



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISCELLANEOUS CIVIL APPEAL 59 OF 2008**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF: THE REGISTERED LAND ACT, CAP.300 AND RATING ACT  
CAP.267**

**AND**

**IN THE MATTER OF: THE DECISIONS OF SENIOR RESIDENT MAGISTRATE, CITY  
COURT IN CMCC NOS.18 – 28 BOTH INCLUSIVE OF 2007**

**BETWEEN**

**REPUBLIC.....APPLICA  
NT**

**VERSUS**

**THE SENIOR RESIDENT MAGISTRATE, CITY  
COURT.....1<sup>ST</sup>RESPONDENT**

**THE CITY COUNCIL OF  
NAIROBI.....2<sup>ND</sup>RESPONDENT**

**TOM CHORE ODIARA.....INTENDED INTERESTED  
PARTY**

**EXPARTE:**

**FALCON PROPERTIES LIMITED**

**RULING**

The Exparte Applicant Falcon Properties Ltd moved the court in two different applications filed on different dates which the court directed that they be heard together on 6<sup>th</sup> July 2012.

These are the applications filed by way of Notice of Motion dated 5<sup>th</sup> June 2012 and 12<sup>th</sup> March 2012.

On the hearing date (6/7/12), learned counsel for the applicant Mr. Goswami in the course of his oral submissions withdrew the application dated 5<sup>th</sup> June 2012 leaving only the application dated 12<sup>th</sup> March 2012 for consideration and determination by the court.

This ruling will therefore be in respect of the application dated 12<sup>th</sup> March 2012. In the said application, the applicant seeks the following orders:

- (1) That this Application be certified urgent.
- (2) THAT a declaration be made that the Order of this Honourable Court issued on 10<sup>th</sup> December 2010 is null and void and/or invalid.
- (3) THAT the said Order be recalled and cancelled.
- (4) THAT the costs of this application be provided for.

The application is supported by three affidavits sworn by the applicant's counsel Mr. Virinder Nath Goswami, the first one was filed together with the application on 12<sup>th</sup> March 2012 and the other two affidavits were sworn on 21<sup>st</sup> May 2012 and 23<sup>rd</sup> May 2012 respectively.

In his depositions in the supporting affidavit sworn on 12<sup>th</sup> March 2012, Mr. Goswami principally reiterated and buttressed the grounds upon which the application was premised which were set out on the face of the application as follows:

1. The intended Interested Party filed a Notice of Motion dated 29<sup>th</sup> March 2010 seeking the following orders:
  - (a) That this application be certified urgent and service of the same be dispensed with in the first instance by reason of its urgency.
  - (b) That the part of the judgment delivered herein on 29<sup>th</sup> November 2009 that concerns all those parcels of land known as Nairobi/Block 97/376, Nairobi/Block 97/378, Nairobi/Block 97/379, Nairobi/Block 97/380 and Nairobi/Block 97/381 be set aside **and the intended interested party/Applicant be granted an opportunity to be heard on merit.**
  - (c) That the costs of this application be provided for.
2. The application was heard and allowed by Muchelule J. by his ruling delivered on 29<sup>th</sup> November 2011.
3. Without observing the procedure laid down in Order 21 Rule 8(2) of the Civil Procedure Rules 2010 the intended Interested party – on the 10<sup>th</sup> December 2010 extracted an Order which reads –

IT IS HEREBY ORDERED:-

***1. THAT the application dated 29<sup>th</sup> March 2010 be and is hereby allowed.***

***2. That the part of the judgment delivered on 29<sup>th</sup> November 2009 that concerns all those parcels of land known as Nairobi/Block 97/376, Nairobi/Block 97/378, Nairobi/Block 97/379, Nairobi/Block 97/380 and Nairobi/Block 97/381 be and is hereby set aside***

***3. THAT the costs be to the Interested Party/Applicant.***

**4. The order as extracted is at variance with the ruling of the Learned Judge in that the Order for**

**the intended Interested Party to be given an opportunity to be heard on merit has been omitted.**

5. Tom Ochore Odiara the intended Interested Party has used the said order to fraudulently convert the Applicants properties to his own name at the Nairobi City Council.

The application is opposed. The 1<sup>st</sup> Respondent filed grounds of opposition dated 25<sup>th</sup> May 2012 while the intended Interested Party filed a replying affidavit sworn by Tom Chore Odiara on 17<sup>th</sup> April 2012. The 2<sup>nd</sup> Respondent filed a replying affidavit sworn on its behalf by Aduma J. Owuor its Assistant Director of Legal Affairs on 26<sup>th</sup> June 2012.

To further advance their respective positions in this matter, parties filed written submissions which were highlighted before me by their respective counsel on 6<sup>th</sup> July 2012.

After carefully considering the application, the affidavits filed in opposition thereto by the 2<sup>nd</sup> Respondent and the Interested Party as well as the grounds of opposition filed on behalf of the 1<sup>st</sup> Respondent alongside the rival submissions made by counsel for the respective parties herein, I find it unnecessary to deal with the technical objections raised by the Respondents regarding the competence of the application since I prefer to deal with the substance of the application and determine it on either its merits or demerits.

I make this choice because in the new constitutional dispensation, courts are encouraged to administer substantive justice and not to lay too much emphasis on technical objections or procedural technicalities.

In this case, the gravamen of the Exparte Applicant's application is that the order issued by this court on 10<sup>th</sup> December 2010 is null and void and should be recalled by the court for cancellation on grounds that it was drawn in contravention of the procedure prescribed under **Order 21 Rule 8** of the Civil Procedure Rules and that the order is not in conformity with the ruling delivered by Hon. Muchelule, J on 29<sup>th</sup> November 2011.

It is common ground that the Interested Party herein had filed a Notice of Motion dated 29<sup>th</sup> March 2010 seeking the following orders:

1. That this application be certified urgent and service of the same be dispensed with in the first instance by reason of its urgency.
2. That the part of the judgment delivered herein on 29<sup>th</sup> November 2009 that concerns all those parcels of land known as Nairobi/Block 97/376, Nairobi/Block 97/378, Nairobi/Block 97/379, Nairobi/Block 97/380 and Nairobi/Block 97/381 be set aside **and the intended interested party/Applicant be granted an opportunity to be heard on merit.**
3. That the costs of this application be provided for.

The court record shows that Hon. J. Muchelule allowed the application in his aforesaid ruling besides making other substantive orders which I will refer to later in this ruling.

According to the Applicant, after J. Muchelule delivered his ruling, the Interested Party extracted the order issued by the court on 10<sup>th</sup> December 2010 without following the procedure laid down under Order 21 Rule 8 of the Civil Procedure Rules and which was at variance with the orders made in J. Muchelule's ruling as the order requiring that the intended Interested Party be given an opportunity to be heard on merit was omitted.

The Applicant's counsel annexed a copy of the impugned order to his supporting affidavit as exhibit marked VG4 as well as a copy of the ruling delivered by J. Muchelule which is marked as annexure VG3.

I have carefully scrutinized the contents of the aforesaid ruling against the terms of the order issued on 10<sup>th</sup> December 2011 and I concur with Mr Goswami's observation that the said order was indeed at variance with the orders made by J. Muchelule on 29<sup>th</sup> November 2011. A careful reading of J. Muchelule's ruling as a whole clearly shows that J. Muchelule not only allowed the prayers sought by the intended Interested Party in his application dated 29<sup>th</sup> March 2010 but he also went further to set aside the judgment delivered by Hon. Osiemo, J on 24<sup>th</sup> November 2009 in its entirety. In order to demonstrate this point, I wish to reproduce the relevant part of J. Muchelule's ruling which in my view fortifies my aforesaid conclusion. At page 8 – 9 J. Muchelule stated as follows:

“This court should have the inherent power to protect its process from fraud or abuse (Re: Justus Nyangaya and Social Democratic Party, H.C. Misc. Appeal No.1132 of 2002 at Nairobi). A court exercising judicial review jurisdiction should have inherent powers to set aside a judgment or order wrongly entered, or entered in favour of a party who had sought to misuse the process by not serving a party who was directly affected by the proceedings. This jurisdiction should be exercised quite sparingly and cautiously. I find that an occasion does present itself in this application for the jurisdiction to be invoked and that is why I allow the application with costs and set aside the judgment of this court that was delivered on 24<sup>th</sup> November 2009”.

From the foregoing passage of Hon. J. Muchelule's ruling, I have no doubt in my mind that the said ruling not only allowed the intended interested party's application but also had the effect of setting aside the entire judgement delivered by J. Osiemo in the judicial review proceedings commenced by the Exparte Applicant in this case.

This is the position that was taken by the Respondents and the intended Interested Party and in my view that is the correct legal position. It is also my opinion that the Exparte Applicant's counsel conveniently omitted to acknowledge this fact in his instant application though he had earlier conceded in an earlier application dated 19<sup>th</sup> may 2011 but filed on 13<sup>th</sup> September 2011 which was later withdrawn that the effect of J. Muchelule's ruling was to set aside the entire judgement of J. Osiemo delivered on 24<sup>th</sup> November 2009.

In that application annexed to the intended Interested Party's replying affidavit and marked “TCO 1”, the Exparte Applicant had sought a review of J. Muchelule's ruling on grounds *inter alia*

**“That the effect of the ruling is that the entire judgment of the court that was delivered on 24<sup>th</sup> November 2009 has been set aside. The applicant had asked for orders relating to five properties only”.-see ground no 3 thereof.**

In Paragraph 4 of the affidavit sworn by the Applicant's counsel in support of the application, Mr. Goswami deponed at Paragraph 4

**“THAT this Honourable Court heard the application and made a Ruling on the 29<sup>th</sup> November 2010 wherein through a slip it has set aside the entire judgement that was delivered on 24<sup>th</sup> November 2009. Annexed herewith marked “VG 2” is a copy of the said Ruling”.**

Given the foregoing concessions by the Exparte Applicant's counsel in the application dated 13<sup>th</sup> of September 2011, I find it to be pure lack of candour for Mr. Goswami to deliberately fail to disclose this position to the court in the instant application.

In view of the foregoing observations, it is my finding that irrespective of whether the correct procedure under Order 21 Rule 8 was followed by the intended interested party in having the said order extracted and issued by the court through its Deputy Registrar or not, the significant point to note is that the said order is invalid as its terms are clearly not in conformity with the orders made by J. Muchelule in the ruling from which the order was extracted. The impugned order not only omitted to include the order that the intended Interested Party was to be heard on merit on the main judicial review application but also

failed to reflect the order that J. Osiemo’s judgment delivered on 24<sup>th</sup> November 2009 had been set aside in its entirety.

The entire judgment of J. Osiemo having been set aside by J. Muchelule in his ruling delivered on 29<sup>th</sup> November 2011, the only option left for the Exparte Applicant to my mind was to either initiate the process of having the substantive motion for judicial review heard afresh or to appeal against J. Muchelule’s ruling to the Court of Appeal.

It is on record that the Exparte Applicant chose not to take up any of the above options but chose instead to file a multiplicity of applications which includes the application under consideration.

From the affidavit sworn on 21<sup>st</sup> may 2012 in reply to the intended Interested Party’s replying affidavit, I have noted that Mr. Goswami deponed that he had served the intended Interested Party with the application for judicial review dated 6<sup>th</sup> August 2008 with the intention of prosecuting it as against him in order to give him an opportunity to be heard on merit as directed by J. Muchelule but when the case was mentioned on 29<sup>th</sup> February 2012 for purpose of fixing hearing date, the intended Interested Party indicated that he was not interested in proceeding with the matter. That was apparently the end of the applicant’s efforts to have the matter heard afresh as the court record does not show that the Exparte Applicant took any further step to fix a hearing date for the fresh hearing of the main judicial review application involving all parties.

Given that the Exparte Applicant’s counsel was aware of the full meaning and effect of J. Muchelule’s Ruling, one would be tempted to concur with the submissions by the Respondents that the Applicant’s conduct of filing a multiplicity of applications instead of exercising its right of appeal to the Court of Appeal or taking steps to prosecute the suit afresh amounts to an abuse of the court process. On the other hand, it can also be argued that the instant application was filed appropriately since a look at the order extracted by the intended Interested Party and issued on 10<sup>th</sup> December 2011 shows clearly on its face that it is at variance with the orders made by J. Muchelule in his Ruling of 29<sup>th</sup> November 2011.

I will therefore allow the application in terms of Prayer 3 which seeks the recalling and cancellation of the said orders in order to give the parties herein an opportunity to properly extract the order that complies with the Ruling delivered by J. Muchelule on 29<sup>th</sup> November 2011 in accordance with the law.

Given that the application herein has succeeded not purely on merit considering that it has been allowed partly for reasons not canvassed in support thereof, I decline to award the applicant costs of the application. Each party to bear its own costs.

**Dated, Signed and Delivered** by me at Nairobi this 20<sup>th</sup> day of July 2012.

**C. W. GITHUA**  
**JUDGE**

*In the presence of:*

Florence – Court Clerk

.....for Applicant

.....for 1<sup>st</sup> Respondent

.....for 2<sup>nd</sup> Respondent

.....for Intended Interested Party