



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 66 OF 2012

IN THE MATTER OF AN APPLICATION BY MOAHED SALEH MAHDI

FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE RESIDENT MAGISTRATE'S COURT ACT

BETWEEN

MOHAMED SALEH MAHDI.....APPLICANT

VERSUS

HON. B.M. EKHUBI, THE RESIDENT MAGISTRATE MOMBASA...RESPONDENT

AND

1. RANA AUTO SELECTIONS LIMITED

2. ZAINAB SALEH MAHDI

3. ABDULRAHIM MOHAMED SALEH MAHDI

4. SHADIA MOHAMED SALEH MAHDI

5. ABUBAKAR KHAMIS SALEH MAHDI

6. OMAR KHAMIS

7. MALIK CAR LINKS (K) LTD.....INTERESTED PARTIES

RULING

The applicant **MOHAMED SALEH MAHDI** filed the Ex-parte chamber summons dated 27th August, 2012 in which he sought leave to apply for the following

“(a) an order of certiorari to remove to this Honourable Court for purposes of quashing

forthwith the proceedings, pleadings, decisions/rulings of 6th March, 2012, 5th July, 2012 and subsequent orders in CM CIVIL SUIT NO. 216 of 2012.

(b) Costs of the proceedings

2. The grant of leave herein do operate as stay of further proceedings and execution of orders given and issued in CMCC No. 216 of 2012 at Mombasa.

3. Costs of the application be in the motion.”

The prayer for leave was granted on 27th August, 2012 by **Hon. Justice TUIYOTT**. The prayer that leave act as a stay was not argued. Instead **MR. MKAN** acting for **RANA AUTO SELECTIONS LIMITED** the 1st Interested Party did undertake on behalf of his client (who is the plaintiff in CMCC 216 of 2012) that no hearing dates would be taken in CMCC No. 216 of 2012. That undertaking effectively disposed of the question of stay. On 10th December, 2012 it was agreed between the parties that the matter be disposed of by way of written submissions. However, on 29th October, 2013 **MR. OLWANDE** acting for the Applicant indicated that he would not file any written submissions but would rely entirely upon the pleadings as well as the list of authorities filed on 30th August, 2012. The respondents likewise did not file any submissions but relied on a letter dated 24th September, 2012 penned by the Hon. Resident Magistrate who had conduct of CMCC No. 216 of 2012. The 1st Interested Party did file their submissions on 22nd August, 2013.

This application for Judicial Review arises from CMCC No. 216 of 2012. In that case the 1st Interested Party filed a plaint dated 9th February, 2012 claiming that

“4. By an oral agreement made on 25th January, 2012 between the plaintiff and the defendants it was agreed that the defendants shall let to the plaintiff a premises situate on plot No. Mombasa/Block XIX/97 for a monthly rent of Kshs. 140,000/= and the plaintiff shall take possession of the said premises on the 1st February, 2012 and to carry out necessary repair after which they would move in on or before 15th February, 2012.”

The Interested Party proceeded to claim in their plaint that they had paid to the applicant (who is the registered proprietor and landlord of plot No. Mombasa/Block XIX/97) a sum of Kshs. 767,640/= being 2 months' rent deposit, 2 ½ months' rent advance, advocates fee and stamp duty. However, before a formal agreement could be signed, the 1st Interested Party found that another tenant had occupied the premises causing him to suffer loss of the Kshs. 767,640/= plus business. By their plaint the 1st Interested Party sought to compel the applicants by injunction to cease any renovations, leasing or interference with the premises. They also sought specific performance damages and costs.

On their part the applicant denied that the 1st Interested Party was a tenant at all. The applicant filed a replying affidavit on 16th February, 2012 stating inter alia that

“4. THAT the plaintiff was informed that the rental is subject to good will of Kshs. 2 million to be paid by the plaintiff in addition to the rent of Kshs. 220,000/= per month. The plaintiff thereafter made out a bankers cheque as deposit and was to pay the Kshs. 2 million and balance sum by 29th January, 2012. However, on 29th January, 2012 the plaintiff was not able to pay the said Kshs. 2 million nor the sum difference. Consequently the plaintiff opted out and collected his cheque from our advocate's office on 30th January, 2012. Annexed herewith is a copy of acknowledgment signed by the plaintiff accepting refund of his cheque No. 026986.....

5. THAT thereafter the defendants proceeded to rent out the premises to other tenants who were able to pay the rent of Kshs. 220,000/= and Kshs. 2 million good will the tenants took

possession on 1st February, 2012 and have been in occupation since then.

6.

7.

8. **THAT the premises were already let out when the plaintiff filed this suit. Consequently the suit has been overtaken by events and the orders and/or prayers seek (sic) cannot be granted.**

The matter was heard in the subordinate court. For purposes of this application two applications filed in the subordinate court are pertinent. These are

1. A preliminary objection dated 7th March, 2012 by which the defendant (1st Interested Party herein) sought to challenge the jurisdiction of the Subordinate Court to hear and determine an application for contempt brought by the 1st Interested Party. This application was argued on 7th June, 2012. The defendant (Applicant) was granted a cash bail of Kshs. 40,000/= pending the ruling. On 5th July, 2012 the trial court delivered its ruling in which it ordered that the defendant be committed to civil jail for a period of one (1) month. It is this that led to the filing of this miscellaneous application. The applicant raised two main issues

i. The Subordinate Court lacked the requisite jurisdiction to hear and determine the matter in view of the fact that the value of the premises given as Kshs. 10 million was way above the pecuniary jurisdiction of the Subordinate Court that of a Chief Magistrate was Kshs. 7.0 million whilst that of a Resident Magistrate being only Kshs. 2.0 million.

ii. The Hon. Resident Magistrate and indeed the Subordinate Court had no power to punish for contempt.

The parameters of Judicial Review were set out by the Court of Appeal in the case of **MUNICIPAL COUNCIL OF MOMBASA VS. REPUBLIC & UMOJA CONSULTANTS LTD**, Civil Appeal No. 158 of 2001 in which it was held

“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 makers 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.”

With this in mind I will proceed to consider the two issues raised in this application.

1. PECUNIARY JURISDICTION

The question here is whether the Magistrate’s Court in CMCC No. 216/2012 exceeded its jurisdiction in hearing this matter based on the value of the premises. In the case before the Subordinate Court the dispute was over tenancy and **not** over ownership of the premises. As such the value of the premises would have no bearing on the jurisdiction of the court hearing the matter. In any event the applicant themselves in their pleadings initially gave the value of the premises as Kshs. 5.0 million placing it within the jurisdiction of the Chief Magistrate’s Court. The applicant later changed their minds and gave the value as Kshs. 10.0 million – this change and the basis for it remain unexplained. As I have stated before this was a dispute over tenancy thus the pecuniary jurisdiction is not a factor. I find that the magistrate’s court was possessed with sufficient and requisite jurisdiction to handle the matter. Therefore this limit of the application fails and is hereby dismissed.

2. JURISDICTION OF THE MAGISTRATE'S COURT TO PUNISH FOR CONTEMPT

The power given to courts in Kenya to punish for contempt is to be found in the Judicature Act Cap 8, Laws of Kenya. Section 5(1) of this Act provides

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts.” [my emphasis]

This provision makes it very clear that the power to punish for contempt rests **exclusively** with the High Court and the Court of Appeal. This is so even despite the provisions of Order 40 rule 3 of the Civil Procedure Rules upon which the trial magistrate relied. The trial magistrate argued in his ruling finding the applicant in contempt, that the Judicature Act and the Civil Procedure Act both being Acts of Parliament conferred concurrent authority. However, the correct position is that Order 40 rule 3 is derived from the Civil Procedure **Rules** (not the main Act), which Rules are subsidiary to the Judicature Act. The learned trial magistrate misapprehended the mandate given by Order 40 rule 3. He did not have jurisdiction to punish for contempt thus his orders committing the applicant to civil jail for one (1) month lack basis and must be quashed. The trial magistrate had also granted to the applicant a cash bail of Kshs. 40,000/= in anticipation of his ruling. Since that ruling has now been quashed I direct that this cash bail of Kshs. 40,000/= be refunded to the applicant. This application succeeds to that extent. Each party to meet its own costs.

Dated and delivered in Mombasa this 28th day of April, 2014

M. ODERO

JUDGE

In the presence of:

Mr. Mkan for 1st Interested Party

Ms. Kisoie for 2nd Interested Party

Court Clerk Mutisya