



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
JUDICIAL REVIEW NO. 4 OF 2010

IN THE MATTER OF: AN APPLICATION BY SANJAY
AMBALAL PATEL FOR LEAVE TO APPLY JUDICIAL
REVIEW

AND

IN THE MATTER OF: THE CIVIL PROCEDURE
ACT CAP 21 LAWS OF KENYA AS READ IN CONJUNCTION
WITH THE COMPANIES ACT CAP 486 OF THE LAWS OF
KENYA

IN THE MATTER OF: MOMBASA CHIEF
MAGISTRATE'S COURT CIVIL CASE NO. 721 OF 2000
BETWEEN JAPHET MWAKINYADI AND AMBALAL
HOLDINGS LIMITED

THE SENIOR RESIDENT MAGISTRATE

AT MOMBASA (Ms. T. MWANGI) RESPONDENT

EXPARTE

SANJAY AMBALAL PATEL APPLICANT

AND

JAPHET MWAKINYADI INTERESTED PARTY

RULING

By way of a Notice of Motion dated 1st February 2010 the Ex Parte Applicant **SANJAY AMBALAL PATEL** sought the following orders:

“a An Order of Certiorari to remove into the High Court for the purpose of quashing all

proceedings and any orders made (or alternatively such of the proceedings as relate to the order made in the ruling dated 14th July 2009) in the suit pending before the Mombasa Chief Magistrate's Court in Civil Case No. 721 of 2000 between Japhet Mwakinyandi and Ambalal Holdings Limited (hereinafter referred 'the said suit')

b Any other or further and consequential orders and/or directions be given."

The interested Party one **JAPHET MWAKINYANDI** did file Grounds of Opposition to the motion on 18th March 2010. The Respondent being the Senior Resident Magistrate at Mombasa (**Ms. T. MWANGI**) represented by Hon. Attorney general did not participate in these proceedings even though it was her decision which was being challenged. The background to this petition is as narrated below.

In the year 2000 the Interested Party herein filed suit against **AMBALAL HOLDINGS LTD** vide Mombasa **CMCC No. 721 of 2000**. The suit arose from a fatal injury accident which had occurred on 9th March 1999. One of the victims in the said fatal injury accident **JUMA SULEIMAN** was a fare-paying passenger in a Nissan matatu Registration Number KAG 418Y which collided with motor vehicle KYN 012 Isuzu Lorry which lorry belonged to Ambalal Holdings Limited. This suit was decided in favour of the Interested Party who was awarded the sum of Kshs.405,960/- together with costs. By the time the judgement was being executed Ambalal Holdings had ceased operations. Subsequent attempts were made by the Interested Party to recover the decretal sum. To this end the Interested Party made a chamber summons application dated 7th September 2001 seeking to have the directors of the company (Ambalal) attend court and be cross-examined as to whether the company had the means and/or assets to satisfy the decree. The learned Senior Resident Magistrate heard this application and on 11th August 2006 ruled that the Corporate Veil of the company be lifted and the company directors be made personally liable for the debt. A further attempt by the Interested Party to execute failed and on 12th January 2010 a stay of execution was obtained. On 13th January 2010 the Exparte Applicant (being one of said Directors) sought leave to file the present Judicial Review Application. Leave was granted on 14th January 2010 and it was also ordered that said leave do operate as a stay pending the hearing and determination of the main motion. Parties both filed their respective submissions.

The grounds for the application were as follows:

- i. The Application made on 7th September 2001 only sought to have the directors cross-examined. No prayer was made for lifting of the corporate veil.
- ii. The Respondent in so ruling failed to appreciate that no

prayer to lift the corporate veil had been made.

- iii. No grounds were established to warrant the orders made in the ruling.

The Interested Party in his Grounds of Opposition to the application raised the following:

- i. The Application was incompetent and bad in law.
- ii. The Ruling made by the Respondent is not amicable to Judicial Review.
- iii. The present Application does not raise any breach to procedure and/or excess of jurisdiction, but raises substantial issues which ought to be challenged by way of appeal **not** through Judicial Review proceedings.
- iv. Under OXXI Rule 36 the Respondent was entitled to lift the veil of incorporation whether such prayer was made or not.
- v. The Application is merely a ploy to deny the Interested Party the fruits of his judgement.
- vi. The Application amounts to an abuse of process.

The remedy of Judicial Review is only applicable where there has been a defect in the decision-making process. Therefore it is the process in arriving at a particular decision and **not** the decision itself which is being challenged. Authorities on this point are rife – to cite a few. **In Civil Appeal No. 234 of 1995,**

THE COMMISSIONER OF LANDS –VS- KUNSTE HOTEL LTD the Court of Appeal in defining the scope of Judicial Review held thus:

“But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.”

Likewise in **R –VS- PUBLIC SERVICE COMMISSION & MINISTRY OF FINANCE (2001) eKLR** Musinga J (as he then was) held that:

“In judicial review proceedings, the court is not concerned with the merits of the decision but looks at the decision making process”.

On this basis this motion must fail. The Exparte Applicant has not effectively challenged the process used by the Respondent to arrive at his decision. There is no allegation that the Respondent acted ultra vires or in excess of her jurisdiction. The Exparte Applicant was fully represented and was granted an opportunity to be heard before the Respondent reached her decision. The process was not flawed in any way. All that is alleged is that based on the facts presented before her the Respondent reached an erroneous decision. That is a matter for appeal **not** for judicial review. What is being challenged here is the merits of the Respondent’s decision which is properly a matter to be determined upon appeal. The question of the legality of the decision (which is not the issue here) would be a subject for judicial review.

It is clear to me that this is merely another attempt by the Exparte Applicant to delay this matter and to deny the Interested Party the fruits of his judgement. This concerns a suit which was commenced in the year 2000 and has been kept alive in the courts for over 13 years. Litigation must come to an end. I find no merit in the present motion. I dismiss the same and I lift the stay imposed on execution. Costs for this application are awarded to the Interested Party.

Dated and Delivered in Mombasa this 21st day of February 2014.

M. ODERO

JUDGE

In the presence of:

Ms. Obinju for Applicant

Ms. Abdulrahman for Interested Party

Court Clerk Mutisya