



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 295 OF 2011

BESPOKE INSURANCE BROKERS.....APPLICANT

VERSUS

PHILIP KISIA, THE TOWN CLERK

CITY COUNCIL OF NAIROBI.....1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

JUDGEMENT

On 14th March, 2012 this court (Githua, J) granted leave to Bespoke Insurance Brokers (the ex-parte applicant) to commence judicial review proceedings in terms of prayer No. 1 of the chamber summons application dated 23rd November, 2011. In the said prayer, the ex-parte applicant was seeking for an order:-

1. **THAT the honourable court be pleased to grant leave to the Ex-parte applicant to apply for an ORDER OF MANDAMUS directed at the Town Clerk-City Council of Nairobi, and all officers, servants or agents of the City Council of Nairobi compelling them to exercise the Orders granted by this honourable court to effect payments of a balance of a decretal sum of Kshs.20,872,392/= (Twenty Million Eight Hundred and Seventy Two Thousand Three Hundred and Ninety Two) from Milimani High Court Civil Case No. 590 of 2005 granted to the applicants vide a decree order issued on 27th October, 2008.**

Through the notice of motion dated 22nd March, 2012 the ex-parte applicant therefore prays for orders as follows:-

1. **Judicial Review by way of an order for Mandamus compelling the Town Clerk, City Council of Nairobi, to pay the Decretal sum outstanding at Kshs.20,872,392.12/= as at the date of filing hereof together with interest thereon till payment in full pursuant to the decree issued in Milimani High Court Civil Case No. 590 of 2005 on 27th day of October, 2008.**
2. **THAT this Honourable Court be pleased to issue such other orders or directions as it deems necessary and expedient in the circumstances.**
3. **Costs of and incidental to this suit be awarded to the Applicant.**

The application is supported by an affidavit, sworn on the date of the application, by Geoffrey Wahome Muotia a director of the applicant. It is also supported by the chamber summons application for leave, a

statutory statement dated 23rd November, 2011 and a verifying affidavit sworn by Geoffrey Wahome Muotia on the same date.

Philip Kisia, the Town Clerk, City Council of Nairobi (the 1st respondent) and City Council of Nairobi (the 2nd respondent) opposed the application through a replying affidavit sworn on 2nd May, 2012 by Aduma J. Owuor the 2nd respondent's Director of Legal Affairs.

Through the replying affidavit the respondents inform the court that the judgment the ex-parte applicant seeks to enforce was obtained ex-parte and their attempt to have it set aside was dismissed. They also inform the court that they have since filed Civil Appeal No. 117 of 2009 in the Court of Appeal and the said appeal is awaiting determination. They further inform the court that there is another Appeal No. 7 of 2007, which appeal the ex-parte applicant had filed against the decision of Azangalala, J (as he then was) after he rejected an application by the ex-parte applicant for summary judgment. The respondents have also through paragraph 12 of the replying affidavit summarized the other grounds for opposing the application as follows:-

12. THAT the respondent has subsequently located its original file wherein it has made all the foregoing discoveries and from the foregoing back drop, it is clear that this instant judicial review application is not only brought in bad faith but the same is indeed premature and grant thereof would be extremely prejudicial in that;

(a) The decree now sought to be executed herein is the very decree that is challenged in the 2nd respondent's pending appeal.

(b) A grant of the orders sought herein would render both of the 2nd Respondent and the Applicant pending appeals nugatory.

(c) The alleged decree is just plainly premature.

(d) The sum at stake herein is quite massive and in the event the 2nd Respondent's appeal succeeds, hereof will lead to serious loss of public funds which funds the 2nd respondent has at all times maintained, was paid out to the underwriter, Invesco Insurance Co. Limited.

(e) Without prejudice to the foregoing, a grant of the said order would go against the negotiated and agreed sum of kshs.17,000,000/= making recovery of the same in the vent of a successful appeal less feasible.

The respondents have also through the written submissions attacked the application on the following grounds:-

- 1. THAT the applicant is seeking orders in its own name and not the name of the republic;**
- 2. That the supporting affidavit sworn on 22nd March,2012 should be struck out;**
- 3. The application does not comply with Order 53 Rule 1(2) of the Civil Procedure Rules (CPR) which provides for the contents of a statutory statement;**
- 4. The ex-parte applicant did not comply with the leave granted and as such the application is defective;**
- 5. The application has not been made in good faith and the court should not exercise its discretion in favour of the ex-parte applicant.**

I think it is important to address the legal issues raised by the respondents before considering the application itself. It is not disputed that judicial review proceedings are supposed to be commenced in the name of the Republic. Rigeru, J (as he then was) held in the case of **NDETE V CHAIRMAN LAND**

DISPUTES TRIBUNAL & ANOTHER [2002] 1KLR 392 that :-

“It is established law that applications for certiorari, mandamus or prohibition should be made in the name of the Republic. The case of Farmers Bus Service v Transport Licensing Appeal Tribunal [1959] EA 779 held that such applications should be made in the name of the crown. When Kenya became a Republic in 1964 the crown was superseded in all legal proceedings to which it was a party by the Republic. The application for judicial review therefore ought to be made in the name of the Republic.”

It must be noted that the above quoted decision was made before the current Constitution was promulgated on 27th August, 2010. Through Article 159(2)(d) the Constitution commands this court to deliver justice without undue regard to technicalities. In order to understand whether an issue raised can be treated as a technicality, the court must consider the impact of such a finding on the case of the opposing party. In other words the court will ask itself whether such a finding will be prejudicial to the case of the other party. In judicial review proceedings the Republic is a nominal applicant. The true beneficiary of the proceedings is the ex-parte applicant who seeks to challenge the decision of a public body. In the case before me, it was clear from the outset what the applicant wanted. The respondents have not suffered any prejudice by the fact that the Republic has not been named as the applicant. I will therefore treat this omission by the ex-parte applicant as a small mistake which should not be used to deny it access to justice. I therefore find the application properly before this court and reject the respondents’ submission on this issue.

On the second issue, the respondents argue that the supporting affidavit sworn by the applicant’s director on 22nd March, 2012 should be struck out. In support of this argument the respondents cited the decision of G.B.M. Kariuki (as he then was) in the case of **REPUBLIC v CHARIMAN LAND DISPUTES TRIBUNAL & 2 OTHERS Ex-parte SHIUMA JACOB MUKALAMA [2006] eKLR** where he stated that:-

“I have perused the Notice of Motion dated 11/1/2002 which was accompanied by an affidavit sworn on the same date by the ex-parte applicant. The motion was filed pursuant to Rule 3(1) of Order 53 Rule 3(1) of Order 53. Rule 3(1) of Order 53 does not permit the filing of an affidavit along with the motion. One does not have far to seek to see why this should be the case. At the leave stage, the Applicants ought to have made out his case by filing a statement setting out, inter alia, the relief sought and the grounds on which such relief is sought as well as an affidavit or affidavits verifying the facts relied on in the statement. Leave is given on the basis of that material. Affidavits in judicial review are filed pursuant Rule 1(2) and 4(2) of Order 53. The affidavit accompanying the Notice of Motion sworn on 11th January, 2002 by Shiuma Jacob Mukalama was misplaced and it is hereby struck out for those reasons.”

I entirely agree with the reasoning of the learned Judge. In my view filing a supporting affidavit along with the substantive notice of motion is a superfluous exercise. As such the supporting affidavit sworn on 22nd March, 2012 by Geoffrey Wahome Muoria is struck out. However, the applicant’s substantive application remains intact.

Thirdly, the respondents argued that the statutory statement does not adhere to the provisions of Rule 1(2) of Order 53 Civil Procedure Rules. According to the said rule a statutory statement should contain the name and description of the applicant, the relief sought and the grounds upon which the relief is sought. It is the respondents’ argument that the statutory statement does not contain the grounds upon which the reliefs are sought but facts relied upon. The respondents argue that the facts are supposed to be found in the verifying affidavit(s). The respondents are correct in their submissions. The contents of a statutory statement are as they have stated. The facts to be relied upon are supposed to be found in the verifying affidavit(s).

I have carefully looked at the applicant’s statutory statement and it contains the description of the parties and the reliefs sought. The third item is stated to be ‘FACTS RELIED UPON’. When one looks at the

said 'FACTS RELIED UPON', it becomes clear that they are grounds in support of the reliefs sought. Without descending into the darkness of technicalities and with the prop of Article 159(2)(d) of the Constitution, I think one can correctly say that the applicant's statutory statement meets the requirements of Rule 1(2) of Order 53 Civil Procedure Rules. I therefore find the applicant's statutory statement to be a proper one for the purpose of these proceedings.

The respondents also attack the applicant's application on the ground that the main prayer in the notice of motion is different from the prayer that the applicant had placed before the court when seeking leave. I agree. For reasons unknown to the court the applicant decided to add the words 'together with interest thereon until payment in full' to its main prayer in the substantive notice of motion. The applicant therefore went against the leave granted. I therefore strike out the above words from the first prayer of the applicant's notice of motion dated 22nd March, 2012.

Finally the respondents argued that the applicant has not approached this court with clean hands. The respondents informed the court that there were two appeals pending in the Court of Appeal in respect of this matter but the applicant had not disclosed this fact to the court when filing its application. The applicant informed the court on 5th December, 2012 that it had withdrawn its appeal (Civil Appeal No. 7 of 2007) on 22nd November, 2012. That does not address Civil Appeal No. 117 of 2009. The applicant did not candidly disclose to the court all the material facts. A party approaching a judicial review court must do so with utmost good faith. All the facts have to be disclosed to the court. A party who approaches the court with clenched fists is most likely to exit the temple of justice with empty hands. I, however, do not wish to make my decision on this non-disclosure of material facts.

An order of mandamus is issued to compel a public body to do that which the law requires it to do. For such an order to issue, the applicant must pinpoint to the court the law which requires a public body to perform a certain duty. In the case before me, Section 263A(1) of the Local Government Act Cap 265 is very relevant. It provides that:-

“Where any judgment or order has been obtained against a local authority.....the clerk of the local authority shall, without delay, cause to be paid out of the revenue of the local authority such amounts as may, by the judgment or order, be awarded against the local authority to the person entitled thereto”.

The respondents have disputed the sum of Kshs.20,872,392/= claimed by the applicant. I have gone through the papers filed by the applicant and it is clear that the applicant was awarded Kshs.27,914,768.10 on 21st October, 2007 in High Court Civil Case No. 590 of 2005. A decree for this amount was later issued. It is also clear from the ruling delivered by the Court of Appeal on 21st October, 2011 in Civil Application No. Nai. 87 of 2010 (UR. 63/2010) that the principal amount was paid in full and what remains is the interest. The applicant did not place any document before the court to explain how the interest was arrived at. This court can only compel the respondents to perform that which is legal. The court cannot compel the respondents to pay money without any documentation to support such payment. It is not to say that the applicant's claim is illegal. What the court requires is evidence as to how the figure was arrived at. For this reason alone, the applicant's application fails and the same is dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 8th day March , 2013

W.K KORIR,

JUDGE