REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION (JR) NO. 6 OF 2011

REPUBLIC.....APPLICANT

V E R S U S

MUNICIPAL COUNCIL OF MOMBASA.....1ST RESPONDENT

LAND REGISTRAR, MOMBASA.....2ND RESPONDENT

AND

MBOLE NZOMO ANTHONY.....EX-PARTE APPLICANTS

AND

SHREEJI ENTERPRISES LIMITED.....INTERESTED PARTY

RULING

Some background to these proceedings helps clarify the controversy now at hand. On 5th August 2010, The Exparte applicant and three others filed Mbsa Civil Suit No. 265 of 2010 (the suit) against Shreeji Enterprises Ltd (*the interested party herein*), Municipal Council of Mombasa (*the 1st Respondent herein)* and three others. Amongst other prayers therein, the plaintiffs sought a prohibitory injunction to restrain the 1st Respondent from permitting a change of user for property known as MN/V/548.

It would seem that at the time of filing the suit the plaintiffs were unaware that the council had already, on

27th July 2010 granted that permission. When they learnt of it the plaintiffs filed a Notice of Motion on 6th October 2010 in which that change of user was the subject, it is not necessary to give the details at this stage. The Notice of Motion and four other applications were argued before Ojwang, J (*as he then was*) who by a decision delivered on 18th March 2011 struck out the plaintiffs entire suit. By a Notice of Appeal dated 23rd March 2011 the plaintiffs gave notice of their intention to appeal against the whole of that decision.

Prior to the delivery of that decision, the exparte applicant sought and was on 27th January 2011 granted leave to take out the present judicial review proceedings. In granting leave Ojwang, J (as he then was) ordered that the leave do operate as stay of the Development permission/change of user granted on 27th July 2010 by the 1st Respondent. Agitated by the grant of leave and the stay order, the interested party rushed back to court and on 23rd February 2011 obtained amongst other orders an order requiring the exparte applicant to provide as security a sum of money or bank guarantee or insurance bond of Kshs. 3,000,000/- as against any losses that it could sustain as a result of the stay. This was to be done within 15 days of the order. Before the end of that period the exparte applicant filed an application seeking to have the order on security varied or set aside.

It is against this background that I am asked to consider two applications; of 18th February 2011 by the interested party and that of 8th March 2011 by the exparte applicant. The prayers now sought in the application of 18th February 2011 is that-

"the leave granted to the exparte Applicant herein on the 27th January 2010 (should be 2011) to institute Judicial Review proceedings herein and the consequential order of stay be set aside."

The application of 8th March 2011 asks this court to set aside, vary and for discharge the orders of Ojwang J (*as he then was*) made on 23rd February 2011 requiring the exparte applicant to furnish security for the sum of Kshs. 3,000,000/- within 15 days. I propose to start with the application of 18th February 2011 as its outcome may determine the fate of the later application.

Emerging from the arguments of counsel are the following issues for determination-

(a) is the exparte applicant in contumelious disobedience of the court order of 23rd February 2011?

(b) Was the application for leave to apply for certiorari time-barred thereby making the leave granted a nullity?

(c) In seeking leave, did the exparte applicant fail to make a full and frank disclosure of all material facts

and if so what are the consequences?

(d) Are these proceedings sub judice the suit and therefore an abuse of court process?

An issue which must be dealt with at once is whether or not the exparte applicant is in contumelious disobedience of the Court Order of 23rd February 2011. The order made by Ojwang J (*as he then was*) was exparte and peremptory in nature requiring the exparte applicant to provide security in the sum of Kshs. 3,000,000/-within 15 days of 23rd February 2011. The last day for deposit would be 10th of March 2011. Two days before that deadline the exparte applicant filed an application under Certificate of Urgency seeking to have the order stay, varied or set aside. In my view there was no disobedience. The Exparte applicant approached court before the time for compliance had lapsed with an application requesting that it be set aside. It would have been different if the application had been made after the lapse of the time and non-compliance. Whether the application demonstrates good reason for staying, setting aside or varying the peremptory order is of course another matter.

The application for leave was filed on 27th January 2011. It sought, inter alia, leave to take out proceedings in the nature of certiorari to bring to this court and quash the decision of the 1st respondent made on 27th July 2010 approving an application for development permission. The interested party contends that it is time barred in respect to certiorari by application of the timelines in Order 53 Rule 2 which reads as follows-

"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act, and where the proceedings is subject to appeal and time is limited by law for the bringing of the appeal, the Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

The argument by interested party is that the last day for bringing the application ought to have been on 26th January 2011 and so the application was late by a day.

Counsel for the interested parties argues that in computing a calendar month a period expires one day before the day in the next month corresponding to the day upon which the period starts. So the period that started on 27th July 2010 when the change of user was granted ended on 26th January 2011 and so the application for leave made on 27th January 2011 was time barred. I would not for a moment agree. The Court of Appeal had occasion to consider computation of time where a statute provides the period for doing of an act to be in calendar month/s. The three Judges in **Kermuli –Vs- Ngachi Civil Appeal No. 125 of 1985 [1988] KLR 273** gave divergent methods. Nyarangi JA was of the view that the computation should exclude the month when the period starts to run (unless of course this is the first day of the month). Gachuhi JA, look the position (*and borrowing from Stroud's Judicial Dictionary*) that one calendar month is from one day of the month to the corresponding day in the other. On the other hand Platt JA, borrowing from Halsburys Laws of England 3rd Edition Vol. 37 was of the view that "the period expires with the day in the succeeding month immediately preceding the day corresponding to the date

upon which the period starts."

Although using different approaches that did not agree, all the three judges were unanimous that the day the thing happened is not counted (*Section 57 of The Interpretation and General Provisions Act Chapter 2*). Even applying the approach of Platt JA which is the most restrictive, the application for leave herein would still be within time. The date the change of user was granted was 27th July 2010. When you exclude it, the period starts to run from 28th July 2010 and expires on 27th January 2011. The application for leave was filed on this last day.

Even more fundamentally, in my view, is that the decision on change of user is not one of the formal orders specified by Order 53 Rule 2. I have to agree with the decision of the three judge bench in **Nrb Misc 1279 of 2004 Republic –Vs- Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others Ex parte Mwalulu & 8 Others** in which the Court held as follows:-

"A careful scrutiny of Section 9 of the Law Reform Act, pursuant to which Order 53 Rules were made and in particular Rules 2 and 7 which it is contended denies this court jurisdiction to grant or give the orders of certiorari outside 6 months reveals that only formal judgments, orders, decree, conviction or other proceedings of an inferior court or Tribunal fall within the six months period stipulated see Order 53 rule."

At the time the application for leave was filed, the suit was pending before Justice Ojwang for ruling. As fate would have it the application was heard by the same judge. For reasons only known to the exparte applicant the application was completely silent as to the existence of the Civil Suit. Looking at the Court record of 27th January 2011 when the application was argued and allowed no mention whatsoever was made of the civil suit. Again the Judge when granting the order did allude to it.

So it is granted that the existence or pendency of the suit was not disclosed. Was this non-disclosure material? The answer to this lies in the substance of the suit and its nexus, if any, with these proceedings. Some detail is necessary. Prayer 3 of the plaint sought an order-

"As against the 4th and 5th Defendants, a prohibitory injunction restraining the 3rd and 4th Defendants by themselves, their servants and or agents <u>from issuing a change of user</u> and or Environment Impact License respectively for Plot No. MN/V/548 to the 1st and 2nd Defendants as themselves, their proxy companies, servants, and or agents, for the use in manufacture of sodium silicate or manufacture of any other chemical product, or any other user that violates the plaintiff's right to a clean and healthy environment."(emphasis mine)

Paragraph 14 and 15 of plaint which partly lays out the cause of action of the suit reads, in part, as follows-

"The Plaintiffs claim against the 4th Defendant and 5th Defendants is the 4th and 5th Defendants intends to aid, abet , and whitewash the 1st, 2nd and 3rd Defendant's illegal and wrongful hazardous activities by purporting to issue a change of user of the suit plot from the current Light Industrial User to Heavy Industrial User that is in violation of the letter and spirit of Physical Planning Act whilst the 4th Defendant intends to issue an Environment Impact License in violation of the letter and spirit of the Environment Management & Coordination Act.

The Plaintiffs aver that any purported Change of User or Environment Impact License issued by the 4th and 5th Defendants respectively will defeat the stated Parliamentary intention and purposes of the said Acts ie, protection of environment, life and health of residents, animals and vegetation respectively and will be an abuse of statutory powers, illegal, null and void … (emphasis mine)"

That suit, as I see it, sought (in part) to stop the Council issuing a change of user on the basis of the "corrective" 2nd Notice of Change. That this Notice did not comply with the requirements of the Physical Planning Act.

That however was not the end of the matter. The exparte applicant, after learning of its existence, introduced the change of user granted on 27th July 2010 into the suit by a Notice of Motion dated 6th October 2010, in which he sought (*in so far as is relevant*) the following prayers-

(a) One Tubman Otieno as the Town Clerk of the 4th defendant within 3 days of the court order supply the Applicant with copies of the documents listed herein below being documents/information required by the Applicants for protection of their rights as pleaded in the plaint in that the said documents establish that the purported Development Permission dated 27th July 2010 allegedly issued by the 4th defendant is invalid for being issued illegally and irregularly and in violation of the Physical Planning Act.

(b) Separately, the Honourable be pleased to Order the said Tubman Otieno to attend court on such day as the court may appoint to be cross-examined on his affidavit sworn on 24th August 2010 and in particular, the validity of the purported Development permission (Annexure "TO-3" of the Affidavit) under the Physical Planning Act No. 6 of 1996.

(c) ***The Honourable Court does give such directions as it will deem fit on the validity/admissibility in evidence, or otherwise of the purported Development Permission issued by the 4th defendant to the 2nd respondent upon the information/documents as will be supplied by Mr. Tubman Otieno***.

In paragraph 9 of the affidavit in support of that application the exparte applicant elaborates the procedure of receiving, processing and approving a change of user. He repeats this detail in paragraph 15 of his replying affidavit of 7th October 2010 filed in the suit and in paragraph 16 says as follows-

"That in view of the foregoing, I have filed a separate application by the Notice of Motion dated 6th October 2010 for the Town Clerk who issued the purported approval of change of user to come to court to produce other documents that will establish that indeed the purported approval is a violation of the provisions of the Physical Planning Act requirements and procedures and is therefore illegal, null and void." (emphasis mine)

The above reveals the real purpose of the application of 6th October 2010.

It would therefore be clear that the change of user of 26th July 2010 and the process leading to its approval was the subject of at least one of the five applications argued before Ojwang J and awaiting his decision, when on 27th January 2011, the application for leave was brought before him. I have no doubt whatsoever that there is a nexus between the issues relating to the Physical Planning Act in the suit and the questions to be determined in these Judicial Review proceedings.

Of course the remedy of Judicial Review is available, in appropriate cases, even where there is an alternative legal remedy. (**CA 265 of 1997 DAVID MUGO t/a Manyatta Auctioneers –Vs- Republic)**. The same set of facts can give rise to a claim in both Private Law and Public Law. This, however, does not remove the obligation of an exparte applicant seeking leave from making a disclosure of any alternative remedy available or alternative proceedings commenced. A Judge who has been approached, exparte, to grant leave must be in full picture so that whatever orders the court makes on leave and/or stay are well informed. In my view where parallel proceedings are pursued on the same set of facts and are related, then it cannot be said that there is a full and frank material disclosure when the existence of the Civil Claim, as in this case, has not been brought to the attention of the Judge.

The following passage from Fordham's Judicial Review Handbook 3rd Edition (as quoted by Wendoh J in **Nrb Misc Application No. 339 of 2006 Francis Gichuki Macharia –Vs- SRM, Karatina & Anor**) reminds an exparte applicant of the duty of candour.

"A claimant for permission is under an important duty to make full and frank disclosure to the court of all material facts and matters. It is especially important to draw the attention to matters which are adverse to the claim in particular;

(a) any statutory restriction on the availability of Judicial Review;

(b) any alternative remedy;

(c) any delay, lack of promptness

and so need for the extension of

time;

In facing up to adverse points, the claimant will have an early opportunity to explain why those points are not fatal and only the case should be permitted to proceed. The duty of full and frank disclosure harks back to the time when permission for Judicial Review was ex parte. That has changed."

Needless to say under our laws applications for leave are still made exparte (unless directed by the court) and so this duty remains.

I have looked the affidavit of the Exparte applicant made in reply to the Notice of Motion of 18th February 2011. He has not given any explanation at all as to why the pendency of the Civil Suit and the applications therein were not disclosed to the Judge. It is not suggested that the disclosure was unnecessary. Not even the oral or written submissions made of his behalf addresses this issue. This silence, in my view, is telling.

It matters not that the Judge who heard the application for leave was the same Judge who heard the applications in the suit or that they were pending his decision. Judges are not superhuman and cannot possibly recall the issues in all the matters that they have to deal with in their busy Judicial lives. It is not the business of this Court to speculate on what order Justice Ojwang would have made had all the facts been placed before him. But one thing is sure! The exparte applicant had a duty to alert the Judge that the application for leave was related, in fact substantially, to a matter awaiting his decision. This court takes a dim view of this failure on the part of the exparte applicant. And in keeping with judicial precedent (see for example **Misc. Applications 1183 of 2004 Republic –Vs- Land Registrar Kajiado & Another – Exparte Kirsek Investments Ltd**) the leave granted must suffer a fatal end. For this reason alone the leave granted must be set aside with all the consequences that follow.

The effect of my decision is to bring these proceedings to an end, for now. It would therefore be academic for the court to decide the other issues raised by the interested party and the exparte applicant's application of 8th March 2011.

The result is that the order of leave and the accompanying stay order of 27th January 2011 are hereby set aside and/or discharged with costs to the interested party.

Dated and delivered at Mombasa this 21st day of March, 2012.

F. TUIYOTT

JUDGE

Dated and delivered in open court in the presence of:-

Sitonik for Exparte Applicant

Simiyu for Khagram for Interested Party

No appearance for 1st and 2nd Respondents and 3rd Respondents

Court clerk - Moriasi

F. TUIYOTT

JUDGE