IN THE HIGH COURT OF KENYA
AT NYERI
Miscellaneous Civil Application 157 of 2008

REPUBLIC OF KENYA ..... APPLICANT

VERSUS

KARATINA SENIOR RESIDENT MAGISTRATE'S COURT....1ST RESPONDENT

WILLIAM WACHIRA MWANIKI ..... 2ND RESPONDENT

JAMES GITHINJI KIARA ..... EX-PARTE APPLICANT

R U L I N G

On 26th June 2008, James Githinji Kiara hereinafter referred to as *"the applicant"* obtained leave to commence judicial Review proceedings in the nature of prohibition to stop the Karatina Senior Resident Magistrate's court from executing the decree of the Senior Resident Magistrate's Court land case number 2 of 2003 relating to land reference number Magutu/Gatei/101 hereinafter referred to as *"the suit premises"*. Leave granted as aforesaid was also to operate as a stay of further proceedings or execution of the decree thereof in the said Karatina Senior Resident Magistrate's Court. The judge granting leave also ordered that the substantive application be filed by the applicant within 30 days from the date of the order failing which, the stay granted would automatically lapse.

The order requiring that the substantive motion be filed within 30 days was clearly made in error. Perhaps the error was inadvertent. Order LIII rule 3(1) is very categorical; "when leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within 21 days by Notice of Motion to the high court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the Notice of Motion and the day named for the hearing." As can be seen, the requirement to file the substantive Notice of motion within 21 days of leave being granted is couched in mandatory terms. That period is not therefore open to extension. In my view any substantive motion filed outside the mandatory 21 days would be incompetent and bad in law notwithstanding that at the time that leave was granted, the judge granting same gave more than 21 days in which to file it.

The applicant filed the substantive Notice of Motion on 17th July 2008. My computation tells me that this was 22 days after the leave had been granted. Accordingly, the substantive motion was filed one day late and therefore in breach of the law. On that score alone the application ought to fail for want of compliance with the law.

I am however cognisant of the fact that this issue was not canvassed before. However as it is a matter of law and goes to jurisdiction, my choice whether to consider it or not was indeed limited. I could not have ignored the same. The foregoing notwithstanding, I would still wish to deal with the issues raised

during the substantive hearing of the Notice of Motion.

The hearing of the substantive motion came before me on 21st July 2009. **Ms Munyi**, Provincial litigation counsel appearing for the 1st respondent raised a preliminary objection to the application stating that the same was misconceived, incompetent, untenable, bad in law, incurably defective and was indeed an abuse of court process. She raised these issues vide a Notice of preliminary objection filed in court on 16th July 2009. In support thereof counsel submitted that though the application was brought under order LIII of the civil procedure rules, the applicant had failed to cite sections 8 and 9 of the Law Reform Act. That the statutory statement contained facts which ought to have been in the verifying affidavit. Prohibition cannot lie on its own in the circumstances of this case. There must be a prayer for an order of certiorari as there was a decree on record dated 12th March 2003 that needed to be quashed first.

Mr. Karweru, learned counsel for the 2nd respondent associated himself fully with submissions of learned provincial litigation counsel. He added however that orders of prohibition can never attach to execution proceedings where there is a valid judgment of the court sought to be prohibited. Secondly, prohibition orders can only be issued against a certain intended Act. What this court was being asked to do was to prohibit the subordinate court from performing its statutory duty.

Mr. Mugo, learned counsel for the applicant sought and was granted time out so as to prepare and respond to the preliminary objection. He did so on 22nd September 2009. His response was that there was no legal requirement to cite sections 8 and 9 of the Law Reform Act in the body of the application. And in any event failure to cite such provisions of the law was not at all fatal to the application. The statement of facts attached to on the Notice of Motion was the same as the one on the ex-parte Chamber Summons. He also submitted that prohibition could issue despite their being no prayer for an order of certiorari. No provision of the law had been cited that made it a mandatory requirement that an order of prohibition must of necessity be preceded by an order of certiorari. The remedy of prohibition was independent. For these submissions counsel relied on the following authorities:

1. Nyeri H.C. Misc. Civil Application No. 288 of 2008 Republic v/s Chief Magistrate's Court Nyeri & Others (UR)

2. Nairobi H.C. Misc. Civil Application No. 689 of 2001 Republic v/s Kajiado Land Disputes Tribunal & Others (UR)

3. Nairobi H.C. Misc. Civil Application No. 62 of 1978 Re Kisima Farm Ltd KLR (E & L)

4. Court of Appeal Kisumu Civil appeal No. 109 of 1984 Kadamas v/s Municipality of Kisumu (1985) KLR 954

5. Court of Appeal Nairobi Civil Application No. Nai 63 of 1984 Jogoo Kimakia Bus Services Ltd v/s Electrocom International (1985) KLR 260.

6. Nyeri H.C. Misc. Case No. 172 of 1998 Republic v/s Kirinyaga Land Disputes Tribunal (UR)

7. Court of Appeal Nairobi Civil Application No. 73 of 2001 Republic v/s University of Nairobi (2001) eKLR

8. Judicial Review P.L.O. Lumumba & P.O. Kaluma

Finally counsel submitted that the court cannot dismiss the application for the alleged transgression of the law. The worst that can happen is to strike it out.

I have carefully considered the preliminary objection, the submissions in favour and in opposition to the same and authorities cited. I am satisfied that the preliminary objection was well taken. Sections 8 and 9 of the Law Reform Act donate powers and confer jurisdiction to this court to hear matters of

judicial review. Order LIII of the civil procedure rules is merely procedural. It is therefore mandatory for the said sections of the Law Reform Act to be cited in the body of the application so as to confer jurisdiction to this court to hear and determine an application for judicial review. As correctly pointed out by Ms Munyi, failure to cite those provisions of the law renders the application incurably defective.

The second issue taken up by Ms Munyi was that the statutory statement contained the facts and indeed evidence of the application instead of the same being in the verifying affidavit. Mr. Mugo's response was that the statutory statement filed with the Notice of Motion was the same as that filed with the ex-parte Chamber Summons application for leave. I think Mr. Mugo's response missed the essence and purport of Ms Munyi's preliminary objection on the point. What Ms Munyi was saying was that the statutory provisions of order LIII rule 1(2) of the civil procedure rules which require that the statutory statement should contain only the name and description of the applicant, the relief sought and the grounds upon which the relief is sought was breached.

There is no denying in my view that the statutory statement as filed is in complete breach of the requirements of order LIII rule 1 (2) of the civil procedure rules. The statutory statement accompanying the application must only contain the name and description of the applicant, the relief sought and the grounds on which it is sought and nothing else. The statutory statement filed herein runs foul of the aforesaid requirements. It contains evidence which ordinarily should have been in the verifying affidavit. In the case of Commissioner General, Kenya Revenue Authority v/s Silvano Onema Owaki T/A Marenga Filling Station, civil appeal number 45 of 2000 (UR), the court of appeal commenting on the issue observed: "..... The facts relied on are required by the rule to be in the verifying affidavit not in the statement as largely happened in this case ..... It is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1 (2) of Order LIII. This position is confirmed by the following passage from the supreme court practice 1976 Vl. 1 at paragraphs 53/1/7

"*The application for leave "By a statement" – The facts relied on should be stated in the affidavit (See Republic v/s Wandsworth JJ; ex.p reat (1942) 1KB 581). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit....."*

At page 283 of the report of the case of Republic v/s Wandsworth Justice, Viscount Caldecote C.J. said:

"The court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction"

The court in the Wandsworth case was considering the provisions of order 53 of the English rules of the supreme court which are in Pari materia with order LIII of the civil procedure rules. The same situation obtains here. The statement of facts contain evidence which ought to have been in the verifying affidavit. Indeed the verifying affidavit which accompanied the application at the leave stage is made up of 2 paragraphs only. It simply states:

"1. THAT I am the ex-parte (sic) herein hence competent to swear this affidavit.

2. THAT I hereby verify that the matters set out in paragraphs 1 – 9 of the statement of facts filed herein are true to the best of my knowledge, information and belief."

From the foregoing it is clear that the verifying affidavit above sought to verify the contents of the statutory statement which should not be the case. As it is therefore some of the contents of the statutory statement touching on evidence are worthless and inadmissible. If the same are struck out as they should, then the substantive Notice of Motion shall be left bare and naked. There will be no evidence in support

thereof since the verifying affidavit which should have contained the evidence in support of the application aforesaid does not have such evidence.

The applicant perhaps realising the mistake he had made earlier in the verifying affidavit sought to correct that omission by filing yet another affidavit with the substantive notice of motion. That subsequent affidavit dated 17th July 2009 was filed without leave of court and ought therefore to be struck out. Order LIII rule 4 of the civil procedure rules specifically provide that the statements and affidavits accompanying the application for leave are the same ones to be served on the respondents and or interested parties with the substantive Notice of Motion. There is no room therefore for an affidavit which did not initially form part of the proceedings at the leave stage to be introduced by the applicant with the substantive Notice of motion without even first seeking leave of court to do so.

In the substantive Notice of Motion, the applicant seeks an order of prohibition directed at the Karatina Senior Resident Magistrate's Court prohibiting it from proceeding with or executing the decree dated 12th March 2003. The decree was in terms that "The award of the District Land Disputes Tribunal Karatina is hereby adopted to the effect that the plaintiff be given a portion of 0.9 acres out of parcel of land number Magutu/Gatei/101...." In other words the applicant is seeking to stop the court from enforcing the said decree by way of execution. As stated by the court of appeal in the case of Republic v/s Kenya National Examination Council ex-parte Geoffrey Gathenji Njoroge and others, civil appeal number 266 of 1996. Prohibition "..... Is an order form the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of Natural justice. <u>It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong on the merits of the</u> <u>proceedings .....</u>" *(emphasis provided).* The applicant is seeking to prohibit the execution of the decree by the court on the grounds that the land disputes tribunal had no jurisdiction to hear and determine the dispute as it related to the title to land. That the tribunal thereby acted ultra vires in proceeding to hear and determine the dispute. In the circumstances of this case that cannot be the province of prohibition since the applicant is questioning the legality of practice and procedure of the land disputes tribunal and the award ensuing therefrom. The applicant cannot in these proceedings purport to challenge the proceedings and award of the land disputes tribunal by seeking prohibition in order to stall the execution of the decree. The applicant would have been perfectly within his rights to seek prohibition directed at the land disputes tribunal. He cannot do so however in these proceedings since the tribunal completed its work and filed its award in court. It is too late in the day now to seek to prohibit what has already been done. As stated in the case of Dr. Joseph Hastings Kinyili v/s The Chief Magistrate's Court, Nairobi, HC Misc, Application No. 271 of 2002 (UR), "..... Prohibition is issued to stop a decision and is futuristic in nature. It cannot look at acts or complaints of the past. It is not historical. It would be for example be perfectly within the ambit of prohibitive orders to require a court or administrative authority to do something, for example not to act in excess of jurisdiction. It cannot on the other hand be contemplated that prohibition would operate to stop a court or an administrative body from pursuing an act which has already taken place, for example prohibit the commencement of a trial when the plea has not been taken....." The same situation obtains her. The applicant herein is attempting to get prohibition against the land disputes tribunal's award which has become a judgment of the court through the back door. He should have sought the prohibition before the tribunal made the award.

I quite agree with Mr. Mugo that it is not a mandatory requirement of the law that prohibition must be preceded first by an order of certiorari. However, in the circumstances of this case there is no escaping the fact that an order of certiorari would absolutely come in handy. I say so because there is already a judgment of the court and decree issued pursuant to the award. That decree or judgment has not been set aside or varied either by judicial review proceedings or on appeal. The decree is alive and valid therefore. That being the case, of what use will be the order of prohibition against the execution of that decree when it still remains alive and valid. Wouldn't it then be an act in vain for this court to issue an order of prohibition in the circumstances?

Again prohibition cannot issue to stop the exercise of judicial authority. Orders of prohibition would never attach to execution proceedings where there is a valid judgment and decree of the court. By this

application, I am being asked to prohibit the court from performing its statutory duty of issuing execution orders out of valid decree when properly moved. That would in my view be an absurdity. Orders of prohibition were not tailored to bring absurdities in judicial proceedings. If anything they were meant to do the opposite, rid judicial proceedings of absurdities. An order of this court cannot issue to negate the very essence of a judgment and decree in the lower court when it has not been quashed or set aside by way of appeal or otherwise. This is what the applicant wants me to do in the circumstances of this case. There is no evidence that in issuing execution orders, the lower court will be acting in excess of or want of jurisdiction, nor will it be departing from the rules of Natural Justice. See Kadamas v/s Municipality of Kisumu (9185) KLR 954. Those are the grounds upon which prohibition can issue and I dare say that they have not been satisfied in the circumstances of this case.

Does the court in which an award from the local land disputes tribunal been filed has to satisfy itself that it was legal and in accordance with its mandate as per section 3(1) of the land disputes tribunals Act? I do not think so.

Section 7(2) of the said Act is emphatic that "..... The court shall enter judgment in accordance with the decision of the tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the civil procedure Act...." It is not therefore the duty of such court to consider the legality of the award before adopting it. Indeed the court's role as it were is procedural and clerical in nature. The court is legally bound to adopt the award of the tribunal and enter judgment in accordance with the said award without making any inquiry as to the legality or otherwise as correctly observed by Kimaru J in the case of Harrison Ndungu Kungu v/s Nakuru Chief Magistrate's Court & Another (2005) eKLR.

I think I have said enough to show that the preliminary objection was well taken. Accordingly the Notice of Motion dated 17th July 2008 is struck out as being incurably defective, incompetent and bad in law with costs to the respondents.

Dated and delivered at Nyeri this 29th day of October 2009

M. S. A. MAKHANDIA

JUDGE