



REPUBLIC
VERSUS

THE CHIEF MAGISTRATE, MOMBASA RESPONDENT

AND

WAHID MOHAMED SAID KHUBRAN..... INTERESTED PARTY

EXPARTE

1. HIGHWAY CARRIERS LIMITED 1ST APPLICANT

2. COAST HAULERS LIMITED 2ND APPLICANT

JUDGMENT

(1) From the handwritten ruling of the Chief Magistrate which is the primary subject of the Judicial Review proceedings herein, the court considered the application before it as follows:-

“This is an application brought by the Plaintiff under certificate of urgency. He has prayed for an injunction against the Defendants to restrain them, their servants or agents or anybody claiming under them from repossessing and/or using motor vehicle Registration KRU 920 and KSH 891...

An injunction restraining the Defendants their servants or agents from selling, parting with possession and or transferring the ownership of the motor vehicle KTC 529 in favour of a third party pending hearing and determination of the application. The grounds that the Plaintiff relied on were set out. The Defendants in reply admitted existence of a sale agreement between them and the Plaintiff. They however said the Plaintiff did breach the same and that he was properly before court...

I do appreciate there is a buyer/seller relationship between the two parties. The court does also take note that the accounts between the parties have not been clearly set out before it. This is not a matter that a court can determine in the application level. I do appreciate the Plaintiff does not deny owing the Defendants and therefore it will be wholly unfair to state that the Plaintiff keeps the motor vehicle in dispute until the matter is heard and finalized.

I do order that because the Complainant has come to equity he must (be) prepared to do equity. He should deposit Ksh.500,000/= in court within 7 days of this ruling and thereafter pay Ksh.80,000/= every 1st day of the month beginning 1st July 2009 until the matter is heard and determined.

Meanwhile the Defendants to handover to the court an account of the owing sums of money for the court's direction. The matter should be given a hearing date before any court with jurisdiction.

The Defendants are to release motor vehicle KTC 529 to the Plaintiff meanwhile. Costs for the auctioneer.

Read in open court this 27th of May 2009 in the presence of Mr. Wachira for the Defendants.

The Plaintiff is in court in person.

Signed CM.”

(2) The above decision by the then Chief Magistrate Mombasa is the subject of the Judicial Review Proceedings before the Court. The Applicant challenges the court's jurisdiction to issue the order for the payment of installments of the debt owing to the Defendant which was the subject of a contract between the parties for the sale of the motor vehicles made on 7th July, 2008 on which the Plaintiff (interested party here) allegedly defaulted prompting the ex parte Applicant to repossess one of the vehicles.

(3) The relevant facts are not in dispute: the ex parte Applicants and the interested party entered into agreement on 7th June, 2008 for the sale of 3 prime moves at a price of Ksh.580,000/= each, making a total of 1,740,000/= payable by 5 equal monthly installments of Ksh.348,000/= from November 2008 to March 2009. Rightly or wrongly, the ex parte Applicants caused the repossession of one of the motor vehicles the subject of the agreement prompting the interested party to file CMCC NO.410 of 2009 seeking injunction to restrain the ex parte Applicants from transferring the repossessed motor vehicles and from the repossession of the two motor vehicles, among other reliefs. Upon an interlocutory application in that suit the Chief Magistrate on 27th May 2009 delivered the ruling set out above which gave rise to the present Judicial Review Proceedings. Leave to file these proceedings was granted on 11th June, 2009 and the court ordered that the grant of leave do operate as a stay of the Chief Magistrate's Court ruling and order extracted therefrom.

(4) The exparte applicants subsequently filed the Notice of Motion dated 16th June 2009 seeking the orders of certiorari and prohibition in respect to the Chief Magistrate Court's ruling and order respectively of 27th May, 2009 (as well as ex parte order of 3rd March, 2009) and 2nd June 2009. The grounds upon which the application was brought as set out on the Statement were principally:

(a) That the court had no jurisdiction to make no order for payment in installments before a final judgment in this suit.

(b) That by ordering payment by installments and release of the repossessed motor vehicle without an application or suit therefor, the court had condemned the ex parte Applicants without hearing.

(c) That the ruling and order of the court were unreasonable as to order payment of Ksh.80,000/= installments instead of Ksh.348,000/= agreed before the parties and sought in the Plaint; and

(d) That the order extracted on 2nd June 2009 offended the provisions of the Civil Procedure Rules regarding extraction of court orders as it did not comply with the ruling.

The interested party filed a Replying Affidavit of 31st June, 2009 attaching the handwritten ruling of the Chief Magistrate's Court and the Respondent's counsel filed grounds of objection dated 14th April, 2010. The parties thereafter filed their respective written submissions and judgment was reserved.

(5) Three issues arise for determination from the parties' pleadings and submissions as follows:

(a) Whether the court had jurisdiction to make the orders of 3rd March, 2009; 27th May 2009 and extracted on 2nd June,2009.

(b) Whether the ruling of 27th May, 2009 offended the Applicants' right to fair hearing under the Rules of Natural Justice and,

(c) Whether the decision of the court by its ruling of 27th May, 2009 was unreasonable within the

Wednesbury principle.

I do not find that anything turns on the alleged discrepancy between the ruling of 27th May, 2009 and the final order as extracted on 2nd June, 2009 because the court had power under Order XX Rule 8(7) of the Civil Procedure Rules to approve a draft order at the time of making the order. Indeed, any errors thereon may be corrected under the slip rule provisions of section 99 of the Civil Procedure Act. Moreover, I do not accept that failure to observe the rules of court under the Civil Procedure Act could found an ultra vires challenge in view of the Act's own exception under section 3A thereof that ***"nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."***

(6) Whether the court had jurisdiction to make the orders of 3rd March, 2009, 27th May, 2009 and 2nd June, 2009.

The application before the lower court was for temporary injunction pending the hearing and determination of the suit. It was expressed to be brought under Order 39 XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. Under these provisions, the court did have power to grant an interlocutory injunction upon the well known principles of **Giella v. Casman Brown (1973) EA 585** and upon such terms of the court deemed fitting.

The power to grant interlocutory relief for the ends of justice, which is recognized under section 63 (c) and (e) of the Civil Procedure Act is in terms that ***"In order to prevent the ends of justice from being defected the court may, if it is so prescribed (c) grant a temporary injunction.... (e) make such other interlocutory orders as may appear to the court to be just and convenient."***

But is this a complete answer to the jurisdictional challenge by the Applicant? I take the view that the physical existence of the power to grant interlocutory relief under section 63 of the Civil Procedure Act is subject to the qualitative limitation on its exercise in compliance with the rule of natural justice and standard of reasonableness. As noted in **Forsyth and Wade, Administrative Law 9th Ed. 2004 at pp 354-359**, there is no unfettered discretion in public law.

It has been established since the two decisions of **House of Lords, Ridge v. Baldwin (1964) A.C 40** and **Associated Picture House Limited v. Wednesbury Corporation (1948) 1 KB 223**, respectively, that the right to a fair hearing is a rule of universal application and that powers must be exercised reasonably. Hence, the determination as to whether the lower court had jurisdiction to make the ruling and orders of 3rd March, 2009, 27th May, 2009 and 2nd June 2009 must await the review of the decisions on the principles of fair hearing and reasonableness.

(7) Whether the ruling and orders of 3rd March 2009, 27th May 2009 and 2nd June 2009 offended the Applicant's right to fair hearing.

It would appear from the pleadings and affidavits before the court that the order of 3rd March 2009 which was exhibited as an annexure to verifying affidavit was an order granted ex parte upon the filing of the application of 26th February 2009, for 14 days only pending the hearing of the application inter partes then scheduled from 9th March 2009. The court has clear power under the relevant rule to grant ex parte injunction for a period of 14 days and I therefore do not find merit in this aspect of the challenge.

As regard the ruling of 27th May 2009, which is reproduced at the beginning of this ruling, I find that in making the order for the payment of installments into court and for furnishing of ***"an account of the owing sums of money"*** for which no prayers were made in the Plaint and application before the court and therefore no submissions by the parties, the court breached the Applicants' right to a fair hearing. It matters not that the Applicant had been heard on the application for injunction pending hearing and determination of the suit. The Applicants' had not been heard on the course taken by the court in making an order for the deposit into court of the installments.

Even though made pursuant to an application under section 3A of the Civil Procedure Act, the court order of 27th May 2009 for the deposit into the court in installments payments presumably towards the payment of the Plaintiff's debt, which the court found "the Plaintiff does not deny owing the Defendants", smacks of judicial tyranny in that the Plaintiff's creditors (Applicants herein) were compelled to forgo the receipt of their debt from the Plaintiff and the Plaintiff himself compelled to pay into the court sums which would in time exceed what he claimed to be the outstanding debt. I find that the lower court was in breach of both parties' right of fair hearing prescribed under the Rules of Natural Justice and entrenched under Article 50 (1) of the Constitution of Kenya 2010. As an order contrary to natural justice is outside jurisdiction and void (see **Anisminic Limited v. Foreign Compensation Commission (1969) 2 A.C 147**), I hold that the lower court's decision in the ruling of 27th May 2009 was made in excess of jurisdiction and therefore void. I have already shown that the court had power to make the order of 2nd June 2009 which should have been the accurate formal expression of the ruling.

(8) Whether the decision of the lower court contained in the ruling of 27th May 2009 and extracted as the order of 2nd June 2009 was reasonable

In making the decision for the payment of the installments into court, the court reasoned that:

- (a) There was a buyer/seller relationship between the two parties;
- (b) The accounts between the two parties had not been set out clearly before the court;
- (c) The Plaintiff did not deny owing the Defendants and
- (d) It would be wholly unfair to state that the Plaintiff keeps the motor vehicle in dispute until the matter is heard and finalized.

The court did not however explain the choice of figures of 500,000/= lumpsum deposit and the monthly installments of Ksh.80,000/= when only 642,000/= was acknowledged by the Plaintiff to be owing and when the contractual installment was set at Ksh.348,000/=. The amount of Ksh.580,000/= was the contractual purchase price of one vehicle such as the one which had been repossessed and it may have been the decision of the court to have the full purchase price of the one lorry paid in a span of one month of the ruling. Whatever the consideration by the court, I do not find that the decision of the court was unreasonable within the meaning of the **Wednesbury principle** that it was "**something so absurd that no sensible person could ever dream that it lay within the powers of the authority.**" Accordingly, I hold that the decision of the court of 27th May 2009 was not unreasonable, nor was it therefore an indication of bias on the part of the court.

(9) The final order of 2nd June 2009 as an extract of the ruling of 27th May 2009 does not reflect the decision of the court in that it requires by the order number 2 thereof that:

"The Defendants to handover to the court an account of the ownership forms of the motor vehicles for the court's direction."

My own transcription of the handwritten note of the ruling is in the relevant part as follows:

"Meanwhile, the Defendants to handover to the court an account of the owing sums of money for the court's direction."

This later rendition of the ruling appears more consistent with court's finding earlier on in the ruling that "***the accounts between the parties had not been clearly set out before the court.***"

I find the Applicants' challenge on the extracted order of 2nd June 2009 justified in the circumstances but as I hold above, the discrepancy could be rectified by slip rule correction under section 99 of the Civil Procedure Act.

Final orders

(10) Upon finding that the order of the lower court of 27th May 2009 was outside or in excess of its jurisdiction by reason of violating the Applicants' right to fair hearing, and considering that the grant of the Judicial Review remedies is discretionary, I have to consider the circumstances of the case and the objection taken by the Respondents that the Applicants had not exhausted available alternative remedies by way of appeal or review of the ruling of the court.

Relying on **R v. Epping and Harlow General Commissioners ex parte Goldshaw (1983) 3 ALL ER 257** the Interested Party submitted that Judicial Review was a residual jurisdiction of the court which would not, save in exceptional circumstances, be exercised where other remedies were available and had not been used. It was submitted for the Interested Party that:

“It is clear in the circumstances that of this case that the most viable and appropriate action to be taken by the ex parte Applicants was to apply for review of the said orders under Order XLIV of the Civil Procedure Rules and/ or to file an appeal to the High Court of Kenya against the decision of the Chief Magistrate which is also an option properly provided for but the Ex parte Applicants chose not to pursue and further opted to limit their options by the fact that the Ex parte Applicants have sought for an order that this matter should not be heard by the Chief Magistrate and/or any other Magistrate notwithstanding the fact that the main suit had not proceeded to full hearing on its merits. The orders under redress strictly relate to interlocutory proceedings and no challenge has been made in regard to the Chief Magistrate's Court proceedings with the hearing and determination of the remedies sought in the plaint. There is therefore no proper and logical cause for the Ex parte Applicants to use this matter to lock out the Interested Party from the intended seat of justice by barring the lower court from hearing the main suit where there exists an option for appeal against the purportedly offending orders.”

(11) In response to the exhaustion of remedies argument the learned authors of **Forsyth and Wade, Administrative Law, 9th Edition (2004) at page 703** write:

“In principle there ought to be no categorical rule requiring the exhaustion of administrative remedies before Judicial Review can be granted. A vital aspect of the rule of law is that illegal administrative action can be challenged in court as soon as it is taken or threatened. There should be no need first to pursue any administrative procedure or appeal to see whether the action will in the end be taken or not. An administrative appeal on the merits of the case is something quite different from judicial determination of the legality of the whole matter. This is merely to state the essential difference between review and appeal which has already been emphasized. The only qualification is that there may occasionally be special reasons which induce the court to withhold discretionary remedies where the more suitable procedure is appeal, for example where an appeal is already in progress.....”

I agree that in order to promote the Rule of Law an unlawful act by an inferior tribunal should be open to judicial review immediately after it is taken or threatened. I also note that in the circumstances of this case, the period prescribed under the Civil Procedure Act and Rules for the filing an appeal has lapsed and it would require an application for extension time for the Applicants to actualize the remedy of appeal. Having found that the decision of the court of 27th May 2009 was in excess of jurisdiction, in the absence of any special reasons for withholding the Judicial Review orders sought, I would grant the order of certiorari to quash the Chief Magistrate's Court order of 27th May 2009 and an order of Prohibition to prohibit the court from acting upon the extracted order of 2nd June 2009 purportedly the formal expression of the ruling.

(12) I agree with the position taken by the Respondents that Judicial Review should not concern itself with the merits of the decision but the legality of it. I have also not found any challenge on the Interested Party's suit before the Chief Magistrate's Court and therefore cannot justify any order for prohibition against the proceedings before court with regard to further prosecution on the Plaintiff's case in the suit. I find that the lower court has jurisdiction to entertain the suit before it and the court is therefore entitled to

proceed with the hearing of the suit and any application filed thereunder.

(13) Accordingly, for the reasons set out above, I make the following orders on the Notice of Motion dated 16th June 2009:

(a) An order of certiorari to quash the ruling of the Chief Magistrate, Mombasa in CMCC NO.410 of 2009 made on the 27th May, 2009.

(b) An order of Prohibition prohibiting the Chief Magistrate's Court from enforcing or executing the orders granted on 27th May, 2009 and issued on 2nd June, 2009.

(c) As the parties have partially succeeded in their respective contentions, there will be no order as to costs.

(d) The Interested party is at liberty to prosecute his application and suit before the Chief Magistrate's Court presided over by any other magistrate.

Dated and delivered on 28th November 2012

EDWARD M. MURIITHI
JUDGE

In the presence of :

Mr. Wachira for the Applicant

Mr. Eredi for the Respondent

Mr. Nyongesa for the Interested Party

Miss Linda Osundwa - Court clerk