



IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF PROHIBITION AND CERTIORARI

BETWEEN

**NATIONAL HOUSING CORPORATION.....PLAINTIFF/
APPLICANT**

VERSUS

**THE CHIEF MAGISTRATE’S COURT, MOMBASA.....1ST
DEFENDANT/RESPONDENT**

**IFTIKHAR OMAR FARAJ.....2ND
DEFENDANT/RESPONDENT**

**MUNICIPAL COUNCIL OF MOMBASA.....3RD
DEFENDANT/RESPONDENT**

JUDGMENT

- (1) The Applicant seeks judicial review orders of Prohibition and Certiorari, respectively, to restrain the Respondent Chief Magistrate’s Court Mombasa from proceeding with Civil Case No. 31 of 2011 between the 1st Interested Party as Plaintiff and the Applicant and the 2nd Interested Party as Defendants, and to quash proceedings, orders and rulings so far taken or made by the court in the said civil case, allegedly without jurisdiction.
- (2) The application is opposed by the 1st Interested Party but the Respondent and the 2nd Interested Party do not oppose it. The parties were represented by counsel: Mr. Ochwa for the Applicant; Mr. Ngaira for the 1st Interested Party; Mr. Nyamboye for the 2nd Interested Party and Miss Lutta for the Respondent.
- (3) The Applicant’s case is that the Magistrate’s Court has no jurisdiction over the Civil Case No. 31 of 2011 as the same relates to a parcel of land LR. Mombasa/Block XIII/410 which has a value of Kshs.310,000,000/= beyond the pecuniary limit of the court’s jurisdiction in civil matters. The Applicant contends that the parcel of land Mombasa/Block XIII/410 to which the 1st Interested Party claims ownership and corresponding right of access in the Magistrate’s Court’s case could not lawfully have been created and that the matter was one of two titles over the same property whose value exceeds the pecuniary jurisdiction of the Chief Magistrate’s Court. Counsel for the Applicant contended that the 1st Interested Party would suffer no prejudice by the grant of the judicial review orders as he could file the suit before the High Court.
- (4) For the 1st Interested Party, it was submitted that he sought to enforce easement rights when the Applicant commenced construction of a wall around the 1st Interested Party’s property plot No. 410:

“The 1st Interested Party only seeks access to the property. The plot is registered under the Registered

Land Act Cap. 300. The Lower Court has jurisdiction. The issue of ownership is not in issue before the Lower Court. The Interested Party only seeks access. The Applicant should file a suit in the High Court to determine ownership of the plots of land. The Interested Party is the owner of the property and he has a right to seek access to the property. It is not for the Applicant to state that the property No. 410 does not exist. It can only be determined by the High Court. The subject of the suit in the lower court is to protect his rights to access. The lower court has jurisdiction to entertain the case.

(5) The issue for the determination in this judicial review proceedings is whether the Magistrate's Court has jurisdiction to deal with the subject matter of the suit filed by the Interested Party against the Applicant and the 2nd Interested Party. The lower court had upon a preliminary objection filed by the Applicant herein ruled that the court had jurisdiction as the issue before the court was the prayer for injunction sought by the Interested Party to restrain **"the Defendants from erecting the perimeter wall blocking access to Mombasa/Block XIII/410 from Makupa Causeway or in any way interfering with the easement rights provided by law. That prayer is plain as it does not call for the value of the blockage to determine the court to hear such a matter. It is not a claim for value or even ownership and in my understanding even a District Magistrate's Court can handle such a matter. Pecuniary jurisdiction from the prayers sought is therefore an irrelevant factor and has not been even properly captured in the Statement of Defence. I am not convinced that the Preliminary Objection has any merit at all and I dismiss the same with costs to the Applicant."**

(6) This court is not sitting on appeal from the Magistrate's Court decision on the Preliminary Objection and as observed by Tunoi, JA (as he then was) in the **Commissioner of Lands and Another versus Coastal Aquaculture Ltd C.A. No. 252 of 1996** **"the existence of a right of appeal to the court from a Tribunal does not deprive the courts of the power to grant an order of prohibition to restrain the tribunal from acting outside its jurisdiction. Nor, is the Applicant for such an order obliged to have first exhausted other prescribed remedies of redress before having recourse to the courts of law."**

(7) To be sure, the magistrate's court has, under section 5 of the Magistrate Courts Act Cap.10 Laws of Kenya, such jurisdiction and power in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed pecuniary limits set by statutory amendments from time to time. The issue before me therefore is whether the subject matter in dispute before the magistrate court in this case is of such value as to exceed the pecuniary limit of Chief Magistrate's Court then set at Kshs.3,000,000/=.

(8) I have perused the pleadings before the lower court. The Plaintiff (the 1st Interested Party herein) allege that his property Mombasa/Block XIII/410 is surrounded by three storey buildings of the 1st Defendant (the Applicant herein) leaving the only access road being Makupa Causeway which the 1st Defendant was in the process of building a perimeter wall thereby denying the Plaintiff alleged easement rights. The Plaintiff therefore sought a permanent injunction restraining the Defendant from erecting the perimeter wall or in any other way interfering with his easement rights. The 2nd Defendant is sued for alleged collusion with the 1st Defendant in granting consent to the 1st Defendant to construct the perimeter wall.

(9) The 1st Defendant (Applicant herein) in its defence denied right to easement claimed by the Plaintiff over its property and indeed the very existence of the Plaintiffs' leasehold property (Mombasa/Block XIII/410) and alleged that the purported title related to the same property owned by the 1st Defendant being Mombasa/XIII/114. The 1st Defendant consequently sought a declaration that its title Mombasa/Block XIII/114 was the only lawful and valid title over the property in dispute; that the Plaintiff's title registered as Mombasa/Block XIII/410 is null and void; and the cancellation of the Plaintiff's title aforesaid.

(10) The 1st Defendant gave the value of the suit property Mombasa/Block XIII/114 as Kshs.310m. being the value of the debt owed to the 1st Defendant by the 2nd Defendant in consideration of which the latter transferred the suit property to the former. In the light of this value and of the order of cancellation of title sought which it was alleged, can only be granted by the High Court, the 1st Defendant/Applicant

contended that the Magistrate's Court has no jurisdiction.

(11) The Plaintiff (1st Interested Party) takes the view that the cause of action is access and not ownership and in any event the value of the Plaintiff's plot Mombasa/Block XII/410 is as shown on the transfer and title Kshs.800,000/= which is within the jurisdiction of the Magistrates' Court.

(12) In my view, the civil jurisdiction of the Resident Magistrate's Court is circumscribed by section 5 of the Magistrate Courts Act (Cap 10) as follows:

“(1) Subject to any other written law the Resident Magistrates Court shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed Provided that the Chief Justice may, by Notice in the Gazette increase the limit of jurisdiction.

(2) The Resident Magistrate's Court shall have and exercise same jurisdiction and powers in proceedings concerning claims under customary law as is conferred on District Magistrate under section 9 (a)” of the Act

Accordingly, save for proceedings concerning a claim under customary law, the Resident Magistrate's Court can only deal with proceedings of civil nature whose subject matter has a value falling within the pecuniary limit set out in the section 5 of the Magistrate Courts' Act. The court cannot therefore have jurisdiction in civil proceedings for injunction, enforcement of easement or such claim **if the subject matter to which the claim relates exceeding the pecuniary limit of the court.** Jurisdiction is pegged to the value of the subject matter in dispute and a distinction must be made between the subject matter in dispute and the reliefs sought by the parties. So that while the Plaintiff seeks an injunction and the 1st Defendant declarations and an order for cancellation of title Mombasa/Block XIII/410, these have no relevance to the jurisdiction of the magistrate's court which is to be determined having regard to the value of the subject matter of the reliefs sought by these parties.

(13) The subject matter of the dispute between the parties here is the plot Mombasa/Block XII/410 for which the Plaintiff seeks the relief by way of injunction to restrain blockage of access and for which the 1st Defendant contests legal existence and seeks the relief of cancellation of title. The value of the plot No. 410 is given as Kshs.800,000/= which is within the jurisdiction of the Chief Magistrate's Court.

(14) However, the jurisdiction is subject to all written laws and therefore where any law denies jurisdiction to the magistrate court with respect to certain relief, then the fact that the subject matter value is within the pecuniary limit will not afford the court jurisdiction to grant such relief. Such law is the Land Registration Act No. 6 of 2012 and the Registered Land Act Cap. 300 which was repealed by the former Act and which was relevant to the proceedings before the magistrate's court. Under section 159 of the Registered Land Act only the High Court has power to deal with suits and proceedings relating title to land where the value of the subject matter exceeds K£ 25,000/=. Therefore, even if the magistrate's court could deal with proceedings relating to the subject matter of the dispute whose value does not exceed Kshs.7,000,000/= by the current pecuniary limits, the provisions of section 159 of the Registered Land Act which is the statute regulating the proceedings relating to title or possession of land registered under that Act provide for a pecuniary limit of KShs.500,000/= only. Under this formulation, the magistrate courts have no authority to deal with the suit property valued at Kshs.800,000/=. This absurdity must be the result of want of coordinated review of statutes and legal notices. I might also add that had the suit property been registered under the Registration of Titles Act Cap. 281 recently repealed by the Land Registration Act of 2012, only the High Court would under section 64 thereof grant the relief of the cancellation of title sought by the 1st Defendant.

(15) Accordingly, for reasons stated above, I find that the Chief Magistrates Courts' had no jurisdiction to deal with civil case No. 31 of 2011. However, the grant of the judicial review orders is discretionary to be exercised judicially in the light of the circumstances of the case. I have considered the following matters in coming at a decision:

(1) The apparent inconsistency between the pecuniary limit set for the value of the subject matter in the Magistrate Courts Act Cap 10 and the repealed (which is the applicable law) Registered Land Act as precondition for the jurisdiction of the magistrate courts.

(2) The constitutional requirement under Article 159 of the Constitution to do justice without regard to technicalities of procedure and to render expedited justice. To quash the proceedings before the magistrate courts and compel the parties to seek relief before the High Court anew will only delay the expedited disposal of the case.

(3) In the record of proceedings of the magistrates court presented as exhibit WK5 of the Verifying Affidavit herein at p. 41 of the Record, the 1st Defendant's counsel Mr. Ochwa is recorded as having urged the court to transfer the matter to the High Court in these words:

“The value of the subject matter must be taken into consideration. The suit ought to have been filed in the High Court and we apply that the suit be transferred to the appropriate court.”

(16) In accordance with precedent established by Madan CJ. in **Stanley Munga Githunguri No. 2** case and noted by Nyamu J. in **Republic v. Commissioner of Police & 2 Others exparte Jacob Juma (2005) eKLR** cited by the Applicants' counsel herein, I will deem the present judicial review proceedings as an application for transfer of the proceedings before the magistrate's court to the High Court. Section 18 of the Civil Procedure Act provides that:

“18(1) On the application by any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its motion without such notice, the High Court may at any stage (a) transfer any suit, appeal or other proceedings pending before it ... or (b) withdraw any suit or other proceedings pending in any court subordinate to it, and thereafter – (i) try and dispose of the same ...”

(17) Accordingly, I will make the following orders:

(a) The Applicants' Notice of Motion dated 14th July 2011 is dismissed.

(b) The 1st Interested Party will pay the Applicant's costs herein as he is the party that set in motion the proceedings from which this application arose.

(c) Mombasa Chief Magistrate Civil Case No. 31 of 2011, **Iftikhar Omar Faraj vs. National Housing Corporation** is transferred to the High Court at Mombasa for trial and disposal.

(d) The Judgment herein be brought to the attention of the Rules Committee for it to consider clarifying the issues raised.

Dated and delivered this 31st day of August 2012.

EDWARD M. MURIITHI

JUDGE

In the presence of:

Mr. Wafula for the Applicants

Mr. Ngaira for the 1st Interested Party

Mr. Ambwere for the 2nd Interested Party

Mr. Ombart - Court Clerk