



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**MISC CIVIL APPLI 402 OF 2006**

**GEORGE GIKUBU MBUTHIA.....APPLICANT**

**Versus**

**SENIOR PRINCIPAL MAGISTRATE & ANOTHER.....RESPONDENTS**

**RULING**

On 21<sup>st</sup> July 2006, the ex parte Applicant George Gikubu moved this court by way of a Chamber summons dated 21<sup>st</sup> July 2006 in which he sought leave of this court to bring an Application for Judicial Review for an order of certiorari to be directed at the Senior Principle Magistrate, Milimani Commercial Courts (1<sup>st</sup> Respondent) to remove into this Honourable court and quash the eviction order issued by the said magistrate on 9<sup>th</sup> June 2006; an order of certiorari issued to quash the entries made by the Registrar of Titles (4<sup>th</sup> Respondent) on 28<sup>th</sup> February 2006 transferring the title of the suit property from the Applicant to the 2<sup>nd</sup> Respondent herein; leave to issue an order of prohibition to restrain the 2<sup>nd</sup> Respondent from the occupation, interference and/or demolition of the suit property LR No. 36/11/1 Eastleigh Section II Nairobi; leave to seek an order of mandamus to issue to compel the 4<sup>th</sup> Respondent to cancel the entries made in the register on 28<sup>th</sup> February 2006 transferring the suit property to the 2<sup>nd</sup> Respondent Mohamed Sheikh and lastly, leave to seek a declaration that the Applicant is the lawful owner of the said property. The court upon hearing the Applicant's Counsel granted leave and ordered the leave to operate as stay pending the filing and hearing of the Notice of Motion.

On 25<sup>th</sup> July 2006 the 2<sup>nd</sup> Respondent filed the Application dated 24<sup>th</sup> July 2006 in which he sought to have the orders of leave and stay issued on 21<sup>st</sup> July 2006 vacated or set aside and that costs be provided for. The Notice of Motion was brought pursuant to Order 50 Rule 1 Civil Procedure Rules, Section 3 & 3 A Civil Procedure Act and the inherent powers of the court. Upon hearing Counsel ex parte, this court discharged the order of stay on the same day ie 25<sup>th</sup> July 2006. What remains of the Application is to have the leave granted on 21<sup>st</sup> July 2006 be set aside or vacated. That is what is before the court for determination to day.

When the Application came up for hearing on 20<sup>th</sup> November 2007, the ex parte Applicant who appears in person claimed to have filed a Preliminary Objection on the question of jurisdiction and wanted it dealt with first. The court overruled him and ordered the same to be argued along with the Application dated 24<sup>th</sup> July 2006 because the Applicant indicated that he had raised the question of jurisdiction in the replying affidavit to this Application dated 24<sup>th</sup> July 2006. Mr. Kibuchi, Counsel for the 2<sup>nd</sup> Respondent did not oppose the Application, but the ex parte Applicant, when asked to reply to Mr.

Nassir submission replied that he did not wish to take part in the proceedings. Since the ex parte Applicants Replying Affidavit is on record the court will go ahead and consider it in court ruling.

Counsel for the 2<sup>nd</sup> Respondent/Applicant, Mr. Nassir relied on the Supporting Affidavit dated 24<sup>th</sup> July 2006 and especially paragraph 8 thereof, where Mohamed Hussein Sheikh deponed that the dispute between the parties herein is not in the public law realm but is a private law dispute and cannot be the subject of Judicial Review proceedings. That it is a dispute between the chargee and chargor where the Applicant claims that the property was sold unlawfully. That the statement and even the exhibits to the Notice of Motion do clearly show that this is a private law matter and it is before the wrong forum. Counsel relied on the case of **NJUGUNA V MINISTER OF AGRICULTURE (2000) 1 EA 184** where the Court of Appeal held (per curiam) that the appropriate procedure for challenging of leave which has already been granted to an Applicant ex parte is to apply under the inherent jurisdiction of the court to the judge who granted leave, to set it aside.

I have read the ex parte Applicant's Replying Affidavit dated 25<sup>th</sup> June 2007. It is a 24 paragraph Affidavit and I find that the issues it addresses relate to the main motion. It is only at paragraphs 22 and 23 that he depones to matters relating to this Application where he claims that the 2<sup>nd</sup> Respondent has not properly invoked the jurisdiction of this court by the Notice of Motion of 24<sup>th</sup> July 2006 and that the 2<sup>nd</sup> Respondent also lacked the necessary locus standi to file the Notice of Motion dated 24<sup>th</sup> July 2007 as he was a principal party to the forgery which has resulted in the transfer of his property by the chargor – the HFCK.

I have now considered the Application, Affidavit in support and Replying Affidavit of the ex parte applicant. The Notice of Motion dated 24<sup>th</sup> July 2006 is expressed to be brought pursuant to S.3 A and 3 Civil Procedure Act and Order 50 Civil Procedure Rules and the inherent powers of the court. S.8 of the Law Reform Act which donates jurisdiction to this court to issue Judicial Review orders provides that when a court exercises jurisdiction under Order 53, it is neither civil nor criminal jurisdiction. It is a jurisdiction that is '**sui generis**'. The special procedure is provided for under Order 53 Civil Procedure Rules. The Court of Appeal reaffirmed this position the case of **HOTEL KUNSTE LTD V COMMISSIONER OF LANDS CA 234/1995** where the court said that Judicial Review is a special jurisdiction and a court exercising such jurisdiction does not exercise criminal or civil jurisdiction. In that case the court held that the Civil Procedure Rules, S. 13 Government Proceedings Act did not apply to Judicial Review Applications. Again in **R V COMMUNICATION COMMISSION OF KENYA CA 175/00**, the Court of Appeal said that it doubted whether Order VI of the Civil Procedure Rules applied to a Judicial Review Application. What I want to clarify here is that S.3 & 3A and Order 50 Civil Procedure Rules & Act which have been invoked by the 2<sup>nd</sup> Respondent/Applicant do not apply and this court would not have jurisdiction to grant the orders sought under those provisions.

In the **NJUGUNA CASE** the Court of Appeal clearly said that an Application to set aside an order made in Judicial Review proceedings should be brought under the inherent powers of the court. Apart from citing S. 3 & 3A of Civil Procedure Act, Order 50 Civil Procedure Rules, the Applicant also invoked the inherent powers of the court. For that reason the court will disregard the other provisions and move under its inherent powers to consider the Application.

From the pleadings, it is the applicant's Case that the Suit land belongs to him. That the 2<sup>nd</sup> Respondent purported to purchase the suit property from HFCK but that was through an invalid conveyance and hence the sale too was invalid. The Applicant claims to be the owner of the suit property and was not aware of orders of eviction and so the applicant was seeking to quash the proceedings before the Senior Principal Magistrate's Court that ordered the eviction. The Applicant was therefore challenging the validity of the title, alleging the sale to be fraudulent.

In this case, the ex parte Applicant is challenging the sale of a house by the HFCK following a charge between him and the 3<sup>rd</sup> Respondent. It seems the 3<sup>rd</sup> Respondent was exercising their rights of sale under the charge. The dispute therefore arises out of a contract or charge which is purely a private matter between the two parties.

What is the nature and scope of Judicial Review orders. **Halsbury's Law of England, 4<sup>th</sup> Ed Rev (1)S Vol 1** spells out the nature and scope of Judicial Review. It reads;

**"Paragraph 64 the scope of Judicial Review: the traditional test for determining whether a body of person is subject to Judicial Review is the source of the power. It is not the sole test however, and it may be helpful to look not just at the source of power but at the nature of the power. The principle distinction that appears from the cases is between a domestic or private tribunal on the one hand and a body of persons who are under say public duty on the other. If the duty is a public duty, the body in question will be subject to the Public Law "possibly the only essential elements" giving rise to the exercise of the supremacy jurisdiction of the court are what can be described as a public element which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction. If the source of power is a statute or subordinate legislation under a statute, then the body in question will be amenable to Judicial Review..... The crucial consideration will be whether a particular decision of the body is made under a statutory power.....where any person or body exercises a power conferred by a statute which affects the rights or legitimate expectation of citizens and is a kind which the law requires to be exercised in accordance with the rules of natural justice, the court has jurisdiction to review the exercise of that power. If the source of power is contractual as in the case of private arbitration, then the arbitrator is not subject to Judicial Review. Thus, members of Trade Unions, Business Associations, and Social clubs and also students in universities and colleges who have contractual rights based on contracts of members ship should in appropriate cases, seek the private law remedies of declarations and injunctions and not the remedy of Judicial Review."**

Back home in the case of **R V THE COMMISSIONER OF POLICE ex parte NICHOLAS GITUHU KARIA HC MISC APPLICATION 534/03**, which arose out of a contract of sale of Government Houses, Nyamu, Ibrahim, and Makhandia JJJ had this to say:

**"if there is a tenancy or lease, Judicial Review remedies would be out of reach and unavailable because the performance of a public duty must arise from a statute and not a contract such as a tenancy or a lease."**

In the instant case the source of power is the contract(just like the above referred case) between the chargee and chargor. The ex parte Applicant has not disclosed any public law right which he enjoyed which has been infringed. All the allegations of breach are in relation to the contract between the parties over the sale of a building. It is a purely private law matter that does not fall within the purview of Judicial Review. The leave granted to the ex parte Applicant to bring Judicial Review proceedings was done in error and this court must set that order aside. As stated in the **NJUGUNA CASE (supra)** a Court of Appeal decision which is binding on this court that this court has jurisdiction to set aside its order, made ex parte, under inherent powers. This matter is therefore properly before this court and this court has the jurisdiction to entertain the 2<sup>nd</sup> Respondents Application seeking to set aside the ex parte order of 21<sup>st</sup> July 2006.

The issues of forgery raised in the Replying Affidavit cannot be dealt with in a Judicial Review Application. They would need to be raised in an ordinary civil suit where particulars of fraud would be pleaded and evidence be led to prove the same. Judicial Review does not deal with merits of a decision but with the procedure adopted in arriving at the said decision. The need for adducing evidence reinforces the fact that this matter is before the wrong forum.

Since prayer 1 and 2 are already spent, I accordingly grant prayer 3 of the Notice of Motion dated 24<sup>th</sup> July 2006 with costs to 2<sup>nd</sup> & 3<sup>rd</sup> Respondent.

**Dated and delivered this 10<sup>th</sup> day of December 2007.**

**R.P.V. WENDOH**

**JUDGE**

Read in presence of:

Mr. Kibuchi for 3<sup>rd</sup> Respondent

Daniel: Court Clerk