



REPUBLIC OF KENYA

High Court at Machakos

Miscellaneous Application 68 of 2006

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY PETER MAKENZI
KALOKI

BETWEEN

REPUBLIC APPLICANT

AND

THE MACHAKOS DISTRICT LAND REGISTRAR RESPONDENT

AND

1. FRANCIS KYENGO KALOKI

2. MUTHOKA KALOKI

3. NZOMO KALOKI

4. DAVID KALOKI INTERESTED PARTIES

AND

PETER MAKENZI KALOKI EX PARTE APPLICANT

RULING

Before me is a Notice of Motion dated 12th June 2006 brought by the *ex parte* applicant Peter Makenzi Kaloki. It was filed under Order LIII Rule 3 of the Civil Procedure Rules. It requests the grant of an order of mandamus and costs in the following terms:-

(a) **THAT, an order of mandamus do issue compelling the Machakos District Land Registrar to remove and/or revoke the caution on Plot No. Mavoko Block 11/12 and Mavoko Block 11/143.**

(b) **THAT, the costs of this application be in the cause.**

The application is grounded on the statement dated 26th May 2006, filed with the Chamber Summons for leave and a supporting affidavit sworn on 29th May 2006, also filed with the Chamber Summons for

leave. Filed also is a copy of a judgment made by Nambuye J, in 2003 in Machakos High Court Civil Appeal No.110/98. In the said ruling, the learned Judge stated with regard to the decision of the Land Disputes Tribunal decision, *inter alia*, that:-

“As regards the appeal to the appeals committee at Embu that can be lodged independent of the entry of judgment. As soon as the decision is given by the elders the right of appeal accrues after 30 days thereof. After every judgment the only court procedure that can be invoked is judicial review only and no other. For the reasons given above this appeal is bound to succeed. The same is allowed and the lower court orders of 30/9/1998 are declared null and void.”

This application was made after the above judgment of the High Court was made.

After this application was filed, the interested parties filed a Preliminary Objection on point of law which stated as follows:-

- 1. THAT the application is fatally defective as it offends the provisions of Order LIII Rule 2, and Rule 3 of the Civil Procedure Rules.**
- 2. THAT the application is also bad in law and defective as the order subject of attack is not attached.**

One of the interested parties Francis Kyengo Kaloki also filed a replying affidavit sworn on 4/7/2006. It is deponed in the said affidavit, *inter alia*, that the record did not show whether leave to file judicial review proceedings was granted and whether the Machakos District Land Registrar was requested and he had refused to remove the caution; that the prayers sought in the application were subject to HCCA No. 110 of 1998 which was still pending; that the filing of this application was an abuse of the process of the court; that the appeal before the Provincial Appeals Committee had never been heard and determined.

The applicant through his counsel, B.M. Mung'ata & Company Advocates, filed written submissions on 7th April 2010. The interested parties through their counsel J.A. Makau & Company Advocates, filed written submissions on 23rd October 2009.

The respondent, who is the Machakos District Land Registrar, did not defend the application, although Mr O'Mirera Principal State Counsel for the Attorney General filed a notice of appointment to act for him.

Mr Nduva and Mr Makau who appeared at the hearing of the application for the *ex-parte* applicant and interested parties respectively, relied on documents and submissions filed.

I have considered the application, documents filed and the submissions of both the *ex parte* applicant and the interested parties.

Though the interested parties claim that leave to file judicial review proceedings was not granted, the original record shows that on 30th May 2006 Lesiit J granted leave to file judicial review proceedings in the presence of Miss Katua for the *ex parte* applicant. Unfortunately the pages of the original record were not filed sequentially. The fact however is that on page 2 of the handwritten original proceedings, Lesiit J, on 30th May 2006 granted leave to file the substantive motion within 21 days. The Notice of Motion herein was filed within that period. Therefore this objection fails.

The interested parties also claim that the order from which judicial review orders have been sought was not annexed. Nor was the application filed within 6 months of the decision. Under Order LIII Rule 7 (1) of the Civil Procedure Rules, the annexing of such an order is required only in situations where the applicant seeks orders of *certiorari* to quash such orders. In the present case, the *ex parte* applicant is seeking *mandamus* orders. Under Order LIII rule 2, the 6 months limitation period only applies to prayers for orders of *certiorari*. The objection therefore fails.

From the supporting documents filed, this application appears to be an application for enforcement of the judgment of Nambuye J referred to above.

In paragraph 5 of the supporting affidavit the *ex-parte* applicant deponed:-

5. THAT, the court ruled in my favour and ordered that the caution be removed, however the interested parties appealed against the said ruling and the court then ordered that I do apply for removal of the caution herein by way of judicial review and which I have hereby done (annexed is a copy of the said judgment in my favour dated 22nd October, 2003 and marked “PMK11.”)

In the said judgment given in 2003 by Nambuye J, it was stated *inter alia* with regard to the removal of the caution as follows:-

“Having won the case before the elders the appellant should have proceed to Land Registrar to have the caution removed following the procedures laid down under the Registered Land Act for removal of the caution. It follows that the appellant’s move to file the application sought to be set aside is null and void.... After entry of judgment the only court procedure that can be invoked is judicial review only and no other.”

The *ex-parte* applicant claims that in the above appeal judgment, the High Court ordered that he applies for the removal of the caution through judicial review. In my view, that is not what the court stated in its judgment. The court merely talked of two scenarios. First, if the issue was the removal of the caution, then the procedures laid down under the Registered Land Act (Cap 300) were to be followed. Secondly, if the issue was the challenge of the decision of the Land Disputes Tribunal, then after entry of judgment, the only avenue open is to invoke the judicial review procedure.

These proceedings are not a challenge to the decision of the Tribunal or the magistrate’s court’s decision. Neither the Land Disputes Tribunal nor the Magistrate’s Court are a party. Their decision cannot be questioned in judicial review proceedings when they are not parties.

These proceedings were brought against the Machakos District Land Registrar who has powers to register and remove cautions under the Registered Land Act. Though the Attorney General entered appearance for that officer, no response was filed. Therefore, the application is not opposed by the public officer targeted for proper exercise of statutory powers. The issue of removal of the caution herein was substantively dealt with by Nambuye J in the judgment referred to above. Instead of specifically requesting the District Land Registrar to remove the caution under section 133 of the Registered Land Act (Cap 300), the applicant has merely, on the basis of remarks made by the High Court in the appeal judgment come to court in the present application. The judgment by Nambuye J was very specific as follows:-

“Applying the above provisions (section 7 of the Land Disputes Tribunal Act No. 18 of 1990) to the facts of this case it is clear that the lower court jurisdiction is limited to the receiving of the award entering of judgment drawing of a decree and then executing the same and nothing more.

- 1. The errors committed on the record are that the learned trial magistrate who received award only read it to the parties. He did not enter judgment as he was required to do.**
- 2. Instead of opening a land case file they opened a miscellaneous file and yet purported to issue substantive orders in respect of the same.**
- 3. The issue of removal of the caution was not one of the issues before the panel of elders and yet the applicant brought it into these proceedings. Having won the case before the elders the appellant should have proceeded to the Land Registrar to have the caution removed following the procedure laid down under the Registered Land Act for the removal of the caution. It follows that the appellants move to file the application sought to be set aside is null and void.**
- 4. That being the case it also follows that the respondent’s application for setting aside and stay**

of execution is without jurisdiction and so it is also null and void.

As regards the appeal to the appeals committee at Embu that can be lodged independent of the entry of judgment. As soon as the decision is given by the elders the right of appeal accrues after 30 days thereof. After entry of judgment the only court procedure that can be invoked is judicial review only and other.

For the above reasons given above, this appeal is bound to succeed. The same is allowed and the lower court orders of 30/9/1998 are declared null and void.

The appellant is at liberty to take whatever action he deems fit to do within the law independent of these proceedings to initiate measures to remove the caution complained of.”

If this court was going to proceed by the application of strict procedural law, I would have asked for particulars as to when, after the judgment of Nambuye J the applicant who was the appellant therein, requested the District Land Registrar Machakos to remove the caution under section 133 of the Registered Land Act (Cap 300) and he failed to do so. However, the District Land Registrar was served with the application and the Attorney-General entered appearance by M.M. O’Mirera Principal State Counsel on 5/7/2006, but no opposition to the application was filed. In indeed, if the District Land Registrar or the Attorney General wanted to oppose the application they should have done so. They had the time and opportunity to do so. They did not. Mandamus orders can be issued by a court to compel a public officer to perform his/her statutory duties. In these circumstances, I will have to administer substantive justice as required under section 1A (1) of the Civil Procedure Act (Cap 21), and Article 159 (2) (d) of the Constitution of Kenya 2010.

Substantive justice requires that I grant the mandamus orders sought as the District Land Registrar has statutory obligations to perform. He has not objected to the request to order him to perform the statutory functions. I grant the mandamus orders sought. Costs in the cause.

Dated and delivered at Machakos this 16th day of August 2012.

George Dulu
Judge

In presence of:-

Mutinda – Court clerk

Ms Amala for *ex parte* applicant present

Mr Mutua Makau for Interested parties present

N/A for Attorney General.