



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**MISCELLANEOUS CIVIL NO.65 OF 2012**

**IN THE MATTER OF: AN APPLICATION BY TUMUNA MICHAEL MWAMBUINGU, FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION,**

**AND**

**IN THE MATTER OF: THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT (ACT NO. 8 OF 1999)**

**IN THE MATTER OF: THE REPEALED REGISTRATION OF TITLES ACT, CAP 281 OF THE LAW OF KENYA,**

**AND**

**IN THE MATTER OF: THE ENVIRONMENT AND LAND COURT ACT (ACT NO. 19 OF 2011) - WHICH COMMENCED ON 30<sup>TH</sup> AUGUST 2011,**

**AND**

**IN THE MATTER OF: ORDER 53 RULE 1 (1) (2) & (4) OF THE CIVIL PROCEDURE RULES AND SEC. 8 OF THE LAW REFORM ACT, CAP 26 OF THE LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CHIEF MAGISTRATE'S COURT**

**AT MOMBASA.....RESPONDENT**

**AND**

**TUMUNA MICHAEL MWAMBUINGU.....EX-PARTE APPLICANT**

**AND**

**KAHLFAN OMAR MOHAMED.....INTERESTED PARTY**

**JUDGMENT**

1. By a Notice of Motion dated 4<sup>th</sup> September, 2012 pursuant to leave granted Tumuna Michael Mwambingu seeks orders of Certiorari and prohibition against the Order of the Principal Magistrate Court, Mombasa issued on the 30<sup>th</sup> March, 2012 at Mombasa in CMCC No. 2145 of 2011 in a civil suit filed by the Interested Party against the Ex-parte Applicant and in it he sought a permanent injunction against the Defendant (Ex-parte Applicant herein) from erecting or continuing to erect any structures or building upon the road frontage and road reserve and from blocking the plaintiff's (Interested Party herein) access to his own premises.

2. The Magistrate's court granted a temporary injunction on the 30<sup>th</sup> March, 2012 in favour of the Interested Party pending the hearing and determination of the suit.

3. It is against that Orders that the Ex-parte Applicant commenced the instant judicial review proceedings seeking the grant of Orders of Certiorari and Prohibition with leave of court granted on 27<sup>th</sup> August, 2012.

4. The Notice of Motion seeks specific prayers as follows:

1. The Honourable Court be pleased to issue an Order of Certiorari and prohibition to remove to the Honourable Court for purposes of quashing the Order by the Principal Magistrate, Honourable Gandani given on 30<sup>th</sup> March, 2012 in CMCC 2145 of 2011 between Khalfan Omar Mohamed V. Tumuna Michael Mwambingu and issued on the 30<sup>th</sup> March, 2012 AND to prohibit the Chief Magistrate's Court, Mombasa from entertaining, hearing and determining the said suit CMCC 2145 of 2011.

The grounds of the Motion are that -

2. By dint of section 3 of the Environmental Management and Co-ordination Act (Act No. 8 of 1999) the Chief Magistrate's Court has no jurisdiction over the issues raised in CMCC No. 2145 of 2011,

5. The Principal Magistrate dismissed it,

1. By dint of section 2 of the repealed Registration of Titles Act, Cap 281, which was then the governing statute over the land subject of the suit, the court with powers over the land falling under the statute was and still is, the High Court

2. The subject suit – CMCC No. 2145 of 2011 – was instituted long after the Environment and Land Court Act (Act No. 19 of 2011), which established the Environment and Land Court, had come into force and,

3. The pendency of the subject suit together with the subject order made therein, is subjecting the Ex-parte Applicant to an unnecessary loss, since his building materials are being wasted away with a substantial number already stolen, and if the same goes on unabated, he will be subjected to a substantial and irreparable loss while the Interested Party does not lay any claim to the suit property.

6. The facts of the case relied on by the THE EX-PARTE APPLICANTS are set out in the verifying Affidavit sworn by Tumuna Michael Mwambingu on the 24<sup>th</sup> August, 2012 as follows -

1. The Ex-parte Applicant has been compelled to commence these judicial review proceedings following the action of the Interested Party in instituting the proceedings in CMCC 2145 of 2011 against him before the Chief Magistrate's Court at Mombasa which suit still pending in the said court.

2. The suit was filed simultaneously with an application for a restraining order on the 15<sup>th</sup> September, 2011, stopping the Ex-parte Applicant from developing his plot which is adjacent to that of the Interested Party and that through his advocates; the Interested Party defended the said suit by responding by way of affidavit.

3. In his defence the ex parte applicant had disputed the jurisdiction of the Chief Magistrate's Court over the subject cause of action since, on the advice of his advocates he believed that the relief sought in the plaint could only be granted by the High Court. The Trial Court nonetheless delivered a ruling on the 30<sup>th</sup> March, 2012 holding that it had jurisdiction, hence the need for this instant application.

4. The Ex-parte Applicant contends that he had extensively canvassed the foregoing issue of jurisdiction and the facts of his intended project in his Defence to the suit at the Chief Magistrate's Court. Copies of the proceedings, Plaint in CMCC 2145 of 2011, Notice of Motion therein dated 15<sup>th</sup> September, 2011, Replying Affidavit, Defence, Written Submissions by both parties to the lower court suit, the Ex-parte Applicant's list of authorities and the subject order issued on the 30<sup>th</sup> March, 2012 all collectively attached.

5. The Ex-parte Applicant believes that this Honourable Court has the powers to remedy situations such as the one the suit herein is subjecting him to, seeing as he cannot now develop the plot which he purchased with the help of a loan that he is still serving.

## **RESPONSES**

7. Neither the INTERESTED PARTY nor the RESPONDENT has filed replying affidavits in response to the averments contained in the Ex-parte Applicant's verifying affidavit. The Interested Party did file a Notice of Preliminary Objection on the 22<sup>nd</sup> October, 2012 based on the following grounds:

i. The Notice of Motion dated 4<sup>th</sup> September, 2012 is defective and fatally flawed in substance and form and should be dismissed.

ii. The remedy of judicial review is not available to the Ex-parte Applicant as sought in the Motion. The Motion is consequently void and invalid and should be struck off and/or dismissed.

iii. The Ex-parte Applicant is guilty of infringing on the mandatory provisions of the law and accordingly the Notice of Motion cannot lie and should be dismissed.

iv. The Notice of Motion is misconceived in law and amounts to abuse of the court process.

v. The Notice of Motion dated the 4<sup>th</sup> September, 2012 is a disguised appeal and not amendable to the judicial review jurisdiction of this Honourable Court.

### **Submissions**

8. The parties filed written submissions on their respective contentions. The submissions by the Ex-parte Applicant dated 5<sup>th</sup> November, 2012; and written submissions by the Respondent and by the Interested Party both of which were filed on the 19<sup>th</sup> March, 2013 and the Ex-parte Applicants response to the submissions by the respondent and by the Interested Party filled on the 22<sup>nd</sup> March, 2013.

### **Issue for Determination**

9. The issue for determination are as follows:

- a. Whether the Preliminary Objection by the Interested Party has merit; and
- b. Whether the Magistrate's Court has jurisdiction over the cause of action in the civil suit impugned by these judicial review proceedings.

10. **The Ex-parte Applicant** in his written submissions asserts that the Preliminary Objection a notice of which was filed by the Interested Party on the 22<sup>nd</sup> October, 2012 is so general that a proper response can only be mounted against it once it had been argued in court. The Ex-parte Applicant thereby reserves the right after the argument of the said preliminary objection, wishing to point out at that stage that it is apparent from the face of it that the preliminary objection does not raise any pure points of law as was held by the Court of Appeal in **Mukisa Biscuit Limited V. West End Distributors Limited** (1969) EA page 696.

11. **The Interested Party on his part** submits that the Application for leave to file the Notice of Motion dated 4<sup>th</sup> March, 2012 did not set out the name and description of parties and the Verifying Affidavit did not disclose whether it was one of the facts relied upon by the Ex-parte Applicant and that both of these omissions were in violation of the mandatory requirements of **Order 53 rule 1(2) of the Civil Procedure Rules**.

12. Further, the Interested Party submits that when the Notice of Motion dated 4<sup>th</sup> September, 2012 was filed it was accompanied only by the affidavits, the relief sought and the grounds on which the relief is sought when it was served to the Interested Party contending that this contravened **Order 53 rule 4(1) of the Civil Procedure Rules**.

13. He also asserts that it has not been clarified as to how and when the said Interested Party (himself) Khalfan Omar Mohamed became an "interested party" in the Application, seeing as the leave granted by the court was to institute proceedings to quash the order of the principal Magistrate in CMCC 2145 of 2011 issued on the 30<sup>th</sup> March, 2012 on the one hand and to prohibit the Chief Magistrate from entertaining or hearing and determining the said suit on the other hand. No relief was sought against Khalfan Omar Mohamed, the so-called Interested Party in the Application for leave.

14. Finally, the Interested Party alleges that when the Notice of Motion was filed on the 4<sup>th</sup> of September, 2012, it was not served on the Principal Magistrate contrary to the provisions of **Order 53 rule 3(2)**.

15. The Ex-parte Applicant in reply by written submission of 22<sup>nd</sup> March, 2013 dismissed the above assertions as being matters of technicality. The Ex-parte Applicant points out that when he raised the issue of whether the Principal Magistrate has been served before Honourable Justice Muriithi, the Interested Party was overruled once it was established that the Principal Magistrate had been indeed been served and that the Attorney General had filed papers on her behalf. He submits that the allegation is absurd seeing as neither the Principal Magistrate nor the Attorney General have complained and that this is not an issue of pure law in terms of **the Mukisa Biscuit Case**.

16. The Ex-parte Applicant further asserts that the allegations that the Chamber Summons for leave to institute the present Motion is defective have also not been substantiated, no attempt has been made to show the defect and that it his submission that the Chamber Summons was proper and that the Honourable Judge directed himself well when granting the said leave. He points out that in fact it is worth noting that was alleged to be defective on the Notice of Preliminary Objection was the Notice of Motion only and not the Chamber Summons.

17. Finally on this issue, the Ex-parte Applicant reiterates that the entire submissions on behalf of the Interested Party by his Counsel are based on technicalities which in his view, even if they were there, which he has denied herein, do not affect the substratum of the Ex-parte Applicant's case and that Further more **Article 159(2) (d)** of the **Constitution of Kenya** vests this Honourable Court with the power to administer justice without undue regard to technicalities.

18. The question of whether or not the Chief Magistrate's Court had the jurisdiction to hear CMCC 2145 of 2011 depends on whether the suit before the Magistrate's Court is in the nature of an ordinary suit brought under civil law with regard to the infringement of the plaintiff's (Interested Party's herein) private right of access to his property or whether the suit was a land matter alleging an ongoing or probable future infringement of the constitutionally granted right to a clean and healthy environment.

19. The respondent and the Interested Party submit that the former position is the case in the subject matter suit, in which case they submit

that the Civil Procedure Act empowers the Magistrates Courts to hear and determine the claim in question. On the other hand, the Ex-parte Applicant submits that the latter position holds in the instant case and in these circumstance, the court with the power to entertain the matter is the High Court and not the Chief Magistrates Court, a Subordinate Court.

20. In addition, the Respondent cites the inherent jurisdiction of the Court under section 3A of the Civil Procedure Act. The Respondent further submits that the court has an overriding objective under the overriding principle under **Section 1A & 1B** of the **Civil Procedure Rules** and therefore humbly submits that the power of the Magistrate's Court was properly invoked and exercised and that it seems the intention of the Ex-parte Applicant is to tie the hand of both the parties and the court by bringing allegation that the private claim falls under the Environmental Management and Coordination Act.

21. Finally, the Respondent contends that in any case the directions issued by the Chief Justice regarding proceedings over matters relating to the environment, land occupation and use are clear, elaborate and well defined. **Gazette Notice No. 1617 of 19<sup>th</sup> February, 2012 under provision no. 1:**

*All proceedings relating to the environment and the use and occupation of, and the title to land pending before the Court of Appeal, High Court, Subordinate Courts or Local Tribunal of competent jurisdiction other than Land Dispute Tribunals which existed under the now repealed Land Disputes Tribunals Act No. 18 of 1990 shall continue to be heard and determined by the same Courts or Tribunals. Any proceedings which shall not have been concluded by the time the Environment and Land Court is established shall be moved to the Court upon its establishment.*

22. The Respondent submits that by the time the Environment and the Land Court was established the subject suit had already been instituted in the subordinate Court and therefore the Ex-parte Applicant trying to dodge compliance of the orders issued by hiding behind provisions of the law.

23. Based on the foregoing, the Respondent and Interested Party contends that the Motion before the Court lacks merit and prays that it be dismissed with cost, the Interested Party urging that what he sought was permanent injunction to stop and prohibit the continued infringement enjoyment of the private of access by the Interested Party to his own property.

#### **Determination**

24. I have no hesitation in holding that the Preliminary Objection taken by the Interested Party raises merely technicalities that do not go to the root of the application and it should have been taken as a response to the Notice of Motion rather than as a pure point of law. See **Mukisa Biscuits** case, supra. See also Order 51 Rule 10 (2) of the Civil Procedure Rules which provides that "(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

25. As regards the challenge on the grant of leave, while Order 51 Rule 15 of the Civil Procedure Rules gives the general provision for application for setting aside of orders made *ex parte* [which application has not been made here], the Court may only exercise the power to set aside in a circumscribed manner as held by the Court of Appeal in **Meixner & Anor. v. Attorney General** (2005) 2 KLR 189 when considering an appeal from an *ex parte* order refusing leave of court to file judicial review proceedings, as follows:

*"The granting of leave or otherwise involves an exercise of judicial discretion. The Court of Appeal can only interfere with the discretion of the judge denying the appellants leave to apply for judicial review on the firmly established principles stated in Mbogo v. Shah [1968] EA 93."*

26. As held in **Meixner**, supra -

*"Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decision are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or in excess of power."*

27. The Court is not able to find that the decision of the magistrate's court, on the face of it, was made without jurisdiction. The Interested Party's suit in the Magistrate's Court prayed for the principal relief as follows:

*"A permanent injunction restraining the defendant by himself his servants or agents or otherwise howsoever from erecting or continuing to erect any structures or buildings upon the road frontage and road reserve and or plot number 1817 and from blocking the plaintiff's access to plot no. 1328 A or trespassing thereupon in any manner whatsoever and howsoever dealing with the aforesaid plot No. 1817 and or road frontage and road reserve."*

This suit appears to be one of enforcement of right to access his property and not one of enforcement of environmental rights as to health hazard which are the subject of section 3 of the Environmental Management and Coordination Act is only auxiliary, and the magistrate's Court would appear to have jurisdiction in the matter.

28. Moreover, Jurisdiction of the Court is a matter of law which may be challenged by judicial review proceedings as well as by appeal, and it may even be taken for the first time on appeal. As appeal will delve into matters of merit of the case, unlike judicial review, the question before the court should have been taken on appeal from the decision of the Magistrate's Court so that in the event the challenge on jurisdiction is declined, the Court may proceed to determine the merits in accordance with the article 159 principle of substantial justice and expeditious disposal of disputes.

29. While dismissing the Preliminary Objection for the reasons set out above, the ex parte applicant fails on the merits of the Notice of Motion as it has not been shown that the magistrate's Court lacks jurisdiction to deal with the matter set out in the Complaint therein.

**Orders**

30. Accordingly, for the reasons set out above, the Notice of Motion for Judicial Review orders of Certiorari and Prohibition herein is dismissed with costs to the Respondents and the Interested Party.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 17<sup>TH</sup> DAY OF APRIL 2018.**

**E. K. OGOLA**

**JUDGE**

**Appearances:**

**M/S Odongo B.O. & Co. Advocates for the Ex Parte Applicant**

**Ms. Ruth Lutta, Litigation Counsel, for the Respondent**

**M/S Asige Keverenge & Anyanzwa, Advocates for the Interested Party.**