



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

**Judicial Review 16 of 2009**

**ANDERSON MOLE MUNYANYA & 2 OTHERS ..... APPLICANT**

**VERSUS**

**SENIOR RESIDENT MAGISTRATE'S COURT MALINDI .....1<sup>ST</sup>  
RESPONDENT**

**A N D**

**MAGARINI SAND CO-OP SOCIETY .....INTERESTED PARTY**

**R U L I N G**

This is an application made by Anderson Mole Munyanya, Kalume Mole and Ali Konde Tuva, for an order of prohibition under Order LIII Rule 3(1) of the Civil Procedure Rules and Section 8 of the Law Reform Act.

It seeks that orders do issue prohibiting the Senior Resident Magistrate's Court, Malindi.

From entertaining, hearing and determining SRMCC No. 382 of 2007 between Magarini Sand Co-operative Society Ltd v Anderson Mole Munyanya, Kalume Mole, Ali Tuva and Ngosa Quata Development Council t/a Ngomeni Sand Quarries and Transport Agencies on grounds that:

- (a)By virtue of section 3 of the Environment Management and Co-ordination Act (Act No. 8 of 1999) the Senior Resident Magistrate's Court has no jurisdiction to determine the issues raised in the claim.
- (b)The exparte applicants are members of the interested party and by virtue of section 76 of the Co-operative Societies Act 19997, (Act No. 12 of 19997) the SRM's court has no jurisdiction to determine disputes between them.
- (c)The SRM's Court, Malindi, has ruled that it has jurisdiction over the subject in dispute.
- (d)The suit is incompetent and an abuse of the court process.

In the statement of grounds, the exparte applicants depone that they seek orders of certiorari and prohibition for purposes of quashing the order by the Resident Magistrate (Hon. Kituku J) dated 18<sup>th</sup> January 2008, in SRMCC (MLND) No. 382 of 2007 filed by the interested party and served on the exparte applicants on 16<sup>th</sup> October 2008; and to prohibit the SRM's court Malindi from entertaining, hearing and determining the said SRMCC 382 of 2007.

It is premised on grounds that the SRM has no jurisdiction to deal with the dispute because of the issues raised. Further, that the order made

by the SRM offends the fundamental principles of natural justice, as it denies the ex parte applicants a right to earn a living and grants the interested party an unlawful monopoly over natural resources.

The orders given by the SRM were interlocutory injunctive orders barring the applicants from engaging in their trade and/or business of mining and selling sand in Wayanii, Timboni and Mwangani areas of Magarini division. They further state that sand harvesting is their only source of income and they in fact harvest from their plots, so stopping them from doing so is oppressive. It is their contention that the whole problem stems from their demand for accounts to be taken as they believed that the society (which is a co-operative of sand dealers in Magarini Division and they are members) was not being run in a transparent manner as there was no proper statement of shares of the individual members - so the filing of the suit was intended to punish and silence the complaining members.

The interested party opposes the application and had filed a preliminary objection (which was not argued but was adopted as an answer to the application) saying that the order sought to be quashed was filed on 29<sup>th</sup> October 2008, so the 6 months limitation period imposed by Order LIII Rule 2 had not been complied with, and no reasons were given for the delay. Further that the SRM had jurisdiction to hear the dispute as the prayer sought was for an injunction. It was also pointed out that SPMCC No. 387 of 2007 is NOT against the ex parte applicants as members of the interested party, but in their capacity as officials of Ngosa Quata Development council t/a Ngomeni Sand Quarries and Transport agencies. It is also indicated that in their defence, the ex parte applicants conceded that the SRM's court has jurisdiction to hear the dispute.

The ex parte applicant's counsel submitted in the written submissions, that from the reference to the interested party's verifying affidavit that the uncontrolled and haphazard harvesting and mining of sand by the ex parte applicants would cause grave environmental damage to the regions of Magarini Division, meaning that the interested party's concern was an imminent violation of his right to clean and healthy environment as guaranteed by Section 3 of the Environmental Management and Co-ordination Act No. 8 of 1999, and in the case of such violation, Mr. Odongo (for the ex parte applicants) submits, that only the High Court has power to hear and determine any claim to that effect and not the RM's court or the SRM's Court)

Further that the ex parte applicants who are sued in SRMCCC 382 of 2007 are all members of the interested party, in which instance only the co-operative Tribunal established under the Co-operative Society's Act (Act No. 12 of 1997) has jurisdiction over disputes between the members of a co-operative society and not the magistrate's court.

The ex parte applicant's counsel urges that it is prudent to raise the issue of jurisdiction now rather than wait until the suit is concluded then raise it on appeal because the High Court can provide a remedy now; moreover because there is already a restraining order in place against the ex parte applicants.

As regards the objection that the application is being made later than six months after the date of proceedings, Mr. Odonyo submits that the order was served on the ex parte applicants on 16<sup>th</sup> October 2008 and computation of the limitation period should be from the date of service and not from the date of issue and that – although the order was granted on 18<sup>th</sup> January 2008, it was not issued on the very day. Mr. Odongo points out that although the order was issued by Mr. Ochenja SRM, it was signed by Mr. Kituku and he reads mischief in the matter and urges this court to intervene.

It is his contention that in SRMCC 382 of 2007, the ex parte applicants are not sued in their capacity as officers of Ngosa Quata Development Council t/a Ngomeni Sand Quarries – drawing this court's attention to the hearing of the plaint that the defendants are sued in their own individual capacities.

Further that in the amended defence filed, the ex parte applicants have disputed the jurisdiction of the court and that if a court has no jurisdiction, then that remains as a fact whether the same is admitted in the statement of defence since jurisdiction cannot be conferred on a court by consent of parties to a suit. It is stressed that this is simply an application for leave to institute Judicial Review Proceedings, and not the substantive motion and it ought to have proceeded ex parte but even though the interested party and the respondent were given an

opportunity to participate, they chose not to bring their case by way of a replying affidavit, instead opting to file a preliminary objection. Mr. Odongo construes this to be a clear indication that they (interested party and respondent) have nothing completely in their favour and opted to try their luck, so the ex parte applicants are entitled to the prayers sought and the leave once granted do operate as a stay.

In response, by way of written submissions, the interested party's Counsel Mr. Mayaka reiterated the grounds raised in the notice of preliminary objection, insisting that the application offends Order LIII Rule 2 of the Civil Procedure Rules. He argues that the order was granted on 18<sup>th</sup> January 2008 in SRMCC 382/08 yet the present application was filed in court on the 29<sup>th</sup> October 2008 – ten months after the order sought to be quashed was granted. He points out that there are no reasons given to explain the delay and due to this procedural defect the application should be dismissed.

He repeats that the suit in the lower court is against the ex parte applicants as officials of Ngosa Quata and not in their personal capacity as members of the interested party and so the issue of being denied right to earn a living does not arise.

It must be borne in mind that at this stage, all that the ex parte applicants are seeking is leave to commence judicial review proceedings with a view to obtaining orders of certiorari and prohibition against the SRM Malindi on grounds that the court has no jurisdiction to hear the matter pending before it, or even grant the orders it has.

It is imperative that I address the issue of procedure first – has there been delay in filing this application – have the six months lapsed? Under Order LIII rule 2.

***“leave shall not be granted to apply for an order of certiorari...unless the application for leave is made NOT LATER than six months after the date of proceeding....”***

That provision does not state that the date of service – it is the date of proceedings – which then is 18<sup>th</sup> January 2008 – this application was filed on 29<sup>th</sup> October 2008 – the time lapse was ten months – there is no point in Mr. Odongo trying to extrapolate and wax technical - whichever way one computes that time, the delay was well over six months. If he has evidence of foul play then he ought to come out clear into it instead of clothing it in the parable of “games being played” by the lower court. There is really no reason given for the delay in filing the application – Order LIII rule 2 is couched in mandatory terms – no leave shall be granted.

The objection is merited and the application does offend provisions of Order LIII Rule 2 and is therefore dismissed.

I award costs of the application to the interested party.

Delivered and dated this 3<sup>rd</sup> day of **March 2010** at Malindi.

**H. A. Omondi**  
**JUDGE**

Mr. Odongo for applicant