REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISCELLANEOUS APPLICATION (JUDICIAL REVIEW) NUMBER 9 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDER OF CERTIORARI AND PROHIBITION

REPUBLIC

VERSUS

THE CHIEF MAGISRATE,

MOLO LAW COURTS (HON. S. WAHOME)..................1ST RESPONDENT

ATTORNEY GENERAL ....2ND RESPONDENT

AND

G W G (NEXT FRIEND TO S K-MINOR)................INTERESTED PARTY

EXPARTE APA INSURANCE LMITED....................................APPLICANT

JUDGEMENT

1. The Notice of Motion dated 4th May 2017 seeks orders that:-

> **i. An order of certiorari to remove the proceedings for the purpose of quashing the decision of the 1st Respondent made on the 28th March, 2017 in Molo SRMCC Number 40 of 2006, G WG (suing as the next friend to S – minor Vs Apa Insurance Limited.**

> **ii. An order of prohibition directed against the 1st Respondent by himself, his servants and/or agent or any other judicial officer for the time being seized of hearing or in conduct of Molo SRMCC Number 40 of 2006, G W G (suing as the next friend to S – minor Vs Apa Insurance Limited from hearing, proceeding, handling or in any way entertaining the Civil Suit, Molo SRMCC Number 40 of 2006, G W G (suing as the next friend to S – minor Vs Apa Insurance Limited**

> **iii. An order that costs of this application and the application for leave be borne by the 1st and 2nd Respondents.**

2. The application is brought on 13 grounds which revolve around the proceedings of 28th March 2017 Molo SRMCC No. 40 of 2006. It is supported by the affidavit of Paul Kibiku Kariba sworn on 4th May, 2017.

3. The Applicant is the Defendant in Molo SRMCC No. 40 of 2006 – while the Interested Party is the Plaintiff. The said suit was on going before the 1st Respondent. The Applicant states that the suit has dragged on since 2006. That the Plaintiff's case was closed on 15th November 2016 after an interlocutory appeal in the matter was heard and determined by the High Court. The hearing of the defence case commenced on 28th May 2017 before the 1st respondent when Paul Kibiku Kariba testified as the 1st defence witness. The witness deponed in the Supporting Affidavit that upon the conclusion of the cross-examination the trial magistrate asked various questions. That the trial court acknowledged that the Defence had established that APA Insurance was not the same as Pan African Co. Ltd and tried to persuade respective counsel to accommodate the plaintiff's claim. That when the respective counsel did not oblige, the 1st Respondent of his own motion re-opened the plaintiff's case. It is the applicant's position that the 1st respondent's action of re-opening the plaintiff's case fails the test of fair administration of justice.

4. The application is opposed. The Interested Party filed grounds of opposition dated 10th July 2017. The grounds are that:-

i. That the Applicant has not come to court with clean hands and does not disclose to court full and correct details.

ii. That no sufficient grounds have been tendered to support the prayers sought.

iii. That no principle of natural justice was breached as the 1st Respondent only needed a clarification whether the Interested Party had sued the right party.

iv. That the application is untenable and it lacks merit.

5. The1st and 2nd Respondents filed grounds of opposition dated 10th July 2017. The 11 grounds of opposition can be summarized into two:-

i. That there is no valid reason why judicial officers should be prohibited from deciding the case.

ii. The issues raised are outside the purview of judicial review as they touch on the merits of the case.

iii. The actions of the trial magistrate in questioning a witness or recalling a witness are within procedural law.

6. In addition to the grounds of opposition the 1st respondent filed a replying affidavit sworn on 17th October 2017. In the brief affidavit he deponed that he was in conduct of Molo CMCC No. 40 of 2006. That his action of recalling the plaintiff witness was for purposes of clarifying whether Pan African General Insurance Company Ltd and Pan African Company Limited were the same or distinct companies the inquiry was in the interest of justice. That the avenue for addressing the applicant's complaint was not judicial review but appeal.

7. Paul Kibiku Kariba swore a further affidavit in response to the replying affidavit of 1st Respondent. He deposed that the re-opening of the plaintiff's case was abuse of the court process and did not fall within the Order 18 Rule 10 of the Civil Procedure Act. That the order re-opening the plaintiff's case was intended to fill the plaintiff's case. The deponent further stated that judicial review was the appropriate remedy to quash the proceedings and prohibit further proceedings.

8. In written submissions dated 22nd January 2018, the applicant identified 2 issues being whether the 1st respondent's conduct amounts to abuse of administration of justice and the possible remedies available to the ex parte applicant. They submitted that the 1st respondent made an inaccurate record of the proceedings and that the same should be omitted. Secondly, they submitted that there was procedural impropriety in re-opening the plaintiff's case outside the parameters of **Order 18 Rule 10** of the **Civil Procedure Rules** and **Section 146 (4)** of **Evidence Act**. The applicant submitted that he would suffer prejudice as the defendant if the proceedings were not quashed. On the remedies sought, the applicant submits that they meet the criteria for judicial review remedies. They submitted that the action of the 1st Respondent did not comply with rules of natural justice and that the decision was tainted with illegality and procedural impropriety. They seek an order of certiorari to quash the said proceedings and the order re-opening the plaintiff's case.

9. The 1st and 2nd Respondents have identified 3 issues as follows:

i. Whether the application raises issues that are not triable within the purview of judicial review proceedings

ii. Whether the 1st respondent acted in abuse of court processes by recalling the plaintiff; and,

iii. Whether the prayer for prohibition can be granted.

The Respondents submitted that the allegation that the 1st Respondent threatened to dismiss the suit cannot be determined in judicial review as it would require the taking of evidence. They submitted further that the 1st Respondent was within the law when he recalled the plaintiff witness. On the prohibition order, the Respondents submitted that the same cannot be granted as it would amount to an infringement of the constitutional rights of the Interested Party.

10. The Interested Party submitted that the 1st respondent exercised its discretion to recall whether witness for purposes of clarifying the issue whether Pan African General Insurance Co. Ltd and Pan African Insurance Co. Ltd were the same or distinct companies. They submitted that the action was within **Order 18 Rule 10** of the **Civil Procedure Rules** and **Section 128** of the **Evidence Act**.

11. The two issues that emerge for my determination is whether the proceedings before the Chief Magistrate are amenable to judicial review and whether the orders can be granted.

12. The scope of judicial review has been discussed in many authorities. In **Republic v Kenya National Examination Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** set out as follows:

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defect of justice and accordingly it will issue, to the end that justice may be done, in all access where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual…These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by s statute and where that

person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

13. In **Republic Vs. Commissioner of Investigations and Enforcement, Ex parte Wananchi Group Kenya Ltd 2014 1 E.A. Page 419**, the Court, **Odunga J**, emphasized that:-

> **"It must be reiterated that judicial review is concerned not with private rights or the merits of the decisions being challenged but with the decision making process. Its purpose is to ensure that the individuals given fair treatment by the authority to which he has been subjected. See Republic –vs- Secretary of State for Education and Science, ex-parte Avon County Council [1991] 1ALL ER 282 at page 285."**

14. It is the contention of the ex-parte Applicant in this case that they did not get fair treatment by the court; that the court engaged in procedural impropriety when it re-opened the Plaintiff's case. It was his further contention that the court demonstrated bias by not recoding the proceedings accurately. The ex-parte Applicant contends that the 1st Respondent was wrong in re-opening the Plaintiff's case. He bases this contention on his interpretation of Section 146 (4) of the Evidence Act and Order 18 Rule 10 of the Civil Procedure Rules.

15. The fulcrum of the application is that the court did not accord the ex-parte Applicant fair treatment, engaged in an unprocedural impropriety and made an order that was prejudicial to the Defendant (now Applicant). From my careful consideration of the application and submissions by all parties it is clear that what is sought to be impugned is the court's order directing the recalling of the Plaintiff witness. I have however found nothing on the record to show that the parties were denied an opportunity to be heard. Further, it would require the production of evidence to demonstrate that the court failed to take down proceedings as alleged by the Applicant.

16. It is true as contended by the Applicant that re-opening the Plaintiff's case or recalling a witness is procedural. However, what the Applicant actually disputes is the order to so re-open the Plaintiff's case. The Applicant argues that re-opening the case would be prejudicial. The issue in the application though couched in terms of procedure is the merit of the court's decision to re-open the Plaintiff's case and recall witness. This is clearly a matter for interrogation in the appellate process. It cannot be a purely procedural issue for Judicial Review. It has not been shown to me in this application that the 1st Respondent in issuing the order, did so without jurisdiction or in excess of jurisdiction. As was stated by the **Court of Appeal in Republic –Vs- Isaac Theuri Githae & another [2007] eKLR**

> **"Certiorari is not an appellate power. Its use may nullify or discharge an order made by the council but the grounds on which certiorari may be granted are strictly limited. . ."**

This in my considered view is not one of the cases in which certiorari may be granted.

17. The Applicant has also sought the order of prohibition to prohibit the 1st Respondent and any other judicial officer from hearing the case. The grounds advanced in support of this prayer is that the Applicant has already suffered delay in the matter and was likely to be prejudiced. This prayer cannot be considered in isolation. The proceedings are in respect of an on-going suit where the Interested Party is the Plaintiff. The parties are in court for the resolution of their dispute. An order of prohibition would automatically bring the proceedings to an end without the matter being decided on merits. It would be tantamount to denying the parties a just resolution of the dispute on merits. In Mbaki & Others v Macaharia & Another (2005) 2 EA 206 court found:

> **"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."**

18. This prayer is therefore refused. For the reasons above, the prohibition order is denied.

19. In view of the above the order that commends itself to me is to dismiss the application in its entirety. The Interested Party shall have costs of this application.

Orders accordingly.

Ruling signed on this …….. day of September, 2018.

R. LAGAT-KORIR

JUDGE

Ruling dated, delivered and signed at Nakuru this 26th day of September, 2018.

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JANET MULWA

JUDGE

In the presence of:

.... Court clerk

.... For the 1st Respondent

.... For the 2nd Respondent

.... For the Interested Party

.... For the Applicant