REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 259 OF 2007

IN THE MATTER OF AN APPLICATION BY LEONARD GACHORO WACHIRA AND 5 OTHERS FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE DECISION BY THE SENIOR RESIDENT MAGISTRATE DATED 18TH SEPTEMBER 2006 AND

THE PROCEEDINGS IN MILIMANI CMCC NO. 9264 OF 2006

NICHOLAS MUCHORA .....1ST APPLICANT

LEONARD GACHORO WACHIRA .....2ND APPLILCANT

REGINA LUNYOLO NDURURU ..... 3RD APPLICANT

MARGARET WAMUYU ..... 4TH APPLICANT

KABORO GACHARA ..... 5TH APPLICANT

KARUA KIGURU ..... 6TH APPLICANT

VERSUS

THE SENIOR RESIDENT MAGISTRATE (MILIMANI COMMERCIAL COURTS) .....RESPONDENT

PROVINCIAL LANDS SURVEYOR, NAIROBI.....1ST AFFECTED PARTY

ALICE WAMBUI MUIGAI .....2ND AFFECTED PARTY

RULING

The ex parte applicant filed an application by way of a Notice of Motion dated 26th March 2007 and sought the following orders:-

"1. That an order of certiorari do issue to bring to this honourable court the entire proceedings in Milimani CMCC No 9164 of 2006 including the ruling and subsequent order made on 18th September 2006 by the respondent for purposes of being quashed.

2. That an order of prohibition do issue to prohibit the affected parties from interfering with the boundaries in respect of the applicants' property adjoining the property known as title no. Nairobi/Block 126/321 until the boundary dispute is resolved as prescribed by the provisions of the Registered Land Act Cap 300.

3. That costs of this application be awarded to the ex parte applicants"

The application was supported by an affidavit sworn by Leonard Gachoro Wachira, the 2nd applicant. He stated that by a plaint dated 2nd August 2006, the 2nd affected party commenced CMCC No. 9164 of 2006. The applicants were the defendants in the said suit. The plaint was filed together with an application wherein the affected parties sought interlocutory mandatory and restraining injunctions against the applicants in respect of the aforesaid Nairobi/Block 126/321, hereinafter referred to as **"the suit property"**. Upon being served with the said pleadings the applicants appointed a Mr. Omboga Advocate to represent them. On 16th August 2006 Mr. Omboga attended court and sought an adjournment of the said application to 13th September, 2006. The application was granted. Subsequently the applicants appointed M/s Mbugua Atudo and Macharia Advocates to represent them. When the matter came up for hearing on 13th September 2006, Mr. Nyaga Muriuki Advocate, duly instructed by M/s Mbugua Atudo and Macharia Advocates sought an adjournment. The court declined to grant the adjournment. The court proceeded to hear the application and though Mr. Nyaga was present in court did not take part in the proceedings.

On 18th September 2006 the trial court granted the orders sought in the application dated 2nd August 2006. The applicants state that the trial court did not have jurisdiction to hear and determine the said application. The reasons thereof are, *inter alia,* that:

(i). The cause disclosed in the plaint is a boundary dispute and under Section 21 (2) of the Registered Land Act, only the Registrar may adjudicate upon such a dispute.

(ii) The value of the suit property exceeded Kshs.500,000/=.

By way of an application dated 4th October, 2006, the applicants moved the trial court for orders of discharge of the injunction granted on 18th September, 2006. The court delivered its ruling on 16th November, 2006 wherein the application was dismissed. The applicants now contend that in dismissing the said application, Mr. E.C. Cherono, the learned trial Magistrate, had erred in law in various aspects.

The affected parties filed a replying affidavit through Alice Wambui Muigai, the registered owner of the suit land. She said that she had filed CMCC No. 9164 of 2006 because the applicants had persistently and unlawfully refused to let the Principal Surveyor point out the beacons on the said parcel of land. She stated that the proceedings of 13th September, 2006 were not ex parte since the applicants were represented by an advocate who did not, however, participate in the proceedings. In her view, the trial court had jurisdiction to hear the application and grant the orders sought because the issue for determination was not a boundary dispute but a dispute about ownership of the suit property. The Provincial Surveyor was not going to the land to adjudicate over a boundary dispute but was going there to inspect and point out beacons.

The affected parties further stated that the application dated 4th October, 2006 seeking to discharge the orders of 18th September, 2006 was heard on its merits and dismissed and consequently the dismissal cannot be challenged by way of judicial review proceedings. The right way of challenging the decision was through an appeal to the High Court.

The respondent through the Attorney-General filed grounds of opposition and stated that the proceedings before the trial court were in respect of ownership, encroachment and trespass to land and not a boundary dispute and therefore the court had jurisdiction.

The applicants and the affected parties filed their respective submissions which I have carefully perused.

It is clear that the applicants were dissatisfied with the orders made by the trial court on 13th and 18th September, 2006. However, no appeal was preferred against any of the said decisions. The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. See **REPUBLIC v JUDICIAL SERVICE COMMISSION ex parte PARENO [2007] 1 KLR 203.** A judicial review court cannot also assume appellate jurisdiction. In the **SUPREME COURT PRACTICE 1997, Volume 1 14/6,** the commentary states:

"The court will not, however, on judicial review application act as a "Court of Appeal" from the body concerned, nor will the court interfere in any way with the exercise of any power of discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise of preventing the abuse of power be guilty itself of usurping power."

Where an applicant is aggrieved by a decision of a trial court because of alleged wrong interpretation or misapprehension of the law, that person ought to file an appeal against the decision and not a judicial review application.

If the applicants' contention all along was that the trial court did not have jurisdiction to hear the case that was before it, they ought to have filed a statement of defence to that effect and raised the issue as a preliminary objection. However, it is not clear whether the applicants filed any statement of defence. But it is evident that in their application dated 4th October, 2006, one of the grounds upon which the applicants sought to set aside the orders made on 18th September, 2006 was that the court lacked jurisdiction to grant the orders. Upon dismissal of that application, the applicants' remedy lay in an appeal to the High Court in its appellate jurisdiction but not an application to the High Court by way of a judicial review.

As regards the proceedings of 13th September, 2006, I agree with the learned trial Magistrate that they were not ex parte. Where an adjournment application is refused and an advocate chooses to either remain silent or refuses to take part in the proceedings any further, the proceedings, for all intents and purposes, are deemed to have gone on inter partes. See **DIN MOHAMMED v SALJI VISRAM & COMPANY [1937] 4 EACA 1.**

Given the facts of the case that was before the trial court, the manner in which the trial court conducted the proceedings and the ruling dated 16th November, 2006, it is clear that orders of certiorari and prohibition are not the efficacious remedies that ought to have been sought by the applicants. The appropriate remedy was an appeal. Consequently, the application dated 26th March, 2007 is dismissed with costs to the respondent and the affected parties.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MARCH, 2011.

D. MUSINGA

JUDGE

In the presence of:
Nazi – court clerk
Mr. Bargoret for the 2nd Affected party
Mr. Omwanza for Mr. Macharia for the applicant