



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

Judicial Review 4 of 2009

**GILBERT KABAGE T/A
PATA COMMERCIAL ENTERPRISES.....APPLICANT
VERSUS
C. M. COURT, NAKURU.....RESPONDENT
AND
WILSON KIPTOO LEITICH.....1ST INTERESTED PARTY
MONICAH WANJIKU NJIHIA.....2ND INTERESTED PARTY
PETER MBATIA MURIITHI.....3RD INTERESTED PARTY
SIMON KAMAU MBURU.....4TH INTERESTED PARTY
RICHARD MASIKA MAKOKHA.....5TH INTERESTED PARTY**

RULING

Before the court below is an amended plaint in Nakuru CMCC No.1282 of 2008 by the interested party in this application and at the centre of that dispute is a property described as NAKURU MUNICIPALITY BLOCK LR No.9/31 belonging to KANU political party. The dispute is between the interested parties who are described in the suit as the trustees of the property in question and the applicants in this application who are sued in various capacities but are clearly a rival group. The court below issued temporary restraining orders against the applicants barring them from evicting the interested parties from the suit property until the suit is heard and determined. It would appear that instead, the applicants proceeded to evict the interested parties who promptly sought to have them punished for being in contempt of court order. The applicants raised a preliminary objection. The application for contempt came up a few times before the learned magistrate whose orders are alleged to have been violated but each time it was not heard. Ultimately on 16th January, 2009 both counsel for the applicants and the interested parties appear before the learned magistrate and the only relevant issue raised was whether counsel for the applicants had a right of audience in the face of his clients' breach of the court order. The learned magistrate did not address the question of right of audience but instead made the following order which provoked this application:

“Court: The preliminary objection to be argued on 27/01/2009 before court handling civil matters. In the meantime, the court will order that the *status quo* as of 30/12/2008 be restored. The tenants who were forcefully evicted to be taken back. Order to be supervised by the PPO. I so order as if there is blatant disregard for the court orders then the court is acting in vain. There was no order for eviction, and the defendants can always be compensated by way of damages.”

It is the underlined portion that has prompted the present judicial review application, in which the applicant is seeking an order of certiorari to quash the order made by the learned magistrate on 16th January, 2009, which I have set out in the previous paragraph. The application is premised on the grounds that the order was made in excess of or without jurisdiction; that the order was made without the due process of the law being observed; that the learned magistrate ignored the rules of natural justice.

Although the learned magistrate was served and a state counsel, Mr. Kipkoge promised to file his papers, he has not done so to date. Responding to the application the interested parties have averred that both sides of the dispute were represented by counsel before the learned magistrate and the order was made after the learned magistrate listened to their submissions; that the order merely restored the position obtained before the eviction; that even then they have not been restored; that the applicants do not deserve the orders they are seeking.

I have considered these arguments, written submissions as well as all the authorities cited, mainly by learned counsel for the respondent. There cannot be any doubt over this court's jurisdiction to supervise, under the Constitution or by way of judicial review, courts and tribunals inferior to it. It is also trite learning that judicial review is solely concerned with the decision-making process, not with

the merits of the decision itself.

See **Commissioner of Lands Vs. Kunste Hotels Ltd.** (1995-1998) 1EA 1. The only judicial review remedy sought in this motion is certiorari. An order of certiorari is issued to quash a decision of a court or body inferior to the High Court, if the decision is either made without jurisdiction or in excess of jurisdiction. It will also issue where the rules of natural justice are not complied with in arriving at the decision. The applicants have averred that the order being challenged was made by the court below without any application and without the applicants being heard by it; that to that extent it was made without or in excess of jurisdiction and in contravention of the rules of natural justice.

The order under review was made by madam W. Kagendo, a Senior Resident Magistrate. The magistrates' courts are established under **section 65** of the **Constitution** as courts subordinate and to be supervised by the High Court. The magistrates' courts exercise jurisdiction conferred by the Judicature Act, Magistrate' Courts Act, the Civil Procedure Act and a host of other laws.

It has not been alleged that the learned magistrate lacked jurisdiction to entertain the suit and the application for injunction that was before her. The application dated 24th December, 2008 was brought pursuant to **section 3A** of the **Civil Procedure Act, Order 20 rule 11** and **order 39 rules 1, 2A, 3 and 9** of the **Civil Procedure Rules**. The relevant provisions for purposes of this matter is **Order 39**, under which, no doubt the learned magistrate had jurisdiction to entertain the application. She issued a temporary order of injunction pending the *interpartes* hearing of the application on 9th January, 2009.

While that order was in force it was alleged in an application dated 6th January, 2009 that the applicants had violated the same. To that application, the applicants raised a notice of preliminary objection. It is not clear whether that notice of preliminary objection has been heard as there was no stay of proceedings when leave was granted in this matter. Be that as it may, the only question now left for determination is whether the learned magistrate could in law or equity issue the orders of *status quo* as of 30th December, 2008 when she issued injunctive order and directed the reinstatement of the interested parties to the suit property. The learned magistrate by directing the maintenance of *status quo* was merely reaffirming her orders. The order directing the reinstatement of the interested parties amounted to a mandatory injunction. There is no provision in the Civil Procedure Rules for orders of mandatory injunction. Such applications are usually brought pursuant to the court's inherent jurisdiction under **section 3A** and probably now under **sections 1A and 1B** of the **Civil Procedure Act**. Once again, a magistrate has jurisdiction to issue an order of mandatory injunction.

It is, however, now settled by case law that a mandatory injunction ought not to be granted on an interlocutory application (or in our case at interlocutory stage) in the absence of special circumstances and only in clear cases.

The Court of Appeal stated this principle thus in the case of **Locaball International Finance Ltd Vs. Agro Export and others**, (1986) 1 EAR 901

“A mandatory injunction ought not to be granted as an interlocutory application in the absence of special circumstances and only in clear cases where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which can be easily remedied or where the Defendant had attempted to steal a march on the plaintiff.”
(Emphasis supplied).

Two conditions enunciated above are relevant. In the considered view of the learned magistrate, the matter called for a quick decision as there was allegation that the *status quo* ordered by the court has been altered to the detriment of the interested parties and the court's integrity was at stake.

Secondly, the applicants having been restrained from evicting, the interested parties, their doing so amounted to stealing a march on the interested parties. In **Kamau Mucuha Vs. Ripples Limited**, Civil Application Nai.No.186 of 1992, the Court of Appeal referring to the **Locaball** case (supra) said as follows:

“A party as far as possible, ought not to be allowed to retain a position of advantage that it obtained though planned and blatant unlawful act.”

The merits of both applications in the court below are not for me to determine. But as stated in Halsibury Laws of England, Fourth Edition Vol. 24.

“...if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted as an interlocutory application.”

I come to the conclusion that the respondent – the learned magistrate had a sense of duty to protect the integrity of the court by simply ensuring that her orders were obeyed and the interested parties restored to their earlier position. She acted within the law. Of course, I

would have come to a different conclusion had there been no restraining orders and the interested parties evicted.

Regarding the alleged violation of the rules of natural justice, I find the claim without merit. Both counsel were before the respondent. Learned counsel for the applicant addressed the court on the issues at hand. His sentiments were obviously noted but rejected.

For these reasons, I find no merit in the application which is dismissed with costs to the interested parties.

Dated, Signed and Delivered at Nakuru this 7th day of May, 2010.

W. OUKO
JUDGE