



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Misc Appli 25 of 2008**

**IN THE MATTER OF:AN APPLICATION BY MISTRY JADVA PARBAT &**

**COMPANY LIMITED FOR JUDICIAL REVIEW ORDERS OF**

**CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF:THE REGISTERED LAND ACT CAP. 300 LAWS OF KENYA**

**BETWEEN**

**MISTRY JADVA PARBAT & CO. LTD ..... APPLICANT**

**VERSUS**

**LAND REGISTRAR, KILIFI .....RESPONDENT**

**AND**

**ALFRED MSANZU NDORO .....INTERESTED PARTY**

**\*\*\*\*\***

**RULING**

Mr. Kilonzo for the Interested Party in this case has raised a Preliminary Objection against the Ex-parte Applicants Notice of Motion dated 16/6/2009. He argues that this court lacks inherent jurisdiction to issue the stay order sought by the Applicant in this instant application. He further argues that the Malindi case **High Court Miscellaneous Application No. 18 of 2008** in which an application is pending for hearing before the Court of Appeal has no relationship with this present suit.

Mr. Mogaka for the Ex-parte Applicant argued against the Preliminary Objection. The initial Judicial Review Application was filed in court on 28<sup>th</sup> November 2008. Leave to commence judicial review proceedings was granted by Hon. Justice L. Njagi on 28<sup>th</sup> November 2008. Then by their Notice of Motion dated 16<sup>th</sup> June 2009 the Ex-parte Applicants sought to stay the Judicial Review proceedings pending the hearing and determination of **Court of Appeal Civil Application No. 126 of 2009**. Mr.

Kilonzo argues that these being Judicial Review proceedings brought under S. 8(1) of the Law Reform Act Cap 26 Laws of Kenya, this court has no powers to issue the relief of stay now being sought by the Ex-parte Applicant.

As pointed out by Mr. Mogaka for the Ex-parte Applicant a preliminary should only be raised on a point of law where all other factors are undisputed. I am guided by the celebrated case of **Mukisa Biscuit and Manufacturing Co. Ltd –vs- West End Distributors Ltd Civil Appeal No. 9 of 1969** wherein at page 700 it was stated that:-

***“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”.***

Based on this definition then to my mind the matters raised by Mr. Kilonzo do not qualify as points of law. The issue of the Malindi case and its relevance to the present proceedings is a disputed fact. Indeed as Mr. Mogaka for the Applicant pointed out in his submission even Mr. Kilonzo himself did not seem quite sure of what the correct position actually is. This is a fact which the court would have to determine and as such cannot form the basis for a Preliminary Objection. Mr. Kilonzo has cited the ruling of Hon. Justice Wendo in the case of **Manca Francesco –vs- Registrar of Titles Mombasa and 2 others Misc. Appl. 7 of 2007** where she held at page 11 citing the case of **Kuria Mbae –vs- The Land Adjudication Officer Chuka Misc. Appl. 257/1987** as follows:-

***“There is no doubt or dispute that a party aggrieved by the decision of this court in granting or refusing an order of certiorari is entitled to appeal to the Court of Appeal. However according to S.8(3) of the Act, this court’s order on such application is final and cannot be the subject of pleading or prohibition. ... In our view therefore, it would appear that this court has no jurisdiction to stay, recall, review or set aside or quash an order of certiorari once it has made it”.***

I have carefully considered this authority and I do in agreement with Mr. Mogaka for the Applicant find it distinguishable from the present case. The distinction being that in the **Manca Francesco** case the court was adjudicating on a matter which had been concluded and where final orders of Judicial Review had been issued. This present case has not been concluded and no final orders of Judicial Review have been granted. As such I find that the findings in the **Manca Francesco** case would not apply to this present case. For the reasons I have cited above I find that this Preliminary Objection must fail. It is hereby dismissed with costs to the Ex-parte Applicant.

**Dated and delivered at Mombasa this 30<sup>th</sup> day of July 2009.**

**M. ODERO**

**JUDGE**

Read in the open court in the presence of:-

Mr. Kilonzo for Interested Party

**M. ODERO**

**JUDGE**

**30/7/2009**