



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JR MISC. APPLICATION NO. 1 OF 2011

FUAD MAHMOUD MOHAMMEDAPPLICANT

VERSUS

DUNCAN NDURACHA

MARIAM MOHAMMED

SENIOR RESIDENT MAGISTRATE'S COURT,

MOMBASA.....RESPONDENTS

J U D G M E N T

This is an application by way of Notice of Motion dated 10th January, 2011, under the provisions of Order 53, Rules 3 (1) of the New Civil Procedure Rules, 2010. It seeks the following judicial review orders which are set out in the Statutory Statement upon which it is based, namely:-

1. An order of Certiorari to remove to the High court Resident Magistrate's Court Civil Case Number 3088 of 2010 between **DUNCAN NDURACHA –VERSUS- MARIAM MOHAMMED** for the decision reached thereon to be quashed.
2. An Order of Prohibition to prohibit the said Duncan Nduracha and/or any other person claiming under him from setting foot upon or continuing with occupation of the premises known as MN/I/3966, Nyali Estate Mombasa.
3. An Order of Mandamus directing that the applicant herein FUAD MAHAMOUD MOHAMED do forthwith take possession and occupation of the aforesaid premises known as MN/3966, Nyali, Mombasa.
4. Costs of this application and other incidental proceedings be provided for.

The grounds set out in the statement upon which the reliefs are sought are inter alia, are that:-

1. The Resident Magistrate's court has no jurisdiction to deal with property registered under the Registration of Titles Act, Cap (281) Laws of Kenya.
2. Under Section 2 of the said Act only the High Court is vested with jurisdiction to hear and determine – matters relating to property registered under the Act.
3. The applicant has at all material times been a purchaser in possession in respect of the property

known as MN/I/3966, Mombasa, Nyali

4. On the 29th November 2010 one DUNCAN NDURACHA sued MARIAM MOHAMMED claiming to be the new owner of the suit premises, MN/I/3966 and seeking among others an eviction order in the following terms:-

“An eviction order, compelling the defendant by herself, servants agents and/or legal representative to move out of the plaintiffs property situated in Kisauni, namely Land Reference Number MN/1/3966.”

1. Consequently the said DUNCAN NDURACHA was issued with eviction orders, apparently to evict MARIAM MOHAMMED from the suit Property.
2. There is no person known by the name MARIAM MOHAMMED who has ever resided in the suit property and no member of the Applicant.
3. The Applicant strongly believes that the said MARIAM MOHAMED is a creation and decoy of DUNCAN NDURACHA, to enable him obtain orders in order to evict the Applicant.
4. The Resident Magistrate’s Court therefore acted without jurisdiction in the matter.
5. In the circumstances the decision of that court is illegal, null and void, calling for the quashing *ex debito justitiae*.
6. The eviction of the applicant was a nullity and illegal as the same violated the fiercely geared natural justice principle of *Audi Alterem partem*.
7. In monetary Terms the Senior Resident Magistrate has no jurisdiction to determine any matters relating to the suit property.
8. By creating a non-existent defendant in the suit (RMCC 3088 of 2010), Duncan Nduracha was perpetrating and perpetuating a fraud of gigantic proportions upon the court, and to defeat the due process of law which had been set in matter in motion the pending High Court suits listed for hearing on the 17th February 2011.
9. The Applicant and his family are now staying with friends and some in rented premises. This is an eerie occasion for them considering that their eviction came just at the beginning of the end year festive season.
10. To avoid a situation where a party uses the courts to entrench an illegality, DUNCAN NDURACHA, ought to be removed from the suit premises, and the Applicant be reinstated therein.
11. It is illegal and unlawful and against the provisions of Section 52, of the I.T.P.A. (Group 8 Acts), for any party to effect transfer of a property which is the subject of pending litigation.

The application is supported by the Verifying Affidavit sworn by

the applicant Fuad Mahamoud Mohamed on 10th January 2011.

Before the application was filed, the applicant duly obtained leave of the court to institute judicial review proceedings on 10.01.2011 and in view of the urgency and the serious allegations of violation of the law and departure from the due process of the law, I reduced the period for filing the application to 2 days, and for the matter to be mentioned on 13.01.2011. The Applicant filed the application on the same day on 13.01.2011, the 1st Respondent, Duncan Nduracha, appeared through Counsel, Mr. Masore Nyangau, Advocate.

The applicant despite the short period and believing that the matter was due for hearing of application for leave filed his Replying Affidavit and Grounds of Opposition on 13.01.2011.

In his grounds of opposition, the 1st Respondent set out the following grounds :-

1. The application is incompetent in that there is no longer any procedure for making any application by way of Chamber summons – The said application is in breach of the mandatory provisions of Order 51, rule 1 of the civil Procedure Rules, 2010.
2. That the court documents in Mombasa SRMCC No.3080 of 2010 have not been authenticated by

- the Registrar as required under Order 53, Rule 7 of the Civil Procedure Rules, 2010.
3. That a judicial review application is a judicial process directed against public bodies engaged in decision making processes and the same is never against private individuals such as the 1st Respondent.
 4. That the joining of a private individual to this application is premature and makes the application for leave incompetent, which leave should not be granted.

It is only at the hearing, not before, of the application that the court

could order any other person, other than the public body be served, not joined as a party with the application as provided by Order 53, rule 3 (3) of the Civil Procedure Rules 2010.

1. That as the applicant has already been evicted from the suit premises, the stay that the court can competently grant pending the quashing of the eviction order should the court find merit in the application - would only be in respect of further proceedings of Mombasa SRMCC No. 3088 of 2010.
2. That the court does not have jurisdiction in judicial review application, at this stage or at all, to prohibit a proprietor of land from “setting foot on his land” or from dealing with it in the manner the law allows him.
3. That the application is couched in judicial review terms when the same is an injunction application making the said application muddled up and therefore incompetent.
4. That the court in SRMCC No. 3088 of 2010 was dealing with an eviction of a trespasser and not ownership of the suit premises and therefore had jurisdiction to issue eviction orders.

In his Replying Affidavit sworn on the same day, the 1st Respondent

deponed, inter alia as follows:-

“.....
.....”

1. –
2. –
3. **That I bought land parcel L.R. No. MN?I?3966 from James Kamore Njomo who transferred the same to me sometime in November, 2010 as shown by a copy of the title deed hereto annexed and marked “DN1”**
4. **That I thereafter severally requested a lady by the name Miriam Mohammed whom I always met in the suit premises to vacate the house, but she failed.**
5. **That I have learnt from my advocates that the Applicant had earlier made an application for Judicial Review on similar grounds which was rejected by the court as shown by a copy of the Ruling, marked “DN2”**
6. **That I subsequently filed a case for eviction of the said lady, served her with court papers and later evicted her.**
7. **That I have never seen the applicant in this case and I do not know the connection he has in the matter.**
8. **That I have already leased out the premises to a tenant.**
9.”

Before the mention of the case on 13.01.2011, this court summoned

the Senior Resident Magistrate Hon. M. Kizito who granted the eviction orders in the case SRMCC No. 3088 of 2010 on 21 December 2011.

This court as the High Court in these judicial review proceedings, wished to obtain information from Honourable Magistrate and for him to throw light on the case, the circumstances in which the orders were given and his response views to the present application as indeed strictly , it was his court which was the

substantive and true Respondent.

Upon lengthy and open discussions with the Honourable Magistrate in my Chambers and upon perusing the court file in civil Case No. 3088 of 2010 together so that it could be decided whether the court ought to instruct the Attorney General to represent the trial court and defend these proceedings, it was discovered that the Summons in this case had never been applied for, issued or served on the Defendant, MARIAMu Mohammed. From the Affidavits of service, the plaint and summons were never serviced on the Defendant, MARIAMU Mohammed whatsoever as required by the law.

This clearly meant that the orders granted for eviction were premature and not founded on the law and that there was a fundamental procedural omission that went to the validity of the eviction orders which were obtained, issued and enforced in the said case.

The suit in the Senior Magistrate's court was filed on 29th November, 2011 when the old Civil Procedure Rules were still in force. The new Civil Procedure Rules of 2011 came in operation on 17.12.2010. However, both codes or Rules of procedure Law have exactly similar provisions regarding the question of summons and service thereof together with the plaint.

Order 4 Rule 3 of the previous Rules provided as follows:-

“3.(1) when a suit has been filed a summons shall issue to the Defendant ordering him to appear within the time specified herein.

(2) Every summons shall be signed by the judge or an Officer appointed by the Judge and shall be sealed With the seal of the court.

(3) Every summons shall be accompanied by a copy Of the plaint.

(4) The time for appearance shall be fixed with reference to the place of residential of the defendant so as to allow him sufficient time to appear. Provided the time for appearance shall not be less than 10 days.

(5) Every Summons shall be prepared by the plaintiff or his advocates and filed with the plaint to be signed in accordance with sub rule (2) of this rule.”

With regard to service of the summons which must always be accompanied with the plaint, the mode of service was set out in order 5, Rule 9)(1) which stated:-

“9(1) wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”

Upon careful inspection and perusal of the entire file in SRMCC No. 3088 of 2010 this court together with the Hon. M. Kizito found as a matter of fact, no summons had been prepared and filed with the plaint by the plaintiff's advocates, M/s K.K. Nyakundi when the plaint was filed on 29.11.2010. Consequently, no summons was or could be issued after being signed and sealed by the court for service on the Defendant.

In an Affidavit of service sworn on 6th December 2010, the Process server one Stanley Njau deponed that he received an application dated 29.11.2010 coming for hearing on 7th December 2010 from Mssrs. K.K. Nyakundi & Co Advocates with instructions to serve the same upon the Defendant. That on the same day he went to the Defendant premises where he met her when she introduced herself to him. He then served her with the documents (Application).

There is no mention of the summons and plaint and this court therefore found that the summons and plaint were not served as required by law. It is not explained why the plaint was not served even if the

summons was omitted so that the Defendant could know that a suit had been filed. The trial court was not satisfied with this service and ordered re-service. The court was of the view that the process server had not stated or indicated how he identified the Defendant.

The process server then reserved "The application together with the hearing notice for 21.11.2010 on 8th December 2010. In his second affidavit of service, again there is no mention of any summons to him by M/s K.K. Nyakundi, Advocates for the plaintiff to effect service on the Defendant together with the application for inter alia eviction orders.

On the basis of the said affidavit of service, the trial court proceeded to hear the application on 21.11.2010. The Defendant was not in court on the said date when the application was heard. In the second affidavit of service which the court accepted that service had now been properly effected the same process server said that he was in the company of the plaintiff who pointed her out to him though he also personally knew the Defendant, MARIAM Mohammed.

On the basis of the foregoing it became certain that the application dated 29.11.2010 was prematurely presented for hearing and was heard and determined before the issuance and service of the Summons accompanied by the plaint. This was a fundamental procedural omission and breach of the Cardinal Principles of Natural Justice. The application could only be presented heard and determined after the following steps had been complied with:

1. *The summons had been filed with the plaint.*
2. *This summons had been signed and sealed by the court.*
3. *The summons had been issued for service on the defendant.*
4. *The summons and the plaint had been served on the Defendant.*

No step in law or fact could take place before the said process was duly complied with even if for any lawful cause, the plaintiff wished the matter of eviction despite being the substance relief sought to be heard before the time to enter appearance and defence had lapsed. This condition precedent for any proceedings or steps, to be taken i.e. issuance and service of the summons accompanied by the plaint had not taken place.

It is irrelevant whether the Defendant was duly served with the application with hearing notice and that some did not appear in court.

It does not matter that the named Defendant, MARIAMu Mohamed has not to date appeared in court or made any representation or challenged the court orders herein.

Through these judicial proceedings, the Applicant has come to court and on oath deponed that there is no person known as MARIAM Mohamed who ever resided on the suit property and no member in household is known by that name.

The Applicant stated that that he is the one in the suit premises and has been in the premises even before 2003 and that in other suits, involving the National Bank of Kenya Ltd and the previous registered owner one James Kamore Njomo and another before the registration of the property into the names of the 1st Respondent, on 5.11.2010 just over 2 weeks before the eviction, there were existing injunction orders in his favour.

Upon careful consideration of the foregoing and discovery and appreciation of all the aforesaid, the Hon. Mr. Kizito informed me that had he noticed the said matters/or had they been raised, he would not have granted the orders in favour of the plaintiff. He said that he proceeded in good faith and on the honest belief though mistaken, that the application coming for inter partes hearing after due service and after the said services of process as required by law.

As a result, Hon. Kizito as the presiding Magistrate in the 3rd Respondent, the Senior Resident Magistrate's Court, Mombasa was of the view that there was no basis for his court to defend the judicial review proceedings and there was no need to instruct the Attorney General to come in to act for the said court. I agreed with him as the High Court and the Resident Judge at the High Court, Mombasa in charge of the law courts at Mombasa. Under Article 165, of the Constitution the High court is conferred with the jurisdiction to supervise and guide the subordinate courts in the discharge of its judicial functions and to make any appropriate orders necessary.

After lengthy deliberations on 13.01.2011 in the presence of Counsel for the Applicant and the 1st Respondent and upon placing on record the discussions with Hon. M. Kizito and the decision reached by the 3rd Respondent, I made inter alia, the following orders:

“.....This court therefore wishes to place it on record that on the basis of the finding of the court regarding the record and in exercise of the Supervisory Powers of this court over the subordinate courts under Article 165 of the Constitution, the Third Respondent wishes to concede to the Application and will not defend the same on the ground that there was a procedural defect – i.e. there was no summons issued in the case and there was no service of the same to give the Defendant the right to enter appearance and file a defence. As a result, the court strictly could not grant the orders granted herein in the manner it did.

In the light of the foregoing, the court proposes to invoke its powers under Article 165 to make amends and the correct the position. The 1st Respondent will be given the right to file its Replying Affidavit and show cause why in the circumstances, he can continue to enjoy the orders obtained and the fruits of what is patently an unlawful, illegal and unconstitutional order.

I therefore grant leave to the 1st Respondent to file and serve a Replying Affidavit to the motion. The application shall be heard on 24th January 2011.

I hereby do order that Mr. Duncan Nduracha be present and attend court on the such day so that he can appreciate what is going on in this said case. Summons do issue and be served on Misa Auctioneers to attend the court to explain to the court on the eviction process herein. Costs in the cause.....

Further Orders:

I do order that the process server Mr. Stanley Njau, do attend the hearing on 24.01.2011. Summons do issue and be served on Mr. Njau and with a view of informing the court how he carried out the service of the application herein.

Mr. Njau to carry with him his original current licence or letter of authority as a process server.

M.K. IBRAHIM

J U D G E

13.01.2011”

The 1st Respondent and the plaintiff in SRMCC No. 3088 of 2010 duly filed his Replying Affidavit sworn on 19.01.2010 made necessary by the matters revealed by the court and placed on record. He stated on oath as follows:-

“1. -

2. -

3. -

4. -

5. That I bought the land reference No, MN/1/3966 from one James Kamore Njomo who informed me and which information I believed true that the land did not have any encumbrances.

6. That during the process of buying the said parcel of land, I instructed the advocate who represented me in the conveyance to conduct a search which was done.

7. That the said search had no encumbrances except a Charge with the British American Insurance Company (Kenya) Ltd which was discharged to enable the transfer of the property to my name. Now shown to me and marked “DN 1” is a copy of the title deed in my name.

8. That I am an innocent purchaser for value without any notice of any claim by the applicant over the suit property.

9. That the said property is currently occupied by my tenant.

10. That after buying the said property, I immediately notified the occupant of the house and informed the lady I used to get in the house, and who informed me the first time I asked her name and which information I verily believe to be true that her name was MARIAMu Mohamed.

11. That I never met any man in the house every time I visited the house and demanded the said occupant to deliver the vacant possession to me.

12. That when the said lady refused to hand over vacant possession. I instructed an advocate to institute legal proceedings against her for her eviction.

13. That I am a law-abiding citizen who is not conversant with the intricate legal procedures of the court which my advocate who was then acting for me employed.

14. That my claim against the said MARIAMu Mohamed is on the trespass not ownership as the said MARIAM Mohamed did not have any claim of ownership on the suit property.

15. That I have been advised by my advocate and which I verily believe to be true, that a subordinate court has jurisdiction to issue an order of eviction against a trespasser and the jurisdiction that is reserved for the High Court over the Registration of Titles Act, Cap 281 is only on ownership.

16. That my advocate has advised me which advise I verily believe to be true that the only recourse the applicant in this application had is to go back to the subordinate court that issued the order in CMCC No. 3088 of 2010 and not a judicial review application.

On 24th January 2011, both counsel for the applicant, Mr. Paul Buti and Counsel for the 1st Respondent Mr. Masore Nyangau appeared before me. Also in attendance was the proprietor of Misa Auctioneers, Mr. Samuel Mugaro who responded to the summons served on him. The process server did not attend court despite service of the summons on him on 18.01.2010.

Counsel made their able submissions. The upshot of the 1st Respondents counsel’s submissions were that the 1st Respondent was an innocent buyer for value and without any knowledge of any claims by the Applicant on the property. That any irregularities or procedural defects or omissions on the service of summons and plaint were not within his control or knowledge. That he relied on his then advocates who he had instructed to sue the occupant of the premises for vacant possession.

The 1st Respondent through Counsel questioned whether any wrongs which took place could be remedied through judicial review proceedings. He said that the Court had no jurisdiction to give any of the judicial review orders sought within the facts and circumstances of this case. That the appropriate procedure was to go back to the Magistrate’s court to set aside the orders given. In any case, he submitted that even if this court set aside and quashed eviction orders, it must stop there and the court could not in law reinstate the applicant if he is the one who had in fact been evicted which was denied. The 1st Respondent insisted that he had a tenant in the premises and the court must consider both sides as justice cuts both ways. That fair administration of justice requires to balance and consider interest of both sides. That the court in exercise of its judicial review powers should look at the rights and interests of both the Applicant and the 1st Respondent.

I have considered all the submissions by counsel and the authorities referred to.

The first prayer OR relief sought by the applicant is an order of Certiorari to remove to the High Court Resident Magistrate’s Court Civil Case No. 3088 of 2010 between DUNCAN NDURACHA –V- MARIAMU MOHAMED for the decision reached thereon to be quashed.

I have already stated the findings of the court upon consulting the 3rd Respondent through the presiding Magistrate of the court, Hon. M. Kizito and upon calling for the record and proceedings, the court in the Civil Case before the Resident Magistrate’s court. No summons was ever drawn and prepared by the 1st Respondent’s Advocates signed and sealed by the court, issued and duly served together with an accompanying plaint on the named Defendant. That by itself makes the whole process relating to the application for eviction and the issuance/grant of eviction order incompetent and fatally defective. Without the issuance and service on the named Defendant, all subsequent proceedings and decisions and enforcement were a nullity. The court did not have any jurisdiction to hear and entertain the application for eviction in the circumstances without service of the summons and plaint. In this case it had never been taken out and issued in the first place. The proceedings on 21st December 2011 and all the orders given were without jurisdiction, invalid and nullities.

The applicant herein raised inter alia, jurisdictional and issues in respect the cause of action in the plaint i.e. that the property was registered vide the Registration of Titles Act. In view of the findings on the summons, it will not be necessary or possible to delve into the said question. However, the ground that touches on the question of the summons is Ground R (V) – that:-

“the eviction of the applicant was a nullity and illegal as the same violated the sincerely guarded natural justice Principle of Audi Alterem Partem.”

The paramount objective of the issuance of summons and service together with the plaint is to enable the Defendant to be served personally and to have the opportunity to enter appearance and upon exercising the opportunity given to prepare his/her defence and to file a defence within a reasonable time. On this basis, a Defendant is given the right to defend the suit and ultimately to be heard in the case. This is not only a cardinal right under the Civil Procedure Rules but certainly also a Constitutional right in any

court proceedings that can lead to orders being given which can lawfully/legally take away ones rights to property and even at times liberty. The rights to be served with summons accompanied by a plaint are absolute rights and not negotiable.

Having said that, does the Applicant have the locus standi, capacity and right to bring these judicial review proceedings and to seek the order of certiorari, or any other related judicial review orders?

This is a pertinent question since strictly The applicant, FUAD MAHAMOUD MOHAMMED is not the Defendant in SRMCC No. 3088 of 2010 and neither is he a party at all. So what makes him institute these proceedings and seek the intervention of this court?

The applicant contends that the truth and fact is that there is no MARIAMU MOHAMED who has ever resided or been in possession of the suit premises, Land Reference No. MN/1/3966, situated in Nyali, Mombasa. That he is the beneficial owner of the said suit premises and has been in occupation from well before 2003. That there are pending Civil proceedings with the person from whom the plaintiff purportedly purchased the property and in which he has injunction orders in force and in his favour.

The applicant makes a very serious allegation that in fact the said MARIAMu Mohamed is a creation of the plaintiff and does not exist in reality and she is a decoy used to fraudulently obtain the eviction orders which have been enforced resulting in his eviction and that of his family. The effect is that he is alleging that the said suit was a stratagem used by the plaintiff to fraudulently and illegally obtain vacant possession of the suit premises. As a result, he was not given the opportunity to be served and to defend the suit whose orders has led to his violent eviction without being given the opportunity to be heard.

I have carefully considered these allegations and the response by the 1st Respondent I do find as a fact on a balance of probability that the applicant had been in occupation and possession of the suit premises as at 21.12.2011 when the eviction order was granted. He was in occupation of the suit premises as his residence with his family. From the evidence i.e. the court papers annexed he has been litigating over the said property from as far back as 2003 with one James Kamore Njomo who has been seeking to have him evicted from the premises through various court cases up to and as late as August 2010 through CMCC No. 2107 of 2010 which has been stayed through MISCELLANEOUS CIVIL APPLICATION NO. 447 OF 2010 which is now coming for hearing on 17.02.2011 as ordered by the Honourable Justice Ojwang.

At the hearing, the wife of the Applicant was in court and the court had sight of her driving licence and voter's card. She is not called MARIAMu Mohamed has not been traced by the applicant and she has not bothered to come to court to seek any protection or remedies. The auctioneers in court upon being asked about the defendant he was to evict he stated that he verily believed that the Applicant's wife who she saw in court was MARIAMu Mohamed as this is what an agent of the plaintiff, a Mr. Kimondo told him. He saw the Applicant at the premises when he was carrying out the eviction.

I also find on a balance of probability that there is no MARIAMu Mohamed who has been on the premises in occupation or otherwise and that in the absence of any evidence to prove this and the process server refusing to respond to the summons to attend court, MARIAM Mohamed is indeed a Creation of the applicant. She does not exist and has been named as a Defendant fraudulently and with the intension to deceive the trial court in granting orders in default of attendance. The defendant MARIAMu Mohamed did not default to appear as she has never been on the premises. She was never a trespasser. She is a ghost brought to life by the applicant to claim service of the application on her to justify and warrant the grant of the eviction Orders by the non-suspecting trial court.

What this devilish and demonic scheme did not anticipate is that the advocate for the applicant/plaintiff in the said suit would be so hurried in this quest that he would negligently fail or omit to prepare the summons, have it signed and sealed by the court for service on the Defendant. The scheme could have been less questionable if this was at least done even if the "Service" was also faked.

As a result, I do hold that the eviction ordered having been obtained through this grand deception

and charade was used to violently and callously evict the applicant and his family from the suit premises.

The applicant was the intended person to be evicted and the 1st Respondent who is now alleged to bear the full names of DUNCAN NDURACHA KAMORE knew that the applicant was the one in the premises and that if served he would have fought and defended the said new legal action as he has done over the years with the previous owner James Kamore Njomo.

The Applicant filed in court a supplementary affidavit albeit without leave of the court. I was inclined to ignore it but the allegation therein is so dramatic and almost unbelievable that this court looked at the copies of the plaintiff's identify card and Pin Number issued by the Kenya Revenue Authority and indeed the full names of the 1st Respondent are Duncan Nduracha Kamore? The previous registered owners of the property were James Kamore Njomo and Peter Macharia Kamore. The court has been placed on the inquiry that this similarities of names are too good or close to be natural or purely coincidental. This circumstantial evidence at this stage is not conclusive but it would be asking too much of the court, not to just wonder, what if it is true that the previous owners and the 1st Respondent are family members or relatives as insinuated by the Applicant's Counsel during submissions which the court at the time discouraged?

I hold that the Applicant has the locus standi and capacity to institute these judicial review proceedings although he is not a named party in SRMCC No. 3088 of 2010. He has the right to apply to be enjoined in the said suit if it became necessary as he is the rightful Defendant who should have been sued.

In the case of **MISC. APPL. NO. 1025 OF 2003 – REPUBLIC –V- JUDICIAL SERVICE COM. OF KENYA EX PARTE STEPHENS PARENO**, i.e. His Lordship Justice Nyamu (as he then was) stated as he discussed the WEDNESBURY PRINCIPLES.

“.....

1. –
2. **An order for judicial review can only be granted where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.”**
3. –
4. **The court will not however on a judicial review application sit as a “Court of Appeal” from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction or the decision as in Wednesbury is unreasonable.”**

In the present case, it was a case of total want of jurisdiction which arose due to the misrepresentations and deceptions of the 1st Respondent, as knowingly executed by his then advocate if not actually instigated and engineered by the said advocate considering that it is the advocate who is deemed to prepare the summons to be presented to court to be signed and sealed by the court and who would procure lawful service as required by the Rules.

While the trial court ought to have been alert and more vigilant, I am doubtful that it could have known of the grand fraud and web of conspiracy that had been organized and was about to be carried out when the application was presented before him as if it was a normal interlocutory injunction which had been duly served. What followed was a total gross miscarriage of justice and blatant violation of the due process of the law and the court. It is indeed sad and a shame that it was done under the guise of the lawful execution and enforcement of an order of our courts.

I have, therefore no hesitation, in granting the order of Certiorari sought. I do hereby grant prayer (a) of the Notice of motion and add that the order of eviction granted on 21st December 2010 is hereby quashed and do hereby also set aside the entire proceedings in the Senior Resident Magistrate's Court

that took place on 21st December 2010. The records of the Honourable court must be sanitized and cleansed and the offending and unholy proceedings set aside.

The second prayer in the application and the statement is for:

“

(b) An order of Prohibition to prohibit the said Duncan Nduracha and /or any other person claiming under him from setting foot upon or continuing with the occupation of the premises.”

I agree with Mr. Masore Nyangau, counsel for the 1st Respondent that judicial review application in a judicial process directed against public bodies engaged in decision making processes and the same is never against private individuals, such as the 1st Respondent. The court has no jurisdiction to grant an order of prohibition against a private individual. The orders or decision under challenge here were orders of eviction which were granted by the Senior Resident Magistrate’s Court. It was not a decision of the 1st Respondent though he is a beneficiary of the enforcement of the said orders. I decline to grant the orders of prohibition.

The third prayer is for:-

“(3(c) an order of Mandamus directing the Applicant herein FUAD MAHAMOUD MOHAMED to do forthwith taken possession and occupation of the aforesaid premises known as MN/3966, Nyali, Mombasa.”

For the same reasons as above, I find that this court has no jurisdiction to grant an order of Mandamus in respect of a private individual. In any case, a judicial review order can only be issued against a Respondent or other Interested Party joined in the proceedings. It cannot be granted “against” an applicant. I agree that the effect of granting such an order would be in effect a mandatory injunction in favour of the Applicant. As a result the same will not be allowed by this court.

In view of the foregoing, should this court stop there and conclude these proceedings after giving its funding on costs – i.e. who should pay the costs of the application? I have dealt with all the substantive remedies or reliefs sought, should the court end their matter there once it awards the costs.

What would be the resulting position or consequences if the court does that?

It would mean that while the entire proceedings on 21.1.211 in SRMCC No. 3088 of 2010 would have been nullified and quashed by the order of certiorari together with the eviction order which has not been returned to court by the bailiff duly executed. The said proceedings and eviction order having been set aside and quashed, the result is that the Applicant remains evicted from the suit property and the 1st Respondent remains in possession occupation and control of the suit premises. The 1st Respondent claims that he had leased the premises and has put a tenant in occupation. He however, did not produce a copy of the lease or tenancy agreement. To the contrary, the allegation is faulted and contradicted by the deposition of the Process Server who went to serve the application herein on the 1st Defendant and the alleged Mriamu Mohamed. The process server stated that he found a gentleman in the premises who informed him that he is the caretaker of the property. The process server Mr. Fidelis Omari Abere in his affidavit of service filed on 12.01.2011 states inter alia as follows:-

“.....
.....

1. **THAT on the same date at around 4.00 p.m. in the company of the Applicant herein FUAD MAHAMOUD MOHAMED we proceeded to the house situated on Plot No. MN/1/3966 Nyali opposite Voyage Hotel which house was pointed out to me by the Applicant and I**

- knocked t the gate, a gentleman who informed me that he is caretaker of the property appeared.
2. **THATI** introduced myself and the purpose of my visit to the said gentleman and he phoned the 1st Respondent and we spoke on phone whereby the 1st respondent insisted that since the matter is urgent I should take a flight to Nairobi and serve his advocate K.K. Nyakundi and Co. Advocates of which I informed him that we have done so.
 3. **THAT**we thereafter agreed that I serve the caretaker with all the pleadings stated in paragraph 2 above for onward transmission to him (1st Respondent)
 4. **THAT**the Applicant FUAD MOHAMMED informed me that he does not know the 2nd Respondent and on enquiring from NDURACHA (1st Respondent) on the phone, when I was talking to him where I could get the 2nd Respondent, he only repeated to me that I leave the documents with the caretaker.”

The record has been available to the 1st Respondent’s counsel but nobody has challenged or questioned or rebutted the affidavit of service of this process- server.

Having considered the demeanour of the 1st Respondent in these proceedings, his absence from court throughout these proceedings despite being summoned by this court in the presence of his advocate and the fact that he has not produced any copy of any lease or tenancy agreement, I do not accept or believe that there is any tenant in the premises as alleged. I accept and believe the affidavit of service that the premises is the hands of the 1st Respondent through a caretaker. There is no evidence of any third party or tenant in the premises.

Having concluded the judicial review proceedings save for the question of costs, I think that this court as the High Court of Kenya would be failing in its duties as the ultimate court charged with the enforcement of the Constitution of Kenya to stop there. I do accept that ordinarily a court ought not go beyond the reliefs sought in the statement on judicial review matters. But if this court leaves the matters as they stand, will it be able to hold its head high and claim that the Constitution of Kenya is protected and enforced by the High Court to the hilt without fear or favour? Will it be able to do so when it cannot redress a grievous wrong meted out to an innocent citizen and his family by the atrocious and fraudulent use of a court order? A court order so tainted with illegality and fraud? Should the court allow the fruits of the said illegal acts and/or omissions and i.e possession of the suit premises to be continued to be enjoyed by the perpetrators of the wrongs and illegalities herein? I do not think so.

Article 165, of the Constitution in clause (6) and (7) provides as follows:-

“(6) the High court has supervisory jurisdiction over the subordinate court and over any person. Body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purpose of Clause 6, the High Court may call for the record of any proceedings before any subordinate court or person. Body or authority referred to in clause 6, and may make any order or give any directions it considers appropriate to ensure the fair administration of justice.”

I hereby invoke this court’s supervisory jurisdiction of the Senior Resident Magistrate’s Court and do hereby call for the record of the proceedings before the said court in SRMCC No. 3088 of 2010 and in particular on 21.11.2010 for inspection and review. Upon perusal and inspection, I confirm that findings that I made hereinabove in the judicial review proceedings herein, I do find that the “MARIAM Mohamed” does not exist as relates to the suit premises. She is a phantom created by the 1st Respondent so that he could obtain “default” orders of eviction in respect of the premises. The said eviction orders were obtained and enforced against the Applicant herein. This amounts to a sacrilegious act of using a court order to carry out what is out rightly and clearly on unlawful and illegal order. The High Court must intervene. The High Court would be failing in its Constitutional discharge of its functions to let the matters pass under the fetters of judicial review jurisdiction. The court has the duty to invoke its

supervisory powers as the orders of the courts which are supposed to be obtained under the principle of justice, fairness and equity were used to visit upon an innocent party and his family the most cruel, callous, coercive, violent and horrendous experience.

This should never happen where the Rule of law and the tenets of a democratic state/society are required and expected to prevail as in Kenya.

The 1st Respondent's acts were contrary to the law and most foul. It is against public policy for one who has flagrantly and blatantly violated the law to retain the fruits of the said illegal action/omission.

In case, I am wrong that there is a tenant in the premises and that there could be possibly a third party on the premises, I wish to apply the principles of law that the Hon. Justice Bosire (as he then was) applied in:

HCCC NO. 2225 OF 1997 BELLE MAISON LIMITED –V- YAYA TOWERS LIMITED when he said as follows:-

“An issue was raised with regard to rights of a third party in the tenant who was allegedly put in possession. The tenant was put in possession almost at the same time the applicant was evicted. Although I concede that an order of injunction prayed for will interfere with that tenant's rights if at all they exist, over the suit property without him being heard, the position in law as I understand is that a person who shows that he is entitled to a mandatory injunction must not be compelled to take damages in lieu. That in effect is what the respondent would like this court to say. Nor must a wrong doer be permitted to benefit, however, remotely, from his wrongdoing, more so where the wrong is blatant or where contract of the defendant is contrary to law. In cases where conduct of the defendant is contrary to Law, the court has no discretion . By shutting its eyes to the act the court will in effect be indirectly sanctioning it.

The defendant having set in motion circumstances which are likely to affect third parties, the remedy of the third party is against it.”

Those are sound principles which I wish to borrow in this matter. I therefore do hereby grant an order of eviction as against the 1st Respondent from the suit premises L.R.No.MN/1/3966, compelling the 1st Respondent, by himself, servants, agents, legal representatives' licencees, tenants or otherwise to forthwith vacate and move out of the suit property.

The order of Eviction shall be issued forthwith and enforced immediately and with immediate effect. The order shall be enforced by the court Bailiff or one appointed by the court and the O.C.S. Nyali Police Station who shall provide appropriate security. Upon the said enforcement, the applicant shall be reinstated into possession and occupation in the premises forthwith.

The 1st Respondent shall pay the costs of the judicial review application and the costs of the enforcement of the eviction orders herein.

Dated and delivered at Mombasa this 31st day of January 2011.

M.K. IBRAHIM

J U D G E

Coram:

Ibrahim, J

Court clerk – Kazungu

Mr. Buti for the applicant

Mr. Masore Nyangau for the 1st Respondent

12.10 p.m.

Judgment delivered in their presence.

IBRAHIM, J

Mr. Nyangau:

I apply under Order 42, Rules 6 (5). I ask for stay of the order of eviction informally. I am instructed to apply. Give the 1st Respondent time to comply with the order. I ask for 7 days.

I plead with you to give him time to comply to - I avoid any eviction. I may be instructed to appeal against the orders. I apply for stay to appeal against the decision.

Order 42, rule 6(3) the Court shall have power to stay its orders.

We request for a few days. We undertake to ensure nobody else comes in.

Mr. Buti

I object. I would not have objected in other case. He who seeks equity must come with clean hands. This maxim cannot apply. The delay in executing and the time of enforcing the order of eviction. He comes in two names conveniently. This is a person not deserving of your discretion. Instructions to appeal in no reasons why. It is contradictory to stay the order. He can appeal even if the order is enforced.

Mr. Nyangau

We have no problem with order of certiorari. They may claim general damages. Applicant is an innocent party. He should be given a chance.

ORDER

I believe in the undoubted right of the Applicant to appeal. I am a believer in the principle that where it is practicable the right of appeal ought not be rendered nugatory.

However, the circumstances of this case is different. My judgment speaks for itself. The court had

demonstrated its outrage and condemnation of the actions of the 1st applicant and the outrageous enforcement of the evictions order.

This is one case where I do not have any hesitation in declining to grant an informal stay. There is no legal or moral fabric which constitutes a threshold for the exercise some indulgence or equitable gesture or relief towards the 1st Respondent who again has not come to court as I would have expected after I condemned his disregard and rebuff of the court orders that he attends at the last hearing.

I feel no compassion for someone who does not give regard to the court in his approach to court and in particular in the manner that the eviction was carried.

Respect is a two-way traffic. He does not respect this court and I will not respect his pleas when he is faced with lawful orders of this court.

I wholly reject the application for stay pending a formal application for stay.

I decline to exercise the court's discretion to allow this oral application. There is a risk that the applicant will change the status of the suit premises and even allow other parties to come into it. I do not think that he will comply with any conditions for stay. He has shown contempt for due process by his actions. Orders accordingly.

Dated at Mombasa this 31st day of January 2011.

M. K. IBRAHIM

J U D G E