



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Miscellaneous Application 9 of 2009

REPUBLICAPPLICANT

VERSUS

**THE SENIOR PRINCIPAL MAGISTRATE'S
COURT – MALINDIRESPONDENT**

A N D

- 1. KAHINDI KAZUNGU NGUNZA**
- 2. CHARO DZOMBO WANZIE**
- 3. MWANGALA SUMA**
- 4. MANDO DZOMBO MANDO**
- 5. SHAURI SULUBU**
- 6. LOICE REHEMAEXPARTE APPLICANTS**

A N D

- 1. SALIM ABDALA BAKSHWEIN**
- 2. AHMED ABDALLA BAKSHWEIN**
- 3. ALI ABDALLA BAKSHWEININTERESTED PARTIES**

RULING

The application dated 29th October 2009 is a Notice of Motion made under section 3A of the Civil Procedure Act, seeking that leave granted to the Exparte applicants to commence Judicial

Revision proceedings for orders of certiorari and mandamus be set aside or in the alternative, the order of stay of proceedings do issue. It is based on grounds that:

- (1) The application seeks to quash and prohibit the hearing of several criminal cases which are at different stages of hearing and with different complainants and accused persons. There is thus a misjoinder of persons and cause of action.
- (2) The exparte applicants are guilty of material non-disclosure.
- (3) The orders have been obtained in abuse of the court process since the filing of the Notice of Motion on 3-8-09, the same has not been served on the interested parties.

- (4) The prayers sought in the Notice of Motion are similar to prayers made in an application dated 6th March 2009 in Malindi HCCC 106 of 2008 Originating Summons which was dismissed by the court on 11th May 2009.
- (5) The application does not disclose a reasonable cause of action as against the 2nd interested party/applicant

In the affidavit supporting the application, the 2nd interested party deposes that on 26th October 2009, he was in court to check on the progress of Malindi PMCr.C 372 of 2009 in which he is the complainant, when he was informed by the prosecutor that the proceedings had been stayed pending hearing of Malindi HCCC App. No. 9 of 2009.

On 3rd August 2009, the ex parte applicant filed the Notice of Motion and had the same listed for hearing on 23-11-09. The ex parte applicant had also filed a similar application in Malindi HCCC No. 106 of 2009 (O.S) and which was dismissed on 11th May 2009, so that filing of this application is really an abuse of the court process.

The order of stay of proceedings impacts adversely on the 2nd interested party as the ex parte applicants are still constructing illegal structures on the plots. It is also pointed out that on 29th October 2009, this court issued an injunction restraining the plaintiffs in HCCC 106 of 2008 OS from selling portions of the plot or erecting structures thereon and the leave granted herein will have the effect of nullifying the injunctive orders.

The application is opposed, and in the replying affidavit by Mando Dzombo Mando, it is deposed that the prayers are made in bad faith as the leave sought to be set aside has been overtaken by events since the ex parte applicant has commenced judicial review proceedings by filing a Notice of Motion whose copy is annexed and marked MDM 1. That all the cases which have been stayed relate to possession, ownership and title in respect of land parcels which are the subject matter in HCCC No. 40 and 106 of 2008.

It is denied that staying of the criminal proceedings in relation to ownership and possession amounts to nullifying the injunctive orders of 29th October 2009, saying that if the criminal case is allowed to proceed before this suit is determined, then their case for adverse possession will be prejudiced.

The first and third interested parties contest the procedural process adopted stating in the replying affidavit that the statements contained in the Statement of 6th July 2009 have not been verified by law and the verifying affidavit does not verify the facts set out in the Statutory statement.

Further that the motion has been brought with ulterior motives since there already existed restraining orders against the applicants and once this was issued, the ex parte applicants who commenced this application lied to the court that the criminal cases referred to touched on plot No. 120 Malindi which is not the case at all and in fact upon obtaining the order of stay in the criminal cases the applicants interpreted the same to mean that the order of June 2009 had also been stayed and they commenced accelerated construction on plot no. 120 Malindi.

At the hearing of the application, Mr. Khatib submitted on behalf of the 2nd interested party/applicant that the relief

sought is to remove all pending proceedings and none of the grounds stated, entitle the ex parte applicants to come to court for the relief's sought. Mr. Khatib argues that, the mere existence of another suit in the High Court, is NOT a ground to entitle an applicant to orders of certiorari and mandamus. It is his contention that the parameters for judicial review are well known and settled i.e error on the face of the record, lack of jurisdiction or acting in excess of jurisdiction or failing to observe the rules of natural justice – which do not constitute any of the grounds the ex parte applicants wish to rely on. Further that the ex parte applicants have breached provisions of the Order LIII Rule 4(2) in that the affidavit in support of the motion sworn on 3rd August 2009 is different in material particulars to the affidavit sworn in support of the application for leave.

It is argued that one can only introduce new evidence or amend the statement with leave from the court – otherwise a party cannot file fresh affidavit, separate from what had already been filed. It is pointed out that by filing an Originating Summons along with Judicial Review proceedings, means the applicants have approached the court with two parallel jurisdictions and the rule is that if there is an alternative remedy, then judicial review cannot issue.

Mr. Ogoti on behalf of the Attorney General agreed with these submissions, saying Judicial review can only issue if there is no other available remedy, yet here applicants have filed originating summons and the issues they complain about, can be addressed adequately in the originating summons. It is pointed out that, some of the cases applicants wish to stop, were filed way back in 2006.

Further that the judicial review was filed in August 2009, and from the annexures in support of the application, a motion was filed in November 2008, then another one was filed in November 2009, then 623/06 was filed in 2006 and they have mixed issues to make it appear as one issue. Mr. Ogoti points out that it is not true that the SPM's Court was bound to determine the issue of ownership in a criminal matter and that the ex parte applicants admit in their affidavits, that the interested parties are the owners of the disputed property and that being the position, then the police were entitled to ferry the changes. It is also argued that there wont be two conflicting decisions because in the originating summons, the court is to determine the ownership while the criminal matters deal with criminal responsibility.

In opposing the Notice of Motion, Mr. Otara on behalf of the ex parte applicants submits that prayer 2 of the application has already been overtaken by events, and what the interested parties should have done was to file an application under Order 44 for review of previous orders. Mr. Otara submits that under section 3A, the court cannot set aside leave which has already been granted.

Mr. Otara points out that the order granted in other civil matters are being introduced here, yet the stay issued by this court was in respect of criminal cases and not civil cases pending before the High Court and that in any event if there has been disobedience then they should move the court for contempt proceedings.

Mr. Otara explains that what is sought to be stayed are the criminal cases relating ownership of plot No. 120 where the issues touch on ownership, possession and sub-division. Further, that some of the criminal matters touch on forceable detainer and if the court convicts, then it means the person retaining the land is doing so illegally and applicants want the court to determine whether they are in legal occupation and should be issued with titles or not.

It is argued that since the two civil matters O.S 106/08 and HCCC 40/08 touch on ownership of land, and the criminal matter touches on land, then the only way to be able to preserve matters pending their determination of matters by the High Court is to ask for stay of proceedings.

Mr. Otara takes issue with the 2nd interested party/applicant's supporting affidavit, saying it is fatally defective and should be struck off because it is not commissioned and the affidavit served on him is not even dated thus offending Order XVIII and Cap 15; so the entire application should be dismissed with costs to the exparte application. Mr. Khatib's response is that the defects in the affidavit cannot stop the court from accepting it – reference is made to Order XVIII Rule 7. He turns the prong back to the exparte applicants saying that the reliefs they seek were obtainable under Order ILIV Civil Procedure Rules and there was no need for filing judicial review proceedings.

In the present situation, leave which is the initial step in the process of applying for judicial review has already been obtained. It must be recognized that at the leave stage, the exparte applicant has already obtained permission of the court to institute judicial review proceedings. The court further directed that the leave was to operate as a stay holding in abeyance criminal matters related to the subject matter in this suit. The idea for such an order is to safeguard the interest of justice by ensuring that a person does not suffer irreparable injury if the court were to grant him the relief sought after the hearing of the case on its merits.

The exparte applicants here had indicated that they were likely to suffer adverse repercussion of decisions in the lower court, attracting penal consequences as the offences were of a criminal nature if the criminal proceedings in the lower court were allowed to carry on. But the interested parties say the scenario here does not call for judicial review. What is judicial review? Attempts to define its meaning have been made, and I refer to the text by P. L. O. Lumumba and P. O. Kaluma "Judicial review of Administrative Actions in Kenya, Law and Procedure (Jomo Kenyatta Foundation) page 1 which defines judicial review as simply the law concerning judicial control of the powers, functions and procedures of administrative authorities which control is through the court process – the concern is with the decision making process to ensure an individual is given fair treatment by the authority which he has been subjected to – see **Commissioner of Lands v Kunste Hotte Ltd C. A. No. 234 of 1995 (unreported)**.

This court was satisfied that a prima facie case with triable issues and merits had been established because from the facts and circumstances presented, the cases in the lower court had the potential of violating the exparte applicant's rights.

In my view it would be a contradiction of purpose for the court to concede the merit of an intended application for an order of prohibition barring the prosecutor of the exparte applicants in the subordinate court by granting leave, then allow the lower court to proceed with the challenged criminal trials by denying an order for stay. Now it is said there was non-disclosure and that the interested party had actually obtained injunction orders against the exparte applicants – so that the effect of the stay is to undo those injunctive orders. I do not think so – the orders stayed the proceedings in the criminal cases which were pending before the subordinate court – it did not direct the exparte applicants to carry on with their activities on the suit property. It had been clearly indicated in the application that the exparte applicants feared that the Senior Principal Magistrate would hear and determine through the criminal process issues on ownership in respect to the land which was the subject matter in Malindi HCCC 40 of 2008 and Malindi HCCC 106 of 2008.

- The judicial review is intended to obtain orders prohibiting the SPM or any other subordinate court from hearing and deciding those criminal matters which were clearly specified as CrC Nos 632 of 2006, 58 of 2008, 11723 of 2008, 1724 of 2008, 1660 of 2008 and 372 of 2008. I fail to detect the non-disclosure alluded to because in the grounds on the face of the application, the two civil matters pending before the High Court were mentioned.

If for whatever reasons, the ex parte applicant interpreted the order to mean that they should carry out activities which the court had restrained in HCCC 106 of 2008, then I would say:

(a) That would be extremely mischievous.

(b) Nothing stops the interested party from taking out contempt proceedings in HCCC 106 of 2008

What other remedy would there be for the ex parte applicant other than to seek for prohibiting orders? In my opinion review under order 44 Civil Procedure Rules would not address the issue of prohibiting proceedings in the criminal matter pending before the subordinate court.

The existence of the other suit by the High Court was pegged to the issue of ownership, possession occupation versus the criminal offence of trespass, forcible detainer etc.

The issue of full disclosure was considered in the English case of **Burns – MAT Ltd v Elcombe (1988) 3A IER pg 188** where Lord Ralph Gibson summoned the law and facts to be considered by a court in determining an application to set aside an ex parte order stating that the principles relevant were (a) Duty of applicant to make full and fair disclosure of material facts.

(c) the material facts are those which the judge needs to know in dealing with the application made and such is to be decided by the court and NOT by the assessment of the applicant or his legal advisors.

(d) The applicant must make proper inquiries before making the application – and this depends on the circumstances and nature of the case.

There is nothing here to show that the ex parte orders were obtained by deceit or concealment of material facts and I find no reason whatsoever to set the same aside.

The upshot is that the application dated 29th October 2009 is dismissed with cost to be borne by the 2nd interested party.

Delivered and dated this 25th day of **March 2010** at Malindi.

H. A. Omondi
JUDGE