



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 20 OF 2020

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI & PROHIBITION

AND

IN THE MATTER OF: THE LAW REFORM ACT SECTION 8 & 9 CAP 26, LAWS OF KENYA

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF: A RULING DELIVERED IN MOMBASA ON THE 20TH FEBRUARY, 2020 IN CMCC NO. 25 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

AND

RESIDENT MAGISTRATE, MOMBASA.....RESPONDENT

AND

JOSEPH NTOMBURA MWAINI

MICHAEL BENJAMIN SIMBA

REVEREND JOSHUA MITHIKA M'IKAO

REVEREND ALFRED MIHESO.....INTERESTED PARTIES

AND

VICTORIA KAPUNE BUYA

MICHA DHADHO YONNA

KAINDWA MANASSEH ASSER

ELISHA ADE

EVA CHARI SEER.....EXPARTE APPLICANTS

RULING

The Application

1. Before the court is an ex-parte application dated 17th July, 2020 brought under a certificate of urgency of the same date. The Application seeks for the following orders:

i) That this matter be certified urgent

ii) That the applicant be granted leave and to apply for an order of certiorari to issue directed to the Respondent to quash the decision of the Honourable court in CMCC No. 25 of 2020 (PB Joseph Ntombura Mwaine & Others vs Victoria Kapune Buya & Others)

iii) That the Application be granted leave and to apply for an order of prohibition directive as the magistrate in case No. CMCC No. 25 of 2020 (PB Joseph Ntombura Mwaine & Others vs Victoria Kapune Buya & Others)

iv) That if prayer 2 above is granted, the Applicant be allowed to file and serve the substantive application within (3) days and the substantive application be fixed for hearing on priority basis.

v) That such leave as granted to operate as stay of the proceedings in CMCC No. CMCC No. 25 of 2020 (PB Joseph Ntombura Mwaine & Others vs Victoria Kapune Buya & Others)

vi) That the costs of this application be provided for

2. The application is premised on the grounds set out therein and is supported by statement and verifying affidavit of Michah Dhadho Yonna sworn on 17th July, 2020 on his behalf and on behalf of all the Applicants.

3. The Applicants' case is that the interested parties filed a suit on 15th January, 2020 seeking inter alia an injunction restraining the Applicants from interfering with the quiet enjoyment and use of Plot No. CR.13275 Mombasa. It was the Applicants' opinion that the matter belonged to the Environment and Land Court being that there are gazetted subordinate courts tasked with handling Environment and Land Court matters. The Applicants filed a Preliminary Objection contesting the Court's jurisdiction inter alia but a ruling was delivered against the Applicants with the Respondent not giving reasons for dismissing the Preliminary objection.

4. The Applicants maintain that since the matter raises issue for determination of ownership of land, the Respondent has no jurisdiction in the matter, and that the Respondent's decision was irrational and unreasonable since it was based only on the fact that the Applicants failed to produce the pleadings in another matter filed at the Environment and Land Court proving that the suit is *sub judice*.

5. The Ex parte Applicants are now before this Court alleging that the Respondent;

(a) Acted irrationally and unfairly in dismissing the Preliminary objection

(b) Violated the Applicants' constitutional right to an administrative action that is expedient, reasonable and procedurally fair

6. The Applicants filed submissions on 12th October, 2020 while the Respondent filed its submissions on 21st October, 2020.

Determination

7. I have carefully read the pleadings and the submissions and the authorities. The issue that comes out for determination is

Whether the ex parte applicant has established grounds for the court to grant the leave sought

8. The court in **Republic v Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited (2019) eKLR** stated "The importance of obtaining leave in a Judicial Review application was eloquently stated by **Waki J** (as he then was) in the case of *Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others* cited by the Respondent's Counsel where the learned Judge said:-

" is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.."(Emphasis added)

9. At the leave stage, the applicant has the burden of demonstrating that the decision is *illegal, unfair and irrational*. The applicant must persuade the Court that the application raises a serious issue. A serious issue is demonstrated if the judge believes that the applicant has raised an arguable issue that can only be resolved by a full hearing of the Judicial Review application. If the court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further.

10. The Applicants have argued that the Respondent does not have jurisdiction to hear the main case since it raises land related issues which should have been heard by an Environment and Land court. Judge Mativo in **Republic v Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited (supra)** stated that

“On principle it seems that in general a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. *The South African Constitutional Court held in the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others* had this to say:-

"Jurisdiction is determined on the basis of the pleadings and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction..."

11. A closer look at the Applicants' pleadings reveals that the case between the Applicants and the interested parties involves management of the church. There is no evidence to show that there is an actual land dispute apart from the applicants' unproven allegations that the interested parties threatened to sell the lands belonging to the church. I find that since the pleadings do not reveal an issue reserved for an Environment and Land Court, the subordinate Court therein has jurisdiction to handle the matter before it.

12. The Applicants also argued that the decision by the Respondent on the preliminary objection was irrational and unreasonable. They stated that their preliminary objection was dismissed without being given reasons for the same. I have read the said ruling on the preliminary objection. The Respondent was very clear on his ruling and why he was dismissing the Preliminary Objection. The Applicants in the Preliminary Objection stated that there was another Environment and Land case touching on the same issues but failed to provide evidence of the same. Hence the Respondent had to dismiss the Preliminary objection. I do not agree that the decision was irrational and unreasonable. In any event the decision by the Respondent is one which can be appealed, and so the Applicants were always at liberty to prefer an appeal if they were not happy with the Respondent's decision.

13. In conclusion, the *ex parte* applicants have not established any basis for the Court to grant any of the orders sought. *Accordingly, the ex parte applicants' application dated 17th July 2020 must fail. The upshot is that the ex parte applicants' application dated 17th July 2020 is hereby dismissed with costs to the Respondent.*

Orders accordingly.

Dated, Signed and Delivered at Mombasa this 22nd day of March, 2021.

E.K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Ms. Opiyo for State/Respondent

No Appearance for Applicant

Ms. Peris Court Assistant