



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL, JUDICIAL REVIEW DIVISION
JR MISC. APPLICATION NO.76 OF 2016

IN THE MATTER OF:AN APPLICATION BY MESSRS UAP INSURANCE COMPANY LIMITED
FOR JUDICIAL REVIEW ORES OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF:ARTICLE 23 [3] [F] AND ARTICLE 165 [6] & [7] OF THE CONSTITUTION
OF KENYA, ORDER 53 OF CIVIL PROCEDURE RULES AND SECTION 8 & 9 LAW REFORM
ACT CAP 26

AND

IN THE MATTER OF:THE COMPANIES ACT

AND

IN THE MATTER OF:THE COMPANIES AND INVOLVENCY LEGISLATION [CONSEQUENTIAL
AMENDMENTS] ACT, 2015

AND

IN THE MATTER OF:THE CHIEF MAGISTRATE'S COURT CASE NO. 956/1997 AND 3574/2013
BOTH BETWEEN MICHAEL KADOWE KARISA VS. AFRICAN SAFARI CLUB

BETWEEN

UAP INSURANCE CO. LTD.....APPLICANT

VERSUS

HON. NJAGI SPM.....RESPONDENT

MICHAEL KADOWE KARISA.....INTERESTED PARTY

RULING

The Background

1. By an ex parte Chamber Summons application dated 27th October, 2016 filed under Article 23(2)(F) and Article 165(6) and (7) of the Constitution of Kenya, Order 53 of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act Cap 26, the ex parte Applicant prays for the following orders:

(a) An order for mandamus be issued compelling and directing the subordinate court to comply with the law by starting de novo the hearing of Mombasa CMCC Number 956 of 1997 and 3574 of 2013 between **Michael Kadowe Karisa vs. African Safari Club Limited** after obtaining leave of the court as required.

(b) An order of prohibition be issued to prohibit execution process arising out of a Judgment of 1st April, 2016 emanating from court proceedings after 19th June, 2014 in CMCC No. 956 of 1997 and 3574 of 2013 between **Michael Kadowe Karisa vs. African Safari Club Limited** as well as further steps of the Court process/proceedings in Case Number Mombasa CMCC No. 1894 of 2016 between **Michael Kadowe Karisa vs. UAP Insurance Company Limited**.

(c) The grant of leave herein do operate as stay of further proceedings in the Declaratory suit Number Mombasa CMCC No. 1894 of 2016 between **Michael Kadowe Karisa vs. UAP Insurance Company Limited**.

(d) Costs of the proceedings be in the Motion.

2. The application is premised on the grounds that the Applicant were insurers of Messrs. African Safari Club in respect of a motor vehicle registration Number KXZ 885 Nissan Cabstar which is said to have been involved in an accident some time on or about 22nd February, 1994. A suit originally number HCC 20 of 1997 R.D. was filed in March, 1997 and transferred to the subordinate court and allocated CMCC No. 3574 of 2013. Both suit numbers CMCC No. 956 of 1997 and CMCC No. 3574 of 2013 between Michael Kadowe Karisa vs. African Safari Club Limited were concluded by a Judgment delivered on 1st April, 2016. African Safari Club the Defendant in the two (2) suits was ordered wound up by the Honourable Lady Justice Mary Kasango in High Court of Kenya Winding Up Cause No. 1 of 2005 at Mombasa on 19th June, 2014. Despite the Winding Up Order made on 19th June, 2014 the proceedings in the subordinate court in the subject matters continued to conclusion including the period after 19th June, 2014 without Court's leave having been obtained to so proceed and without joinder of the official receiver who had been appointed provisional liquidator. The Applicant's case is that the proceedings after 19th June, 2014 without leave, decisions/judgment were in violation of statute, without jurisdiction and the consequential declaratory suit lodged is therefore a nullity. There is no estoppel to a statute and hence the proceedings, Judgment and consequential declaratory suit ought to be nullified/quashed. Further, proceedings in the Declaratory suit Mombasa CMCC No. 1894 of 2016 between Michael Kadowe Karisa vs. UAP Provincial Insurance Company Limited arising out of proceedings and Judgment in violation of law ought to be prohibited.

3. The application is supported by Verifying Affidavit worn by **Joseph Mwai**. The said affidavit expounds the said grounds. The deponent to the Verifying Affidavit is a Senior Legal Officer of the ex parte Applicant, and handles all suits lodged against the ex parte Applicant. The ex parte Applicant's case is that it was the insurers of Messrs. African Safari Club Limited's motor vehicle registration number KXZ 885 when it was said to have been involved in an accident sometime on or about 22nd February, 1994. The deponent Mr. Mwai states that in his capacity as the Senior Legal Officer Claims, he has internally handled the files for Court Case Numbers CMCC No. 956 of 1997 and CMCC No. 3574 of 2013 between Michael Kadowe Karisa vs. African Safari Club Limited in which the firm of Mogaka Omwenga & Mabeya were on record. He is aware from the record in file that the aforementioned suits emanated out of the aforementioned accident that is said to have occurred sometime on or about the 22nd February, 1994 involving motor vehicle KXZ 885 belonging to African Safari Club Limited an insured of the Applicant. Originally CMCC No. 3574 of 2013 was in the Mombasa High Court as Case Number 20 of 1997 [R.D] before being transferred to the subordinate court. The aforementioned two (2) Subordinate Court Cases proceeded before the Court on diverse dates including after 19th June, 2014. African Safari

Club Limited the insured of the Applicant was by a decision of Hon. Justice Mary Kasango given on 19th June, 2014 in Mombasa High Court Winding Up Cause No. 1 of 2005 ordered as wound up. However, the Court's leave to proceed with the suits after 19th June, 2014 was never obtained neither was the official receiver who had been appointed as provisional liquidator ever enjoined in the matters before taking any further steps pursuant to the Winding Up Order. The proceedings in CMCC No. 956 of 1997 and CMCC No. 3574 of 2013 after 19th June, 2014 without leave together with the decisions/Judgment therefrom were in violation of statute hence a nullity as they were entertained without jurisdiction and therefore ought to be quashed as are the proceedings in the consequential Declaratory suit Mombasa CMCC No. 1894 of 2016 between Michael Kadowe Karisa vs. UAP Provincial Insurance Company Limited. The Applicant's case is that it is a matter of public policy that there can be no estoppel to a statute and that parties cannot waive operation of a statute hence the impugned proceedings and Judgment ought to be nullified/quashed and consequential proceedings/further steps in the declaratory suit lodged be prohibited. The Applicant's attempts to have the aforementioned impugned judgment of 1st April, 2016 set aside were thwarted by a Subordinate Court's Order of 29th July, 2016 that declined the review application. The Applicant's case is that as it stands the proceedings after 19th June, 2014, and the Judgment were in breach of law and consequential declaratory suit emanating therefrom is a nullity. In view of the foregoing the Applicant seeks leave to institute judicial review proceedings.

4. When the ex parte application was placed before the learned Judge Hon. Emukule J on 31st October, 2016, the Judge declined to give leave, directing that the application be served upon the Respondents for the hearing on whether the said leave should be given, hence these proceedings.

The Response

5. Upon service of the application by **Mr. Mogaka**, the ex parte Applicant's counsel, the Respondent entered appearance through the office of the Attorney General, but stated that they have no interest in the outcome of this application, and so **Mr. Makuto** counsel for the Respondent was relieved from these proceedings.

6. **Mr. Gikandi**, counsel for the Interested Party on his part filed a Notice of Preliminary Objection to the application for leave to commence Judicial Review proceedings. That notice was filed on 25th January, 2017. The Interested Party raises the following grounds of objection:

(a) The application is statute barred and it contravenes the provisions of the Law Reform Act, Order 53 rule 2 of the Civil Procedure Rules 2010 as it was filed more than six (6) months from the date of the Judgment which the Applicant seeks to be quashed.

(b) The application for leave to commence Judicial Review proceedings is fatally defective as it contravenes the provisions of Order 53, rule (7) sub rule (1) of the Civil Procedure Rules 2010 in so far as a copy of the Judgment duly verified and certified by the Deputy Registrar, which the Applicant seeks to quash, has not been attached to the application.

(c) The application is fatally defective on a point of law in so far as the Applicant has erroneously sought a remedy for Judicial Review of the court order issued on the 29th day of July, 2016 by the Chief Magistrate's Court, whereas the Applicants should seek redress through an appeal in the High Court. The Applicant ought to apply for orders to set aside the Judgment which they seek to impeach herein.

Submissions

7. Counsel made oral submissions to the application. From the submissions the only issue for determination is whether or not the ex parte Applicant has satisfied the criteria for grant of leave to commence Judicial Review proceedings.

8. **Mr. Mogaka** for the ex parte Applicant submitted that Chamber Summons dated 27th October, 2016

seeks leave to commence Judicial Review proceedings. The orders were not granted because the Judge questioned whether the Judicial Review would be the best way to go in this matter. Mr. Mogaka stated that Judicial Review was the way to go because the Judgment delivered on 1st April, 2016 was delivered against an insured of the Applicant. The Applicant was not a party. As at the time the Judgment was delivered the insured African Safari Club had been wound up. The winding up order was delivered on 19th June, 2014. So if Judgment was delivered on 19th June, 2014, no further proceeding could take place without the leave of the court, and subsequent joining of the receivers to the proceedings. This was not done. Consequently any proceedings done after 19th June, 2014 are deemed a nullity in law. The Judgment in the lower court was on 1st April, 2016 without leave of court having been given. Before the Judgment the full hearing of the matter took place without leave. Mr. Mogaka submitted that where a statute directs a particular action, a consent of the parties cannot divert that action. In that regard, the proceedings were conducted in excess or without jurisdiction. That is why the Applicant seeks to challenge the decision of the court through Judicial Review proceedings.

9. Mr. Mogaka further submitted that the insurance company, the Applicant before the court, was not a party to the said proceedings and could not have appealed the decision because they had no forum. The Judicial Review court would be the forum for the Applicant to show that it cannot challenge proceedings which were a nullity in the first instance. There is no other remedy as there is no provision for appeal. Mr. Mogaka citing the case of **Richard Michael Ashley vs. The National Environment Authority Misc. Civil Application No. 1222 of 2005**, submitted that the existence of an alternative remedy does not bar the commencement of Judicial Review proceedings. Mr. Mogaka submitted that this is a proper case for leave to be granted to commence Judicial Review proceedings and that the said leave to operate as a stay of further proceedings.

10. Mr. Gikandi opposed the application, submitting that the Judgment to be quashed was delivered on 1st April, 2016. If the same were to be quashed it should have been delivered within six (6) months. Counsel submitted that Order 53 rule 2 provides that that kind of a Judgment cannot be quashed unless the application to do so is made within six (6) months. Secondly, counsel submitted that there is no prayer for quashing of the said Judgment. So the Judgment will remain even if the Judicial Review orders are given. Mr. Gikandi submitted further that the Judgment sought to be quashed can be appealed against by the Defendant. Mr. Gikandi submitted that the procedure of coming to this court for the purposes of quashing regular proceedings pending in other courts amounts to abusing process of court. Mr. Gikandi submitted that the most efficacious way of dealing with this matter is to allow the matter in the lower court to proceed to its logical conclusion. Mr. Gikandi submitted that as long as there is no application for the quashing of Judgment delivered on 1st April, 2016 in RMCC No. 956/1997, then the declaratory suit RMCC 1294/2016 cannot then be stayed or be quashed. Counsel urged the court to let the parties deal with their issues in the declaratory suit.

11. However, Mr. Mogaka submitted that there is an arguable case by the Applicant who is entitled to leave and that they cannot go back to the declaratory suit since that is the enforcement they are seeking to quash. Counsel submitted that in any event, one magistrate cannot quash a decision of another magistrate as that would amount to one magistrate sitting in Judgment of another, to which Mr. Gikandi submitted that the learned magistrate who will hear the declaratory suit will not be a robot.

Determination

12. I have carefully considered the submissions of the parties. The issues I raise for determination are these:

- (i) Whether the motion is time barred under Section 9(3) of the Law Reform Act.
- (ii) Whether the Applicant's failure to annex the decision to be quashed was fatal to the proceedings.
- (iii) Whether there is another remedy.

13. On the first issue it is to be noted that the Judgment to be quashed was made on 1st April, 2016. The ex parte Chamber Summons herein was filed on 27th October, 2016, 27 days after the six (6) months required. The issue then is whether this court can extend the time to allow the application to be within time. There is no application for extension of time. Even then it seems to me that time under Section 9(3) of the Law Reform Act cannot be extended. There is no provision for extension of time. This is what the court of Appeal said in the case of **Wilson Osolo vs. John Ojiambo Ochola & Another** –

“There was quite clearly a fundamental error on the part of the Superior Court in granting such extension of time as Section 9(3) of the Law Reform Act, Cap 26 Laws of Kenya, quite clearly shows that an application for leave to apply for an order of certiorari cannot be made six months after the date of the order sought to be quashed. Section 9(3) of the Law Reform Act reads: “(3) In the case of an application for an order of certiorari to remove any judgment order decree conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law;...” It can readily be seen that order 53 rule 2 (as it then stood) is derived verbatim from S.9 (3) of the Law Reform Act. Whilst the time limited for doing something under the civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act. There is no provision for extension of time to apply for such leave in the Limitations of Actions Act (Cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a Limitation period.”

Quite clearly this court cannot extend the time vide the said Section.

14. On the second issue on the fact of failure to annex the award sought to be quashed see the case of **Judicial Review No. 13 of 2013 Ex-parte Margaret Waitherero** where the Judge had this to say:

“I raise questions on the competency of the suit because the award sought to be quashed was never supplied to the court. Now, if I do not know what it is that I am being called upon to quash what exactly is it that I will be quashing....”

15. It is to be noted that the Applicant could not give such annexure because the Applicant has not prayed for certiorari as a remedy. In the absence of a prayer for certiorari, the application is in vain because even if the order for mandamus and prohibition are given the Judgment will still stand since it is not quashed.

16. The third issue is whether there is another remedy. I agree with Mr. Mogaka that availability of an alternative remedy should not be a bar to the grant of Judicial Review remedies. However, in this matter, there are already proceedings in the lower court in which the same issues can be skillfully canvassed. The High Court should very sparingly issue orders which interfere with proceedings in the lower courts.

17. For the foregoing reasons, the Chamber Summons dated 27th October, 2016 is dismissed with costs.

Dated, Signed and Delivered in Mombasa this 25th day of May,

2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Omwenga holding brief Mogaka for ex parte Applicant

Mr. Mwangi holding brief Mr. Gikandi for Interested Party

Mr. Makuto for Respondent

Mr. Kaunda Court Assistant