



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
JUDICIAL REVIEW NO. 15 OF 2016

REPUBLIC.....APPLICANT

AND

JOSHUA NGOME IMMANUEL.....1ST EX-PARTE APPLICANT

EDMUNO NGUMBAO.....2ND EX-PARTE APPLICANT

VERSUS

THE SENIOR RESIDENT MAGISTRATE COURT MALINDI.....RESPONDENT

AND

ISAAC OMOLLO OTIENO.....INTERESTED PARTY

JUDGEMENT

1. The 1st ex-parte Applicant, Joshua Ngome Immanuel, was the defendant in Malindi CMCC No. 31 of 2016 which was heard by the Respondent, the Senior Resident Magistrate. The Interested Party, Isaac Omollo Otieno, was the plaintiff in that case. The 2nd ex-parte Applicant, Edmuno Ngumbao, is said to have bought L.R. No. Gede/Michomboni/33, the subject of the litigation in the case before the Respondent, from the 1st ex-parte Applicant.

2. Through the notice of motion amended on 28th March, 2017 the ex-parte applicants pray for the issuance of an order of certiorari removing into this court the decree and judgement of the Respondent dated 25th August, 2016 for purposes of quashing.

3. From the papers filed in court, the ex-parte applicants' case is that at the time the decree and judgement of 25th August, 2016 were issued by the Respondent, there was an order issued in Malindi High Court Petition No. 3 of 2016 staying the hearing and determination by the Magistrates' Courts of matters touching on environment and land. It is thus the ex-parte applicants' assertion that the Respondent acted without jurisdiction.

4. The Respondent did not reply to the application. The Interested Party opposed the application through an affidavit sworn on 8th December, 2016.

5. The Interested Party's averment is that his case was heard on 28th June, 2016 and judgement delivered on 25th August, 2016. He states that after the decree was extracted he proceeded to execute the same through a court bailiff and that by the time the ex-parte applicants moved the court to set aside the judgement the same had already been executed.

6. The Interested Party contends that at the time he filed his suit, the Respondent had jurisdiction to hear and determine the matter pursuant to practice directions issued on 25th July, 2014 by the Chief Justice under the Environment and Land Court Act, 2011.

7. Additionally, the Interested Party faults the presence of the 2nd ex-parte Applicant in these proceedings asserting that the 1st ex-parte Applicant had no locus to sell the land to him as alleged in their application.

8. The Interested Party wraps up his case by averring that the Respondent had jurisdiction to determine the matter at the material time and this matter is only meant to deny him full enjoyment of the orders issued against the 1st ex-parte Applicant.

9. When the matter came up for hearing, the advocates for the parties opted to rely on the submissions which they had filed.

10. In support of their case, the applicants submit that the trial Magistrate's decision to deliver judgement in Malindi CMCC No. 31 of 2016 despite the existence of stay orders issued by this Court in Malindi High Court Petition No. 3 of 2016 should be deemed null and void. Further, that the Interested Party should not be allowed to benefit from illegal proceedings which were in violation of the stay order issued by the High Court.

11. The applicants also assert that no valuation report for the land had been provided to enable the Respondent determine pecuniary jurisdiction before proceeding with the matter.

12. According to the applicants, the Interested Party's action of executing the decree while having knowledge of the stay orders issued by this Court was not only null and void but also in contempt of court.

13. In conclusion, the applicants assert that this Court has supervisory jurisdiction over subordinate courts and the Respondent having been aware of the stay orders should not have proceeded with the matter. The applicants therefore pray for the quashing of the proceedings. They also pray that the Interested Party be directed to meet their costs.

14. The Interested Party commenced his submissions by giving a brief background of the matter. He stated that being the administrator of the estate of Doreen Ochieng Omollo he instituted Malindi CMC No. 31 of 2016 on 18th February, 2016 against the 1st ex-parte Applicant, Joshua Ngome Immanuel. He duly served the 1st ex-parte Applicant who failed to enter appearance or file a defence. The matter thus proceeded for formal proof and judgement was subsequently entered in his favour.

15. It is the Interested Party's submission that at the time he instituted his suit, the Respondent had jurisdiction to hear and determine the matter pursuant to the practice directions that had been issued by the Chief Justice. That in instituting his suit he had fully complied with the requirements of Section 15 of the Civil Procedure Act which requires that a suit be instituted in the court of the lowest grade competent to try it. It is the Interested Party's contention that the parcel of land in dispute being L.R. No. Gede/Mijomboni/33 measured 85 feet by 48 feet and the Respondent did indeed have pecuniary jurisdiction to hear the matter.

16. Acknowledging the creation of the Land and Environment Court by the Environment and Land Court Act, 2011 pursuant to the provisions of Article 162 of the Constitution, the Interested Party submits that the creation of the Environment and Land Court never ousted the jurisdiction of the Magistrates' Courts to hear and determine land matters. In support of this assertion reliance was placed on the decisions of

Oloa, J in **Peter Mburu v Andrew Kimani Adam & 2 others [2016] eKLR** and Angote, J in **Kibwana Ali Karisa & another v Said Hamisi Mohamed & 3 others [2015] eKLR**.

17. On the allegation that the matter proceeded in the face of stay orders issued on 14th March, 2016 in Malindi High Court Petition No. 3 of 2016, the Interested Party contends that the stay orders were not applicable to his matter. In support of this assertion, the Interested Party relies on the statement of Oloa, J in **Peter Mburu** (supra) that: -

“Soon after delivering this ruling, I have now become aware of the conservatory orders issued on 14th March 2016 in Malindi Constitutional Petition No. 3 of 2016 which touch on the recent Statute Law (Miscellaneous Amendment Act No. 25 of 2015) which I have referred to in my ruling.

However, it is also clear that the decision to transfer this suit was not solely based on the said Statute Law Amendment Act but on my finding that under Section 13 of the Environment and Land Court Act, this Court has appellate jurisdiction which means that jurisdiction can only be exercised while hearing appeals from subordinate courts. Therefore to allay any confusion that may arise, and I have transferred land cases to that Court previously, I hereby confirm that those conservatory orders issued in the Malindi Court have no bearing on this suit. Let it proceed at Wanguru Court as directed.”

18. It is the Interested Party’s position therefore that the stay orders did not affect the jurisdiction of the Respondent to entertain his case.

19. Finally, the Interested Party posits that the 1st ex-parte Applicant has not approached this Court with clean hands. I do not really get the drift of the Interested Party’s argument. I will thus reproduce the submissions on this issue for record purposes. He states that: -

“He who comes to equity must do so with clean hands. It is clear from the Interested Party’s Replying Affidavit dated 5th December, 2015 that the 1st ex-parte Applicant went beyond the Court Orders to grant vacant possession of the suit property or risk eviction when after execution by the court bailiff and eviction thereof; he sought repossession of the suit property.

Therefore, in making the judicial review application, he is coming to seek justice having disobeyed court orders which amounts to contempt of court”

20. He then proceeds to urge the court to jealously protect its authority. As already stated, I do not understand why the Interested Party is saying that the 1st ex-parte Applicant disobeyed court orders.

21. Moving onto his final ground, the Interested Party asserts that the matter proceeded by way of formal proof as the 1st ex-parte Applicant failed to defend the claim and the remedy of judicial review is not available to him as equity does not aid the indolent. The Interested Party opines that the applicants are only interested in delaying his enjoyment of the fruits of the judgement.

22. The Interested Party concludes by urging this Court to dismiss the ex-parte applicants’ notice of motion and award him costs.

23. I find that the jurisdictional issue raised in this proceeding is a narrow one. The question is whether the Respondent had jurisdiction to hear and determine Malindi CMCC No. 31 of 2016 in view of the stay orders issued on 14th March, 2016 in Malindi High Court Petition No. 3 of 2016.

24. This matter will best be determined by understanding the pleadings and orders issued in Malindi High Court Constitutional Petition No. 3 of 2016, Malindi Law Society v The Attorney General and 4 others. It is unfortunate that although the said Petition is the basis of these proceedings, the applicants never bothered to exhibit the stay orders issued therein.

25. Be that as it may, I have perused the judgement of this Court (Emukule, Chitembwe and Thande, JJ) in Malindi Petition No. 3 of 2016 and note that the Petitioner therein sought to nullify, on the ground of unconstitutionality, various provisions of three Acts of Parliament: the Environment and Land Court Act (E&LCA”), the Magistrates Court Act, 2015 (“MCA”) and the High Court (Organization and administration) Act, 2015 (“HC(O&A)A”). Of interest to this Court is that the Petitioner specifically challenged provisions introduced to the E&LCA by the Statute Law (Miscellaneous Amendments) Act, 2015 which gave jurisdiction to the subordinate courts to hear and determine matters within their pecuniary jurisdiction involving occupation and title to land. The order of stay therefore suspended the operations of those provisions. In a judgement delivered on 11th November, 2016 the Court declared the provisions empowering the subordinate courts to hear environment and land disputes unconstitutional. For completion of the record, I am aware that on 13th December, 2016, the Court of Appeal granted an interim order of stay of execution and implementation of the judgement.

26. From the brief background highlighted in this matter and the pleadings and submissions of the parties it emerges that the provisions of the law that had empowered the subordinate courts to hear and determine environment and land disputes under the E&LCA were in limbo from 14th March, 2016 when they were suspended up to 13th December, 2016 when the Court of Appeal stayed the execution and implementation of the judgement of this Court declaring those provisions unconstitutional. During that period the subordinate courts had no jurisdiction over environment and land disputes as the provisions that had given them jurisdiction had initially been suspended by a stay order and subsequently declared unconstitutional by a judgement of this Court. The Interested Party cannot take refuge in the practice directions issued by the Chief Justice on 25th July, 2014 as those directions, in so far as they related to the jurisdiction of the subordinate courts, were rendered otiose when Parliament moved to formally grant jurisdiction to the subordinate courts by introducing amendments to the E&LCA through the Statute Law (Miscellaneous Amendments) Act, 2015.

27. As for the comments of Olao, J in **Peter Mburu** (supra) I find that the same were made according to the peculiar circumstances in that case. In my view they are not applicable to this matter in light of the judgement in Petition No. 3 of 2016.

28. In conclusion, I agree that the Respondent had no jurisdiction to hear and determine the dispute between the 1st ex-parte Applicant and the Interested Party. Jurisdiction is bestowed upon a court by statute or the Constitution or both. Where there is no jurisdiction, a court cannot get the same through the consent of the parties or by proceeding ex-parte. The hearing and determination of Malindi CMCC No. 31 of 2016 was therefore a nullity. Anything done in pursuit of any orders issued in the proceedings is null and void. It is, however, noted that at the time the matter was filed the Respondent had jurisdiction. In the circumstances, an order of certiorari is issued removing the proceedings that took place between 14th March, 2016 and 13th December, 2016 in Malindi CMCC No. 31 of 2016 to this court and quashing them.

29. I note that unless they resort to arbitration, the ex-parte applicants and the Interested Party still have a long litigation road to travel. In the circumstances, I direct each party to meet own costs of the proceedings.

Dated, signed and delivered at Malindi this 29th day of June, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT