REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL HUMAN RIGHTS AND JUDICIAL RVEIEW DIVISION

JUDICIAL REVIEW APPLICATION NUMBER 366 OF 2014

GATEWAY INSURANCE COMPANY LIMITED…….....….APPLICANT

VERSUS

JIMMY KIAMBA, TREASURER NAIROBI

COUNTY GOVERNMENT…….....……..….1ST RESPONDENT

LILIAN NDEGWA, SECRETARY NAIROBI

COUNTY GOVERNMENT..……....…...…….....…….2ND RESPONDENT

NAIROBI COUNTY GOVERNMENT…….....….....……..3RD RESPONDENT

RULING

1. The application the subject of this ruling has a chequered history. Following my judgement herein on 11th June, 2015, in which I granted an order of mandamus compelling the Respondents to implement the decree emanating from the judgement given in HCCC No. 890 of 200, the ex parte applicant, vide its application filed on 29th July, 2015 sought orders that the officers of the Respondent be punished for contempt of the Court.
2. When the said application came up for hearing on 11th October, 2015, **Miss Said**, learned counsel for the Respondents informed the Court that a meeting had been scheduled between the parties aimed at charting the way forward for payment and the matter was stood over to 5th November, 2015. On the adjourned date, **Mr Njiru** informed the Court that nothing happened in the intervening period and Miss Said informed the Court that they did not receive any communication from their client and requested for 7 more days. The Court directed the Respondent to file and serve its replying affidavit within 7 days and granted corresponding leave to the applicant to file a rejoinder thereto with submissions. The Respondent was then to file and serve its submissions within seven days of service of the applicant's submissions a the matter was stood over to 1st December, 2015 for a date for ruling
3. Come 1st December, 2015 and the applicant informed the Court they had already filed their submissions though the Respondent had not even responded to the application. **Miss Said** however requested for seven more days to respond to the application and though the application was opposed as a delaying tactic, the Court indulged **Miss Said** with a further seven days within which to respond to the application with liberty to the applicant to react thereto. Once again the matter was stood over to 16th December, 2015 for a date for ruling.

4. On 16th December, 2015, **Mr Njiru** informed the Court that he was yet to be served with any papers in reply. However, **Miss Said** sought for more time to respond. That request was declined and the Court gave 12th February, 2016 as the date for ruling.
5. While the delivery of the ruling was pending, the Respondent filed an application dated 22nd December, 2015 seeking an order that the Respondent be granted leave to file their response to the said application before delivering its ruling and that the draft replying affidavit be deemed as duly filed. It is this application that is the subject of this ruling.
6. According to **Miss Said**, who swore the supporting affidavit, the advocate for the 1st and 3rd Respondents inadvertently did not file the replying affidavit and that it was not her intention or of her own making not to respond to the same hence that inadvertence ought not to be visited on her client. To the Respondents, whereas they risked losing their freedom and property, the applicant would not suffer any prejudice hence the substantive justice required that the Respondents be heard. These issues were reiterated by learned counsel in her submissions in prosecuting the said application.
7. The application was however opposed by way of grounds of opposition in which the Applicant contended that since the matter was pending delivery of the ruling it was irregular for the file to have left the Judge's Chambers for a party to file an application before the ruling; that the Respondents were employing delaying tactics in order to defer the delivery of the ruling; that the application which was filed on 22nd December, 2015 was for over one month not set down for hearing; and the proposed affidavit adds no value to the proceedings as it dealt with matters already determined in the Judgement of the Court. These issues were similarly highlighted by **Mr Njiru** for the Applicant.
8. I have considered the issues herein. The first issue is the propriety a party intercepting the delivery of a reserved decision by filing an intervening application. In **The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004, Ouko, J** (as he then was) expressed himself *inter alia* as follows:

   "The Law of Succession Act, like section 3A of the Civil Procedure Act has a saving provision as to the court's jurisdiction under section 47 which is affirmed by rule 73 of the Probate and Administration Rules. It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them."

9. Similarly **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru Hccc No. 262 of 2005** held:

   "The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

10. In **Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593, Hancox, JA** (as he then was) emphasised that it is a residual jurisdiction, which should only be used, *in special circumstances* in order to put right that which would otherwise be a clear injustice.
11. One of the instances in which the court exercises this residual power is in the fulfilment of its obligation to ensure that the orders it issues are not issued in vain. This was recognised by the Court of Appeal in **Nicholas Mahihu vs. Ndima Tea Factory Ltd & Another Civil Application No. Nai. 101 of 2009** where it was held that the Court has the duty to ensure that its orders are at all times effective.
12. 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.
13. 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 and that the court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.
14. It follows therefore that the inherent jurisdiction as the name suggests is not donated to the Court by any legislation but underlie the very nature of the Court as a seat of justice which the Court ought to draw upon whenever necessary and when all else fails in order to ensure that justice is attained.
15. Accordingly, it is my view that in appropriate cases, the Court is entitled to arrest the delivery of a decision in order to do justice if circumstances warrant it. However, that is a jurisdiction which cannot be exercised in a superficial and casual manner. Arresting a judgement and any judicial process for that matter is a power which ought not to be exercised lightly. In this respect, **Sir Udo Udoma**, CJ in Musa Misango vs. Eria Musigire and Others Kampala HCCS No. 30 of 1966 [1966] EA 390, expressed himself as follows:

> **"Now it is unquestionable that, both under the inherent power of the court, and also under a specific rule to that effect under the Judicature Act, the court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to the trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think that they will be successful in the end lies a wide region, and *the courts have properly considered this power of arresting an action and deciding it without trial as one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure*. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claims as a matter of law. It is evident that our judicial system would never permit a plaintiff to be "driven from the judgement seat" in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad."** [Emphasis added].

16. Therefore whereas the powers to arrest the decision may be invoked, it is a power which ought to be invoked very sparingly and in exceptional circumstances and not to assist a person who is intent upon abusing the process of the Court. Being a discretionary power, as held in **Shah vs. Mbogo [1967] EA 116 at 123B,** the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.
17. In this case, it is contended that the reason for failing to file the replying affidavit was due to

inadvertence. There was no attempt to explain this inadvertence. It is not sufficient to simply contend that there was inadvertence on the part of counsel. Counsel must go further and explain what the nature of the inadvertence was in order for the Court to appreciate whether it was in fact an inadvertence or merely an attempt to delay and obstruct the course of justice. In this case, the Court afforded the Respondents ample opportunities to file their response to the application even after the applicant had filed its submissions. The applicant did not take the said chances seriously. It is now contended that if the Court proceeds to deliver its ruling without considering the respondents' version the respondent's rights to a hearing would have been violated. I wish to refer to the position of the Court of Appeal in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** where it restated the law as follows:

"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 court is not convinced that 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."

18. In this case the respondents are very economical with the reasons which gave rise to the default in filing their response to the application after being afforded several opportunities to do so.
19. These being judicial review proceedings parties and their counsel ought to take note of the position propounded in **Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006** where it was held that:

> **"Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings…As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes…Legal business can no longer be handled in a sloppy and careless manner and some clients must realise at their cost that the consequences of careless and leisurely approach must fall on their shoulders."**

20. It was however contended that the mistake herein was that of counsel. The record however does not reflect this fact. From the record, not once was there an indication that the respondents had furnished the advocate with the necessary facts to enable the advocate respond to the application. The nature and quality of the advocate's mistake in this application has not been disclosed in order for the Court to exercise its discretion it the Respondents favour. This being an exercise of judicial discretion, like any other judicial discretion must be exercised judicially. Accordingly, it has to be exercised on fixed principles and not on private opinions, sentiment and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders.
21. Whereas counsel's mistake may on occasion justify favourable exercise of discretion, the nature of the mistake ought to be sufficiently brought home to the Court. Otherwise Counsel ought to take note of the sentiments expressed by **Kneller, J** (as he then was) in **Et Monks & Company Ltd vs. Evans [1985] KLR 584** to the effect that:

> **"If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay, which has resulted in the action being dismissed for want of prosecution.**

Advocates for the most part insure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates. Should the trial proceed despite a prolonged delay the plaintiffs may not succeed because it cannot after such a long time establish liability and then it has no remedy against anyone else. If the plaintiff has caused or consented to the delay, which led to its suit being dismissed for want of prosecution, then it must blame itself."

22. I have considered the material relied upon by the Respondents to arrest the delivery of the pending ruling and I am not satisfied that it meets the threshold for doing so. The reasons now being adduced ought to have been relied upon earlier on in the proceedings. I am not satisfied that this application has been brought to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. The Applicant's position that it is designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice, cannot be farfetched.
23. The ex parte applicant sought orders that the irregular replying affidavit filed herein be expunged from the records. I am not aware of the effect of such incongruous order. Does it amount to plucking the document from the record and disposing of it? In my view the appropriate step to take in such circumstances is simply to ignore such irregularly filed document as worthless, since a party dissatisfied with the decision may well lodge an appeal in which event the said document may well become relevant.
24. That would have been sufficient to dispose of this application. However, as stated hereinabove this Court ought not to grant orders in vain. In the application dated 17th July, 2015, the orders of contempt are directed at specific officers, **Jimmy Kiamba**, **Lilian Ndegwa**, **Luke Gatimu** and **Gregory Mwakanongo**. If the media reports are anything to go by, some of these people may well nolonger be with the County Government of Nairobi and granting orders against them may well not be helpful to the ex parte applicant.
25. In order to do justice to the ex parte applicant, it would be proper that instead of just granting leave to the respondents to oppose the application, the contempt proceedings should commence *de novo* with leave to the *ex parte* applicant to amend its application accordingly.
26. The Respondents will pay the ex parte applicant the costs of this application assessed in the sum of Kshs 15,000.00 within 30 days and in default, the person occupying the position of the accounting officer of the County Government of Nairobi be committed to jail for one month.
27. It is so ordered.

Dated at Nairobi this 3rd day of March, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Njiru for the ex parte applicant

Mr Nyangayo for Miss Said for the Respondent

Cc Patricia