



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Misc Civ Appli 46 of 2002

IN THE MATTER OF: ORDER LIII R 1 (2) OF THE CIVIL PROCEDURE RULES
IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW FOR AN ORDER OF MANDAMUS

REPUBLIC APPLICANT

V E R S U S

TITLES
1. THE REGISTRAR OF

2. THE ATTORNEY GENERAL RESPONDENTS

AND

SAIDA TWAHIR MOHAMED HATIMY INTERESTED PARTY

RULING

Two parties who claim to be interested in the property known as C.R. 6350/13 SUB DIVISION NO. 8826 (Original No. 143/2 SECT. 1 MN) filed two separate motions under Section 3A Civil Procedure Act asking this court to exercise its inherent jurisdiction to set aside its orders made on 16th December 2004 in favour of M/S Kalidas Kanji (A) Ltd, hereinafter called, Kalidas.

The first motion dated 5th May 2005 was filed by Al Had Hatimy and it was argued by Mr. Mwakisha. His concise argument was that Kalidas came to this court and urged it to direct the registrar of titles to revoke / cancel the title to the subject plot as per the powers vested in him by virtue of Section 60 of the Registration of Tittles Act. That the court heard Kalidas ex parte in this cause seeking orders of mandamus, and granted the orders. That under O53 Civil Procedure Rules, a party seeking such orders must notify all the parties involved / interested in the subject matter so that if they wish to oppose of otherwise deal with the orders sought, then they have an opportunity to do so. That Kalidas did not serve Hatimy with the notice as mandated by law and thus the orders it got were a nullity that accordingly this court ought to set them aside ex debito justitiae in exercise of its inherent jurisdiction ie without necessitating an appeal.

Saida Hatimy, another interested party, filed her notice of motion dated 16th May 2005 and in

presenting it Mr. Khatib supported Mr. Mwakisha's arguments above. He added that indeed there were other causes including HCCC 33/2003 in which all the parties here are involved, wherein Kalidas seeks similar orders as the ones he got on 16th December 2004. That for the fact that Kalidas had this alternative remedy to his grievance, a thing it did not disclose to the court on 16th December 2004, it did not deserve to get the orders of mandamus against the registrar of titles which orders were anyway obtained without due compliance with O53r3(2) Civil Procedure Rules.

Mr. Jiwaji's position is that his client only sought mandamus orders directed to the registrar of titles and nothing to / from the two applicants above. That thus Kalidas did not have to involve them in the judicial review proceedings leading to the orders under review and that they in turn have no capacity to impeach those orders.

It was added that the orders of 16th December 2004 did not seek to cancel the title in question but only to have the registrar endorse on it a charge that was made in favour of Kalidas in 1962. That the omission of that endorsement on the certificate of lease issued on 2nd November 2000 left Kalidas without cover.

The above being the compressed positions of the parties herein, the court's view is as follows:

Kalidas filed a chamber summons on 26th February 2002 followed by (an amended) notice of motion on 26th September 2002 for Judicial Review Orders of Mandamus to be directed to the registrar of titles to act as per Section 60 RTA to call up the subject title herein so that he could "*revoke the same and also to revoke transactions carried out in respect of the said land*" The proceedings invoked O53r1(2) Civil Procedure Rules. So without more, the proceedings fell under O53 as a whole. That provision of law enjoins parties seeking relief's under it, after getting leave to apply for the orders set out, to file a notice of motion within 21 days. Then it adds (O53 r 3(2)):

"(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court be served on the presiding officer of this court and an all parties to the proceedings."

For our case here it was mandamus to be directed to the registrar of titles to revoke the title in issue. Mr. Jiwaji said that his client did not wish to have the title revoked but cancelled or whatever the court got from all that, but the end result is one. Anyway O53 r3(2) Civil Procedure Rules requires that a party who has leave to seek orders of mandamus, prohibition or certiorari must file a notice of motion to argue in support of the orders sought but that notice "*shall be served on all persons directly affected.*" That provision of law couched in mandatory terms, does not mean that to be party to the intended judicial review proceedings, a party directly affected do apply to be joined so as to have capacity to engage in those proceedings. The duty is on the applicant to serve such affected parties and by operation of law they are parties to the proceedings. On being served the affected party then chooses the path to take but at least he is aware of the proceedings. If the applicant omits or fails to serve such persons directly affected, then, they are entitled to come before the court and seek that the orders obtained without due service be set aside as being a nullity. In this case the applicants were not served with the notice of motion leading to the orders of 16th December 2004. Mr Jiwaji argues that they were not required to do anything under Section 60 RTA. That the registrar who was so required was the only party served and even if to date he had not complied with the orders of 16th December 2004, that is all that was intended.

In this court's view the correct position in law is that Kalidas ought to have served the applicants with the notice of motion that led to the orders of 16th December 2004. They were persons directly affected by virtue of their interests in the subject property. Whether the endorsement of the charge in favour of Kalidas made a difference to those interests or not, did not matter. Only that the law requires that they be served with the notice of motion for the sought orders of mandamus. Such service was not effected and the orders of 16th December 2004 are invalid. This court gave them and it sets them aside by its inherent powers to do justice to the parties.

In sum the orders sought by the 2 applicants herein are granted with costs.

Orders delivered on 9th September 2005.

J.W. MWERA

JUDGE