



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

Misc Appli. 7 of 2007

MANCA FRANCESCO.....APPLICANT

Versus

REGISTRAR OF TITLES MOMBASA

THE COMMISSIONER OF LANDS.....RESPONDENT

RANSA COMPANY LIMITED.....INTERESTED PARTY

RULING

Before me is the Notice of Motion dated 13th November 2006 brought pursuant to the inherent jurisdiction of this court by the Interested Party herein; Ransa Company Ltd. The Interested Party prays that the Applicants Notice of Motion dated 4th October 2006 be struck out, that the court do set aside or review the consent order between the ex parte Applicant and the Respondent issued on 31st October 2006; that the ex parte Applicant's Notice of Motion and Chamber Summons application for leave be struck out or dismissed and costs incidental thereto be provided for.

This application is predicated on grounds found in the body of the application and the supporting affidavit of Luigi Ghislotti. The application was opposed on the basis of the affidavit of Manca Francesco dated 22nd January 2006 and the verifying affidavit.

Luigi Ghislotti, is a director of the Interested Party, Ransa Ltd. Co. He instructed the firm of Ole Kina Advocate to oppose the application dated 4th October 2006 which first came up for hearing on 19th October 2006. That since there were other proceedings filed in Malindi Court being HCC 36/04 and 10/05, relating to the same parties and same dispute, it was agreed that an application be made to transfer this Judicial Review matter to Malindi. When he visited his Advocate on record on 9th November 2006, he was shown a copy of an order which had been entered into by consent between the ex parte Applicant and the Respondent in which they agreed that the title issued to the Interested Party be cancelled. (LG 1). It is the Interested Party's contention that the filing of the Judicial Review matter in Mombasa Court instead of Malindi High Court was intent on picking a court and even so the application is defective since notice to the Registrar was not served as required. That in any event, the issue before the court being a private law issue the Applicant cannot have a remedy in Judicial Review. That the Notice of Motion dated 4th October 2006 is an abuse of the court process; that the firm of Fadhil Kilonzo cannot purport to act for the ex parte Applicant because at one time the Interested Party had instructed Mr. Kilonzo to take over his case in HCC 10/05 and the said firm of Advocates even filed a notice of change of Advocates

(LG 1 12-13) to take over from Ole Kina Advocates but when the Interested Party realized that Mr. Kilonzo was relating with the ex parte he withdrew the instructions.

That the manner in which the consent order was obtained was irregular because the suit involved three parties and two of the parties purported to reach a consent without the participation of the 3rd party who was the Interested Party. Mr. Sumba urged this application on behalf of the Interested Party.

The motion was opposed and Mr. Kalama led by Mr. Kilonzo argued the motion on behalf of the ex parte Applicant. Counsel relied on the Affidavit sworn in support of the leave dated 19th September 2006 and the replying affidavit of Maurice Kilonzo sworn on 22nd November 2006. It was submitted that this motion is overtaken by events because the consent orders have already been executed. That the court domesticated the consent order on 8th November 2006 and the Interested Party had counsel, one Mr. Musembi, present when the order was made That since the Interested Party's Counsel was present they are deemed to have been party to the consent. That an application to set aside the consent was filed 5 days later on 13th November 2006 yet they were party to the consent order. That the consent order is sacrosanct and can only be set aside if it is shown that there was fraud. That in any event in this case the substantive orders were against the Respondent who consented to the orders. That the Interested party had a chance to appear and he did so, but he acquiesced to the recording of the consent order and cannot challenge it.

That under S.23, 60, 61, 262 of the Registration of Titles Act (RTA) as read with S.64 of RTA, the court has power to compel the Registrar to cancel the title and that the consent was made pursuant to that Section (S 64). In reply to the allegation that there was bad faith in filing the case in Mombasa High Court instead of Malindi, it was contended that the judge was on transfer when the matter came up for hearing and that is why it had to be taken to Mombasa High Court and that if there was any objection that should have been raised on 18th November 2006.

As to allegations that Fadhil Kilonzo was instructed by the Interested Party, it was denied that the firm ever represented the Interested Party and that the mere fact that an advocate represented one party cannot bar him from representing an adversary. That there has been no confidentiality disclosed, Counsel relied on the case of **UHURU HIGHWAY DEVELOPMENT LTD. V CBK CA 286/01** and **RAKUSEN V ELLIS MONDAN & CLARKE (1912) CH DIV.**

According to Counsel the Interested Party should have appealed. In reply to the effect of 64 of RTA, Mr. Sumba submitted that it is meant to give effect to a judgment of the court.

I have considered the affidavits in support and in opposition to the motion, and the submissions by Counsel. The substantive motion filed by the ex parte Applicant on 4th October 2006 was for Judicial Review orders. It was the Notice of Motion dated 4th October 2006 in which the ex parte Applicant sought orders of mandamus to issue directing the Respondents either by themselves or their servants and/or agents to revoke and cancel all entries and records relating to grant No. CR No. 23596/1 in respect of plot No. 671 Watamu; an order of prohibition to prohibit the Respondent their servants or agents from registering any dealings in connection with plot No. 671 Watamu CR No. 23596/1 in any manner as to prejudice the Applicant's proprietary rights to plot No. Kilifi/Jimba/439. The grounds upon which the application was premised were that the Applicant is the registered and absolute proprietor of plot No. Kilifi/Jimba/439 and the Interested Party had a lease from the Government of Kenya on plots 671 Watamu CR No. 2396/1 which was allegedly overlapping and co-extensive to the Applicant's plot. That despite the Respondent confirming that plot No. 671 Watamu does not exist and that its creation was fraudulent and erroneous, the Respondent has not cancelled the entries on plot 671 and the Interested Party has entered and encroached on Kilifi/Jimba/439 and has started developments thereon and has put up billboards advertising the said plot for sale. That Ransa Company Ltd. was named as an Interested Party and upon being served with the application, filed a lengthy replying affidavit dated 13th November 2006 and filed in court on the same date laying claim to the same plot. He exhibited an allotment letter dated 4th November 2002, had complied with all requirements and was issued with a title IMT 1. According to the Interested Party the Respondent excised part of his land and named it Kilifi/Jimba/439 is

gone to the Applicant. Obviously, there was a dispute over the ownership of the plot, Kilifi/Jimba/439 between the ex parte Applicant and the Interested Party.

While the Notice of Motion was yet to be heard, on 31st October 2006 Kalama Katana & Co. Advocates acting for the ex parte Applicant and Martin Mutungi – Counsel for the Respondent, filed the consent order, in dispute. It reads:

“.....we, the respective M/s Kalama Katana & Co Advocates for the ex parte Applicant and Martin Mutungi Counsel for the Respondent shall be most grateful if the following order was recorded:-

“By consent, the Notice of Motion application dated 19th October 2006 be and is hereby allowed in the following terms:

(a) The order of mandamus do issue directing the Respondent either by themselves their servants or agents to revoke and cancel all entries and records relating to grant No. CR No. 23596/1 in respect of Plot No. 671 Watamu.

(b) That an order of prohibition do issue prohibiting the Respondents their servants and/or agents from henceforth registering any dealings whatsoever in connection with Plot No. 671 Watamu CR No. 23596/1 which could in any manner prejudice the Applicant’s proprietorship to plot No. Kilifi/Jimba/439.

(c) That there be no orders as to costs.

Signed

Kalama Katana & Co.

Advocates for the ex parte Applicant

Signed

Martin Mutungi

Litigation Counsel for the Respondent

For Attorney General’s Chambers Mombasa.”

There is no evidence that the Interested Party or his Counsel were aware or party to the above consent. However, on 8th November 2006 when the parties appeared before the judge, Musembi Advocate held brief for Ole kina, Counsel for the Interested Party. The court made the following order; **“By consent orders in terms of the consent order dated 31st October 2006”**. There is no evidence that Mr. Musembi ever took issue with the said order.

The question is whether this court can review or set aside that consent order. The order of 8th November 2006 is a final order of the High Court in the Judicial Review application that was before it. Section 8 of the Law Reform Act Cap 26 Laws of Kenya which donates jurisdiction to Order 53 Civil Procedure Rules to grant orders of Judicial Review provides at Section 8 (3) & (5) that any person aggrieved by an order made in the exercise of the civil or criminal jurisdiction of the High Court may appeal to the Court of Appeal. Rule (3) specifically bars a return to any such order and a return in my view would include review. Sections 8 (3) and (5) of the Law Reform Act read as follows:

“S.8 (3) No return shall be made to any such order, and

no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.

(4)

(5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this Section may appeal therefrom to the Court of Appeal.”

In this case my brother Justice Maraga accepted the consent filed by the Applicant and Respondent in the presence of Counsel for the Interested Party. It is an order of that court. If this court were to review that order, it would be sitting on appeal of that judge’s order. The Judicial Review jurisdiction is supervisory in nature not appellate and this court cannot supervise another judge whose jurisdiction is concurrent. The Interested Party is aggrieved by the order of the High Court and his redress lies with the Court of Appeal.

So that this court having concluded that it has no jurisdiction to deal with this matter, the court will not deal with the various issues raised, eg fraud or , representation by counsel, because this is not the correct forum to determine those issues. There is now a wealth of authority to fortify the position this court has taken in this matter. In Misc Application 1238/98 **R V COMMISSIONER OF LANDS ex parte JEMIMAH MBUGUA** Justice Makhandia held that the court had no jurisdiction to review its order where the application had not been heard on merit but had been called out and dismissed because the Applicant was absent. Again in **KENYA FARMERS ASSOCIATION LTD. V THE MINISTER FOR CO-OPERATIVE DEVELOPMENT MISC APPLICATION 284/03**, a party sought to set aside a court’s order made when the Judicial Review application was heard in his absence, but Justice Kimaru held that the court lacked the jurisdiction to re hear the Judicial Review application under S. 8 (3) & (5) of the Law Reform Act but that he should appeal. In **KURIA MBAE V THE LAND ADJUDICATION OFFICER – CHUKA MISC APPLICATION 257/1987**, Mbitio and Mango JJ held 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 Section 8(3) of the Act, this court’s order on such application is final and cannot be the subject of pleading or prohibition. There is also no provision in the said Act or any other law making such prerogative order of this court subject to the usual pleadings available in proceedings under the Civil procedure Rules. 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.....”

In the case of **J.B. MAINA & CO LTD V GRAIN BULK CA 246/03**, the Court of Appeal observed that the Law Reform Act clearly provides for a right of appeal from orders made under all the provisions of Order 53 Civil Procedure Rules and it is not necessary to invoke the inherent powers of the court as the Applicant purported to do in the instant case. I am in agreement with the above cited authorities.

Though I sympathise with the situation the Interested Party finds himself and though he may have a good case and taking into account that the order challenged relates to land, this court’s hands are tied on account of jurisdiction and for all the above reasons, I do find that the Applicant should move the proper court by way of appeal as review is not available to him and there is none envisaged under the Law Reform Act and Order 53 Civil Procedure Rules. The Notice of Motion dated 13th April 2006 is hereby dismissed with each party bearing their own costs.

Dated and delivered this 23rd day of September 2008.

R.P.V. WENDOH

JUDGE

Present:

Mr. Sumba for Applicant

Mr. Kagoni holding brief for Kilonzo for Respondent

Daniel: Court Clerk