



REPUBLIC OF KENYA

High Court at Malindi

Judicial Review 61 of 2011

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE REGISTRERED LAND ACT CAP 3001 LAWS OF KENYA

AND

IN THE MATTER OF: REPUBLIC

=VERSUS=

THE CHIEF MAGISTRATES'S COURT AT MALINDI.....RESPONDENT

EXPARTE

- 1. SHAIKH ASBERALI SADIQLI**
- 2. SHAIKH QURBAN HUSSEIN RAHSEED**
- 3. AMIL SAHEB**
- 4. SHAIKH SHABIR SHAIKH BUHNUDDIN**
- 5. SHEIKH MUSTAFA SHAIKA ABULDRASUL**
- 6. SHAIKH ABDUL ANWARALI**
- 7. SHAIKH ASHUJAUDDIN MULLA MANSOORALI**
- 8. MULLA ASGERALI SHAIKH RAJABALI**

(all suing as the nominees appointed BY His Holiness Mohamed Burhanuddin for and on behalf of the Bohra Community in Lamu).....APPLICANTS

VERSUS

MOHAMED ALI MOHAMED.....INTERESTED PARTY

RULING

1. What is before the Court is the Notice of Motion dated 15th

November 2012 brought under Section 8 and 9 of the Law Reform

Act and Order 53 of the Civil Procedure Rules.

2. The Notice of Motion is seeking for the following reliefs:

a) That this Honourable Court do grant orders of Certiorari and Prohibition to remove to this Honourable Court for purposes of quashing, the proceedings and orders of the Chief Magistrate at Malindi made on 6th July, 2011 in CMCC No. 178 of 2010 – MULLA ASGERALI SAIDQALI & 8 OTHERS -VS- MOHAMED ALI MOHAMED and all the subsequent orders and directions.

b) That this Honourable Court do prohibit the Chief Magistrate based at Malindi from entertaining, hearing, determining and or proceeding with the purported case against the *ex-parte* applicants/and/or in any other manner whatsoever involving the *exparte* applicants in CMCC No. 178 of 2011.

c) That the costs of this Application be in the cause.

3. The Application is premised on the statement and the Verifying Affidavit of Shaikh Asgerali Sadiqali and on the following grounds:

(a) That on the 6th July 2011, the Chief Magistrate's Court at Malindi in CMCC No. 178 of 2010 issued a Judgement in which the suit was dismissed on merits with costs despite the court not having jurisdiction to hear and adjudicate on the matter;

(b) That in the Judgement the Respondent concerned that the court has no jurisdiction but the court proceeded to hear and adjudicate on the matter on merits.

4. The Applicants have deponed in the Verifying Affidavit that they are the trustess of the estate of the deceased SAKINABA **BINTI EBRAHIM JEE** whose estate comprises Title No. **LAM/BLOCK 1/628** and which was consecrated as a Warkf property for the benefit of the Bohra Community.

The Applicants herein sued **Mohamed Ali Mohamed in No. 178 of 2010** for trespass on the suit property.

5. The Applicants have further deponed that on 6th July, 2011, the learned Chief Magistrate dismissed the entire suit on merits despite not having the jurisdiction to her and adjudicate on the matter.

6. The Applicants now want the Judgement of the learned Chief Magistrate quashed for want of jurisdiction to hear and determine the matter on merit.

7. The Interested Party, Mohamed Ali Mohamed, filed a Replying Affidavit sworn on 4th February 2012 in which he has deponed that the Applicants slept on their rights and never bothered to lodge any appeal against the said judgement; that it is the Applicants herein who filed the suit in the lower court and that thought he raised the issue of the court's lack of jurisdiction in his defence, the Applicant did not respond to the same.

8. According to the Interested Party, It is only after the Judgement was delivered against the Applicants that they raised the issue of jurisdiction, which jurisdiction they conferred upon when they filed the suit.

9. The Interested Party has fully deponed that the learned Magistrate Judgement cannot be

challenged though judicial review and the Application is misplaced, that there are well established procedures in law through which judgment can be challenged and that the Applicant is meant to frustrate him as a lessee of the Applicants property.

10. The Parties herein filed their submissions through their advocates reinstated the facts in their affidavits. I have considered the said submissions.

11. The Applicants counsel submitted that it is not in dispute that the learned Chief Magistrate acted in excess of her powers, a fact which she admitted in her Judgement. Consequently, it was submitted, the learned Chief Magistrate's decisions is unlawful *null* and *void ab initio*.

12. Counsel further submitted that the issue of jurisdiction in statutory and cannot be consented to or assumed. Counsel relied on several authorities to argue on this particular aspect.

13. The Interested Party's advocate filed his submissions on 19th March 2013 and did not say anything different from the averments in the Replying Affidavit.

14. The Attorney General, on behalf of the learned Chief Magistrate filed his submissions on 5th April 2013 in which he states that parties have a right of appeal to the High Court of dissatisfied with the decisions of the subordinate courts.

15. According to Counsel, the Applicants who were the Plaintiffs in the lower Court, did not file the suit in the lower court to challenge ownership of the property, but they were challenging the rights of the Interested Party to construct on the suit property. In that, respect, counsel argued, the court had jurisdiction.

16. The typed copy of learned Magistrates Judgement has been annexed on the interested party's Replying. The said Judgement shows that the Plaintiffs, who were the appointed Trustee, of the estate of **Saiabai Binti Ebrahimjee**, sought for an order of permanent injunction against the Interested Party herein from trespassing or developing on plot number Lamu/Block 1/628 and an order for demolition of the illegal structures on the said plot.

17. According to the Judgement of the lower court, the said plot was consecrated as a **Warkf property (Islamic trust property)** by the deceased for the benefit of the Bohra Community.

18. After hearing the parties and analysing the evidence, the learned Magistrate, at page 30 of her Judgement held as follows:

“I would also wish to point out that the Plaintiffs at paragraph 3 of the Plaint brought this suit as trustee. This suit was wrongly filed in this court. This is because under the Trustees Act, 6p. 167 Laws of Kenya, the court which her jurisdiction in the High Court or a Judge thereof. As such the court lacked jurisdiction and thought it was pleaded by the defendant it was not raised. I leave it at that.”

19. The learned Magistrate proceeded to dismiss the suit with costs not for want of jurisdiction, but because ***“the Plaintiff has not proved his case on a balance of probabilities.”***

20. Thought the Interested Party concedes that indeed the learned Magistrate did not have jurisdiction to entertain the claim, and that he raised the issue of jurisdiction in his defence, he has taken the view that, **firstly**, the Applicant should have filed an appeal in the High Court and **secondly**, that the Applicants themselves conferred upon the court jurisdiction.

21. This two issues raised by the Interested Party were canvassed before my sister Lady Justice Meoli at the stage of granting leave to the Applicant to file the current motion.

22. The learned Judge, at page 2 of her Ruling held as follows:

“the court either had jurisdiction or it did not. The court cannot confer upon itself jurisdiction where it none and neither can parties by consent queth a court with it.”

23. The court quoted with approval Smith & Bailey on the Modern English Legal Systems 3rd ed. From page 976, which states that an application for judicial review ought to be made where a challenge is based in the doctrine of **“ultra vires”** rather than exercising the rights of appeal on a point of law.

24. The courts have established that the existence of another remedy is not a bar to the pursuit of Judicial Review. In the case of **Commissioner of Lands & Another -Vs- Coastal Aquaculture Ltd**, Civil Appeal No. 252 of 1996, the Court of Appeal held that the existence of a right to appeal is not a bar to an application for an order of prohibition, or that of *certiorari* as was held in **David Mugo t/a Manyatta Auctioneers -Vs- Republic**, Civil Appeal No. 265 of 1997.

25. However, it was further held by the Court of Appeal in the Coastal Aquaculture case (*supra*) that if there is an equally, convenient, beneficial and effective remedy available a court will generally decline to exercise its discretion in favour of an applicant for a prerogative order. This was the same position that the Court of Appeal held **Republic -Vs- National Environment** (2011) e KLR in that the **“existence of an alternative remedy cannot by itself prevent a court from issuing a Judicial Review Order.”** The Court of Appeal quoted extensively the cases of **Republic -Vs- Birmingham City Council, ex-parte Ferraro Ltd.** (1993) 1 LL ER 530, Harshoam District Commission, *ex-parte* Weriham (1955) 1 WLR 680; **Harley Devt Inc -Vs- Commissioner of Inland Revenue** (1966) 1 WLR 727; **Republic -Vs- Wandsmith County Court** (2008) 1 WLR 475.

26. The Applicant in the instant case is challenging the jurisdiction of the lower court in hearing on merit and delivering its Judgement dated 6th July, 2011 it is therefore more convenient for the applicant to challenge the decision of the lower court, in which the court itself held that it had jurisdiction, by way of judicial review and not appeal.

27. It is now settled that a court which has no jurisdiction to deal with a matter should down its tool the moment it makes such a finding. A court without jurisdiction cannot hear a matter on merit, if it does its decision shall be *ultra vires, null and void*.

28. In the case of **Republic -Vs- Chairman, Lands Disputes Tribunal Kirinyaga District & Another Ex-parte Peter Maru Kariuki** (2205) e KLR, the court held as follows:

“If a court has no jurisdiction over the subject matter of the litigation, its Judgements and orders, however precisely certain and technically correct, are more nullities, and not only avoidable, they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the court in which they are rendered, but declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred by consent of parties and any waiver in their part cannot make up for the lack or defect of jurisdiction.”

29. The learned trial Magistrate found as a fact in her Judgement that the suit was wrongly filed in her court because under the Trustees Act, cap 167, the court which had jurisdiction in the High Court or a judge thereof. Having found so, and having exercised a jurisdiction which it correctly observed that it did not, I find and hold that the Judgement of the learned Magistrate delivered on 6th June 2011 is null and void.

30. Consequently, I allow the Applicants Application dated 15th November 2012 as prayed.

Dated and Delivered at Malindi this 23rd day of May 2013.

O. A. ANGOTE

JUDGE