



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

JUDICIAL REVIEW NO. 8 OF 2014

JOYCE KARAMBU RINGERA.....APPLICANT

VERSUS

RESIDENT MAGISTRATE, MERU.

F. M. MWENDA CONSTRUCTION CO. LTD.....RESPONDENTS

J U D G M E N T

1. The applicant through an ex parte Chamber Summons headed ‘Judicial Review’ brought under Article 165(6) and (7) of the Constitution of Kenya and under Order 53 Rules 1, 2, 3 and 4 of the Civil Procedure Rules and Section 1A and 1B of the Civil Procedure Act and Section 8 and 9 of the Law Reform Act sought leave to bring to the High Court and quash the order entering judgment dated 9th October, 2013 in Meru CMCC 293 of 2013. The applicant also sought the leave so granted to operate as stay of the proceedings and orders therein pending hearing and determination of the substantive motion thereof.
2. A quick perusal of the ex parte Chamber Summons reveals that the grounds in support of the application are on the face of the application listed from (a) to (g). The application was further supported by verifying affidavit and annexures attached thereto, supporting affidavit and statement of facts.
3. On 4th April, 2014 the court granted the applicant leave as sought and leave so granted was ordered to operate as stay of the proceedings and orders made therein pending hearing and determination of the substantive motion.
4. The ex parte applicant filed the substantive motion on 15th April, 2014. On 9th June, 2014 the ex parte applicant filed an application for amendment of the notice of motion dated 15th April, 2014. That by consent dated 1st July, 2014 both the 1st respondent and the applicant consented to the notice of motion to be amended as per notice of motion dated 9th July, 2014 which consent did not involve all parties and to which consent the Deputy Registrar did not enter judgment as requested.
5. When the matter came up for hearing Miss Kiome ,learned Counsel appeared for the ex parte applicant whereas Mr. Ndubi, learned Advoate appeared for the interested party. There was no appearance for the respondent.

6. The counsel for the ex parte applicant urged that the application dated 9th June, 2014 is supported by affidavit dated 11th April, 2014 and 9th June, 2014. The counsel urged the court to grant prayer No.1. she urged he matter proceeded ex parte before a Resident Magistrate who had no pecuniary jurisdiction to hear and determine the matter in a claim founded on a commercial contract for construction which had an arbitration clause.
7. The Counsel for the ex parte applicant submitted that the claim is for Kshs.9million and as such the ex parte judgment entered is null and void for want of jurisdiction relying on the **NATIONAL ENVIRONMENTAL TRIBUNAL & OTHERS HC.MISC.APPLICATION NO. 26 OF 2011** in which matter Hon. Mr. Justice G. V Odunga, sitting at Nairobi referred to the case of **PASTOLL V KABALE DISTRICT LOCAL GOVERNMENT GENERAL AND OTHERS(2008) 2 EA 300** where the court held”

“ 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. It is, for example, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission.....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 defiance of logic 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 procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

8. Miss Kiome learned Counsel urged the Resident Magistrate court acted illegally and without jurisdiction. She urged the decision is ultra vires and prayed that the court do issue the orders sought by the applicant in the application dated 9th June, 2014.
9. Mr. Ndubi, learned Advocate for the interested party opposed the notice of motion relying on the replying affidavit dated 22nd May, 2014 and 18th June, 2014 and authority referred thereto 2014 urging the notice of motion is misconceived.
10. Mr. Ndubi, learned advocate urged the notice of motion dated 9/6/2010 having been spent that there remained only one prayer for setting aside an ex parte judgment entered on 9th October, 2013. He submitted the judgment cannot be subject of Judicial Review as the application is contrary to order 10 rule 11 of the Civil Procedure Rules. He urged an order for endorsement for interlocutory judgment by a Magistrate is subject of provisions under Order 10 Rule 11 of the Civil Procedure Rules.
11. Mr. Ndubi, learned advocate further submitted that if the ex parte applicant was aggrieved by the entering of the interlocutory judgment she ought to have moved the court for setting aside the ex parte judgment by the same court. He urged the ex parte applicant on 11/10/2013 proceeded to file a notice of motion pursuant to Order 10 Rule 11 of the Civil Procedure Rules seeking to set aside the interlocutory judgment. He further submitted the Resident Magistrate did not hear the matter at lower court but only endorsed a request for interlocutory judgment urging further that the Resident Magistrate did not take evidence in the matter. He further urged the claim is for balance which amounts to Kshs.2,729,160/- and not kshs.9,000,000/-. He urged the Magistrate court has jurisdiction to determine the matter.
12. Miss Kiome in a quick rejoinder urged that even the consent entered on 24th September, 2013 was illegal and that the court which endorsed the interlocutory judgment lacked jurisdiction.

13. I have carefully considered the ex parte applicant's application, the affidavit in support and the interested party's replying affidavit and authorities relied upon in support and in opposition and parties positions. The issue for consideration is whether the application satisfies the conditions for granting orders of judicial review.

14. The ex parte applicant in her amended notice of motion which this court notes was served only on advocate for the interested party and no service was effected on the respondents whose endorsement of interlocutory judgment is sought to be quashed is said to be supported by affidavit of Joyce Karambu Ringera and statement of facts attached therein. I note that no explanation was given for failure to serve the Resident Magistrate Meru, being the respondent in this application. There is no single document on service of the respondent with the application. Even the amended notice of motion and consent to amendment the notice of motion was not served upon the Resident Magistrate, Meru being within High Court premises. The failure to serve the notice of motion and Counsel proceeding with the same when it was glaringly clear that the notice of motion had not been served is fatal to the ex parte applicant's notice of motion. It is against the trite law to condemn any party unheard. It is equally unfair and contrary to Article 50 of the Constitution to condemn any party unheard; be as it may I shall proceed to consider the grounds raised by the ex parte applicant.

15. The ex parte applicant in her statement of facts averred that the endorsement of interlocutory judgment by the Resident Magistrate is null and void for want of jurisdiction and for breach of Arbitration Act. The attached court proceedings show that the Resident Magistrate endorsed interlocutory judgment as follows:-

“INTERLOCUTORY JUDGMENT

The defendant herein having been duly served with summons and a copy of plaint and failed to enter appearance and/or file defence within the stipulated period of time and upon request by M/S Ndubi & Associates advocates for the plaintiff judgment is hereby entered for the plaintiff against the defendant as prayed in the plaint. Case to proceed for formal proof.”

E. W. WAMBUGU

RESIDENT MAGISTRATE

16. The Resident magistrate did not hear the matter but was in endorsing judgment discharging administrative function, which can be exercised even by the Executive Officer who is not a Magistrate or a Judicial Officer (see Order 48 of Civil Procedure Rules) and as such if find the Resident Magistrate was not exercising Judicial function as such the issue of jurisdiction do not arise.

17. A perusal of the plaint annexure “JKI” under paragraph 15 the prayers are well set out as follows:-

- a. ***General damages for breach of contract***
- b. ***A permanent order of injunction, restraining the defendant from wasting the applicant's building materials on the suit plot, proceeding with the suit, construction on the suit land using any other contractor, and or builders and or the plaintiff's materials as well as an order for final settlement of the plaintiff's contract dues as provided for under the contract.***
- c. ***An order that a proper and independent audit of the construction works be carried out.***
- d. ***An order of mandatory injunction requiring the applicant to go back to the suit premises and proceed to complete the construction works and or ferry away its (applicant's) building materials there from.***

18.It is evidently clear from the prayers sought that no specific amount is sought which in anyway can be said is above the jurisdiction of the Resident Magistrate of Kshs.2,000,000/. The awarding of general damages is at discretion of the trial court and it cannot be argued that since under paragraph 10 of the plaint in particulars of specials exceed Kshs.2,000,000 the court has no jurisdiction in a matter in which special damages are pleaded but not prayed for as in the instant case. The court cannot grant what has not been prayed.

19.In the instant case interlocutory judgment was entered by the Resident Magistrate and the applicant has filed an application to set aside the interlocutory judgment at the lower court but instead of pursuing that line she moved to this court to have the same quashed for want of jurisdiction of the Resident Magistrate. I am not satisfied as the matter is pleaded in the plaintiff's plaint that the Resident Magistrate has no jurisdiction. I am satisfied the trial court has jurisdiction to try the matter as it is pleaded. The trial court did not therefore act without jurisdiction or illegally as alleged ultravires of the Civil Procedure Act.

20.Where there is clear statute on how an aggrieved party can seek redress such as in civil matters being handled by courts; it is improper to seek the orders of Judicial Review by failing to pursue the matter as provided for in Civil Procedure Act. In cases where party is not satisfied with an interlocutory judgment, Civil Procedure Rules provides on how a party should seek remedy and it is therefore my finding that in such situation it is not amenable for aggrieved party to go contrary to the laid down provisions of a statute and apply for judicial review.

21.In view of the conclusion I have already come to I find no merits in the Judicial Review application for those reasons the same is dismissed with costs to the interested party.

DATED, SIGNED AND DELIVERED AT MERU THIS 8th DAY OF OCTOBER, 2014.

J. A. MAKAU

JUDGE

DATED, SIGNED AND DELIVERED AT MERU THIS

1. Miss Kiome for exparte applicant
2. Mr. Ndubi for the interested party
3. N/A for the respondent

J. A. MAKAU

JUDGE