



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA

Civil Miscellaneous Application 345 of 2009

IN THE MATTER OF: CRIMINAL CASE NO. (M) 3004 OF 2009  
(MUNICIPAL COURT)  
AND  
IN THE MATTER OF: AN APPLICATION FOR LEAVE TO FILE AN  
APPLICATION FOR JUDICIAL REVIEW ORDERS  
OF PROHIBITION AND CERTIORARI

BETWEEN

REPUBLIC ..... APPLICANT

VERSUS

1. S.C. MUTHEE, CHIEF BUILDING INSPECTOR  
MUNICIPAL COUNCIL OF MOMBASA  
2. HON. M.K. MWANGI  
(S.R.M.) MUNICIPAL COURT ..... RESPONDENT

AND

1. MOHAMED HATIMY  
2. HATIMY GROUP LIMITED ..... INTERESTED PARTIES

\*\*\*\*\*

RULING

Before me is the Notice of Motion dated 3<sup>rd</sup> November 2009 filed by the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties herein, MOHAMED HATIMY and HATIMY GROUP LIMITED seeking the following orders -

- “1) *That this application be certified as urgent and be heard ex-parte in the first instance.*
- 2) *That the proceedings and all consequential orders made on 21<sup>st</sup> October 2009 be set aside*
- 3) *That the Interested Parties herein be granted unconditional leave to defend the Judicial Review proceedings filed herein*
- 4) *That the costs of the application be provided for”*

An application seeking similar orders was filed by Mr. Kibara

Advocate on behalf of the 1<sup>st</sup> Respondent – S.C. MUTHEE, CHIEF BUILDING INSPECTOR, MUNICIPAL COUNCIL OF MOMBASA.

Both the Interested Parties and the 1<sup>st</sup> Respondents argue that they were not served with notice of and therefore were totally in the dark about the hearing of this Judicial Review in the High Court of Mombasa on 21<sup>st</sup> October 2009. However by his replying affidavit dated 27<sup>th</sup> November 2009 SALIM SAID KIOI on behalf of all the ex-parte Applicants, opposes the present application and avers that all parties

having been properly served had proper notice that the matter was scheduled for hearing on 21<sup>st</sup> October 2009. On that date neither the Interested Parties nor the 1<sup>st</sup> Respondent were represented in court when the case was called out. An affidavit of service dated 14<sup>th</sup> October 2009 sworn by one **PAUL ODHIAMBO OUTAH**, who describes himself as a licensed process server, and which was filed in court on 19<sup>th</sup> October 2009, having been seen by this court, the matter proceeded in their absence. Judgement was reserved for 16<sup>th</sup> November 2009. However before that judgement could be delivered the Applicants filed these present applications. In effect the Applicants seek the setting aside of the courts proceedings and all consequential orders of 21<sup>st</sup> October 2009. As stated earlier since both applications seek similar orders I will proceed to deal with them as one.

Whereas both Interested Parties and the 1<sup>st</sup> Respondent aver that they were not properly served with hearing notice for 21<sup>st</sup> October 2009, the ex-parte applicants insist that service was effected. In his supporting affidavit dated 3<sup>rd</sup> November 2009 the 1<sup>st</sup> Interested Party **Mohamed Hatimy** avers in clause (1) that he is a director of the 2<sup>nd</sup> Interested Party. As such I find that service on the 1<sup>st</sup> Interested Party would in law amount to proper and sufficient service on the 2<sup>nd</sup> Interested Party. In opposing the two applications the Respondents rely on the affidavit of service sworn by **Paul Odhiambo Outa** on 14<sup>th</sup> October 2009. In his said affidavit of service the process-server at paragraph (2) states as follows –

***“THAT on the 26<sup>th</sup> August 2009, I received a Notice of Motion application dated 24<sup>th</sup> August 2009 from Kenga & Company Advocates with instructions to serve on S.C. Muthee, Chief Building Inspector, Municipal Council of Mombasa, Hon. M.K. Mwangi (S.R.M.) Municipal Court, Mohamed Hatimy and Hatimy Group Limited all at Mombasa”***

It is apparent from this that the process-server was given clear and precise instructions by Kenga & Company Advocates on exactly upon whom service of the hearing notice was to be effected. Did he comply with these directions and serve the people named in paragraph (2)? It appears not. At paragraph (4) of the same affidavit the process-server goes on to state

***“THAT on the 26<sup>th</sup> August 2009 at around 2.45 p.m., I personally served the Chief Building Inspector, Municipal Council of Mombasa, Town Hall, Treasury Square Mombasa with the Notice of Motion application and which service was accepted by Mr. MUMIN, Legal Department who signed and stamped at the back of the copies returned herewith”***

This paragraph is confusing to say the least. The process-server claims to have **personally** served S.C. Muthee yet immediately goes on to state that service was accepted by a Mr. Mumin of the Legal Department. How is this possible. If S.C. Muthee was personally served then it is he who ought to have accepted service and appended his signature on the documents. How did this Mr. Mumin come in? Did the said Mr. Mumin have authority to accept service on behalf of S.C. Muthee? This has not been alleged. Mr. Kibara for the 1<sup>st</sup> Respondent insists in his oral submissions that his client was not **personally** served. From the wording of paragraph (4) of the Affidavit of Service this seems to be a correct assertion. Whilst it is common and procedural for service to be effected on a legal officer of a parastatal or other public body, there is no indication that this Mr. Mumin was the legal officer of the Municipal Council of Mombasa. He was merely a man served on the legal department. His designation is not given. Even if Mr. Mumin was the legal officer it has not been indicated that he had authority to accept service on behalf of S.C. Muthee. In my view this alleged service on S.C. Muthee was neither proper nor adequate. It is not clear exactly who accepted this service. Was it S.C. Muthee personally or Mr. Mumin? As such I find that this alleged service as described in paragraph (4) of the Affidavit of Service dated 14<sup>th</sup> October 2009 cannot be relied upon.

With respect to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties paragraph (5) of the same Affidavit of Service provides –

***“THAT on 26<sup>th</sup> August 2009 at around 3.15 p.m., I personally served Mohamed Hatimy at Zulfat Hatimy Complex building with the Notice of Motion and which service was accepted by Mr. Mohidin Hatimy who declined to sign at the back of the copies returned herewith saying that the cited company had wound up and that Mr. Mohamed Hatimy who was cited was in Nairobi at that time since he was carrying out football matters for K..F.F.”***

Once again there is a contradiction in this paragraph. It is not clear exactly who accepted service. The process-server first declares that

he **personally** served the 1<sup>st</sup> Interested Party **Mohamed Hatimy**. He goes on in the very same paragraph to aver that service was accepted by one **Mohidin Hatimy**. Who exactly was served? This remains unclear. As Mr. Khatib for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties points out, it is desirable that service be effected on a party personally. It is only when after having made several attempts to trace the person, which prove futile, that service may be effected on a family member who ordinarily resides with the party sought to be served. In this case the process server made only **one** attempt to serve Mr. Hatimy. He was clearly told that Mr. Hatimy was away in Nairobi. He did not make a second attempt to return when Mr. Hatimy was present. He opted to serve a Mohidin Hatimy in the office. There is no evidence that Mohidin was a relative of Mohamed Hatimy. The mere fact that they bore the same name is not proof of a relationship. There was no enquiry by the process server as to whether Mohidin was **authorized** to receive service on behalf of Mohamed Hatimy. Once again I find this service to have been neither proper nor adequate. In my view this type of service cannot be relied upon.

The courts exist to provide justice to all parties. In light of my findings above it would be unjust and a denial of justice to shut out the 1<sup>st</sup> Respondent together with the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties from these Judicial Review proceedings on the basis of such flawed and incompetent service. This court does have inherent jurisdiction under S. 3A of the Civil Procedure Act to make such orders as would be necessary to meet the ends of justice. In the case of **REPUBLIC –VS- COMMISSIONER OF POLICE & 2 OTHERS ex-parte JACOB JUMA [2005] eKLR** my learned senior brother Hon. Justice J.G. Nyamu held at page 8 that –

*“the court is entitled to invoke its inherent jurisdiction to deal with the situations before it especially in the situations where it is clear that it has jurisdiction to deal with the matter. In such instances it would be a tragedy for justice were the court to fold its hands and say look this court’s hands are tied”*

I could not agree more. My hands as a Judge are not tied. It would in my view amount to an injustice to deny the 1<sup>st</sup> Respondent as well as the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties audience on the basis of what I have now discovered to be flawed service. I find that no adequate or proper notice was given to them of the hearing scheduled for 21<sup>st</sup> October 2009. Their non appearance on that day was neither deliberate nor intentional, but was in actual fact due to inadequate service. As such I do hereby invoke my inherent powers under S. 3A Civil Procedure Act to right this wrong. Accordingly I do hereby allow the 1<sup>st</sup> Respondent’s Notice of Motion application dated 3<sup>rd</sup> November 2009 in terms of prayers (2) and (3) thereof. For avoidance of doubt I do hereby set aside my proceedings of 21<sup>st</sup> October 2009 in **Miscellaneous 345 of 2009** and further I do grant to the 1<sup>st</sup> Respondent as well as the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties unconditional leave to defend the Judicial Review proceedings filed herein. Costs will be in the cause.

**Dated and Delivered at Mombasa this 16<sup>th</sup> day of December 2009.**

**M. ODERO**  
**JUDGE**

Read in the open court in the presence of:

Mr. Khatib for Interested Party

No appearance by Ex-parte Applicant

Mr. Khatib holding brief for Mr. Kibara for 1<sup>st</sup> Respondent

**M. ODERO**  
**JUDGE**  
**16/12/2009**