



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA MOMBASA

MISCELLANEOUS APPLICATION NO. JR 3 OF 2011

IN THE MATTER OF: THE LOCAL GOVERNMENT ACT [CAP 21] LAWS OF KENYA

=AND=

IN THE MATTER OF: THE LANDLORD AND TENANT ACT [SHOPS, HOTELS AND CATERING ESTABLISHMENTS ACT] (CAP 301) LAWS OF KENYA

=BETWEEN=

REPUBLIC.....APPLICANT

=VERSUS=

THE RESIDENT MAGISTRATE’S COURT,

AT MOMBASA [MUNICIPAL COURT].....RESPONDENT

=AND=

HUSSEIN MAALIM SHEIKH.....1STEX-PARTE APPLICANT

NURU BADAWI.....2ND EX-PARTE APPLICANT

=AND=

HANIFA ABDULKARIM ABDULKADIR.....INTERESTED PARTY

JUDGMENT

Introduction

1. The substantive application in this Judicial Review matter is a Notice of Motion dated the 21st January 2011 and filed on the 25th January 2011. The main prayer in that Notice of Motion is for an Order of Certiorari to remove the proceedings in **Criminal Case Number M. 3733/10 – *Municipal v. Hussein Maalim Sheikh*** from the Resident Magistrate’s Municipal Court No. 14 at Mombasa to the Honourable Court to be quashed.

2. Leave to make the initial Judicial Review Application had been applied for on the 20th January 2011 and was granted on the 21st January 2011. The grant of the said leave was also ordered to operate as stay of proceedings and order given on the 18th January 2011 in the Resident Magistrate’s Criminal Case Number M.3733/10 – ***Municipal v. Hussein Maalim Sheikh***.

3. The said order given by the Resident Magistrate’s Court on the 18th January 2011 was directed at both Ex-parte Applicants ordering them to vacate the premises on Plot No. 96/XLI/MI along Biashara Street, Mombasa which the record shows as being owned by the Interested Party herein who was the accused person in the aforementioned case at the Resident Magistrate’s Court. Aggrieved by this decision, and considering it the result of a scheme between the Interested Party and Public Health officials to find a way of evicting them despite the pendency of a prohibition order issued on the 28th May 2010 in their favour by the business premises rent tribunal, the Ex-parte Applicant moved to court to seek Judicial Review orders.

4. The Interested Party in her Replying Affidavit to the Notice of Motion dated 21st January 2011 sworn on the 29th March 2011 made an

allegation (at paragraph 5 b, c and d) that the Ex-parte Applicants had been out of the country on the date (the 20th January 2011) when their Verifying Affidavit were allegedly sworn and signed by them at the leave stage of the present proceedings and that as such the documents as filed with the court were false. Consequently, the Interested party also made an application by way of Chamber Summons dated 29th March 2011 for the orders that-

1. The Honourable Court be pleased to Order the 1st and 2nd Ex-parte Applicants to personally appear on date appointed by the court for purposes of Cross-Examination on their respective Verifying Affidavits sworn on the 20th January 2011.

2. On that date appointed by the court for Cross-Examination, the 1st and 2nd Ex-parte Applicant do appear with their original official passports as at 20th January 2011.

3. That in default of compliance of prayer 1 and/or 2 above, the two Verifying Affidavits sworn purportedly by the 1st and 2nd Ex-parte Applicant respectively on the 20th January 2011 be struck out of the court record and the Honourable Court be pleased to vacate its orders of the 21st January 2011.

5. On the 27th September 2012, with the Tuiyott, J. sitting and all parties it was ordered as prayed in prayer 1. and 2. by the Interested Party and the date for the appearance of the 1st and 2nd Ex-parte Applicant fixed as the 28th November 2012. On the date appointed, the advocate for the Ex-parte Applicants informed the court that his clients were around the premises of the court although not present in court but that they had not brought their passports as ordered because one was due for renewal and the other had been left at home. The file was placed aside till 1.00 p.m. in the afternoon when the Tuiyott, J. still not having seen the Ex-parte Applicants personally in court, ruled that the Interested was free to proceed as she wished, at which point the advocate for the interested party prayed for the application dated 29th March 2012 to be allowed in its entirety. The ruling on that prayer was fixed for the 19th February 2013.

6. On the 19th February 2013, for reasons not apparent on the face of the court file, the Court was not sitting. By a notice dated the 25th February 2013 and addressed to all parties to the present matter, a new ruling date was set for the 27th February 2013. On the said 27th February 2013, the Honourable Justice F. Tuiyott delivered the said ruling in open court, granting the prayers of Interested Party as prayed, striking out the two Verifying Affidavits and vacating the orders of the Court as made on the 21st January 2011.

The present Application

7. On the 28th March 2013, the Ex-parte applicants filed an application by way of Notice of Motion seeking orders that-

- 1) There be a stay of proceedings pending hearing interparties of the Notice of Motion
- 2) The ruling delivered on the 27th February 2013 together with all consequential orders be reviewed/or set aside.

It is this Notice of Motion dated the 28th March 2013 that is the subject of this ruling.

8. The EX-PARTE Applicants' case is set out in the Supporting Affidavit sworn by Nuru Badawi on the 28th March 2013 that:

1. The application dated 29th March 2011 seeking orders to Cross-Examine the Ex-parte Applicants was to be heard on the 28th November 2012, however when the matter was called out the Applicants were not in court.

2. On the said date, the Honourable Court gave directions that the matter may be mentioned any time before the ruling on the 19th February 2013. In the intervening time the High Court was on vacation and by the time it had resumed the Presiding Judge was out of station for a period including the 19th February 2013 and as such, mention as directed was not possible.

3. Subsequently within a very short notice the parties were informed that the date of the ruling would be the 27th February 2013, and the advocates for the Ex-parte applicants wrote to the Presiding Judge through Deputy Registrar requesting that the ruling be held in abeyance as the Ex-parte Applicants were ready and willing to testify and be Cross-Examined on their Affidavits.

4. In spite of the request, the Honourable Court proceeded to read the ruling without according the Ex-parte Applicants an opportunity to adduce their evidence or be Cross-Examined as requested. The consequence of that ruling is that the Ex-parte Applicants have been prejudiced as they will be evicted from the suit premises on very flimsy grounds and they will suffer loss and damages occasioned by the closing down of their business as they do not have alternative premises.

9. The Ex-parte Applicants also swore a further Affidavit on the 11th April 2013 in which Nuru Badawi – 2nd Ex-parte Applicant adopted the contents of the Supporting Affidavit sworn on the 28th March 2013 and in addition, averred that the suit premises in question was not dilapidated as alleged by the Interested Party. He attached two photographs of the premises (as NB-1) as proof of his assertion.

10. The respondent did not file any response to the application choosing to remain neutral in the matter.

11. On her part, the INTERESTED PARTY ASSERTS in reply to the averments contained in the Ex-parte Applicants' Supporting Affidavit by way of a Replying Affidavit sworn on the 8th May 2013 that:

1. Contrary to the 2nd Ex-parte Applicants allegation, the court record does not show any directions being issued that there may be a mention before the ruling date of February 2013.

2. The Applicants are not entitled to the orders they now seek for reasons that.

a. Prayers 1. and 2. Of the application dated 29th March 2011 were allowed by consent and the parties thereon took the 28th November 2012, also by consent as date when Cross-Examination was to take place but the Ex-parte Applicants both failed to attend court on flimsy grounds.

b. On the 28th November 2012, when counsel for the Ex-parte Applicants informed the court that his clients were around the precincts of the court, the Honourable Court was kind enough to grant him several hours as it waited for the Applicants to present themselves before the court before allowing counsel for the interested party to proceed, the Court itself has observed this in it's ruling (annexed as HAA-1).

c. The Ex-parte Applicants, immediately after instituting this suit and obtaining the stay orders herein, have never bothered to list the matter for hearing for a period of more than two years and five months.

d. Prior to the 28th November 2012, on the several occasions that the matter came up for hearing of the Interested Party's Application dated 29th March 2011 the Ex-parte Applicants have put up many excuses not to proceed including;

i. Failing to instruct their advocates leading to the said advocates filling an application to cease acting on the grounds of lack of instructions, said application dated the 26th March 2012.

ii. Alleging that they did not have their passports as they were being renewed when the renewal of a passport is barely a five minute affair upon payment of the requisite fees.

iii. Failing to appear in court on dates when ordered by the Honourable Court to attend.

e. Two years down the line, they have never bothered to file a reply to the chamber summons application dated 29th March 2011.

f. The orders prayed for herein seek to propagate an injustice as the Interested Party will still have to attend RMCC No. M. 3733 of 2010 for mentions as the Ex-parte Applicants take their sweet time, having done nothing for two years.

g. The effect of the stay orders by the Honourable Court is that the liberty and freedom of movement of the Interested Party has been impaired.

3. The stay orders attendant to this application are causing a lot of harm as the building is yet to be renovated and continues to be a danger to the health of members of the public and exposes the Interested Party to potential lawsuits in the event that due to its dilapidated state it collapse and causes injury or fatality.

4. In any event and without prejudice to the foregoing, the main suit does not have merit and is not sustainable in law in as far as it attempts to stay criminal proceedings in a lower court by way of Judicial Review. This should serve as notice of the Interested Party's intention to raise a preliminary objection at the time of the hearing of the Ex-parte Applicants' initial Application.

5. It is absurd and unfair for the Ex-parte Applicants to seek to stay the proceedings of RMCC No. M.3733 of 2010 because:

a. On the 29th June 2010 the Public Health Officer and the Medical Officer of Health from the Mombasa Municipal Council after a site visit to the suit premises issued a notice under Section 119 of the Public Health Act Cap 242 demanding that the premises be renovated (Notice attached as HAA-2).

b. The Ex-parte Applicants were notified of the directive but they refused and or ignored to allow the said renovations, as a result of which the Interested Party was charged in the Municipal Court on the 17th August 2010 for failure to comply with the said notice (copy of charge sheet attached as HAA -3).

c. On the 13th October 2010 Public Health Official conducted another site visit and informed the court of the Interested Party's continued non compliance (letter attached as HAA-4).

d. The Interested Party is currently out on bail in the RMCC matter but has to attend court from time to time for mentions (copy of cash bail receipt attached as HAA-5).

Submissions

12. The Ex Parte Applicants filed written submissions urging as follows. The other parties did not file submissions, on the question before the court that is whether the Court will review and set aside the ruling of the court made on 27/2/2013. It was submitted that the Ex-parte Applicants submit that because of the circumstances listed in the grounds for their application, (paragraphs 1 – 4 above at page 3 – 4), the

Honourable Court ought to be pleased to review or set aside the ruling of the 27th February 2013. They also give a brief history of the dispute between themselves and the Interested Party, starting from the order of the Business Premises rent Tribunal on the 28th May 2010 all the way to the current Judicial Review proceedings. They point out that the substantive Notice of Motion herein (dated 21st January 2011) still awaits to be heard and has been held in abeyance due to the Application filed by the Interested Party on the 29th March 2011. With respect to the said Application made by the Interested Party, the Ex-parte applicants submit that they are and have always been willing to cooperate and be examined on their affidavits to combat the wrongful allegations that they were both out of the country and were not available to sign the said affidavits on the date they were purportedly signed. They add that this allegation is a taint on their image, depicting them as dishonest business person and hence, it is defamatory. They are ready and willing to state their case and present their facts to the court, an opportunity that they submit to have missed on a technicality. As regards the Replying Affidavit of the Interested Party, the Ex-parte Applicants submit that in the entire affidavit, no sufficient or reasonable ground have been adduced for the Honourable Court to consider and deny to grant the orders as prayed in the Substantive Notice of Motion. To that effect they categorically deny the allegations contained therein that they have been enjoying star orders without making an effort to prosecute these proceedings and counter that it is this Application by the Interested Party that has delayed the hearing of the Substantive Notice of Motion. The Ex-parte applicants also point out that other factors beyond their control have caused delays in the prosecution of their application such as, the elections and subsequent election petitions as well as periodic insufficiency of judges. Further, with reference to the assertion of the Interested Party that the Honourable Court cannot purport to stay criminal proceedings in a lower court by way of judicial Review the Ex-parte Applicants submit that the manner herein is of a public nature such as those with respect to which the Honourable Court has jurisdiction to act in an administrative capacity, be they civil or criminal. The Ex-parte Applicants also point out that there are currently no ongoing proceedings in RMCC No. 3733 of 2010 since it was stayed and that the Interested Party's allegations to that effect are a ploy to win the sympathy of the Honourable Court. On the Interested Party's assertion that the suit premises dilapidated, Ex-parte Applicants submit that as is evidence by the attachment of photography in the further affidavit sworn on the 11th April, 2013, this is not the case. They submit that the claims of the need to conduct renovation are a flimsy ground meant to evict them indirectly, adding that there are other tenants in the building who continue to enjoy the tenancy in peace and that in any event, they would be willing to give the Interested Party the opportunity to conduct said renovations while they store their merchandise in the premises' storeroom to be reinstated after the renovation rather than being evicted unfairly. Finally, the Ex-parte Applicants submit that the Interested Party intends to defeat their Application on a mere technicality and as such it is in the interest is allowed so that the parties may ventilate their issues on merit and further that allowing the Application will not cause any party to suffer prejudice as the Interested Party shall continue to receive rent for the said suit premises.

DETERMINATION

13. By its ruling of 27/2/2013, the Court (Tuiyott, J.) disposed of the application of 29/3/2011 holding as follows:

"5. The date of 28th November 2012 appointed for cross-examination of the applicants was taken by consent. Whilst I was informed by their Counsel that the Applicants were within Court precincts, they did not physically present themselves to the Court. They may have had good reason or plausible reason for failing to carry their passports but it is not excusable that they failed to attend Court even after the Court had indulged them upto 1.00pm. I take it that they were reluctant to resent themselves for cross-examination. Having consented to prayers (1) and (2) of the application, they would be well aware of the consequences of their failure to comply. That is the consequence they must put up with. The affidavits allegedly sworn by the Applicants on 20th January 2011 in support of the Chamber Summons of 20th January 2011 are hereby struck out. The result is that all orders granted on 21st January 2011 are hereby vacated. The Interested Party shall have costs of his application of 29th march 2011."

14. The Court cannot go at this stage into the merits of the judicial review application filed before the Court. The application properly before the court is one of review by setting aside the orders of the Court made on 27/2/2013 striking out the verifying affidavits to the Chamber Summons for leave herein dated 20/1/2011. The merits of the dispute between the parties is not also before the Judicial Review Court. See **Commissioner of Lands v. Kunste Hotel Limited** (1997) eKLR where the Court of Appeal held that:

"But it must be remembered that judicial review is concerned not with private rights or merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he is subjected."

15. Although this Court has, in my view, power to review its decisions pursuant to the substantial justice principle of Article 159 of the Constitution, sections 1A and 63 of the Civil Procedure Act as well as Order 45 of the Civil Procedure Rules, the applicant has not shown sufficient cause to warrant such course bearing in mind that no explanation is given for the failure to attend court on the day set for their cross-examination on their verifying affidavits.

16. If the Ex Parte Applicants' complaint is that the court which heard the application of 29th March 2011 erred in not heeding the applicant's request by letter to have the cross-examination deferred to a later date, that may only be a ground of appeal not review as to accede to such argument this court would be sitting on appeal from a decision in discretion of a court of equal status. Even with appellate courts, the jurisdiction to set aside an order made by a trial court in exercise of its discretion is circumscribed as observed 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:

"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."

17. The Court in **Mbogo v. Shah**, supra, held that –

"A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself

in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice.”

Orders

18. Accordingly, for the reasons set out above, the ex parte applicants’ application for setting aside of the orders of the court herein is dismissed with costs to the Interested Party.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 17TH DAY OF APRIL, 2018.

E. K. OGOLA

JUDGE

Appearances:

M/S Y. A. Ali & Co. Advocates for the Ex Parte Applicants.

Ms. Namahia, Litigation Counsel for the Respondent.

M/S I.R.B. Mbuya & Co. Advocates for the Interested Party.