REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. APPLICATION NO. 3 OF 2019

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES AND SECTIONS 8 & 9 OF THE LAW REFORM ACT: CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION BY INVESCO ASSURANCE COMPANY LIMITED FOR JUDICIAL REVIEW BY WAY OF CERTIORARI AND PROHIBITION

BETWEEN

INVESCO ASSURANCE COMPANY LTD.....APPLICANT

-VERSUS-

THE CHIEF MAGISTRATE'S COURT AT TAWA.....1ST RESPONDENT

EUNICE MWIKALI MAINGI & GEDION NYAMAI KILONZO (suing as the legal

rep of the estate of) STANLEY MWANIKI NYAMAI (deceased).....2ND RESPONDENT

CO-OPERATIVE BANK OF KENYA.....3RD RESPONDENT

KCB BANK KENYA LTD.....4TH RESPONDENT

RULING

1. The application for determination is the Notice of Motion dated 26th July, 2019 and filed on 6th August 2019. Its brought under Order 53 Civil Procedure Rules and sections 8 and 9 of the Law Reforms Act. It seeks the following orders

a) That, an **Order of Certiorari** to quash the order of the Chief Magistrate's court at Tawa issued on 18th July, 2019 in the Civil Case No. 117 of 2017 freezing the Applicant's bank accounts held in the 3rd and 4th Respondent banks and any other order subsequently made on 25th July, 2019 during the inter partes hearing of the application.

b) That, an **Order of Prohibition** to restrain the 3rd and 4th Respondents from acting on the order of the Chief Magistrate court, Tawa *(the 1st Respondent)* issued on 18th July, 2019 in Civil Case No. 117 of 2017.

c) That, an **Order of Prohibition** to restrain the 3rd and 4th Respondents from debiting the aforementioned Applicant's accounts to the tune of Kenya shillings three million, five hundred and thirty eight thousand, five hundred and fifty-nine (Kshs.3,538,559).

d) Costs to the application

2. The application is supported by the grounds set out in the statutory statement and Paul Gichuhi's verifying affidavit dated 26/07/2019.

3. The principal grounds are that;

a) The proceedings which resulted in the freezing orders were done ex-parte.

b) The 2nd Respondent obtained the orders by material non-disclosure and misrepresentation in that, the amount already paid is Kshs.1,250,000/= and not 700,000/= as alleged.

c) If the orders persist, the Applicant will default on its many contractual obligations and be exposed to action for breach in addition to causing unprecedented financial chaos in the going concern status of the company.

d) The Applicant is willing to pay the 2nd Respondent amounts that are rightfully due, in installments.

e) The ex parte orders are excessive, arbitrary, and punitive and without due regard to their wide ranging ramifications, import and effect on the going concern of the company and the general insuring public.

4. The application is opposed through a replying affidavit sworn on 09/08/2019 by the 2nd Respondent. She deposes that the Applicant has not bothered to set aside the valid court order, that it has admitted the claim by making part payments and is therefore statutorily bound to honour its obligation. She has also deposed that if the orders are lifted, the Applicant's intention is to transfer the amounts to secret accounts and defeat the valid court order. It's also her deposition that the Applicant has previously breached all arrangements to pay in installments and should therefore be compelled to pay the balance at once.

5. The other Respondents did not file any response to the application.

6. The application was canvassed by way of written submissions.

The Applicant's submissions

7. The Applicant identifies the main issue for determination as;

> *"Whether the Applicant has presented sufficient grounds to warrant issuing orders to set aside the orders issued in Tawa Civil Suit No. 117 of 2017."*

8. The Applicant submits that the use of the word '*may*' in Order 23 of the Civil Procedure Rules (CPR) gives the court discretion and is therefore not bound to make the decree nisi absolute.

9. It submits that according to the 3rd Respondent's replying affidavit sworn on 06/08/2019 (*affidavit not on record)*; the ledger balance in account 1118724178 is Kshs.-2,890.70 hence not sufficient to pay the decree holder. Accordingly, it contends that the 3rd Respondent should be discharged and costs be borne by the 2nd Respondent.

10. It admits entering into consent with the 2nd Respondent to settle the pending claims and submits that Order 21 Rule 12 of the CPR empowers the court to order that monies due, pursuant to the judgment of the court, be paid in installments where sufficient reasons are given. It submits that in determining whether the judgment debtor should pay in installments, the court should be guided by the principles laid sown in **Rajabali Alidina –vs- Remtulla Alidina & Anor** as reiterated in the case of **Surgipharm Ltd –vs- Express Kenya Ltd & Anor (2017) eKLR.** The said principles are given as;

a) The circumstances under which the debt was contracted.

b) The conduct of the debtor.

c) His financial position.

d) His bonafide in offering to pay a fair proportion of the debt at once.

11. It further submits that defaulting the payment and breaching it's consent was not occasioned by its own fault. According to the Applicant, a one-month breach is not so inordinate to warrant garnishee order absolute against its bank account. It contends that the 2nd Respondent should have reminded it about the consent *via* a letter instead of rushing to court.

2nd Respondent's submissions

12. The 2nd Respondent submits that the primary suit (Tawa SRMCC No. 88 of 2016), was heard, determined and an award of Kshs.3,686,353/= made. The declaratory suit (Tawa SRMCC 117 of 2017) was also heard and concluded but the decretal sum remained unpaid and after several reminders, she proceeded to execute. She caused the goods to be proclaimed and obtained breaking orders but the Applicant sought time to pay. They entered into a consent but the Applicant failed to comply hence the garnishee application.

13. She frames the issues for determination as follows;

a) Whether the application is competent and has merit considering the conduct of the 1st Respondent.

b) Whether the Applicant is entitled to the orders sought.

14. On the first issue, she cites the case of **R –vs- Minister for Lands and Settlement & 3 others Ex-parte Euton Njuki Makungo (2016) eKLR** where **Justice Olao** made reference to case of Pastoli ***–vs- Kabale District Local Government Council & Others 2008 2 E.A 300*** where the scope of the jurisdiction of a court exercising Judicial Review powers was discussed as follows;

> *"In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety…Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality…..… Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defence of logic and acceptable moral standards…..… Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with un-procedural fairness towards one to be affected by the decision".*

15. She has also cited the case of **Municipal Council of Mombasa –vs- R & Umoja Consultants Ltd C.A Civil Appeal No. 185 of 2001** where the Court of Appeal expressed itself as follows;

> *"Judicial Review is concerned with the decision making process, not with the merits of the decision itself. The court would concern itself with such issues as to whether the decision makers had the jurisdiction. Whether the person affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters. The court should not act as Court of Appeal over the decider which would involve going into the merits of the decision itself."*

16. She submits that the current application is more centered on the merits of the case rather than the decision making process. She contends that the Applicant should have concentrated on showing the unreasonableness of the decision such that a different individual in the same capacity would not have issued such orders.

17. She also submits that the Applicant's complaint about a short notice period resulting in inability to instruct an advocate is a decoy to frustrate her efforts in that, a specified time of service was given by the court because the application preceding the petition was filed under certificate of urgency. Secondly, the Applicant did not receive the notice under protest so as to notify the court and parties that the date was not convenient.

18. She further submits that the Applicant had representation since the primary suit and as such, failure to appear in court was a waiver of its right to be heard. She cites the case of **R –vs- County Government of Kiambu Ex parte Robert Gakuru & Anor (2016) eKLR** where the following extract from **Nrb Civil Application No. 179 of 1998; Union Insurance Co. of Kenya Ltd –vs- Ramzan Abdul Dhanji**, was relied on;

> ***"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the Applicant was denied the right to defend itself. The Applicants were notified on every step the Respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the Applicant was given a chance to be heard and the issue of failure by the High Court to hear the Applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."***

19. It is the 2nd Respondent's submission that the Applicant was given a chance to be heard but deliberately squandered it. It's also her submission that service has not been denied and no compelling reason has been advanced as to why the Applicant did not appear in court.

20. On the second issue, she has cited the **Robert Gakuru case *(supra)*** where the learned Judge relied on the following extract from the **Halsbury's Laws of England 4th Edn. Vol.1 (1) para 12, pg 270;**

> ***"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary.*** *The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief* ***. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.*** *Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfillment* ***. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders (emphasis added).***

Analysis and determination

21. I have considered the application, the supporting affidavit, the replying affidavit as well as the rival submissions and it is my considered view that the only issue for determination is whether this matter is properly before this court;

22. On the 29th July, 2019 the Applicant filed a Chamber Summons dated 26th July 2019 seeking leave to file a Judicial Review application. He further sought an order for the leave to operate as stay of execution of the orders by the Magistrate's court Tawa in Civil Case No. 117 of 2017. On 1st August 2019 **Justice Kemei** sitting in Machakos granted the leave sought and directed that the substantive application be filed within 21 days. Further that prayer no. 4 for leave to operate as stay be heard interpartes on 6th August 2019 before this court.

23. The Applicant promptly filed the substantive application on 6th August, 2019, when the matter came for hearing of prayer No. 4 of the Chamber Summons. The parties by consent agreed to have a temporary stay of the proceedings in SPM Tawa Civil Case No. 117 of 2017. That therefore remains the position to date.

24. I now move to determine whether this matter is properly before this court for issuance of the orders sought.

25. It is not in dispute that there was a primary suit which was determined in favour of the 2nd Respondent and an award of Kshs.3,686,353/= made. The Applicant failed to satisfy the decree on behalf of its insured and the 2nd Respondent filed a declaratory suit. The declaratory suit was heard, determined and the 2nd Respondent proceeded to extract a decree which was also not satisfied. Execution proceedings were commenced and they jolted the Applicant into action and the parties recorded a consent which again, was dishonored by the Applicant.

26. The 2nd Respondent initiated garnishee proceedings in the trial court and the issuance of an order nisi prompted the filing of the current Judicial Review proceedings under certificate of urgency. The Applicant wants the orders issued by the learned trial magistrate to be quashed. The orders were issued on 18/07/2019 and are worded as follows;

> ***a) This application is hereby certified as urgent.***
>
> ***b) That an order is hereby issued upon the garnishee nisi and the same is hereby served on the garnishees before being served on the defendant.***
>
> ***c) That the garnishees holding account No. 01136068932800 at Cooperative Bank Kenya Ltd and account No. 1118724178 at KCB Bank Kenya Ltd for the defendant upon service to appear before this honorable Court as directed to show cause why they should not settle the plaintiffs advocates the sum of Kshs.3,538,559/= being the decretal sum in favour of the plaintiff herein and further costs of these garnishee proceedings.***
>
> ***d) The matter is hereby set for inter-parties hearing on 27/07/2019.***

27. Garnishee proceedings are hinged on Order 23 of the CPR which states as follows;

Order for attachment of debts

> *1 (1) A court may, upon the ex parte application of a decree- holder, and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the "garnishee") to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid*
>
> *(2) At least seven days before the day of hearing, the order nisi shall be served on the garnishee, and, unless otherwise ordered, on the judgment debtor.*
>
> *(3)……..*
>
> *(4)……..*

Attachment of deposits

> *(2) A credit in a deposit account with a bank or other financial institution shall for the puposes of this Order be a sum due or accruing and shall be attachable accordingly notwithstanding that any of the following requirements is applicable to the account ad has not been complied with.*
>
> *a) ……..*
>
> *b) ……..*
>
> *c) ……..*

d) ……

Effect of Garnishee order

(3) Service of an order that debts due to a judgment-debtor liable under a decree shall be attached, or notice thereof to the garnishee in such manner, as the Court may direct shall bind such debts in his hands.

(4)……

(5)……

(6)……

(7)……

(8)……

(9)……

(10)……

28. Section 2 of the Civil Procedure Act defines a Court as *"the High Court or Subordinate Court acting in exercise of its civil jurisdiction."* Accordingly, the Senior Resident Magistrate Court at Tawa was exercising it's Civil Jurisdiction by presiding over the declaratory suit and the subsequent garnishee proceedings.

29. I agree with the holding in the **Kabale District case *(supra),*** that for a Judicial Review application to succeed, the Applicant must show that the decision or act complained of is tainted with illegality, irrationality, procedural impropriety or offends the rules of natural justice.

30. From the plain reading of Order 23, garnishee proceedings are done in two different stages. The first one is for a garnishee order nisi and the second one is for a garnishee order absolute. It is evident from the record that the issuance of the Order nisi was preceded by an *ex-parte* application by the 2nd Respondent/decree holder as per the provisions of Oder 23 Rule 1 of the CPR.

31. Accordingly, the Applicant cannot be heard to be complaining about *'right to be heard'* yet the law recognizes the *ex-parte* nature of the proceedings leading to the issuance of the order nisi. Further, the garnishees have not denied being served within 7 days as prescribed by Order 23, rule (1) sub-rule (2). It is therefore evident that the process leading to issuance of garnishee order nisi was sanctioned by the law.

32. From the orders of the learned trial Magistrate, an inter-parties date had already been set for the garnishees to show cause as to why the amount in their possession should not be released to the decree holder. It is therefore evident that the trial court was proceeding to the second stage of the garnishee proceedings when it was stopped in its tracks by commencement of these Judicial Review proceedings. The trial court was on course in the procedure as provided by the law. I am therefore unable to see any procedural impropriety on its part.

33. It is also noteworthy that service of order nisi upon the garnishee automatically binds the debt in possession of the garnishee *(Order 23, Rule 3).* It is therefore improper for the Applicant to refer to the orders as excessive, arbitrary and punitive because the garnishees' accounts are automatically 'frozen' upon service and this is not something that can be attributed to an act or omission of a Judicial Officer.

34. With regard to the Applicant's concern about the actual amount owing, the 2nd Respondent has acknowledged part payment and the Applicant agrees that it has not settled the whole claim. The issue of what is due and owing to the 2nd Respondent is therefore a question of reconciliation of accounts which should be handled ably by the trial court. That alone cannot put the matter in the province of Judicial Review.

35. The upshot is that the Applicant has failed to show that the orders complained of are tainted with any illegality, irrationality or procedural impropriety. I find no merit in the application which I dismiss with costs. The partes to appear before the trial court on 18th November, 2019 at 9:00 am for directions on when to proceed before that court.

Orders accordingly.

Delivered, Signed & Dated this 12th day of November 2019, in Open Court at Makueni.

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Hon. H. I. Ong'udi

Judge