager Resolution Insurance Ltd appointing Ronald Kirui the ex-parte applicant as the County's liaison (contact) person for the tender for provision of medical insurance services. It follows thus that the ex-parte applicant was appointed as liaison person or agent by the 2nd respondent.

13. The 2nd issue is whether the said appointment was terminated without ex-parte applicant being given a chance to be heard. The ex-parte applicant has said that his appointment was terminated without being given a chance to be heard. The respondents state that they received communication from the interested party that the interested party had an internal insurance agent and as such the appointment of the ex-parte applicant could not be sustained. I have seen a letter signed by James Wanjohi General Manager Medical Sales of the interested party dated 25th January 2019 informing the 1st respondent that it was too late to appoint the ex-parte applicant, as the cover had already commenced. On that basis the ex-parte applicant was informed by the 1st respondent that his appointment had been terminated.

14. In my view, the appointment of the ex-parte applicant was terminated in the above circumstances by the 1st and 2nd respondent, and the ex-parte applicant was not given an opportunity to be heard before the said termination of appointment.

15. The third issue is whether the above termination is an issue for judicial review reliefs. It is trite law that judicial review reliefs being a reliefs under the purview of equity, will only come into play as a fall back where there are no or no adequate avenues for relief under the ordinary laws and statutes.

16. In the present case, in my view, judicial review reliefs are not available to the ex-parte applicant. The first reason is that there is no allegation of violation of statutory requirements by a public authority or abuse of power by any of the parties that would bring the matter within the purview of judicial review. Secondly, it is clear to me from the facts disclosed that this is a purely contractual matter which would require the interpretation of the law of contract and statutory requirements under the Law of Contract Act (Cap.23) and the Insurance Act, with regard to who can appoint and terminate an insurance agent, when, how. Delving into such legal matters cannot be a function of the judicial review court, as that will be going into merits rather than the process.

17. I find that the ex-parte applicant has not demonstrated that judicial review procedure is the most efficacious method of addressing his complaints. On that account, I find that judicial review proceedings herein were misadvised and inappropriate. I thus dismiss the judicial review proceedings herein, and if the ex-parte applicant desires, he may pursue his cause in the ordinary courts under the contract law. The

ex-parte applicant will pay the costs of the respondents and the interested party.

18. Consequently, I dismiss the judicial review proceedings herein as same are misadvised. The ex-parte applicant will pay the costs of the respondents and the interested party.

Dated this 30th day of April 2020.

GEORGE DULU

JUDGE

Delivered through video conferencing in the presence of Mr. Langat court assistant, Mr. Musyoka ICT officer, Mr. Kemboi for ex-parte applicant, Mr. J. K. Kirui for the respondents and Mr. Masinde holding brief for interested party.