



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW NO. 7 OF 2017

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW REMEDY OF
CERTIORARI AND STAY PROCEEDINGS**

**IN THE MATTER OF: THE MOMBASA SRMCCC COURT CASE NO 1686 OF 2016
BETWEEN BANDARI INVESTMENTS V HASHIM LOMA, 2) BAYA 3) OMAR JUMA 4)
SHIDA CHARO 5) KASHINDO 6) NAHODHA JOHN AND 7) CHRIS**

REPUBLIC.....APPLICANT

VERSUS

- 1. HON. E. MUTUNGA, SENIOR RESIDENT MAGISTRATE, MOMBASA**
- 2. THE HON. ATTORNEY GENERAL.**
- 3. OFFICER COMMANDING POLICE DIVISION (OCPD) KISAUNI**
- 4. OFFICER IN CHARGE OF KIEMBENI POLICE STATION (OCS)...RESPONDENTS**

AND

BANDARI INVESTMENTS COMPANY LIMITED.....INTERESTED PARTY

***EX-PARTE APPLICANTS:* 1. DALU CHIGAMBA MUNGA**

2. EPHRAIM KITSAO BAYA

RULING OF THE COURT

The Application

1. By an application dated 7th April 2017 brought under Order 53 Rule 3 & Section 8 & 9 of the Law Reform Act and Article 10, 21, 22, 23 (3) (F), 28 & 31 of the Constitution of Kenya, 2010, the ex-parte applicant seeks the following orders;

- i. An Order of Certiorari do issue to call up the High Court for quashing the proceedings and orders made on 9.9.2016, 22.2.2017 and 1.3.2017 respectively in Mombasa S.R.M.C.C No. 1686 of 2016 between Bandari Investments Co. Limited versus 1) Hashim Loma, 2) Baya 3) Omar Juma 4) Shida Charo 5) Kashindo 6) Nahodha John and 7) Chris; on the grounds set out in the Statement of Facts and Verifying Affidavit filed and served alongside the application for leave;

ii. An Order of Prohibition do issue, to prohibit and bar the 1st Respondent from continuing with the hearing of the said subordinate court case, or the 2nd and 3rd Respondents from enforcing the impugned civil orders made on bed of the said subordinate court file; for want of jurisdiction; abatement of the said proceedings for want of taking out of summons to enter appearance, and/or service on the defendants or other occupants and residents on parcel 817 (O.N. 324/2) of Section II MN; or likely/threatened violation of the rule of law, (Article 10) human dignity (Article 28) and right to privacy (article 31) by demolition of their abodes, without due process and in abuse of court process and during the pendency of other related proceedings before the ELC Court at Mombasa;

iii. The costs of this motion and for the application for leave are provided for.

The application is founded on the grounds set out in the face of the application and in the statement of facts dated 17th March 2017.

2. The ex-parte Applicants allege that they are residents of Nguu Tatu village, on part of what is now described as portion 817 [Original No. 324/2] of Section II Mainland North; where they reside with their families. The ex-parte Applicants further allege that Mombasa **SRMCC No. 1686 of 2016** (Bandari Investments Co. Limited versus 1) Hashim Loma, 2) Baya 3) Omar Juma 4) Shida Charo 5) Kashindo 6) Nahodha John and 7) Chris) was filed before the subordinate court on 9.9.2016 and that no summons to enter appearance were issued in the suit and that according to the affidavits of service of one **PETER O. OMOGO** there were attempts to serve other court papers but not the summons.

3. The ex-parte Applicants claim that despite the lack of issuance of summonses to enter appearance and want of service of court processes on the named defendants, the case proceeded to hearing and orders were issued against the defendants.

4. The ex-parte Applicants claim that the proceedings before the subordinate court were a nullity because of the following reasons;

a. Want of issue and/or service of court process and pleadings as well as the application for interim relief.

b. Want of jurisdiction on the part of a subordinate court, to hear a case involving alleged trespass to land by reason of Article 162 of the Constitution of Kenya, 2010.

c. Contravention of *audi alteram partem* principle of natural justice requiring that all the sides to a dispute are heard before court can grant or make any order in a matter before it;

d. Want of issue of summonses to enter appearance, for service on the Applicants;

e. Want of service of summonses to enter appearance, for service on the Applicants;

f. The matter of who was and is still in possession and physical control of the suit land [portion 817 [original no. 324/2] of Section II Mainland North] was sub-judice before the Environment and Land Court in **ELC No. 210 of 2013** (Ibrahim K. Baya & 12 others versus Mahmood Kassam and 7 others); being a claim for recovery of Plot 819 [Original No. 330/2] of Section II Mainland North and in **Mombasa Constitutional Petition No. 74 of 2014** (Kazungu Katana & 382 others versus Mohammed Kassam and 6 Others); a claim for recovery of plot 324, 382, 817 and 819 all of Section 11 Mainland North.

5. The ex-parte Applicants allege that the subordinate court has issued an injunction on 9.9.2016, a mandatory injunction on 22.2.2017 and police supervision orders on 1.3.2017, all of which were allegedly issued without proper service on the Applicants or the defendants in that suit.

6. The ex-parte Applicants allege that they are not named as parties in the subordinate court suit therefore they cannot apply to set aside the purported service of summonses to enter appearance.

7. The ex-parte Applicants' case is that though they are not parties in the named suit they are directly affected by the eviction order issued by the subordinate court in the form of a mandatory injunction thus they are deserving of the orders sought herein.

Response

8. The 2nd Respondent responded to the application by way of Grounds of Opposition filed in court on 11th July 2017 wherein he opposed the application on the grounds that;

- a. The application was misconceived and offended the provisions of Order 53 Rule 1 and 2 of the Civil Procedure Rules.
- b. The 1st Respondent had authority to determine the suit and the authority cannot be challenged through judicial review.
- c. The 1st Respondent acted within its mandate as a magistrate.
- d. A judgment of a court cannot be challenged through judicial review but rather by way of an appeal.
- e. The application offends Article 160 (5) on immunity of judicial officers.
- f. A judicial review application cannot be supported by both Order 53 and constitutional Articles and therefore this application lacks legal backing.

Neither the 1st, 3rd and 4th Respondents nor the Interested Party herein responded to this application.

Submissions

9. The application came up for hearing on 31st July 2017 wherein the parties canvassed it by way of oral submissions.

10. Mr. Kimani, learned counsel for the ex-parte Applicants submitted that the suit before the subordinate court is founded on the tort of trespass and the main prayer is that of eviction. Counsel submitted that the suit before the subordinate court had been filed after enactment of the Constitution of Kenya, 2010, thus Article 162 (2) (b) was in effect and the subordinate court had no jurisdiction to entertain the matter and the same cannot be transferred to the proper court due to lack of jurisdiction of the subordinate court.

11. Mr. Kimani submitted that the only remedy available for the ex-parte Applicants is for this court to call for the subordinate court's file and quash the proceedings in exercise of this court's supervisory jurisdiction.

12. Mr. Kimani further submitted that the proceedings before the lower court were a nullity because summons to enter appearance were not taken out by the plaintiff therein and the legal effect of this omission under Order 5 (1) (6) of the Civil Procedure Rules is that the suit collapses by way of abatement and the orders issued therein become a nullity.

13. Mr. Kimani stated that the ex-parte Applicants cannot go before the lower court because they are not party to the proceedings, however, the orders issued by the lower court greatly affect the ex-parte Applicants.

14. Mr. Makuto, learned Counsel for the 2nd Respondent submitted that the proceedings for eviction referred to by the ex-parte Applicants have been suspended under the revised Land Act. Counsel further stated that the Chief Magistrate's court had the jurisdiction to deal with the matter by virtue of Article 162 (2) (b) which envisages a situation where a legislation by Parliament gives effect to it, which is the

Environment and Land Court Act that grants the Chief Magistrate Court jurisdiction to deal with issues of land.

15. Mr. Egunza, learned Counsel for the Interested Party submitted that the application is statute barred under Order 53 Rule 3 of the Civil Procedure Rules which demands that any action for judicial review orders be filed within 6 months. Counsel argued that in the lower court case, the 1st interim orders sought to be quashed were issued on 9.9.2016 while the proceedings before this court were commenced on 20th March 2017.

16. Mr. Egunza submitted that the suit papers in the matter before the lower court were served but the defendants chose not to enter appearance. Counsel further submitted that the ex-parte Applicants can still seek redress from the lower court.

17. On the issue of jurisdiction of the lower court, Mr. Egunza submitted that a tort of trespass can be remedied through a Chief Magistrate Court and not necessarily an Environment and Land Court.

18. In response to the submissions of learned counsels Mr. Makuto and Mr. Egunza, Mr. Kimani submitted that the issue that this application is time barred does not apply since the orders sought to be quashed herein are continuing orders which have been continuously extended. Counsel further contended that neither review nor appeal are available to the ex-parte Applicants as they are not parties to the suit before the lower court.

Determination

19. Having carefully considered the application I find that the following issues arise for determination:

- a) Whether summons to enter appearance were taken out in the suit before the lower court and effectively served on the defendants therein.
- b) Whether the lower court had the jurisdiction to entertain the suit.
- c) Whether the orders sought herein cannot be granted due to time limitation.

20. On the first issue, whether summons to enter appearance were taken out in the suit before the lower court and effectively served on the defendants therein? The ex-parte Applicants herein contend that the plaintiff in Mombasa CMCC No. 1686 of 2016 did not take out summons to enter appearance, the same were not served on the defendants thus their inability to enter appearance hence the proceedings before the lower court were a nullity. The Interested Party herein who is the Plaintiff in the lower court case claims that the summonses to enter appearance were taken out and served on the defendants but the defendants choose not to enter appearance.

Order 5 Rule 1 (1) (2) and (3), Rule 6 and 7 provide:

(1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.

(2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.

(3) Every summons shall be accompanied by a copy of the plaint.

6. Service of summons shall be made by delivering or tendering a duplicate thereof signed by the judge, or such officer as he appoints in this behalf, and sealed with the seal of the court.

7. Save as otherwise prescribed, where there are more defendants than one, service of

summons shall be made on each defendant.

21. I have carefully read through a copy of the affidavit of service sworn by **PETER O. OMOGI** on 22nd September 2016 annexed to the verifying affidavit of **DALU CHIGAMBA MUNGA** sworn in support of this application. The deponent in the affidavit of service at paragraph 2 states:

“THAT on 12th September, 2016, I received the Court Order issued on 9th September 2016, Notice of Motion under Certificate dated 8th September 2016, Authority to Plead, Fast Track Plaintiff, Plaintiff Statement, Plaintiff List of Documents and Plaintiff List of Witness from the firm of M/S D.N Omari & Co. Advocates with instructions to effect service upon the Defendants herein.”

It is evident from the deponent’s statement that no summons to enter appearance were given to him nor did he serve the same on the Defendants in that suit. Therefore, I am inclined to believe the ex-parte Applicants claim that no summons to enter appearance in the lower court case were taken out neither was there service of summons to enter appearance upon the defendants in that matter. This being the case the Defendants were not given an opportunity to be heard which is contrary to the rules of natural justice.

22. On the second issue, whether the lower court had the jurisdiction to entertain the suit. In the case of **REPUBLIC VS. ATTORNEY-GENERAL & 4 OTHERS, ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014]**, the court held that:

“Judicial review applications do not deal with merits of the case but only with the process. In other words judicial review only determines whether decision-maker had jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision-maker took into account relevant matters or did take into account irrelevant matters”.

Jurisdiction is everything and if a court lacks jurisdiction it should not take any further step in its proceedings. See the case of **The Owners of Motor Vessel Lillians versus Caltex Oil (Kenya) Limited C.A No. 50 of 1989.**

Article 162 (2) of the Constitution provides that:

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:

a. Employment and labour relations; and

b. The environment and the use and occupation of and title of land.

The Interested Party herein who is the Plaintiff in the suit before the lower court was seeking orders of eviction and destruction of all structures on parcel known as sub-division no. 817 (Orig.No. 324/2)- the suit land and mesne profits for the loss of use of the suit land.

Section 2 of the Statutes Law (Miscellaneous Amendments) Act, 2015 amended the Environment and Land Court Act, 2011 as follows:

“Section 26 insert the following new sub-sections immediately after sub-section (2)-

(3) The Chief Justice may, by notice “in the Gazette, appoint certain Magistrate to preside over cases involving environment and land in respect to any area of the county.

(4) Subject to Article 169(2) of the Constitution, the magistrate appointed under sub-section (3) shall have jurisdiction and power to handle-

a. Disputes relating to offences defined in any Act of Parliament dealing with environment and land; and

b. Matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction of the Chief Magistrate as set out in the Magistrates' Courts Act."

The above amendments were aimed at giving jurisdiction to certain Magistrate's court to deal with matters relating to environment and land. In **Malindi Law Society versus Attorney General & 4 Others [2016] eKLR**, the court found the above amendments to be null and void, however, an appeal has been lodged against that decision.

23. This being the case, this court can still determine the jurisdiction of the lower court based on the pecuniary value of the suit land. Section 7(1) of the Magistrates' Court Act 2015 provides for the civil pecuniary jurisdiction of magistrates' court as follows:

a. Chief Magistrate- Kshs. 20,000,000

b. Senior principal magistrate- Kshs. 15,000,000

c. Principal Magistrate- Kshs. 10,000,000

d. Senior resident magistrate- Kshs. 7,000,000

e. Resident magistrate- Kshs. 5,000,000

According to the copy of the Certificate of Title found in the bundle of documents filed by the ex-parte applicant sub-division Number 817 (Original Number 324/2 Section II Mainland North) is said to be around 59.5 acres while in the transfer document the Interested party herein bought the suit land at Kshs. 178, 500,000. Considering the value at which the suit land was purchased by the interested party, the value exceeds the jurisdiction of the lower court which is a Senior Resident Magistrate Court whose pecuniary jurisdiction should not exceed Kshs. 7,000,000. The lower court therefore did not have the jurisdiction to determine Civil Suit No. 1686 of 2016 and the suit before that court was a *nullity ab initio*. In the case of **Charles Wainaina Njehia versus Barclays Bank of Kenya [2006] eKLR** the applicant sought to transfer a suit whose value was Kshs. 1,600,000/= from the Magistrate's court to the High Court. The application was dismissed, the court holding that if the matter was filed in a court with no jurisdiction, the suit was a *nullity ab initio* and there was nothing capable of being transferred as the suit itself was a nullity. The court further reasoned that there was an express provision of law which barred the filing of the suit in the Magistrate's Court and therefore the suit was filed in breach of the law.

24. On the third issue, whether the orders sought herein cannot be granted due to time limitation, the interested party has contended that judicial review orders should be sought within six months from the date when the decision complained of was made. The Interested party alleged that the 1st interim orders sought to be quashed were issued on 9.9.2016 while the proceedings before this court were commenced on 20th March 2017.

25. Order 53 Rule 2 of the Civil Procedure Rules provides:

"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appeal has expired".

The ex-parte Applicants want the orders made on 9.9.2016, 22.2.2017 and 1.3.2017 by the lower court to

be quashed. The order made on 9.9.2016 was in the nature of an injunction which was issued pending the hearing of the application interparties thus the order was continuous. The other orders are within the time frame provided for under Order 53 Rule 2. For these reasons I find that the judicial review orders sought are within the time limit provided for by the law.

26. For the foregoing reasons, the ex-parte Applicants' application dated 7th April 2017 is allowed and orders made as follows:

a. An Order of Certiorari is hereby issued quashing the proceedings and orders made on 9.9.2016, 22.2.2017 and 1.3.2017 respectively in **Mombasa S.R.M.C.C No. 1686 of 2016 between Bandari Investments Co. Ltd v. 1) Hashim Loma, 2) Baya 3) Omar Juma 4) Shida Charo 5) Kashindo 6) Nahodha John and 7) Chris;**

b. An Order of Prohibition is hereby issued prohibiting **and barring the 1st Respondent from continuing with the hearing of Mombasa S.R.M.C.C No. 1686 of 2016 between Bandari Investments Co. Ltd v. 1) Hashim Loma, 2) Baya 3) Omar Juma 4) Shida Charo 5) Kashindo 6) Nahodha John and 7) Chris** and prohibiting and barring the 2nd, 3rd and 4th Respondents from enforcing the impugned civil orders made by the said subordinate court;

c. Costs of this application to the ex-parte Applicants.

It is so ordered.

Dated, Signed and Delivered at Mombasa this 18th day of October, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Egunza for 2nd Respondent

Mr. Ngari for 1st Respondent

Mr. Kaunda Court Assistant