



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA

Misc Appli 948 of 2005

IN THE MATTER OF: HIGH COURT CIVIL CASE NO. 24 of 2005

KOMBA LIMITED

-V E R S U S-

1. MWINYIKAI B. CHIRIWACHO
2. JUMA SAIDI KWAMBIRWA
3. ATTORNEY GENERAL
4. GUNTER KELLER

IN THE MATTER OF: AN APPLICATION BY KOMBA LIMITED FOR AN ORDER FOR COMMITAL OF:- MR. HASHIM SAT, DISTRICT LAND REGISTRAR, KWALE IN RESPECT OF THE DISOBEDIECE OF THE ORDERS DATED 7<sup>TH</sup> AND 18<sup>TH</sup> FEBRUARY 2005.

R E P U B L I C.....APPLICANT

-VERSUS-

HASHIM SAT .....RESPONDENT

- V E R S U S -

KOMBA LIMITED ..... APPLICANT

RULING

In this Miscellaneous Application KOMBA LIMITED, the Ex-parte Applicant, seeks to cite the Respondent, HASHIM SAT, for contempt of court. What he is alleged to have disobeyed are two court orders issued by Mwera J and Khaminwa J on the 7<sup>th</sup> and 18<sup>th</sup> February 2004 respectively in Mombasa HCC. NO. 24 of 2005. Those orders inter alia forbade the District Land Registrar Kwale from making any entries in the register relating to **Title No. Kwale/Diani Beach Block/168** or in the registers of subdivisions arising therefrom pending the determination of the Ex-parte Applicants' application in that case. The orders are said to have been served upon the Respondent as the District Land Registrar Kwale at the material time but it is alleged that he disobeyed them hence this application seeking to have him committed to civil jail.

In the course of hearing the contempt application, the Respondent, apprehensive that his constitutional rights might be violated filed an application in this same contempt proceedings file under sections 72 and 84 of the Constitution, section 3A of the Civil Procedure Act, Order 44 Rule 1 and Order 50 Rule 17 of the Civil Procedure Rules and sought orders that:

“1. This matter be consolidated with HCCC. No. 24 of 2005 Mombasa.

2. That this Honourable court do declare that the applicant's/respondent's application dated 21<sup>st</sup> of December 2005 and the court orders made on the 7<sup>th</sup> February 2005 and 18<sup>th</sup> February 2005 in HCCC. No.24 of 2005 Mombasa are violative of the applicants'/respondent's constitutional rights to liberty under Section 72 of the Constitution.

**3. The orders dated the 7<sup>th</sup> February 2005 and the 18<sup>th</sup> February 2005 in HCC. 24 of 2005 be set aside and stayed.”**

The application is based on the grounds that:

**“(a) The court orders given on the 7<sup>th</sup> February 2005 and 18<sup>th</sup> February 2005 are injunctive orders which this Honourable Court has no jurisdiction to grant under section 16 of the Government Proceedings Act Cap. 40.**

**(b) The threat to cite the respondent/applicant for contempt of court is violative of his fundamental rights because it is an attempt to enforce court orders which the law does not give the court jurisdiction to grant.**

**(c) The matters in HCCC. No. 24 of 2005 Mombasa and this case relate to the same subject matter.”**

The application is supported by the Respondent’s affidavit in which he has basically repeated the above grounds. It is opposed by the Ex-parte Applicant whose advocates have filed grounds of opposition.

Looking at both the application and the grounds of opposition it appears to me that two main issues fall for determination. The first one is whether or not the orders of 7<sup>th</sup> and 18<sup>th</sup> February 2005 are injunctive in nature and if they are whether they could issue in this case in which the Government is one of the defendants in view of the provisions of Section 16 of the Government Proceedings Act Cap. 40. The second one is whether or not this court has jurisdiction to entertain the questioning of the propriety of orders made by Judges of concurrent jurisdiction. As the latter issue was not live in both counsels’ submissions and was therefore not canvassed, I express no views on it.

I have perused the orders. Before I say whether or not they are injunctive in nature a brief statement of the facts in that case -Mombasa HCCC. No. 24 of 2005 – is pertinent.

In its amended plaint in that case the plaintiff claims that it bought **Title No. Kwale/Diani Beach Block/168** (“the suit piece of land”) for Sh. 40 million and had it registered in its name on 16<sup>th</sup> January 1992. Subsequently the first and second defendants conspired with Government officials and had the piece of land transferred to them on 25<sup>th</sup> October 2004. The plaintiff’s efforts to have information on that transfer were frustrated by the Respondent who had custody of the parcel file relating to that piece of land. Thereafter the Ex-parte Applicant saw constructions going on on the land. On enquiry it was informed that the first and second defendants had subdivided the suit piece of land and sold or were in the process of selling portions thereof to third parties including the fourth defendant. The Applicant then filed that suit and sought permanent injunctions against the first, second and fourth defendants and declarations against the Government. Along with the filing of the suit it filed an application under Order 39 Rules 1,2, and 3 and Order 5 Rule 17 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act and sought injunctive orders against the first and second defendants, and against the Government it sought orders that:

**“(a) No further entries be registered against the title to Kwale/Diani Beach Block/168 by the District Land Registrar (“DLR”) or any other official acting by his instructions or under his direction until determination of this Application.**

**(b) That the DLR be directed to provide full access to the plaintiff to search the file on Kwale/Diani Beach Block/168”.**

The application was first heard by Mwera J who granted those prayers for a period of 14 days and on 18<sup>th</sup> February 2005 Lady Justice Khaminwa extended those orders to cover entries in the registers relating to subdivisions of the suit piece of land.

Having perused the pleadings in that case and the orders themselves, I find and hold that, in as far as they relate to the Attorney General who is the third defendant in that case, the orders are not injunctive but conservatory orders. Given the history of this matter I have no doubt in my mind that the learned judges were perfectly entitled to issue those orders under the inherent jurisdiction. If they did not do that the suit piece of land could by now have been disposed of to third parties and at the time of hearing the suit the substratum would have disappeared thus rendering that suit a mere academic exercise.

Even if I am wrong in this and the orders are said to be injunctive in nature, I still maintain that my learned brother and sister were perfectly entitled to issue them against the Attorney General and by extension against the Government and its officers.

In the course of his submissions on behalf of the Ex parte Applicant Mr. Shah cited the case of **Royal Media -VS- Telkom Kenya [2001] 1 EA 210** in which Visram J held that in an appropriate case, especially where the wrongdoer himself is a party to the suit, the court can issue injunctive relief against the Government. Having carefully perused section 16 of the Government Proceedings Act I concur with that view.

Statutes should be given purposeful interpretations. It is presumed that by any enactment Parliament intends to suppress some mischief. It is also presumed that Parliament is unlikely to intend to abolish one mischief at the cost of causing another, which is just as bad or even worse. Parliament cannot therefore have intended to shield the Government against certain acts at the costs of creating hardship to members of the public. What mischief did Parliament intend to suppress by enacting section 16 of the Government Proceedings Act? Before I answer that question I would like to quote *in extensio* the provisions of that section. It reads:-

**“16 (1) In any civil proceedings by or against the Government the court may, subject to the provisions of this Act, make any order that it may make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:**

Provided that –

**(i) where in any proceedings against the Government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but in lieu thereof make an order declaratory of the rights of the parties; and**

**(ii) in any proceedings against the Government for recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in**

**(iii) lieu therefore make an order declaring that the plaintiff is entitled as against the Government to the land or property, or to the possession thereof.**

**(2) the court shall not in any civil proceedings grant an injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.”**

In my view by enacting this section Parliament intended to outlaw injunctions or orders which would restrain the Government from carrying out its mandate to the public or those attaching Government property or ordering its delivery to plaintiffs. For instance an injunction cannot issue to restrain the Government from compulsorily acquiring a piece of land required for a public road. Nor can it issue to restrain the Ministry of Health from providing health services on a piece of land that a party claims to be his. In such cases even though the act of the Government may affect private rights, however, because of the public interest involved the Government cannot be hamstrung by orders of injunction. Similarly the court cannot, in execution of a decree against the Government order the attachment of Government property. Nor can it order specific performance against the Government. In both cases that will entail the taking away of

Government property and such an act will no doubt hamper and in some cases even cripple Government operations. That, I think is the mischief Parliament intended to suppress by enacting section 16. The same view that operations of Local Authorities should not be ground to a halt must have informed the enactment of S.263A of the Local Government Act which outlaws attachment of Council property.

However, in a case like this one of a dispute on the ownership of a private piece of land over which neither the Government nor members of the public claim any proprietary interest and in which the Government and the public stand to suffer no proprietary or pecuniary loss, in my view, an injunction can issue to restrain the acts of Government officers who, while performing their regulatory roles, allow themselves to be sucked into those disputes. Even where the Government officers are not acting unlawfully if their acts are likely to confer undue advantage to one party over the other in my view injunctions can also issue against the Government or its officers in any such case provided, as I have said, the Government stands to suffer no loss or disadvantage and its operations are not effected.

In this matter as is clear from the facts in the suit giving rise to these proceedings which I have stated herein above, the dispute is on the ownership of the piece of land known as **Title No. Kwale/ Diani Beach Block/168** and is between the plaintiff in that case on the one hand and the first, second and fourth defendants on the other. The Attorney General has been sued on behalf of the Government

officers at Kwale District Land Registry who allegedly allowed themselves to be sucked into the dispute. Other than perhaps for costs, the Government stands to gain or lose nothing whatever the decision of the court in the matter.

In the circumstance and for the reasons I have given the orders granted against the Government officers, even if they are found to be injunctions, have not and will not in any way affect any Government operations. They were therefore properly issued.

In these proceedings seeking to cite Mr. Sat the then Kwale District Land Registrar for contempt of court he has nothing to fear if he has not disobeyed the court orders as alleged. The court is not about and cannot under any circumstances deny him his right of being heard in the matter. So the question of being likely to be denied his constitutional right to liberty does not arise.

It should be remembered that in the enjoyment of one's constitutional rights, one cannot be allowed to trample upon the rights of others. If therefore the Land Registrar is at the end of the day found to have disobeyed those orders thus causing the plaintiff to suffer loss that is trampling upon the plaintiff's rights and if he is found guilty and committed for contempt of court he will not have been denied his constitutional right to liberty.

He will have been incarcerated for his act of disobedience and there is nothing unconstitutional about that. No one can be allowed to violate the law and argue that he cannot be imprisoned because that will deny him his constitutional right to liberty.

The other prayer in the application is for the consolidation of this Miscellaneous Application with HCCC. No. 24 of 2005. There is no warrant for that. If anything I think the consolidation will cause confusion in the two matters.

In the circumstances and for the reasons I have given I dismiss this application with costs.

**DATED and delivered this 9<sup>th</sup> day of March 2007.**

**D.K. MARAGA**

**JUDGE**

**9.3.2007**

Before Maraga J

Mutungi for applcaint

Ambwere for Shah

Langat for I.P.

Court clerk – Mitoto

Court - Ruling delivered in court.

D. MARAGA

JUDGE

Mr. Mutungi – I apply for leave to appeal.

**D. MARAGA**

JUDGE Mr. Ambwere – Have no objection

**D.MARAGA**

JUDGE

Court – Leave to appeal granted.

D.MARAGA

**JUDGE**

**9.3.2007**