REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC CIVIL APPLICATION NO. 216 OF 2010 (JR)

REPUBLIC.....APPLICANT

VERSUS

THE CITY COUNCIL OF NAIROBI.....RESPONDENT

EX PARTE BLUESHIELD INSURANCE COMPANY LIMITED

RULING

1. By my judgement delivered on 6th June, 2013 in this application in which I held as follows:

> **"Lastly it is contended that the Respondent has in fact deposited a sum of Kshs 16,671,952/= in court. There is a court receipt for the said sum dated 9th March 2007. None of the parties has addressed what the current position of the said sum is. Order 22 rule 1(1) of the Civil Procedure Rules provides:**
>
> ***All money payable under a decree or order shall be paid as follows—***
>
> ***(a) into the court whose duty it is to execute the decree;***
>
> ***(b) direct to the decree-holder; or***
>
> ***(c) otherwise as the court which made the decree directs.***
>
> **By virtue of the said provision payment into court is deemed to be payment of the decree. Therefore if the Respondent has paid the sum into court, an order of mandamus would not be issued as the decree would have been settled thereby and the Applicant ought to apply for the release of the same.....For this reason I find no merit in the Notice of Motion dated 5th August 2010 which is hereby dismissed with costs to the Respondent."**

2. By a Notice of Motion dated 2nd July, 2013, the ex parte applicant herein, **Blueshield Insurance Company Limited**, has now moved this Court principally seeking an order that the said decision be vacated and/or set aside and that the ex parte applicant's Notice of Motion dated 5t August, 2010 be allowed.

3. The gist of the application is that when the applicant moved to have the said sum which was purportedly deposited in Court, it realised that that sum had in fact been withdrawn on the basis of an ex parte application made on behalf of the Respondent and was therefore not available in Court. It was therefore contended that unless the decision made herein is reviewed the applicant will forever be deprived of he fruits of judgement based on a decision made on the basis of misleading information given to the Court.

4. According to **Mr Nyanga**, learned counsel for the applicant this Court has power to review its decision in the exercise of its inherent jurisdiction and that section 8(3) of the ***Law Reform Act*** which provides that "*no return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section*" only applies to situations where the application for judicial review is granted and not where the application is disallowed as in this case.

5. The Respondent opposed the application based on grounds of opposition filed on 22nd August 2013.While not expressly disputing the factual averments made by the applicant, the Respondent's position was that this Court is precluded by section 8(3) from reviewing its decision made on judicial review whether the orders are negative or positive and the only option available to an aggrieved party is to file an appeal under section 8(5) of the *Law Reform Act*, Cap 26 Laws of Kenya.

6. It was further contended that what the applicant intends to achieve by this application is to have the court sit on appeal on its decision by reversing its earlier decision. According to **Mr Otieno** for the Respondent the applicant ought to have appealed and applied to be adduced fresh or further evidence. It was further submitted that the applicant has in fact not sought an order for review but an order seeking that the earlier decision be vacated and set aside a power which can only be exercised by the Court on appeal.

7. I have considered the application, the affidavit, grounds of opposition, the submissions and authorities relied upon by counsel and this is the view I form of the matter.

8. The first issue is whether this Court has power to review its decision made on judicial review application. The question whether the Court can revisit its decision made on a judicial review was dealt with by the Court of Appeal in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** where the Court held that the superior court in the matter before the court has the residual power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction and not necessarily under section 3A of the ***Civil Procedure Act*** which strictly speaking does not apply to judicial review proceedings. That section in any case does not confer inherent jurisdiction on the Court but only reserves the same. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the Civil Procedure Act is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.

9. Dealing with inherent powers of the Court it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.

10. I therefore find no merit in the submission that this Court has no power to revisit its decision made on judicial review. Whether such course is referred to as review, vacation of orders or setting aside in irrelevant in my view. In light of the said decision of the Court of Appeal I decline to be persuaded by the decision to the contrary in **Republic vs. The Clerk County Council of Meru & Another [2012] eKLR** and the decisions cited therein which were all High Court decisions.

11. In the premises it is nolonger necessary for me to consider the issue whether or not the provisions of section 8(3) of the ***Law Reform Act*** only apply to situations where the prayer for judicial review is granted and not where it is denied.

12. The next issue is whether this Court ought in the circumstances of this case to set aside its earlier decision. From the said decision it is clear that were it not have been for the allegation that the decretal sum had been deposited in Court the Court would have had no difficulty in allowing the application. Therefore to disallow the application would have the effect of forever locking the applicant from enjoyment of otherwise deserved orders. Any Court worth its salt out not to countenance such a miscarriage of justice. Taking into account all the circumstances of this case I am satisfied that the justice of the case mandates that the earlier decision be revisited since the Respondent ought not to benefit from its own misleading information since a court of justice, it has been held, has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

13. As held hereinabove there was no other reason why the application ought not to have been allowed. In the premises, the decision made herein on 6th June, 2013 is hereby reviewed and set aside and is substituted therefor an order allowing the Notice of Motion dated 5th August, 2010.

14. Consequently I grant an order of Mandamus against the Town Clerk of the City Council of Nairobi compelling the said Town Clerk to comply with the decree granted on the 14th day of August 2009 in Milimani HCCC No. 71 of 2006 between **Arkchoice Insurance Brokers Limited and Blueshield Insurance Company Ltd versus The City Council of Nairobi**. I however decline the prayers seeking that the Town Clerk shows cause why he should be committed as the said prayer is premature at this stage. The applicant will have the costs of these proceedings.

Dated at Nairobi this 3rd day of April 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nyanga for the Applicant

Mr Otieno for the Respondent