



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION NO. 1 OF 2015(JR)**

**IN THE MATTER OF:** AN APPLICATION TO APPLY FOR JUDICIAL REVIEW BY WAY OF CERTIORARI AND PROHIBITION

AND

**IN THE MATTER OF:** THE CHIEF MAGISTRATE'S COURT AT KERICHO, CIVIL CASE NO. 324 OF 2012

AND

**IN THE MATTER OF:** ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES

AND

**IN THE MATTER OF:** SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26)

BETWEEN

REPUBLIC .....APPLICANT

AND

THE CHIEF MAGISTRATE, KERICHOLAW COURT .....1ST RESPONDENT

JOHN K. ROTICH .....2ND RESPONDENT

AND

ALBERT ATAMBO .....1ST INTERESTED PARTY

BENARD AMADI .....2ND INTERESTED PARTY

JOHN MIRORO .....3RD INTERESTED PARTY

NDEGE CHAI SACCO LTD .....4<sup>TH</sup> INTERESTED PARTY

VERSUS

MARCUS OTIENO OKWAYO – CHAIRMAN

*Suing on behalf of other members of the*

*body known as payroll self help group .....EX-PARTE SUBJECT*

### **J U D G M E N T**

1. By a Notice of Motion dated 9<sup>th</sup> February, 2015 filed in this court the same day, the exparte applicant herein (*Marcus Otieno Okwayo*) seeks the following orders:
  - a. *That this Honourable Court be pleased to issue Judicial Review by way of Certiorari to remove into the Honourable Court for purposes of being quashed the purported decision of the Honourable Resident magistrate given on 13<sup>th</sup> November, 2014 in Kericho CMCC.NO. 324 of 2012.*
  - b. *That this court be pleased to issue Judicial Review by an order of prohibition, prohibiting the aforesaid trial Resident Magistrate from continuing with the trial and proceedings on the said civil Suit No. 324 of 2012.*
  - c. *That costs of this application and incidentals thereto be provided for.*

#### **The Exparte Applicant's case**

2. The application is supported by the verifying affidavit of **Marcus Otieno Okwayo** plus the grounds on the face of the application.
3. According to the deponent there is judgment in Kericho CMCC No. 324 of 2014 for the sum of Shs. 100,000/= with costs and interest. The judgment is in his favour (MOO1(a) and (b)).

On 20<sup>th</sup> August, 2014 M/S Kolato Auctioneers were instructed by his lawyers to execute the decree. On 11<sup>th</sup> September, 2014 the court halted the execution following an objection filed by M/S Meroka on behalf of M/S Yaya Car Sales(K) Ltd. (MOO3 (a) and (b)).

4. His lawyers filed a Notice of Motion dated 24<sup>th</sup> September, 2014 challenging the objection filed by Mr. Meroka. This Notice of Motion came for mention on 15<sup>th</sup> October, 2014 when Mr. Meroka was given three(3) days to regularize his position. He did not comply and the said Notice of Motion was fixed for hearing on 22<sup>nd</sup> October, 2014. By the 22<sup>nd</sup> October, 2014 there was still no compliance and the order issued on 11<sup>th</sup> September, 2014 halting execution was vacated.
5. Soon after the vacation of the said order Mr. Meroka arrived and presented the court with a receipt of payment of the decretal sum of Shs. 195,376/= by the 2<sup>nd</sup> respondent to the applicant dated 16<sup>th</sup> October, 2014. He therefore stated that the execution had been overtaken by events. To his knowledge the payment had not been made to him as the judgment creditor but to the 1<sup>st</sup> – 3<sup>rd</sup> interested parties.
6. His advocate protested and the learned trial magistrate ordered that he (*the exparte applicant*) moves the court appropriately for a determination as to which party was entitled to the payment made by the 2<sup>nd</sup> respondent.
7. His advocate then filed an application dated 27<sup>th</sup> October, 2014 under certificate of urgency. The same was certified as urgent and fixed for interpartes hearing on 12<sup>th</sup> November, 2014.(MOO7 (a) and (b)).
8. On 12<sup>th</sup> November, 2014 when the said application came for hearing, Mr. Meroka urged the learned trial magistrate to hear an application he had filed on 12<sup>th</sup> November, 2014. The court

inclined to Mr. Meroka's request instead of hearing the earlier application by the exparte applicant. He found the actions by the learned trial magistrate to amount to irrational and procedural impropriety.

9. He fears that if the order of 12<sup>th</sup> November, 2014 is not quashed he will not get justice from that court.

### **The Respondents' Case**

10. The 1<sup>st</sup> respondent though served did not file any response to the application.

11. The 2<sup>nd</sup> respondent filed grounds of opposition dated 23<sup>rd</sup> February, 2015 which are as follows:

- a. *That the application lacks merit, is bad in law and is misconceived and the court lacks the power to grant the orders sought.*
- b. *That the 2<sup>nd</sup> respondent is improperly joined in this case.*
- c. *That the applicant lacks locus to bring this cause.*
- d. *That the matter, KCO CMCC NO. 324 of 2012 was settled vide consent on 9.12.2013 which reviewed the judgment of the court.*

### **The Exparte applicant's submissions**

12. Mr. Migiro for the exparte applicant submitted that the Notice of Motion was filed pursuant to leave granted by this court on 22<sup>nd</sup> January, 2015. He submitted that this court has jurisdiction and power under **Order 53 Rule 3** of the **Civil Procedure Rules** and **Section 8 and 9** of the **Law Reform Act** to issue the orders sought.

13. He also referred to the court's supervisory power to supervise the subordinate courts and Tribunals under it. He further submitted that the facts in the exparte applicants' verifying affidavit have not been rebutted. He referred on three authorities namely;

- i. **Nyeri C.A No. 44 of 2013 – Milka Nyambura Wanderi & Anor. Vs P.M's Court & 4 others.**
- ii. **Kisumu C.A. No. 232 of 2004, Ismael S. Mboya & 2 others V. Mohamed Haji Issa & Anor.**
- iii. **Nairobi Judicial Review No.112 of 2011, SDA Church (E.A) Ltd Vs P.S Ministry of Nairobi Metropolitan Development & Anor.**

### **The 2<sup>nd</sup> Respondent's submissions**

14. Mr. Meroka for the 2<sup>nd</sup> respondent opposed the application and submitted that the exparte applicant sued in the primary suit as the Chairman of PAYROLL SELF HELP GROUP, and judgment was entered. The same was reviewed by a consent dated 9<sup>th</sup> December, 2014.

15. The exparte applicant sought to execute on the reviewed judgment and several applications were filed leading to the decision of 13<sup>th</sup> November, 2013. Later on the same date all the parties agreed to have all these issues canvassed on 2<sup>nd</sup> February, 2014. This did not materialize because of these proceedings.

16. That the exparte applicant should have made an application before the learned trial magistrate for the said magistrate to recuse himself, instead of doing so in this court.

17. He further submitted that the 2<sup>nd</sup> applicant who is the 4<sup>th</sup> plaintiff in the primary suit has wrongfully been enjoined in this suit.

He also pointed out that the ex parte applicant did not seek leave to sue on behalf of the self help group of which the 1<sup>st</sup> – 3<sup>rd</sup> Interested Parties are officials.

18. Finally he invited the court to look at the consent of 9<sup>th</sup> December, 2013 and dismiss the application.

19. In reply Mr. Migiro said the suit was never compromised and the issue of Locus was sorted out by the lower court.

### **Determination**

20. Having considered the averments, grounds, documents and the submissions, I find the ex parte applicant's case to be that he was on 12<sup>th</sup> November, 2014 denied a hearing by the trial court in Kericho CMCC No. 324 of 2012. The said denial amounted to bias and partiality by the learned trial magistrate, hence the orders sought by him.

21. **Section 8** of the **Law Reform Act** specifically sets out the orders that the High Court can issue in Judicial Review proceedings and the said orders are: Mandamus, certiorari and prohibition. **Order 53** of the **Civil Procedure Rules** also deals with the said three orders only.

It is the submission of Mr. Meroka for the 2<sup>nd</sup> respondent that the orders sought by the ex parte applicant are not available to him because this court lacks the power to do so.

22. I find that to be an unfortunate submission because **Section 8** and **9** of the **Law Reform Act and Order 53** of the **Civil Procedure Rules** have given this court the jurisdiction to issue the orders sought by the ex parte applicant.

23. What then are the grounds upon which the court can grant Judicial Review? They are illegality, irrationality, procedural impropriety. In the case of **Pastoli Vs. Kabale District Local Government Council & others [2008] 2 E.A 300** it was held:

*“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ... illegality is when the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provision of a law or its principles are instances of illegality. It is, for example illegality where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable oath, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards... Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in the non observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision”.*

24. The ex parte applicant has relied on procedural impropriety to argue his application. His argument basically is that his application dated 27<sup>th</sup> October, 2014 which was certified urgent and fixed for hearing on 12<sup>th</sup> November, 2014 ought to have been heard before the 2<sup>nd</sup> respondent's application dated 12<sup>th</sup> November, 2014 and filed on the same day. He states that the orders made by the learned trial magistrate on 12<sup>th</sup> November, 2014 prejudiced him heavily and this affected his

application dated 12<sup>th</sup> November, 2014.

25. I have had a chance of perusing the lower court record (*Kericho CMCC No. 324 of 2012*). The many complaints here and there arise from execution of a decree in the said matter.

Judgment was delivered on 16<sup>th</sup> September, 2013 in favour of the exparte applicant in the sum of shs. 100,000/= plus costs and interest. And vide a consent dated 9<sup>th</sup> December, 2013 the judgment was reviewed. The reviewed judgment does not mention any figures but states;

- a. *That the 5<sup>th</sup> defendant/respondent do release to the plaintiff/applicant all the monies or sums of monies in the credit of its Account No. 515001104 to M/S Migiro & Co. Advocates from which the Advocate undertakes to pay the 1<sup>st</sup> defendant/respondent 1.2% of that sum and to the plaintiff/applicant 98.8% of the amount.*
- b. *That the said account be closed upon the said sum of money being so paid.*
- c. *That the plaintiff/applicant do notify its debtors to forthwith pay any monies awarded to him to his advocates.*

26. I have also noted that the court that heard the primary suit and delivered judgment was presided over by Hon. J.R. Ndururi Principal Magistrate. However, all other applications and counter applications have been handled by the court presided over by Hon. R. Limo Resident Magistrate. This disrupts the flow of proceedings and should as much as possible be minimized.

27. On 12<sup>th</sup> November, 2014 the learned trial magistrate was faced with two applications filed under certificate of urgency. One had been fixed for hearing on the said date but one was filed on that same day. Is there any law that prohibits the court from giving hearing preference to an application filed later than the other? Does it always follow that all applications are heard and determined according to when they were filed?

28. My answer to both questions is in the negative. It is upto the trial court to look at all or both applications and determine in what sequence to hear them. It is a discretion which has to be judiciously exercised.

29. The record shows that though the exparte applicant was on 12<sup>th</sup> November, 2014 ready to prosecute his application dated 27<sup>th</sup> October, 2014 Mr. Boiyon for Koske for 1<sup>st</sup> – 3<sup>rd</sup> defendants (*now interested parties herein*) was asking for specifically fourteen (14) days to respond to the two applications filed.

30. The learned trial magistrate also heard Mr. Meroka for the 2<sup>nd</sup> respondent exparte. He then delivered a Ruling which unfortunately does not form part of this record. What has been filed is only a copy of the orders emanating from the Ruling and which orders the exparte applicant is complaining against. I have however managed to read the Ruling as contained in the original file.

31. In the said Ruling the learned trial magistrate has explained the reasons why the application dated 27<sup>th</sup> October, 2014 could not be heard then, nor the prayers sought granted.

Even if the exparte applicant was ready to argue his application dated 27<sup>th</sup> October, 2014, Mr. Boiyon was not ready and had asked for time to file responses to both applications.

32. Could the court just dismiss such a request and hear the exparte applicant, when the other parties had not filed their responses? Infact that is what would amount to a violation of a party's right to be heard.

33. One of the prayers in the application dated 12<sup>th</sup> November, 2014 was to grant leave to the 4<sup>th</sup> defendant (*now 2<sup>nd</sup> respondent*) to change advocate since there was already judgment in the matter. Would it also have been just for the learned trial magistrate not to hear the applicant on this in spite of his application having been filed, later than that of the *ex parte* applicant? My answer to this is a big No.
34. Determination of which application to hear first or which orders to grant first varies from case to case depending on the circumstances of each case. It's a discretion exercised by the trial court and if the said discretion has not been properly exercised then the way forward would be an appeal. Judicial Review is concerned with the process of arriving at a decision and not the merits of the said decision. See **Municipal Council of Mombasa V R and Umoja Consultants Ltd C.A No. 185 of 2001 (Court of Appeal); R Vs. Kenya Revenue Authority ex parte Yaya Towers Ltd [2008] eKLR.**
35. From my assessment of the record and what transpired before the court on 12<sup>th</sup> November, 2014, I do not find any procedural impropriety proved. It follows that the prayers for the orders of certiorari to quash the decision of 12<sup>th</sup> November, 2014 is declined.
36. The second prayer was for an order of Prohibition, prohibiting the learned trial magistrate from continuing with the trial and proceedings in CMCC No. 324 of 2012. Since no form of impropriety has been expressly revealed from the record, good practice would be for the *ex parte* applicant to make an application before the learned trial magistrate for his recusal. It is only when such an application fails that one looks for other alternatives.
37. The *ex parte* applicant has failed to satisfy the grounds for issuance of a Judicial Review. The result is that the Notice of Motion dated 9<sup>th</sup> February, 2015 fails and is dismissed with costs.

**Dated, signed and delivered this 26<sup>th</sup> day of March, 2015**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of**

Mr. Migiro for applicant - present

Mr. Meroka for 2<sup>nd</sup> respondent - present

Interested parties -

Lagat – Court Assistant