



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL MISC. APPLICATION NO. 119 OF 2011**

**REPUBLIC.....APPLICANT**

**VERSUS**

**TAWA SRM COURT.....1<sup>ST</sup> RESPONDENT**

**EUNICE NTHENYA MUIA.....2<sup>ND</sup> RESPONDENT**

**MAKUENI COUNTY LAND REGISTRAR....3<sup>RD</sup> RESPONDENT**

**EX PARTE.....GEORGE MUSYOKA KALUVU**

**RULING**

1. The Ex-Parte Applicant, George Musyoka Kaluvu (*hereinafter Applicant*) filed the Notice of Motion dated 30<sup>th</sup> May 2011 on 10<sup>th</sup> August 2011 pursuant to the leave granted by the court on 13<sup>th</sup> May 2011. The application seeks the following orders:

(1) *That an order of prohibition directed at the Respondents and/or their agents do issue prohibiting them from enforcing/executing the decree of the 2<sup>nd</sup> Respondent which was issued by the 1<sup>st</sup> Respondent on 7/9/2010.*

(2) *That an order of certiorari do issue to bring into this court for purposes of quashing the proceedings and decree of the 2<sup>nd</sup> Respondent in case No. 220 of 2009 which was issued by the 1<sup>st</sup> Respondent on 7/9/2010 and any other subsequent proceedings of the said Respondents subsequent thereto, including costs.*

(3) *That an order of injunction do issue restraining the 2<sup>nd</sup> Respondent, her agents and/or servants from utilizing the suit land – Mbooni/Kalawani 1773 which has been subdivided by the 2<sup>nd</sup> Respondent and given new numbers being 1815 and 1816.*

(4) *Costs of these proceedings be in cause.*

2. According to the statement and the affidavits filed herein, the Applicant's late father, Samson Kaluvu Ndoos was the proprietor of land parcel Mbooni/Kahawani/143 (*currently Mbooni/Kabweni/1773*) within the County of Makueni. The Applicant's complaint is that the 2<sup>nd</sup> Respondent, Eunice Nthenya Muia who is not a beneficiary to the estate of the late Samson Kaluvu Ndoos filed SRMCC Tawa No. 220 of

2009 claiming to have purchased a portion of the aforesaid land. The lower court entered judgment in favour of the 2<sup>nd</sup> Respondent.

3. The applicant was aggrieved by the said judgment and appealed in HCCA 133 of 2010.

4. The Applicant contended that the lower court lacked the requisite jurisdiction to entertain the case and that the 2<sup>nd</sup> Respondent lacked *locus standi* to institute the same. It was further averred that the Applicant was not given a chance to be heard.

5. The application was opposed. The 2<sup>nd</sup> Respondent stated that she initiated the proceedings in SRMCC Tawa No. 220 of 2009 as a purchaser for value. It is further deponed that the Applicant was not denied audience in the lower court as the Applicant's defence was struck out for having been filed out of time. The 2<sup>nd</sup> Respondent filed a preliminary objection which raises the same grounds.

6. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed the grounds of opposition dated 19<sup>th</sup> March 2014. The grounds are that the Applicant ought to proceed with the appeal that was filed. That the orders sought cannot be granted as the Applicant failed to commence these proceedings within six months of the decision sought to be quashed. That the provisions of Order 5 rule 2, Civil Procedure Rules have not been complied with.

7. The application and the preliminary objection were canvassed simultaneously by way of written submissions. I have considered the said submissions.

8. The judgment of the lower court that is the subject matter of these proceedings was delivered on 7<sup>th</sup> September 2010. The chamber summons application that sought leave to commence the proceedings herein was filed on 13<sup>th</sup> May 2011. This was a period of over eight months. This is contrary to the provisions of Order 53(2) Civil Procedure Rules and Section 9(3) Law Reform Act.

9. Leave to institute the proceedings herein was granted on 13<sup>th</sup> May 2011. The substantive motion was filed on 10<sup>th</sup> August 2011. Although this period was in excess of the 21 days provided for by Order 53 rule 3(1) of the Civil Procedure Rules, it is evident from the proceedings exhibited by the Applicant that the court file could not be traced and a skeleton file had to be reconstructed. I am prepared to accept that the Applicant was thwarted from filing their substantive motion in time.

10. The Applicant argued that the lower court did not have the requisite jurisdiction to entertain the claim. The dispute involves the ownership of a plot that was said to have been purchased at the price of Ksh 115,565/=. The claim was therefore within the jurisdiction of the lower court. The other issue raised by the Applicant concerning the 2<sup>nd</sup> Respondent's capacity to institute the claim goes to the merits of the case and can be addressed in an appeal. The same applies to the question as to whether the Applicant was properly heard by the lower court or whether the defence case was struck out.

11. As stated by the Court of Appeal in **Municipal Council of Mombasa –vs- Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**): –

***“Judicial Review is concerned with the decision-making process, not with the merits of the decision itself. The Court would concern itself with such issues as to whether the decision maker had the 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. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision”.***

12. With the foregoing, I find no merits in the application and discuss the same with costs.

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**B. THURANIRA JADEN**

**Dated and delivered** at Machakos this 14<sup>th</sup> day of May, 2015

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**B. THURANIRA JADEN**

**JUDGE**