**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW NO. 45 OF 2013**

**IN THE MATTER OF AN APPLICATION FOR MANDAMUS**

**AND**

**IN THE MATTER OF THE LOCAL GOVERNMENT ACT, CAP. 265 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE JUDGMENT IN NAKURU CMCC NO. 1997 OF 1999**

**BETWEEN**

**RUFUS NGANGA NJIHIA.....APPLICANT**

**BOARD OF GOVERNORS LORETO HIGH SCHOOL.....1ST RESPONDENT**

**ATTORNEY GENERAL.....2ND RESPONDENT**

**RULING**

1. The Notice of Motion dated 1st March 2014 has been brought under **Order 53 Rules 3(1), (2)** and **(3)** and **4(1)** of the **Civil Procedure Rules, 2010** and **Section 8(2)** and **9** of the **Law Reform Act**. It was filed pursuant to the leave granted by the court on 10th December 2013. The *ex-parte* Applicant seeks the following orders:

**(a) an order of Mandamus to compel the Respondent to pay the decretal sum which stands at Kshs. 433,675/- as at 5th November, 2012 plus interest at court rates till payment in full in Nakuru CMCC NO.1997 OF 1999 as decreed in the said case; and**

**(b) that the costs of this application be borne by the Respondent.**

**THE *EX-PARTE* APPLICANT'S CASE**

2. The *ex-parte* applicant filed a suit in the lower court, CMCC NO. 1997 OF1999, against the 1st Respondent and three other defendants seeking damages for the injuries he sustained in a road traffic accident. By a judgment delivered on 3rd October 2012, the 1st Respondent and the driver

of its motor vehicle were found jointly and severally liable and ordered to pay the claimant Kshs. 340,000/= together with costs and interest.

3. In the present suit, the *ex-parte* Applicant seeks an order of mandamus to compel the 1st Respondent to settle the decree. The application is supported by the Statement of Facts dated 23rd August 2013 and the Verifying Affidavit sworn on 29th August 2013 by Dominic Mukui Kimatta.

**THE RESPONDENTS' CASE**

4. In opposition to the application, the Respondents filed the Replying Affidavit of Margaret Ruinge which was sworn on 10th November 2014. The 1st Respondent contended that as at 12th August 1998, when the accident occurred, the motor vehicle was insured by United Insurance Company Limited (the insurance company) under policy number 7NMCP22750. The Certificate of Insurance that was issued to the 1st Respondent, No. 801204 and for the period commencing on 01/07/98 and expiring on 30/06/1999, was annexed to the Replying Affidavit and marked **"MRI".**
5. Consequently, the Insurance Company took over the suit against the 1st Respondent in the lower court and appointed the firm of R.K. Muthiga to defend the 1st Respondent's interest.
6. However the company was placed under statutory management before it could settle the decree. The Statutory Manager declared a moratorium on the payments due from United Insurance to its policy holders and all others creditors for three months which was renewed on 27th September 2014.
7. The Respondents' case was that they cannot be compelled to settle the decretal sum while the moratorium is still in force.

**SUBMISSIONS**

8. Counsel argued the application in court on 26th January 2015. Counsel for the *ex-parte* Applicant submitted that the 1st Respondent had refused to comply with the *ex-parte* Applicant's request to settle the decree. Being a public body, only an order of mandamus issued by this court can compel it to act.
9. Counsel also submitted the fact that the 1st Respondent's insurer going under did not affect the *ex-parte's* right to pursue the 1st Respondent for payment. He was not privy to the contract between the 1st Respondent and its insurer and further the insurer is not a party to these proceedings. According to Counsel, no good reason had been presented as to why the application should not be granted.
10. State Counsel acting for the Respondents submitted that the duty to pay the decretal sum does not lie with the 1st Respondent but with its insurer. Accordingly, the *ex-parte* Applicant should move to the insurance company and list himself as a creditor. That if the court were to grant the orders sought, it would in essence be punishing the 1st Respondent who had taken out insurance cover at the time.

**ISSUES FOR DETERMINATION**

11. The issues for determination in this application are:

    (a) whether the suit is competent; and

    (b) whether the 1st Respondent should be compelled to settle the decree of the lower court.

**ANALYSIS:**

**Whether the suit is competent**

12. Although this issue was not raised by either party, it is one that flows from the pleadings and one which this court should determine. I note although the claim was filed by Rufus Nganga Njihia who is the *ex-parte* Applicant, the affidavit verifying the facts has been sworn by one Dominic Mukui Kimatta, Counsel for the *ex-parte* Applicant.
13. **Order 9** of the **Advocates (Practice) Rules** prohibits Counsel from appearing in a matter wherein he may be called as a witness. The proviso therein provides that he may give evidence whether orally or by way of a declaration on formal matters or non-controversial matters of fact.
14. This is in contravention of **Order 53 Rule 1(1)** and **(2)** of the **Civil Procedure Rules** which provides:

> **"1. (1) No application for an order for mandamus, prohibition or certiorari shall be made unless leave thereof has been granted in accordance with this rule.**
>
> **(2) an application for such leave shall be made *ex-parte* to a judge in chambers and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds upon which it is sought, and by affidavits verifying the facts relied upon."**

15. The verifying affidavit verifies the statement of facts is of evidential value in an application for judicial review. (See **Republic** V. **Eldoret Municipal Council** *Ex-parte* **Patrick Nalianya Wanyonyi & Another,** [2005] Eklr**).** It is the document wherein all the evidence that is to be relied on is attached. It can therefore neither be deemed as informal nor as containing non-controversial matter.
16. Accordingly, it must be sworn by the applicant who seeks the orders of court on the basis of the evidence which he has presented. I am guided in this regard, by the decision in **Republic** V. **County Secretary Murang'a County Government** *Ex-parte* **Stephen Thiga Thuita** [2004] Eklr, that:

> **"My understanding of these rules, more particularly sub rule (2) thereof is that the applicant whose name and description is given in the statement of facts is the same person who should swear the affidavit or affidavits verifying those facts; the affidavit cannot be sworn by any other person. Without such an affidavit by the applicant it cannot be said that there is an application or no proper application before court for judicial review orders. It therefore follows that the omission of the applicant's affidavit verifying the facts on which he relies in pursuit of the relief for a judicial review order of mandamus is fatal; to his application."**

17. Although the matters deposed by Counsel are those within his knowledge and the affidavit is therefore in compliance with **Order 19 Rule 3(10)** which requires all Affidavits to be confined to such facts as the deponent is able of his own knowledge to prove, I find that in light of the provisions under **Order 9** of the **Advocates (Practice) Rules** and the place of the verifying affidavit in an application for judicial review, it is not proper for Counsel to swear such a vital document. The scope of his authority does not extend to Counsel swearing this affidavit on behalf of his client.
18. Whereas he may swear a verifying affidavit on a matter of fact within his knowledge to accompany the statement of facts, the person who institutes the suit and who seeks the orders of court must also swear an affidavit or in lieu present a written authority allowing another person to act on his behalf may be filed.
19. For this reason I find that the verifying affidavit was sworn by a person other than the *ex-parte* applicant and without his authority. The owner of the case has not verified the contents of the statement in which his case is stated. This is not a technicality that can be cured under **Section 1A** and **1B** of the **Civil Procedure Act, Cap. 21** but a substantial issue that goes to the core of the case. Accordingly, I find that the verifying affidavit is fatally defective and strike it out. It follows that without this documents which presents evidence in support of the case, the application for judicial review falls short of the requirements of **Order 53 Rule 2** and cannot be allowed to stand.

**Whether the Respondents should be compelled to satisfy the judgment of the lower court**

20. The Respondents did not dispute liability under the judgment of the court or that the *ex-parte* Applicant was entitled to the sum awarded in the decree. Their case was that the obligation to satisfy the decree lay in the insurance company which covered the 1st Respondent's motor vehicle at the time of the accident. However, the *Exparte* Applicant was unable to pursue the insurance company because of the moratorium that had been declared by its Statutory Manager. The Respondent contends that the *ex-parte* Applicant should therefore move against the insurance company and be listed as its creditor with the Statutory Manager.
21. In response to this contention, Counsel for the *ex-parte* Applicant argued that he cannot claim against the insurance company because he is not privy to its contract with the 1st Respondent and therefore, the moratorium does not affect his claim. He argued that the order of mandamus is the only remedy available to the *ex-parte* Applicant against the Respondent.
22. This court states that judicial review remedies are discretionary and should only be issued where there is no other alternative remedy that is more efficient or suitable. In essence, although the availability of other remedies is no bar to seeking the judicial review remedies, it should however be sought as a matter of last resort.
23. In **Shah** V. **Attorney General,** (No.3) Kampala HCMC No.31 of 1969 [1970] EA 543, the court addressed this issue as follows:

> **"Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under statutory or legal duty to do or not to do something; the duty itself being of imperative nature."**

24. In defining and enunciating the scope of the order of *mandamus*, Court of Appeal in **Kenya national Examination Council** V. **Republic** *exparte* **Gathenji Njoroge & 9 Others,** [1997] eKLR relied on an extract from **Halsbury's Law of England, 4th Edition Volume 1 at page 111 para.89** that:

> **"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 defects of justice and accordingly it will issues, to the end that justice may be done, in all cases where there is a specific legal right and 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."**

At paragraph 90 headed *"the mandate"* it is stated:

> **"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leave discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."**

25. The court then held:

> **"What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a 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."**

26. **Section 10** of the **Insurance (Motor Vehicle Third Party Risks) Act No. 12** of **1945** provides-

> **"(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."**

27. The section places an obligation on an insurer to pay to the decree holder directly the sum payable under a judgment in respect of a liability covered by the policy. This obligation dispenses with the the requirement of privity of contract in order for the decree holder to claim against the insurance company. The decree holder is at liberty to move the court for declaratory orders, against the insurance company directly.
28. However, as at the time when the 1st Respondent filed its Replying Affidavit, their insurer had been placed under statutory management. Subsequently, the statutory manager, in exercise of the powers conferred by **Section 67C(10)** of the **Insurance Act, Cap.487**, declared a moratorium on the payment by the insurer of its policy holders and other creditors on the 27th September, 2014, for a period of three months.
29. *The moratorium suspends, temporarily, payment of claims to the policy holders or creditors. It is not an abrogation by the insurance company of its duties, but a suspension of the obligations of the company by the statutory manager to enable him set its affairs in order.*
30. *Thereafter, the ex-parte applicant was free to lodge his claim with the statutory manager for payment.*
31. *As I have stated earlier in this Ruling, the orders of judicial review are discretionary and should be granted where the court is satisfied that it is the best cause of action. The author of* ***Halsbury's Laws of england 4th Ed Vol. ll page 805 para 1508*** *stated as follow on this issue:*

> ***"Mandamus is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the bais of evidence and sound legal principles."***

32. *In this instance, I find the ex-parte Applicant has not satisfied this court to exercise its discretion in his favour. In light of the fact that the 1st Respondent was insured and that the insurance company had evidently taken up the claim in exercise of its subrogation rights, I am not satisfied that the ex-parte Applicant has exhausted all methods for the recovery of the decretal sum and should have first pursued the statutory manager for payment before turning to the 1st Respondent.*

***FINDINGS***

33. *In the end, I find that this application is incompetent for want of a Verifying Affidavit sworn by the ex-parte A0pplicant.*
34. *I also find that this is not a suitable case in which this court should exercise its discretion to grant the order of mandamus sought by the ex-parte Applicant.*

***DETERMINATION:***

35. *The application sought is not merited and is hereby dismissed.*
36. *Each party shall bear their own costs.*

***Dated, Signed and Delivered at Nakuru this 24th day of April, 2015.***

***A. MSHILA***

***JUDGE***