



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 266 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF HIGH COURT CIVIL APPEAL NO. 501 OF 2008

AND

IN THE MATTER OF SECTION 88 OF THE KENYA RAILWAYS CORPORATION ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE MANAGING DIRECTOR,

KENYA RAILWAYS CORPORATION.....RESPONDENT

EX PARTE :

SAMUEL MUGWE GIOCHE

RULING

The Application

1. The *ex parte* Applicant herein, Samuel Mugwe Gioche, was the Respondent in Civil Appeal Number 501 of 2008, wherein judgement was entered in his favour arising from an accident in which his wife suffered fatal injuries. Kenya Railways Corporation, the Respondent herein, was the Appellant in the said appeal, and had appealed the judgment of the trial Court which had found it 100% liable for the said accident, and awarded general and special damages as well as costs to the Applicant.

2. The Applicant now seeks the following orders in an application by way of an Amended Notice of Motion dated 17th October 2018:

a) **THAT an order of mandamus do issue against the 1st Respondent to pay to the applicant the judgement debt herein in the sum of ksh 1,392,130/= together with all accrued interest at court rates from 19th October, 2017 till full payment arising from the judgement of Civil Appeal Number 501 of 2008- Kenya Railways Corporation Limited vs Samuel Mugwe Gioche delivered on 24th October 2012.**

b) **THAT in default of compliance with the order of mandamus and failure to pay the judgement debt in the sum of Kshs 1,392,130/= together with all accrued interest at court rates from 19th October 2017, the order of mandamus be deemed as sufficient notice under Section 30(1) of the Contempt of Court Act,2016 to the Managing director of the 1st Respondent and the persons holding the office of the 2nd Respondents requiring them to show cause why contempt of court proceedings should not be commenced against them thirty(30) days after service of the Orders of Mandamus;**

c) That in default of compliance with the order of mandamus and failure to pay the judgement debt in the sum of Kshs. 1,392,130/=together with all accrued interest at court rates from 19th October,2017 thirty days after service, and failing to show sufficient cause for non-compliance with the Orders of mandamus, the Applicant be at liberty to commence contempt of Court proceedings against the Managing Director of the 1st Respondent and the persons holding the office of the 2nd Respondent for them to be personally summoned to Court, proceeded against them and/or committed to civil jail for Contempt of this Honourable Court;

d) That the Respondents be condemned to bear the Costs of this Application

3. The Applicant relied on a verifying affidavit and statutory statement sworn on 17th October 2018 by his Advocate, Daniel Gachiengo Gitau, and on a statutory statement of the same date filed by his Advocates on record. In summary, his case is that the Respondent only paid the Decretal sum but has neglected to pay the awarded costs.

4. His advocate contends that they filed a Bill of Costs against the 1st Respondent, who were dully and ably represented by M/S Musyoka Wambua and Katiku Advocates which was taxed and allowed. Thereafter, they wrote several notices and reminders to the Respondent to pay the monies but to no avail. That the awarded costs amount to kshs 1,392,130/= which is due and continues to accrue interest at court rates. He therefore contended that in the circumstances, an order of mandamus ought to issue as the Respondent will continue with the disobedience of the orders and thus erode the dignity and confidence of the Court.

5. It was the Applicant's submission that he seeks the orders of mandamus against the Respondent for the failure to honour a Court Judgement in Civil Appeal number 501 of 2008, where the Respondent was ordered to pay a sum of ksh 1,392,130/=. Further, that the Respondent's affidavit does not address the substantive issues raised in the application and therefore stands unopposed, the main issue being the non-payment of the decretal sum. They relied on the case of **Kenya National Examination Council v Republic Exparte Geoffrey Gathenji Njoroge & 9 Others, [1997] eKLR** for the issuance and scope of the order of mandamus.

6. The Applicant explained how the matter came about and submitted that he made every effort to have the taxed amount paid in full, but to no avail. He further submitted that the Respondent as mandated under section 88 of the Kenya Railways Corporation Act has failed to honour its obligations. Further, that Court orders are not granted in vain, and it's only fair the Court issues the orders in the application. In closing they submitted that the Respondent should not be allowed to hold the Court in contempt and should be compelled to pay the amount.

The Response

7. The application was opposed by the Respondent, in a replying affidavit sworn on 7th November 2018. He stated that Daniel Gachiengo Gitau was the Applicant's advocate in **Civil Appeal No 501 of 2008 - Kenya Railways Corporation vs Samuel Mugwe Gioche**. He conceded that judgement was entered in favour of Samuel Mugwe Gioche therein, who is therefore the only rightful person who can institute the proceedings.

8. Based on the foregoing he urged that Daniel Gachiengo is a stranger to the suit and lacks the *locus standi* to institute the judicial review proceedings and swear the affidavits. He was of the view that the Court erred in law when it granted a stranger (Daniel Gachiengo Gitau) leave to file the application. He added based on legal advice that the same is misconceived, incompetent bad in law and ought to be struck out.

9. He contended that the averment in the affidavit constitutes a gross distortion of facts and does not reflect the true position as they are averments of the Advocate. It was his case the Court directed the Applicant's advocate on 8th October, 2018 to amend the application to reflect the correct parties and true position, but the advocate failed to honour the directive and it remains defective and should be dismissed.

10. Mr. Maingi, who was the Respondent's advocate, submitted that the application is incompetent *ab initio*. That Gachiengo Gitau and Company Advocates sought leave to file the application which was granted on 25th July 2018, and the rationale of leave being sought is to sieve out applications which appear to be abuse of the court process. He placed reliance on the case of **R vs Panel for Takeover and Mergers exp Datafin (1987) Q B 815** for the proposition that at leave stage the applicant must demonstrate that he /she has sufficient interest in the matter otherwise known as *locus standi*.

11. The Respondent submitted that the application for the grant of leave is normally *ex-parte* and the court is restricted to threshold issues, and relied on the cases of **Republic vs County Council of Kwale & another Ex-parte Kondo & 57 Others, Mombasa HCMCA N0 384 of 1996** and **Mirugi Kariuki Vs Attorney General Civil Appeal No 70 of 1991** for the proposition that leave would only be granted if on the material before the court there is a *prima facie* case.

12. Further, that the matter in issue is whether the Applicant demonstrated to the Court a *prima facie* case for the grant of the relief sought. It was the Respondent's submission that it's not disputed that judgement was entered in favour of Samuel Mugwe Gioche, and that he is the only one with any rightful and justifiable interest in seeking leave to file the suit and not the advocate Daniel Gachiengo who acted as his advocate. Therefore, that the Court erred in both law and fact by granting a stranger leave in the first instance.

13. In addition, that the Court granted the Applicant leave to amend the application dated 17th October 2018. However, that the statutory statement and affidavit is still being deposed by Daniel Gachiengo Gitau, the Applicant's advocates with no mention or involvement of the Applicant, rendering the entire application defective. On whether the statement and affidavit of Daniel Gachiengi Gitau as advocate is sustainable, the Respondent submitted that its trite law and practice that an advocate cannot and should not depose or engage himself in the realm of evidence in a matter that he is appearing. In addition that it has not been explained why the Applicant is not in apposition to swear the supporting documents. Reliance was placed on the case of **Barrack Ofulo Otieno vs Instarect Limited, (2015) eKLR** for the proposition that advocates are not permitted to swear affidavits in contentious matters.

14. In closing, the Respondent urged the Court to come to the conclusion that the Applicant was neither in a position to instruct his advocate to file the application, nor swear the supporting affidavit and statement on his behalf. Further, that the application ought to fail for being misconceived and wrongfully instituted without proper leave of the court in the first instance. That the application therefore is an abuse of the Court process and the same ought to be struck out with costs to the Respondent.

The Determination

15. I have considered the pleadings and submissions by the Applicant and Respondent, and the issues that arise for determination are firstly, whether the instant application is properly before court, and secondly whether the Applicant is deserved of the orders sought. With regard to the first issue, the Respondent urges that the instant application is improperly before court as it was initially not instituted in the name of the Applicant, but instead in his advocate's name, and therefore did not meet the threshold for grant of leave. However, these arguments are being made late in the day, and after this particular defect was remedied by the Applicant who with leave of the Court amended his pleadings to show that he is the one instituting the judicial review proceedings. It is notable that the Respondent did not oppose the application for amendment, and the correct position now reflected in the Amended Notice of Motion is that it is brought by the Applicant and not the Applicant's Advocates.

16. On the arguments that the supporting and verifying affidavit to the application was sworn by Daniel Gachiengo Gitau, the Applicant's advocate, the law is settled that an advocate should refrain in as far as possible from swearing contentious matters on behalf of his client. **Rule 9 of the Advocates Practice Rules** provides for this as follows:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non- contentious matter of fact in any matter in which he acts or appears.”

17. The rationale for this position was explained in the holding in **In the matter of the Estate of M'Magiri M'Mugira (Deceased), [2005] eKLR** as follows:

“It is now trite law that an advocate acting on instructions of his client, should avoid swearing any affidavit in the matter in which he is acting unless the circumstances are such that it is necessary, nay, imperative, to require him to swear such an affidavit.... In my view an advocate does not become authorized to swear an affidavit merely because, by virtue of his representation, he becomes knowledgeable of the relevant facts. He still needs to decide whether or not swearing such an affidavit will not bring him in professional conflict with his position as such advocate. He needs to decide whether if he swears such an affidavit he will place himself in a position where he becomes a potential witness by the sheer nature of the contents of the affidavit. And in my view, even where he finally finds that he indeed has to swear such affidavit because he is the only one who should do so by the nature of things, he nevertheless, must at the head of the affidavit clearly reveal that he has been authorized by his client to do so, preferably through a short affidavit by his client to that effect.”

18. I have perused the supporting affidavit and replying affidavit of Daniel Gachiengo Gitau sworn on 17th October 2018 and 26th June 2018 and find that his averments are confined to the facts on the filing of Civil Appeal Number 501 of 2008 and taxation of the Applicant's Bill of Costs, which were within his knowledge as the Applicant's Advocate and on the Court record. He also averred that he had authority to swear to the affidavit. As these were facts that were within his knowledge, he could aver to the same as he was not averring to information passed to him by another person. The affidavits are therefore not defective.

19. However this finding notwithstanding, I do note that the statutory statement still indicates that it is the Advocate who is the Applicant, and was not amended to reflect the position in the Amended Notice of Motion. The solution to this defect in my view is not to dismiss or strike out the application, but to grant the Applicant the opportunity to remedy his pleadings, which this Court has power and discretion to do under Article 159(2) of the Constitution and Order 53 Rule 4 of the Civil Procedure Rules. Order 53 Rule 4(2) specifically which provides as follows:

“(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.”

20. In the premises, this Court will not proceed to determine the outstanding issue, and will not give its final decision on the Amended Notice of Motion application dated 17th October 2018 at this stage, pending the necessary amendments to the Statement by the Applicant. I accordingly order as follows:

- a) **The Applicant is granted leave to file and serve an amended statement within thirty (30) days of the date of this ruling.**
- b) **The Respondent is also granted leave to file and serve a further affidavit and supplementary submissions if need be, within 14 days of service of the Amended Statement.**
- c) **This matter will thereafter be mentioned to set a new judgment date.**

d) The costs shall be in the cause.

21. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF APRIL 2019

P. NYAMWEYA

JUDGE