



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 198 OF 2012

REPUBLIC.....APPLICANT

VERSUS

RESIDENT MAGISTRATE'S COURT,

MILIMANI COMMERCIAL COURT.....1ST RESPONDENT

ROBERT NJENGA MWAURA.....INTERESTED PARTY

EX-PARTE

BETTY WANGU WAMBUGU

JUDGEMENT

Through the notice of motion dated 14th May, 2012 Betty Wangu Wambugu (the ex-parte applicant) prays for an order of certiorari to remove into this Court and quash the decision of the respondent (the Resident Magistrate's Court, Milimani Commercial Court) issued on 20th March, 2012 directing the ex-parte applicant to vacate, cease and desist from occupying the house on the property known as L.R. No. 7785/292 (I.R. No. 30597/288) Runda, Grove Estate. She also prays for the costs of the application. Her former husband Robert Njenga Mbugua is the Interested Party.

According to the papers filed in Court by the applicant, it emerges that the applicant and Interested Party's marriage was annulled on 29th July, 2009 vide **Chief Magistrate's Court at Nairobi, Milimani Commercial Court, Divorce Cause No. 159 of 2008 ROBERT NJENGA MWAURA v BETTY WANGU WAMBUGU.**

On 20th March, 2012 the Interested Party filed a chamber summons application in the said Divorce Cause seeking orders that:

1. **The Application herein be certified urgent and heard ex-parte in the first instance.**
2. **That the respondent be and is hereby ordered to vacate, cease and desist from occupying the house occupied by the applicant and the children of the marriage on Land reference number 7785/292 I.R number 30597/288 Runda Grove Estate Nairobi pending the hearing and determination of this application.**
3. **That the respondent be and is hereby ordered to vacate, cease and desist from occupying the house occupied by the applicant and the children of the marriage on Land reference number**

7785/292 I.R number 30597/288 Runda Estate Nairobi.

- 4. The Respondent is restrained from reentering, encroaching, occupying, accessing or in any other way interfering with the applicant's occupation and quite enjoyment of the house occupied by the applicant and the children of the marriage on Land reference number 7785/292 I.R number 30597/288 Runda Estate Nairobi.**
- 5. That the Officer Commanding the Gigiri Police Station be ordered to enforce the orders issued herein.**
- 6. The cost of this Application be granted to the Applicant.**
- 7. Any other order that the court may deem fit to grant.**

On 21st March, 2012 Mr. Sironka N. a resident magistrate issued an order directing the ex-parte applicant to vacate the house in question. The OCS Gigiri Police Station was directed to enforce the order. The magistrate directed that the application be heard *inter partes* on 27th March, 2012.

It is the ex-parte applicant's case that on 7th May, 2012 the respondent found her to be in contempt of the order of 20th March, 2012.

The applicant contends that the respondent had no jurisdiction to issue the order of 20th March, 2012 and that the said order was issued in breach of the rules of natural justice.

The Interested Party opposed the application by way of a replying affidavit sworn on 30th May, 2012. It is the Interested Party's case that the applicant failed to disclose material facts leading to the issuance of the order of 20th March, 2012. The Interested Party avers that the applicant left for the United States of America (USA) in 2000 where she worked at various hospitals. He avers that he was the primary caregiver and provider for their two children throughout her absence. The Interested Party swore that on 15th March, 2012 the applicant returned to Kenya and went to the house unannounced and uninvited and that is when he moved to Court and obtained the orders in question.

The Interested Party contends that the respondent had jurisdiction to issue the order in question since it related to the custody of the child of the marriage by the name Shaka. He asserts that the matter was not about ownership of property.

The Interested Party avers that when the matter came up for *inter partes* hearing on 27th March, 2012 the Court directed the applicant to comply with the order first. The Interested Party asserts that the applicant had other remedies including seeking a review of the order or filing an appeal against it.

Further, the Interested Party avers that the applicant moved to the Family Division of the High Court and filed HCCC No. 24 of 2012 and was given orders *ex-parte* but the orders lapsed after she failed to serve them and that is when she filed these proceedings. It is the Interested Party's case that the applicant filed HCCC No. 24 of 2012 on 29th March, 2012 two days after she had been directed by the respondent to comply with the court order and this demonstrates abuse of the court process by the applicant.

It is the Interested Party's case that the Family Division is already seized with the issue of occupation and ownership of the house.

When the matter came up for highlighting of submissions on 25th November, 2013 Mr. Njuki for the applicant identified three issues for the determination of the Court namely:

1. Did the magistrate act *ultra vires* his jurisdiction in granting the order of 20th March, 2012?
2. Is the issuing of an eviction order *ex-parte* a breach of the rules of natural justice? and
3. Was the magistrate gazetted to act as a children's court?

Having gone through the papers filed in Court I find that the proper question to be answered in this judgment is whether this Court is properly seized of this matter.

Through the verifying affidavit sworn on 10th May, 2012 the applicant did indeed reveal that she had filed HCCC No. 24 of 2012 in the Family Division seeking the division of the matrimonial property. She attached to her verifying affidavit the pleadings in that case and among the pleadings is a notice of motion dated 27th March, 2012. In the notice of motion the applicant essentially sought an order restraining the Interested Party from conveying, wasting away, alienating, selling or otherwise disposing of certain properties, including the house in question herein and/or otherwise restricting the applicant's peaceful enjoyment of the properties in question. I have intentionally put emphasis on the last limb of the prayer. In essence the applicant was trying to overturn the order issued by the respondent on 20th March, 2012.

According to the Interested Party *ex-parte* orders were indeed issued but vacated on 24th April, 2012. The applicant did not disclose this material fact when seeking leave and neither does she deny the Interested Party's assertion that indeed such an order was issued and later vacated. It appears that the applicant only moved to this Court after the order was vacated. The Interested Party is therefore correct that the application before this Court is bad for non-disclosure of material facts and is also an abuse of the court process.

In coming before this Court, the applicant is indirectly appealing against the decision of the Family Division to vacate the *ex-parte* order granted to her to have peaceful enjoyment of the house. The issue here is no longer the order of the respondent but the order of the High Court. This Court has no supervisory jurisdiction over a superior court-see Article 165(6) of the Constitution.

The circumstances under which the order of 20th March, 2012 was issued are no longer examinable by this Court considering that the applicant had appealed, albeit indirectly, against the order of the respondent. She should pursue the matter before the Family Division. Judicial policy does not encourage a multiplicity of suits between the same parties over the same matters. The application therefore fails.

Considering the relationship between the applicant and the Interested Party, I make no order as to costs.

Dated, signed and delivered at Nairobi this 30th day April, 2014

W. KORIR,

JUDGE OF THE HIGH COURT