



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISC. APPL. JR NO. 202 OF 2009

BETWEEN

NJERI CHUCHU APPLICANT

AND

**THE INSURANCE REGULATORY
 AUTHORITY (INCORPORATING THE
 COMMISSIONER OF INSURANCE)..... 1ST RESPONDENT**

**THE SENIOR RESIDENT MAGISTRATE’S COURT
 KIAMBU..... 2ND RESPONDENT**

ATTORNEY GENERAL.....3RD RESPONDENT

AND

BONIFACE KAHUGU KIMUHU1ST INTERESTED PARTY

GEMINIA INSURANCE CO. LTD2ND INTERESTED PARTY

RULING

1. It is regrettable that an application for leave to commence judicial review proceedings has been pending since April 2009. In that application the *ex-parte* applicant (“the applicant”) seeks the following orders;

[2] That the Honourable Court be pleased to grant leave to the applicant to be granted leave to comply for judicial review against the respondents for orders of:

- (a) Mandamus – to compel the 1st respondent to perform its Statutory duty to direct, supervise and ensure that the 2nd interested party settles the decretal sum in SRMCC*

47/2005 Kiambu.

(b) *Prohibition – to restrain the Kiambu Chief Magistrate’s Court from issuing warrants in SRMCC No. 47/2005.*

[3] *That the Honourable Court be pleased to grant leave to operate as a stay of execution in SRMCC No. 47/2005.*

2. The facts upon which the application is predicated are not in dispute. The applicant was sued by the 1st interested party, Boniface Kahugu Kimuhu, in ***Kiambu CMCC No. 47 of 2005, Boniface Kahugu Kimuhu v Florence Njeri Chuchu and James Watako Chuchu***. This was an ordinary running down case where the plaintiff was a passenger in the motor vehicle owned by the defendants. After hearing the case, the learned magistrate found in favour of the plaintiff on liability and awarded general damages amounting to Kshs. 800,000 together with special damages costs and interest. It is apparent from the depositions that the judgment is in the process of being executed.
3. The applicant’s complaint set out on the face of the Chamber Summons and in her verifying affidavit is that the Geminia Insurance Company Limited (“Geminia”), which was supposed to indemnify her against the judgment, failed to appoint an advocate to act on her behalf as defendant in the suit whereupon she had to appoint her own advocate and defend the case to her prejudice.
4. She asserts that Geminia had a duty to indemnify her under the provisions of **Section 10(2) of the Insurance (Motor Vehicle Third Party) risks Act, (Chapter 405 of the Laws of Kenya)** and **Section 203(1) and (2) of the Insurance Act**. Her case was that it was incumbent upon Geminia to defend the claim and thereafter take up or reject the claim depending on the finding of the case.
5. The application before the court is one for leave to commence judicial review proceedings. The principles upon which the court acts are well set out in the case of ***Njuguna v Minister of Agriculture (2008) EA 184*** where the Court of Appeal stated that, “*The test whether leave should be granted to the applicant for judicial review is whether, without examining the matter in depth, there is an arguable case that the reliefs might be granted at the hearing of the substantive application.*” I have considered the parties depositions, oral and written submissions in light of this principle and I take the following view of the matter.
6. In ***Kenya National Examinations Council v Republic ex-parte Gathenji and Others CA Civil Appeal No.266 of 1996 [1997]eKLR***, the Court of Appeal addressed the scope of an order of mandamus, “*What is the scope and efficacy of an ORDER OF MANDAMUS? “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 issue, 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.” [A]n 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.*”
7. On the facts of the case, can the court compel the Insurance Regulatory Authority (“IRA”) to perform its statutory duty to compel Geminia to settle the decretal sum? In so far as the case in the Magistrate’s Court is concerned, IRA does not bear any statutory obligation or duty that can be enforced by way of an order of mandamus and none has been demonstrated. The relationship between the applicant and Geminia is a contractual relationship governed by the applicable policy and the provisions of the ***Insurance (Motor Vehicles Third Party Risks) Act***. The duty of the

Geminia to settle any claim referred to under **section 203** of the **Insurance Act** is to be read within the context of **Insurance (Motor Vehicles Third Party Risks) Act** which provides a framework for settlement of third party insurance claims. Gemina and IRA were not parties to the suit before the Magistrate's Court and their liability to the applicant was not an issue nor did it give rise to the decree which is sought to be enforced.

8. In **Kenya National Examinations Council v Republic ex-parte Gathenji and Others (supra)**, the Court of Appeal discussed the scope of the order of prohibition, it stated, "*What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings*" Transposing these *dicta* to the present case, I would say that the applicant has not shown that the Magistrate's Court in its proceedings and judgment acted *ultra vires*, breached the rules of natural justice or that the decision was *Wednesbury* unreasonable to attract an order of prohibition. In fact nothing is alleged against the court.
9. It must be clear that the Chamber Summons dated 1st April 2009 lacks merit, does not raise any arguable issue and has no prospects of success. It is dismissed with costs to the respondents and interested parties.

DATED and DELIVERED at NAIROBI this 9th day of September 2013

D.S. MAJANJA

JUDGE

Mr Opere instructed by S. W. Ndegwa and Company Advocates for the ex-parte applicant.

Mr Bungu instructed by Kambuni and Company Advocates for the 1st respondent.

Ms Chimau, Litigation Counsel, instructed by the State Law Office for the 2nd and 3rd interested party.

Ms Thoronjo, instructed by Annie Thoronjo and Company Advocates for the 1st interested party.

Mr Nyangoro instructed by Kelvin Mogeni and Company Advocates for the 2nd interested party.