



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Appli 605 of 2008**

**BENSON MWANGI GITONGA.....PLAINTIFF**

**Versus**

**THE SENIOR PRINCIPAL**

**MAGISTRATE**

**COURT MURANGA & ANOTHER.....1<sup>ST</sup> RESPONDENTS**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JOHN MWANGI MUCHINA.....INTERESTED PARTY**

**RULING**

Benson Mwangi Gitonga seeks the leave of this court to commence Judicial Review proceedings against the Senior Principal Magistrate Court Muranga, the Attorney General (Respondents) and John Mwangi Muchina, the Interested Party, for orders of certiorari to quash the proceedings in SPMCC 442/03 Murang’a, **John M. Muchina v Benson Mwangi Gitonga**, for want of jurisdiction and prohibition to restrain the execution of the order of sale of land Reference No. Location 2/Kanderendu/1407, 1408, 1409, 1410, 1411, 1412, 1413 and that the grant of leave do operate as stay. The Chamber Summons is supported by a statement dated 29<sup>th</sup> September 2008 and the affidavit of the Applicant sworn on the same date.

Briefly, the Applicant is the registered owner of all those plots Loc 2 Kanderendu/1407-1413 which were subdivided from 2 Kanderendu/1022. That the case before the Murang’a Court arose from a sale transaction between him and the Interested Party who paid Kshs.858,000/= for the sale of the land. That the Interested Party failed to complete the purchase price and the contract could not be performed and the Interested Party filed SPMCC 442/03 to recover his money and obtained judgment. The Plaintiff is 139 II. The Applicant has not been able to repay the Kshs.858,000/= and the Interested Party has gone ahead to execute and the sale was advertised for 2<sup>nd</sup> October 2008 and he has been advised that the Murang’a Court had no jurisdiction to entertain the matter in the first place and that is why he has moved this court seeking Judicial Review orders.

The application was opposed and Mr. Makongo, Counsel for the Respondent urged that the SPMS court has jurisdiction to entertain the said suit relating to land under S. 159 Registered Land Act. He also observed that the proceedings and decision of the SPM’S Court Murang’a were not exhibited, Save for the decree which show the date of the decree to be 1<sup>st</sup> October 2007 and he believes the Applicant intentionally left them out as they were time barred in filing an appeal and they are coming to this court as an alternative remedy. He also submitted that the dispute is a normal contract of sale of land and Judicial Review orders do not lie and that the Applicant has not demonstrated that he has an arguable case.

I do agree with Mr. Makongo, Counsel for the Respondent that the Applicant has exhibited documents selectively to

hide the true facts from the court. It was important that the proceedings and judgment in the Murang'a Court be exhibited not merely only as decree. The issue of jurisdiction if at all did not arise, when this application was filed. It should have been raised before the Muranga Court when the matter came up before that court. Without the proceedings from that court, this court cannot tell whether the Murang'a Court was ever asked to disqualify itself on account of lack of jurisdiction. The applicant has waited for 5 years till judgment has been entered to move this court challenging the Senior Principal Magistrate's decision for want of jurisdiction. The delay for 5 years has not been explained in order for the court to exercise its discretion in Judicial Review to grant leave.

As properly noted by the Counsel for the Respondent, the decree is dated 1<sup>st</sup> October 2007, exactly one year ago. The Applicant did not move any court till execution has been done a year later then he has rushed to court to invoke its discretion by a certificate of urgency under Judicial Review. The Applicant is not making a full and frank disclosure of all facts relevant to his case and he would not be entitled to the exercise of this court's discretion. It is noteworthy that the Applicant has not disclosed whether or not he exercised his right of appeal. I find that the Applicant lacks candour and wants to abuse court's process. Michael Fordham "**Judicial Review Hand Book**" 3<sup>rd</sup> Ed at page 352 says as follows of the duty to disclose,

**"21.5 Claimants duty of candour**

**A claimant for permission is under an important duty to make full and frank disclosure to the court of all material facts and matters. It is especially important to draw attention to matters which are adverse to the claim; in particular,**

**(1) Any statutory restriction on the availability of Judicial Review;**

**(2) Any alternative remedy;**

**(3) Any delay/lack of promptness and so need for an extension of time. In facing upto adverse points, the claimant will have a early opportunity to explain why these facts are not fatal and why the case should be permitted to proceed (i.e confess and avoid). The duty of "full and frank disclosure" herks back to the time when permission for judicial orders was exparte (without notice to the defendant/interested party)"**

In Kenya, applications for leave to commence Judicial Review are still made ex parte unless where the court directs that it be heard inter partes like in the instant case. The Applicant has not told the court why he did not appeal or why the delay of one year. He has withheld important information from the court and that disentitles him to the grant of Judicial Review orders.

As regards the issue of whether or not the SPM'S Court has jurisdiction, that has to be established by facts by a valuation of the land in question which has not been done. £25,000/= is much more than it was in those days when the Registered Land Act came into force.

In sum I find that the Applicant has not demonstrated that he has an arguable case or that he deserves the orders sought and the Chamber Summons is dismissed with the Applicant bearing the costs.

Dated and delivered this 8<sup>th</sup> day of October 2008.

R.P.V. WENDOH

JUDGE

**Present:-**

Mr. Ndegwa – Applicant

Daniel – court clerk