



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Application 496 of 2009

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT MILIMANI COMMERCIAL
COURTS CASE NUMBER 4963 OF 2009**

BENSON KIRUMA NGARUAAPPLICANT

VERSUS

PHILIP JUMA AKOKO. RESPONDENT

EX PARTE APPLICANT: PHILIP JUMA AKOKO

R U L I N G

The application before this court is a Chamber Summons dated 21st August 2009 seeking leave of this court by the Ex Parte Applicant, to file a Notice of Motion Under O. 53 of the Civil Procedure Rules, seeking Judicial Review Orders of Certiorari and Prohibition. Although the procedure for such leave is usually ex parte, in this case the Respondent filed grounds of Opposition Statement dated 28th August 2009. The prosecution of the application accordingly included a fully argued opposition to the leave sought.

The facts from which the proceedings arose are as follows as far as the court understands them. A civil suit number 4963 of 2009 was filed in the Resident Magistrate's court at Milimani Commercial Courts Nairobi. The Plaintiff therein was the present Respondent who had recently purchased a piece of land, L.R. No. Nairobi/Block 82/1776, at Tena Estate. The land's value which is not contested, is given in a Valuation Report as Kshs. Six Million. Part of development on the plot includes a single storeyed residential building.

Apparently the property was developed by some financial aid of a loan from the Housing Finance Company of Kenya Limited, advanced to the original owner, one Philip Juma Akoko. When the said Philip Juma Akoko apparently failed to repay the loan as per the purported terms of the mortgage, the Chargee realized its security. Later it sold the property to a third party, one Benson Kiruma Ngarua, the plaintiff in the Resident Magistrate Civil Case Number 4963 of 2009 aforementioned. Several suits are pending in court arising from disputes as to whether the Housing Finance Ltd properly or otherwise, exercised its chargee's powers of sale.

In the meantime however, the Housing Finance Co. Ltd, transferred the property to the Respondent herein and the latter obtained a certificate of title as the new registered owner. The Respondent, Benson Kiruma Ngarua, filed in the Chief Magistrate's Court, Milimani Commercial Courts the aforementioned suit No. 4963 of 2009 against the present Ex Parte applicant. His prayers included Vacant possession and the issue of ownership.

Simultaneously with the filing of the above suit, the plaintiff therein who is the Respondent herein, filed a Notice of Motion seeking that

- a) **That a declaration that the defendants continued occupation of the suit property was unlawful and amounted to a trespass.**
- b) **That the court do order the eviction of the Defendant/Ex Parte applicant from the premises.**
- c) **That the eviction was to be effected by Siuma Traders (probably auctioneers) with assistance of OCS Buruburu Police Station.**

It will be noted as a matter of interest that the prayers of the application aforescribed, raised substantive issues, some of which were not even sought in the main suit under which the application was purportedly filed as an interlocutory application. For example, the declaration that the Defendant's occupation of the suit premises was unlawful was not contained in the main suit. Nor was eviction issue later to be granted by the magistrate's court after declaring that the plaintiff was entitled to ownership included in the plaint.

The application was fixed for a hearing on 7th August, 2009 when it could not be heard because the Defendant/Ex Parte applicant was not present and the Plaintiff admitted non-service. The result was adjournment to 12th August, 2009 when service could have been effected. The record shows that on 12th August, 2009 the court proceeded with the hearing without investigating whether the Defendant was served that time round. The court appears to have assumed that the defendant had been served and had decided not to file a replying affidavit as well as to fail to attend court to defend the application. To that end there is an affidavit on record which purports to depone that defendant was served on 4th August, 2009. This of course is unlikely to be true since on 7th August, 2009 the applicant admitted in court that by then the defendants had not been served. That being so the process-server's affidavit sworn on 5th August, 2009 asserting that the Defendant was served on 4th August, 2009 for the application fixed for a hearing on 12th August, 2009 was clearly intended to mislead the lower court. More so because the date of hearing of 12th August, 2009 had not been fixed by 4th August, 2009 and was not to be fixed until 7th August, 2009.

There are other facts and issues that need to be highlighted. First, the Ex parte applicant herein who was the defendant in the lower court, referred to section 159 of the Registered Land Act, Cap 300, under which the suit property is pointed to be registered. He averred before the lower court that the Resident Magistrate's Court did not have jurisdiction to hear and determine the issues of title, possession and/or eviction.

Section 159 aforementioned states thus: -

“Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being interest which is registered or registrable under this Act or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matter in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court or where the dispute comes within the provisions of section 3(1) of the Land Disputes Tribunals Act in accordance with the Act.”

A careful interpretation of the above provisions, leave no doubt in my mind that the Resident Magistrate's Court which determined the matter now targeted for intended judicial review order of

certiorari, faced the issue of jurisdiction. From the facts not so far denied by the parties herein, not only was the suit property's value far higher than the pecuniary jurisdiction of that court, but the issue before the court involved title and/or possession. Clearly in my view the lower court had no jurisdiction to hear, leave alone to determine, the suit before it concerning the subject property and the parties therein.

Two issues come out from the Resident Magistrate's trial and decision. The process of the trial itself appears on the face of things, bad and probably incompetent. Not only did the court decide substantive title ownership matters by way of an interlocutory application but the application's prayers themselves were not sought in the plaint and accordingly possibly were foreign to the suit. Secondly, the court proceeded to hear the application without first satisfying itself that due process had been complied with in terms of proper service of pleadings having been made. As stated in the case of **R v Electricity Commissioner** (1924) I KB 171

“Whenever any person or body of persons has legal authority conferred by legislation to make decisions in public law, which affect the common law or statutory rights of other persons as individuals, it is amenable to the remedy of judicial review of its decision either for error of law in so acting, or for failure to act fairly towards the person who will be adversely affected, VIZ by not affording him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him, on the part of the person by whom the decision falls to be made.”

The above principle might be applicable to this case or not. The applicant seeks leave in this application to file a Notice of Motion to canvass the quashing of the Resident Magistrate's Court's process and probably, decision adopted and arrived in the suit below. He also seeks that if the leave is granted, it should be allowed to operate as stay of any proceedings, including execution arising from the court's decision. However, the respondent/deed holder argued that if the Resident magistrate's Court erred in arriving at an ex parte decree, the might power Judicial Review Orders need not be called to aid. This is because, he stated, there is a simple procedure under Order 9B of the Civil Procedure Rules under which the decree could be set aside.

I have considered the Respondent's point. There is no doubt that the applicant on learning of the decree passed against him dispossessing him of ownership of the suit property in his absence, and without being served with the application under which the dispossessing orders were made, could apply to set the whole process and the decree aside under Order 9B aforesaid. That procedure could probably be easier and quicker to adopt. He could on the other hand have appealed. Indeed the Court of Appeal appears to have expressed a strong opinion that in such cases, the Civil Procedure mechanisms should first be preferred and be exhausted. In Court of Appeal Civil Application No. Nairobi 92 of 1992 (Nai.40/92 UR) the court stated: -

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure rules cannot oust clear constitutional and statutory provisions.”

With the above observation, I do concur. The next question however, is whether the case before me falls into this principle squarely so that I would be bound by it.

The view I have adopted is that the Resident Magistrate's Court did not merely offend the simple procedure i.e. hearing the application in question ex parte without investigating whether service had been properly effected. Not at all. He in this case went further and entertained an interlocutory application whose prayers were clearly outside the purview or jurisdiction of the main suit. Secondly, the prayers and therefore the reliefs sought under the application were substantively larger than those sought in the main suit. Thirdly and finally, the court had on the face of Section 159 of the Registered Land Act, aforementioned, probably no jurisdiction to hear matters of title or possession and therefore, eviction.

What the above means to this court is that Resident Magistrate's Court may have acted without or in excess of jurisdiction. In such a case the order of Certiorari may lie.

Having come to the above conclusions and having observed the fact that the applicant's Chamber Summons were properly accompanied by a statutory Statement of Facts and a Verifying Affidavit, and in view of the fact that service upon the Registrar of this Court was served more than a day before the application was placed before me, I hold that the applicant is entitled to the leave sought.

Further more, to prevent the Respondent from taking further steps with the decree of the lower court, the leave should be allowed to operate as stay of all proceedings until the intended Notice of Motion for Judicial Review is heard and finally determined or until the stay is discharged or varied, if at all.

ORDERS

1. The leave sought by the Applicant to file a Notice of Motion seeking Judicial Review orders is hereby granted.
2. The applicant to file the Notice of Motion in (1) above within 14 days.
3. The applicant to serve the intended application within 21 days of filing.
4. The Respondent and Interested parties so served to file and serve their replying affidavits within 21 days of service of the application.
5. The said Notice of Motion if filed, to be mentioned on 8th February, 2010.
6. Costs in the main cause.

Dated and delivered at Nairobi this 2nd day of December, 2009.

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D A ONYANCHA

JUDGE