



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. (JR) APPLICATION NO. 101 OF 2012

**IN THE MATTER OF: AN APPLICATION BY CITY COUNCIL OF
MOMBASA FOR ORDERS OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF: THE CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 905 OF 2012

BETWEEN MOHAMED RAJAB BARAWA AND CITY COUNCIL OF MOMBASA

AND

IN THE MATTER OF: CIVIL PROCEDURE ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF MAGISTRATE'S

COURT MOMBASA *EX PARTE*.....RESPONDENT

AND

CITY COUNCIL OF MOMBASA.....APPLICANT

AND

MOHAMED RAJAB BARAWA.....INTERESTED PARTY

RULING

1. This Ruling relates to a Notice of Motion dated and filed on 16th January, 2013 in which the *ex parte* Applicant, the City Council of Mombasa, sought the following orders:-

1. An order of Certiorari be issued to remove into the High Court and quash the entire decision by

the Respondent in the Ruling delivered on 6th December, 2012.

2. An order of prohibition be issued, prohibiting the Respondent from hearing, entertaining, proceeding or in any manner dealing with Mombasa CMCC No. 905 of 2012, **MOHAMMED RAJAB BARAWA VS. CITY COUNCIL OF MOMBASA**.

3. The costs of this application.

2. The applicant was supported by the Statutory Statement (of facts), the Affidavit Verifying the Facts sworn on 24th December, 2012 by one Rose Jumwa Ngowa, the *ex parte* Applicant's Deputy Administrator, and the principal grounds that:-

- i. the Respondent acted without jurisdiction,
- ii. that the Respondent's actions are therefore null and void,
- iii. the Respondent has granted final orders without hearing the parties.

3. The genesis of the Notice of Motion herein lies in the Complaint (Fast Track) dated 4th May, 2012 in which the Interested Party claims that while he was an employee of the *ex parte* Applicant, and was the lawful occupant of the *ex parte* Applicant's quarter, at Utange Municipal Housing Estate, the *ex parte* applicant's agents, employees and/or servants unlawfully broke into the house and forcibly evicted him, and threw out his household goods, the particulars of which he enumerated in paragraph 10 of the complaint, and in the end sought the following orders:-

- a. reinstatement of the plaintiff to his house at Utange Municipal House (Quarters),
- b. special damages,
- c. general damages,
- d. costs and interest at court rates,
- e. any other or further relief the court deems fit and just to grant

4. Together with the complaint, the Interested Party's counsel also filed an application by way of a Notice of Motion dated 7th September, 2012 in which he sought orders that:-

1. the plaintiff be declared the legal tenant of the defendant's house situate at Utange and the detained household goods and eviction of the plaintiff from the said house by the defendant's agents and/or servants on 28th February, 2012 is unlawful;
2. the defendant's agents and/or servants do return all household goods unlawfully distrained from the plaintiff/applicant's house situate at Utange and the security guard stationed at Utange be withdrawn forthwith.
3. by way of mandatory injunction that the plaintiff be re- instated to the suit premises forthwith and the eviction carried out by the defendant's agents and or servants on 28th February, 2012 be declared illegal.
4. the costs of the application be provided for.

5. The said orders were granted on 6th December, 2012, and eighteen days later on 24th December, 2012, the defendant (the *ex parte* Applicant) filed an application for, and was by orders made on the same date, granted leave to commence judicial review proceedings for orders of certiorari and prohibition and the

court ordered that the leave so granted would operate as a stay. The Notice of Motion, the subject of this Ruling, was filed pursuant to the said leave.

6. The *ex parte* Applicant's counsel claims that the learned trial magistrate had no jurisdiction to hear and determine the application for what turned out in their terms, to be final and not interim orders. Barring a successful Preliminary Objection on a pure point of law, for example on a plea of limitation, or the existence of exceptional circumstances that no other remedy, such as compensation in damages and costs is available, it is trite law that courts will not ordinarily grant final orders upon an interlocutory application. But these are errors made by courts from time to time. The making of such errors do not amount to lack or absence of jurisdiction.

7. Counsel for the *ex parte* Applicant also pegged the argument of lack of jurisdiction upon the **PRACTICE DIRECTIONS ON PROCEEDINGS RELATING TO THE ENVIRONMENT AND THE USE AND OCCUPATION OF, AND TITLE TO LAND** issued by Hon. the Chief Justice on 9th February, 2012. Whereas a "*tenancy*" relates to land, where the term land includes all the permanent structures thereon, the existence or otherwise of a valid tenancy is subject to proof and cannot be implied or assumed. In the instant case the occupation by the Interested Party of a quarter or house within one of the *ex parte* Applicant's Housing Estates, was subject to another contract, the Interested Party's terms or conditions of service. That was subject of strict proof and the court erred in assuming the validity of that claim.

8. Though Article 159(2) (d) of the Constitution of Kenya, 2010 (the Constitution) enjoins the court to determine all matters according to substantial justice, and disregard **undue** technicalities, the supreme law did not intend that procedural law shall be ignored or that it was no longer good law.

9. Firstly therefore, Section 8(1) of the Law Reform Act (Cap 26, Laws of Kenya) clearly states that this court shall not issue any of the judicial review orders of certiorari, prohibition and mandamus in its civil or criminal jurisdiction. Though Section 8 of the Law Reform Act permits the invocation of the judicial review jurisdiction where there is an alternative remedy such as an appeal to the Superior Courts, the nature of the judicial review cannot be over-emphasized, and clearly understood in light of the Constitution.

10. **Secondly**, judicial review is today a constitutional remedy guaranteed under Article 47 as read with Article 23(3) (4) of the Constitution. Articles 47 (1) confers upon every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Where that right is challenged, the court is mandated to grant one of the judicial review remedies as provided under Article 23(3) of the Constitution.

11. **Thirdly**, the judicial review remedy is particularly concerned with review of administrative decisions of persons or body of persons or inferior tribunals charged with the exercise of administrative powers in the governance of the country at the national or county level and generally against abuse of power. In that regard therefore judicial review is concerned with the review of the decision-making process by such persons or tribunals, but not private rights or the merits of the decisions being challenged. Where a judicial officer has, in the exercise of his judicial function made a decision with which a party is aggrieved, the usual procedure is either an application for review of such a decision or an appeal to the superior court, and not an application for judicial review. Judicial review is not an appellate remedy whether civil or criminal. Judicial review is a jurisdiction which is "*sui generis*", **COMMISSIONER OF LANDS VS. KUNSTE HOTEL LIMITED KLR (E&L) 249.**

12. Consequently, the claim by the Applicant that the trial magistrate had no jurisdiction cannot be a basis for the grant of judicial review orders of either certiorari let alone prohibition, and I decline to grant any of those orders.

13. However, Article 165(6) of the Constitution confers upon this court supervisory jurisdiction over subordinate courts and over any person, body or authority exercising judicial or quasi-judicial authority, and not over a superior court. And for the purpose of such supervision, this Court may call for the record

of any proceedings before any subordinate court or person, body or authority referred to in sub-article (6), and may make any order or give any directions it considers appropriate to ensure the fair administration of justice.

14. In this regard therefore, the Plaint in Mombasa CMCC No. 905 of 2012 did not seek any of the orders sought and granted pursuant to the Notice of Motion of 6th December, 2014. The application and orders granted were a complete departure from the original pleadings, and were therefore a breach of Order 1, rule 6(1) of the Civil Procedure Rules 2010. For such an application and the subsequent orders to stand, there ought to have been an amendment of the plaint as required by the said rule –

“6(1)No party may in any pleading make an allegation of fact or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.

(2) Sub-rule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.”

15. In the suit giving rise to the application herein, there was no pleading or prayer for a declaration that the Interested Party is the legal tenant of the subject quarter, there was no pleading for restoration of the goods allegedly unlawfully distrained, and there was no prayer for a mandatory injunction. Having failed to amend his pleading in accord with rule 6(2) of Order 2 of the Civil Procedure Rules, the Interested Party could not make claims by way of an interlocutory application.

16. For those reasons, the orders made on 6th December, 2012 are hereby set aside with a direction that each party bears its own costs.

17. I direct that the Mombasa CMCC No. 905 of 2012 be fixed for hearing and determination in the next 120 days.

18. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 28th day of April, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

No Appearance for Applicant

Mr. Miyala for Interested Party

Court Assistant Mutisya