



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL, JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 4A OF 2017 [J.R]

**IN THE MATTER OF: APPLICATION BY KENYA KAZI SERVICES LIMITED FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF: SENIOR RESIDENT MAGISTRATE'S CIVIL CASE NO.2275 OF 2012
BETWEEN BENJAMIN NYALE =VERSUS= K.K. SECURITY COMPANY LIMITED DEISION
OF 20TH JANUARY, 2017**

BETWEEN

KENYA KAZI SERVICES LIMITED.....APPLICANT

VERSUS

SENIOR RESIDENT MAGISTRATE, MOMBASA.....RESPONDENT

=AND=

BENJAMIN NYALEINTERESTED PARTY

RULING OF THE COURT

The Application

1. The Notice of Motion application before the court is dated 24th February, 2017 and filed herein on 27th February, 2017 by the Interested Party pursuant to Order 3A of the Civil Procedure Rules. The application prays for orders that:

(1) That this instant matter be certified as urgent and service be dispensed with in the first instance.

(2) That this Honourable Court be pleased to discharge the orders of 17th February, 2017 granting the *Ex Parte* Applicant leave to institute judicial review proceedings Certiorari, Prohibition and mandamus and subsequently consequential orders.

(3) That the Honourable court does hereby strike out with cost the *Ex Parte* Applicant Application dated 17th February, 2017 in its entirety with costs.

(4) That the *Ex Parte* Applicant does pay cost of this instant application.

2. The application is premised on the grounds set out therein, that is, that at the time the Honourable Duty Judge of this division issued *ex parte* orders of 17th February, 2017, i.e. Leave to apply for judicial review proceedings of mandamus, certiorari and prohibition and a further order for stay of execution, the *Ex parte* applicant had on the 7th February, 2017 filed an appeal to wit, **MOMBASA CIVIL APPEAL NO. 20 OF 2017, KENYA KAZI SERVICES LIMITED v. BENJAMIN NYALE** running *paripasu* with the *Ex Parte* Application for leave herein. The Application for leave instant and the consequential orders sought and granted *ex parte* and the Appeal to wit, **MOMBASA CIVIL APPEAL NO. 20 OF 2017, KENYA KAZI SERVICES LIMITED v. BENJAMIN NYALE**, raise the same issues and were running *paripasu*. The *Ex Parte* Applicant withdrew the Appeal abovementioned vide a **NOTICE TO WITHDRAW** dated 17th February, 2017 and filed at 3.20 p.m. after being granted the *ex parte* orders in her Application for leave and stay of execution by this court is clear indication that the *Ex Parte* Applicant was not only playing **RUSSIAN ROULETTE** with the mind of the court but engaged in abusing the process of the court and thus undermining the just, proportionate and affordable resolution of the issues before court by engaging in trickery; that the withdrawal of the Appeal hours after being granted the orders of 17th February, 2017, entitled the court to infer that their motive for withdrawal is not a proper one and within the parlance of the law and hence a gross abuse of the courts process; that the Applicant's action was not to vindicate their right or enforcement of a just claim but to achieve an improper end by misdirecting the mind of the court; that the Applicant's action is to further use the courts process to vex the Interested Party; that at a perusal of the proceeding in the Appeals case above mentioned and the one originating the said appeal, the Applicant is bent on not satisfying a valid judgment after three failed attempts to set aside the valid Judgment; that this court is mandated by the law to safeguard abuse of the courts process as exhibited by the *Ex Parte* Applicant; and that it is the interest of justice that the orders sort be granted to avert abuse of the court's process.

3. The application is supported by affidavit of Philip Ojode, advocate for the Applicant, sworn on 24th February, 2017. The supporting affidavit expands on the aforesaid ground.

The Response

4. The application is opposed by the Applicant/Respondent who filed grounds of opposition on 3rd March, 2017. The Respondent's case is that the contents of the Verifying Affidavit and presentation by counsel at *ex-parte* stage are demonstrative of full disclosure and the same is fully adopted in response to the Interested Party's motion; that there are no good grounds set out in the Notice of Motion to justify the grant of the orders; that the main motion is already filed and scheduled for hearing on 30th March, 2017 hence the same should be heard on merits as opposed to interlocutory application; and that the Application by the Interested Party ought to be dismissed.

Submissions

5. Parties made oral submissions to the application. **Mr. Ojode** Counsel for the Applicant submitted that the application dated February, 2017 that led to the *Ex Parte* Applicant KENYA KAZI SERVICES LIMITED being granted leave to commence judicial review proceedings is incompetent and the same should be struck out and the orders issued therein discharged for material non-disclosure and hence a gross abuse of the courts process. Counsel submitted that at the time the Duty Judge of this division issued *ex parte* orders of 17th February, 2017 i.e. leave to apply for judicial review proceedings of mandamus, certiorari and prohibition and a further order for stay of execution, the *Ex parte* Applicant had on the 7th February, 2017 filed an appeal to wit, **MOMBASA CIVIL APPEAL NO. 20 OF 2017, KENYA KAZI SERVICES LIMITED vs. BENJAMIN NYALE** running *paripasu* with the *Ex parte* Application for leave herein. Counsel submitted that the Application for leave instant and the consequential orders sought and granted *ex parte* and the Appeal to wit, **MOMBASA CIVIL APPEAL**

NO. 20 OF 2017, KENYA KAZI SERVICES LIMITED vs. BENJAMIN NYALE, raise the same issues and were running *paripasu* with the Appeal case having a hearing date of 22nd March, 2017 for highlighting of submissions. Counsel submitted that the *Ex Parte* Applicant withdrew the Appeal abovementioned vide a **NOTICE TO WITHDRAW** dated 17th February, 2017 and filed at 3.20 p.m. after being granted the ex parte orders in her application for leave and stay of execution by the this Court which is a clear indication the Ex parte was not only playing **RUSSIAN ROULETTE** with the mind of the court but engaged in abusing the process of the court and thus undermining the just, proportionate and affordable resolution of the issues before court by engaging in trickery. The Applicant further submitted that the withdrawal of the Appeal hours after being granted the orders of 17th February, 2017, entitles the court to infer that their motive for withdrawal is not a proper one and within the parlance of the law and hence a gross abuse of the courts process; and to further use the court process to vex the Interested Party.

6. Mr. Ojode submitted that a perusal of the proceeding in the said Appeal case and the one originating the said appeal, it is clear the Applicant is bent on not satisfying a valid Judgment after three failed attempts to set aside the valid Judgment.

7. Counsel submitted that the merits of the ruling of the court below cannot be determined via a Judicial Review Application which is a public law remedy. It would be determined by a Civil Court as statutory mandated and in this case – Appellate court by submissions of both parties and that court can make a final determination. If this Court would determine the same issues, it would be rubber stamping what would have been determined by the Appellate Court.

8. Counsel submitted that besides the facts herein, a tort claim is purely a private law remedy, not the concern of judicial review and the intention of the ex parte Applicant in the Appeals Court was to reverse the decision of the court below. Counsel submitted that if the Appeal was no longer an efficacious option, then the ex parte Applicant should have withdrawn the Appeal before commencing the judicial proceedings and they would be required to make a full disclosure of the pending appeal when they appeared before the duty court at the Ex Parte Proceedings. The principle of full disclosure to the Duty judge of the existence of the civil appeal and the incompetent of the same having not been withdrawn was pertinent and the same must be frowned upon.

9. **Mr. Mogaka** for the Respondent submitted that there is no appeal now. The Civil application No. 20/2017 has been withdrawn and is marked as closed upon the Notice of withdrawal being lodged. Counsel submitted that the matter came up before Hon. Lady Justice Njoki Mwangi for highlighting of submissions when he informed the Judge that the same had been withdrawn whereupon the Judge marked the matter as withdrawn. Secondly, Mr. Mogaka submitted that it is not true that this application was filed before the main motion for Judicial Review proceedings, which was filed on 21st February, 2017. The Applicant's application is filed on 27th February, 2017. The Judicial Review main motion was served upon the Applicant on 21st February, 2017 which service the Applicant accepted under protest. Mr. Mogaka denied that there was material non-disclosure, or that there was an abuse of the court process, or that the ex-parte Applicant is engaging in trickery. Mr. Mogaka cited the Court of Appeal in **Agakhan Education Service vs. Republic** (see list of authorities). Counsel submitted that once the court is satisfied that there is an arguable point at the leave stage, the court grants the leave. Courts do not issue orders in a walk in walk out basis. Once given, court orders can only be discharged sparingly on material non-disclosure. Counsel submitted that the court should discourage parties coming to court to discharge orders of leave. Instead the parties should go directly to the main motion. On the issue of material non-disclosure, Mr. Mogaka submitted that he clearly disclosed in the verifying affidavit that the Civil Appeal No. 20 of 2017 was being withdrawn, and they provided reasons for the same. The appeal was filed hurriedly without reference to the law since the advocate was not given notice of the Ruling on Objection proceedings. Counsel submitted that the Appeal was incompetent and they disclosed this in the verifying affidavit. Mr. Mogaka submitted that since there were full disclosure about the withdrawal of the appeal proceedings, it now cannot be said that the application for leave to institute judicial proceedings are an abuse of the process of the court. Counsel submitted that this application is therefore without merit, and should be dismissed, noting that the main motion is scheduled for hearing on 30th March, 2017 and should be allowed to continue.

The Determination

10. I have considered the application before the court, the grounds and the supporting affidavit. I have also considered the grounds of opposition to the same and the opposing submissions of Counsel. In my view, the following are the issues to be determined by the court.

- (i) Whether there was a material non-disclosure by the Respondent as alleged;
- (ii) Whether the court was deceived by the Respondent;
- (iii) Whether the Respondent has abused the court process;
- (iv) Whether the orders issued on 17th February, 2017 can be revoked in light of the fact the substantive motion for which the leave was given was filed and served before this application was filed.

11. I will deal with all the above issues at once. The brief history of the application is that this matter stems up from a **SRMCC No. 2275/2012 Benjamin Nyale vs. K.K. Security Guards** filed on 24th October, 2012. The suit against the ex parte Applicant was for assault where the Interested Party was seeking damages in tort. The Defendant did not enter appearance and the Interested Party obtained Judgment against the Applicant. After entry of Judgment the ex parte Applicant appointed **M/S Mogaka Omwenga Advocates** to set aside the Judgment. The advocate entered appearance and filed an application to set aside the Judgment. The application was dismissed. After that there were negotiations on payment upon which it was agreed that payment be made within seven (7) days. After seven days the firm of Mogaka Omwenga claimed that K.K. Guards were not their clients. It is then that the firm of **M/S Mose & Mose Advocates** came on record bringing objection proceedings. In the cause of time M/S Mose & Mose Company and M/S Mogaka Omwenga & Company Advocates remained in the matter, the latter holding brief for the former. Finally Mr. Mogaka & Omwenga Advocates prosecuted the objection proceedings but always holding brief for Mr. Mose. The objection proceedings were finally dismissed on merit. The ex parte Applicant then proceeded to file an appeal being Mombasa Appeal No. 20 of 2017.

12. The Respondent's case is what the ruling which was delivered in the SRMCC No. 2275 of 2012 by Hon. L. T. Lewa on 20th January, 2017 was read in the absence of the Respondent because notice of the reading of the ruling was never issued to the Respondent. The Respondent's case is that in objection proceedings an aggrieved party has to seek the leave of the court to appeal at the time the ruling is being delivered. The appeal is not as of right. Because the Respondent allegedly was not served with the notice of the ruling, the Respondent intends to challenge the procedure of delivering a ruling without notice through the intended Judicial Review proceedings. In the meantime the Respondent filed an Appeal No.20/2017, which they realized was a nullity *ab-initio* and which they subsequently withdrew after successfully seeking the leave of the court to commence Judicial Review proceedings.

13. This court considered the Respondent's application for leave on 17th February, 2017 and was satisfied of merits thereof and the leave was granted.

14. It is that leave that is now being challenged by the current application. The position of this court, and indeed the position of the law, is that on an application for leave to commence Judicial Review proceedings, the court ought merely to be satisfied that the ex parte Applicant has an arguable case for seeking the leave. This is normally so because there is no merit to be argued at this stage. Once the leave is granted, it is the duty of the Judicial Review Court to enter into the merits given for the various orders sought. It is therefore not customary for a court to revoke or retract the leave once given unless there was a case of gross abuse of the process of court or a serious non-disclosure of relevant facts by the ex parte Applicant. Indeed in this application the Applicant alleges that there was a non-disclosure of the fact that the Respondent had filed an appeal No. 20 of 2017, and that this is a clear case of an abuse of the process of the court.

15. The truth of the matter, however, is that Mr. Mogaka appeared in court for the ex parte applicant on 17th February, 2017. Record shows that Mr. Mogaka disclosed that the ex parte Applicant had filed an appeal No. 20/2017 which they were in the process of withdrawing since the same was a nullity *ab initio*. This fact is also deponed to in paragraph 9 of the Verifying Affidavit of **Sophia Mohamed** sworn on 17th February, 2017. So it is not correct that the ex parte Applicant failed to disclose that fact. Further, and consequently, it cannot be inferred that the Respondent has abused the process of this court. So, also the allegation by the Applicant that this court was deceived is not correct. It should also be emphasized that a court of law cannot be easily deceived. Courts do not issue orders without looking at the pleadings. In this particular instance the pleadings are clear enough and so the allegation that the ex parte Applicant intended to cloud the mind of the court is not correct.

16. The last issue is whether or not this court can revoke the leave granted on 17th February, 2017 especially after the Respondent had executed that leave and filed the substantive motion on 21st February, 2017. The position of this court is that even if there were good grounds to revoke or annul the said leave, the court would still exercise great caution if the substantive motion had already been filed. In the instant case there are no valid grounds to revoke or set aside the leave. The fact that the substantive motion for orders of Judicial Review were filed on 21st February, 2017 only fortifies the Respondent's case. That motion was filed on 21st February, 2017 and served upon the Applicant herein on 22nd February, 2017. It was many days after that service, being on 27th February, 2017 that the Applicant filed this application for orders to set aside the leave. It is the position of this court that the substantive motion for Judicial Review orders is validly filed, and that any challenges to the issues in that suit will now be dealt with within that forum. It needs no emphasis that granting the leave to commence Judicial Review proceedings is not the grant of the Judicial Review orders. The orders can only be issued on merit and therefore the Applicant here will not suffer any prejudices.

17. For the foregoing reasons, the application herein dated 24th February, 2017 by the Interested Party is dismissed with costs in the cause.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 29th day of March, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Mogaka for Applicant

Mr. Ojode for Respondent/Applicant

Mr. Kaunda Court Assistant