



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 71 OF 2013

**IN THE MATTER OF: APPLICATION FOR LEAVE TO APPLY FOR THE ORDERS OF
CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF: MOTOR VEHICLE REGISTRATION

NUMBER KBV 051 J

BETWEEN

LEN VAN AERSCHOT APPLICANT

VERSUS

HON. S.K. GACHERU, PRINCIPAL MAGISTRATE, MOMBASA

GEORGE, MAINGI

T/A MUGEMA ENTERRISES RESPONDENTS

AND

JACKSON NGUWA NZARO INTERESTED PARTY

RULING

1.This Ruling relates to a Notice of Motion dated the 27th February 2014, whereas the ex parte applicant sought:-

- a. an order of Certiorari to bring to this Court and quash the decision delivered on 29th November, 2013 by Hon. S.K. Gacheru, Principal Magistrate's Court; Mombasa, in Miscellaneous Civil Application No. 2007 of 2013, George Maingi t/a Mugema Enterprises Vs Len van Aerschot.
- b. A prohibition to prohibit the said Respondent by himself, his officers, employees, agents or assigns from selling, disposing or otherwise dealing with motor vehicle registration number KBV 051J pending the hearing and determination of the Judicial Review Application.

2. According to the grounds and the Verifying affidavit of Len Van Aerschot, the ex parte Applicant, the sole reason for seeking these Judicial remedies was alleged lack of jurisdiction by the presiding magistrate to deal with the subject matter, a motor vehicle whose value was said to be Ksh. 8 million whereas the learned magistrate's jurisdiction was Ksh. 2 million.

This lack of jurisdiction was acknowledged and pursuant to a Notice of Motion dated 6th December, 2013, the orders dated 29th December 2013, were set aside, the Notice of Motion dated 22nd December, 2013 and the entire proceedings were struck out and dismissed. This means that there is no subsisting order for the Court to consider or to grant the Judicial review orders sought herein. The entire proceedings in this large file have been in vain, and abuse of process.

3. In this regard the words of the English **COURT THOMAS LAUNCHES VS TRINITY [1961], ALL ER 26**, at page 33 are apt:-

“Counsel for the defendants says that the principle is that a man shall not pursue a remedy in respect of the same matter in more than one Court. In my Judgment, the principle is rather wider than that. It is that no man/woman should be allowed to institute proceedings in any Court if the circumstances are such that to do so would really be vexatious. In my Judgment, it is vexatious if somebody institutes proceedings to obtain relief in respect of a particular subject matter where exactly the same issue is raised by his opponent in proceedings already instituted in a another Court in which he is not the Plaintiff but the Respondent”.

4. This is the very principle codified in section 6 of the Civil Procedure Act, (Cap 21 Laws of Kenya), against filing new actions while actions for the same reliefs between the same parties are pending before a Court of competent jurisdiction, or have been determined by that Court.

Having read the large of volume of repeated assertions and submissions of Counsel, it is clear to the Court the application made by the ex parte applicant before this Court was and is vexatious and an abuse of the process of Court. The ex parte applicant was aware or knew of the proceedings before the subordinate Court, instituted against him, and the impugned order of 29th November 2013, yet he had the temerity to simultaneously apply to have the action struck out, (and succeeded in having the action struck out and consequential orders set aside, while at the same time, appeal this court to call up and quash the same orders! I agree with Counsel for the Interested Party, that that was a needless act and abuse of the process of Court, to file an application for leave to institute Judicial Review proceedings for orders of Certiorari and prohibition in respect of proceedings which had been terminated, and orders set aside.

5. It is not essential but it is necessary to say that an issue of ownership of the subject matter (the motor vehicle), cannot be determined in Judicial review proceedings. That question can only be determined on the basis of evidence before a Civil Court of competent jurisdiction.

For those reasons, I must hold that the application herein for the Judicial Review reliefs of Certiorari and Prohibition which had, to the applicant's knowledge been set aside, and the proceedings struck out, is an abuse of the court process.

6. The Notice of Motion dated 7th March, 2016 is dismissed with costs to the Interested Party.

7. There shall be orders accordingly.

Dated, signed and Delivered in Mombasa this 14th day of June, 2016.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:-

Mr. Ndegwa holding brief for Sisonic

No appearance for Attorney General for Respondent

Mr. S.M. Kimani for Interested Party

Silas Kaunda – Court Assistant

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RULING

1. Pursuant to the provisions of Section 99 of the Civil Procedure Act, (Cap 21, Laws of Kenya) and the inherent jurisdiction of the Court, I hereby make correction that reference in paragraph 6 of the Ruling delivered on 14th June 2016, was a slip error and shall read - **“dated 27th February, 2014”**.

2. Save as aforesaid the contents and orders of the Court in the said Ruling are hereby reiterated and affirmed.

Dated, signed and Delivered in Mombasa this 17th day of June, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE