



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC MISC. APPLICATION NO. 66 OF 2020

REPUBLIC.....APPLICANT

=VERSUS=

THE CHIEF LAND REGISTRAR.....RESPONDENT

EX-PARTE

ASHOK DOSHI.....1ST EX-PARTE APPLICANT

PRATIBHA ASHOK DOSHI.....2ND EX-PARTE APPLICANT

RULING

Background

1. The subject of the Judicial Review proceedings relates to LR No.209/3850 IR No. 56396 situate along processional way in Nairobi (suit property). The suit property was allotted to Green View Lodge Limited on 13th March 1986. The suit property was allegedly sold to Magnum Properties Limited who sold it to the Ex-Parte Applicants in 2018.
2. Prior to the sale of the suit property to the Ex-Parte Applicants, Green View Lodge Ltd had filed a suit against magnum Properties ltd and another in ELC 559 of 2011 over ownership. The two Defendants in this suit filed two separate applications seeking orders that Green View Lodge Limited deposits security for costs. In a ruling delivered on 22nd September 2017 Lady Justice Gitumbi ordered Green View Lodge Limited to deposit Kshs.10,000,000/= and Kshs.15,000,000/= in respect of the first Defendant's application and 2nd Defendant's application respectively. The deposit was to be deposited in an interest earning account in the names of counsel for the plaintiff and the Defendants within 45 days failing which the suit by Green View Lodge Ltd was to stand dismissed.
3. On 9th October 2018 lady Justice Komingoi gave directions regarding the ruling by lady Justice Gitumbi and found that the suit by Green View Lodge stood dismissed with costs to the Defendants and found that the Notice of motion filed by Magnum properties dated 25th January 2018 stood allowed in its entirety following these directions all the caveats which had been registered against the title were removed paving way for registration of the suit property in the name of the Ex-Parte Applicants on 23rd October 2018.
4. On 13th February 2020, the Registrar cancelled entry Nos 1 to 15 on the title to the suit property under section 79(1) and (2) of the land Registration Act. This is what led to the Ex-parte Applicants filing Nairobi Judicial Review Misc.No.46 of 2020 before moving to Mombasa ELC where they filed Judicial Review Misc. Application No. 14 of 2020 which was later transferred to Nairobi where it was later transferred to Nairobi where it was given Nairobi Judicial Review Misc. Application No. 66 of 2020. It is this application which gave rise to a preliminary objection by the Respondent herein.

The preliminary objection

5. The Respondent through a notice of preliminary objection dated 24th September 2020 urged the court to dismiss the Ex-Parte Applicants application dated 13th July 2020 and the one dated 1st August 2020 on the following grounds: -

1) That the Ex-Parte Applicants on 12th June, 2020 filed Nairobi Judicial Review Misc. Application No.46 of 2020 Ashok Doshi & Pratibha Ashok Doshi Versus the Chief Land Registrar between the same parties, over the same subject matter where orders for stay were in the first instance not issued and which matter the applicants deliberately concealed or failed to disclose before

this Honourable Court when they filed the application for leave dated 22nd June, 2020.

2) That by instituting a multiplicity of actions on the same matter between the same parties in different courts, filing two similar – causes of actions in respect of the same right and commencing a second cause of action in a different court and seeking a similar relief which was in the first instance not granted constitute gross abuse of the Court and the judicial process warrants the dismissal of the applications dated 1st August 2020 and 13th July ,2020.

3) That the fact the Nairobi Judicial Review Misc. Application No.46 of 2020 was on 17th September ,2020 dismissed for want of attendance on the part of the Ex-parte applicants and the Honourable Court ordered that the file be marked as case closed finalized the case herein and proceeding with this matter when there exists a dismissal order of a similar matter, between the same parties over the same cause of action would be tantamount to ignoring the dismissal order and will amount to a gross abuse of court or judicial process.

4) That these proceedings violate the provisions of section 8(3) and (5) of the Law Reform Act Cap 26 laws of Kenya and therefore the same ought to be dismissed.

6. The Respondent contends that the Ex-Parte Applicants had filed Judicial Review Misc. Application No. 46 of 2020. When this application for leave was placed before Justice Eboso, the Judge did not grant leave Ex-parte but instead ordered that the application be served for interpartes hearing on 17th September 2020. The Ex-parte Applicants filed an application seeking to review the Judge's orders. This application was also set down for inter-partes hearing on 17th September 2020.

7. The Applicants did not wait for the hearing of the two applications. The Ex-Parte Applicants moved to Mombasa ELC where they filed Judicial Review Misc. Application in which they obtained leave to commence Judicial Review proceedings. The Applicants also filed an application for injunctive reliefs. In the meantime, when the two applications which had been filed by the Ex-Parte Applicants came for hearing inter-partes hearing on 17th September 2020, the Ex-Parte Applicants and their lawyer were not in court. It is only counsel for the Respondent who was in court. The court proceeded to dismiss the two applications for non-attendance and ordered the file closed.

8. The Respondent contends that the filing of a similar application in Mombasa without disclosing that a similar application had been filed in Nairobi amounted to abuse of the process of the court. The Respondent argues that he orders Justice Eboso granted dismissing the two application in Nairobi were final orders and that if he Ex-Parte Applicants were aggrieved; they could only prefer an appeal against the orders of the Judge. The Respondent also argue that the Ex-parte Applicants could only appeal against the order refusing to grant leave ex-parte and to review the orders refusing to leave Ex-Parte .

9. The interested party supported the preliminary objection by the Respondent. On the other hand, the Ex-parte Applicants opposed the preliminary objection arguing that the same does not amount to a pure point of law which will pass as a preliminary objection. The Ex-parte Applicants argues that they withdrew the Misc. Application which had been filed in Nairobi before they moved to file the one in Mombasa. They argue that as at the time the court in Nairobi was dismissing their two applications they had already withdrawn the application by sending a notice of withdrawal via email on 23rd June 2020 and there was therefore nothing capable of being dismissed.

10. On their failure to disclose to the Mombasa court that a similar application had been filed in Nairobi, the Ex-Parte Applicants claim that this was inadvertence.

11. I have carefully considered the preliminary objection by the Respondent and the opposition to the same by the Ex-Parte Applicants. I have also considered the submissions by the parties herein. There are two issues which emerge for determination. The first is whether this court has jurisdiction to entertain the two applications by the Ex-parte Applicants. The second is whether the filing of the current application is an abuse of the process of the court.

12. On the first issue, the Respondent argues that the orders given by Justice Eboso were final orders and that if the Ex-Parte Applicants were aggrieved by those orders, they would have gone to the court of Appeal and not to file fresh proceedings. In support of this argument, the Respondent relied on the decision of Justice Makhandi (as he then was) in the case of **Republic Vs United Insurance Company Limited Ex-Parte C .Lutta Kasamani t/a kasamani & Co.Advoates , Kisumu (unreported)** where the Judge stated as follows:-

“ A strict construction of the provisions of section 8(3) and 8(5) of the Law Reform Act show that they do not confer jurisdiction on this court to stay review, or set aside any order it has granted or made . Once an order of whatever kind has been made in judicial review proceedings, the only remedy open to an aggrieved party is to appeal to the Court of Appeal. In the instance case, the Applicant ought to have preferred an appeal from the order dismissing the application rather than making the instant application”.

13. In the United Insurance Company Limited (Supra), the Applicants application for Judicial Review had been dismissed for non-attendance. The Applicant applied for setting aside of the dismissal order. A preliminary objection was raised that the court had no jurisdiction to entertain an application for review or setting aside. The Judge upheld the preliminary objection and dismissed the application for setting aside the dismissal order.

14. The Respondent also relied on the Court of **Appeal in Civil Appeal No. 186 of 2004 Biren Anritlal Shah & Another Vs Republic & 3 Others** where the High Court had refused to grant an order of certiorari. When the Applicant applied for review of the Ruling the Justice Githinji (as he then was) declined to review the order stating that he had no jurisdiction . The Applicant preferred an appeal to the court of Appeal which dismissed the appeal holding that the Judge was right in refusing to review his order as he did not have jurisdiction to do so owing to the provisions of the Law Reform Act.

15. The Ex-parte Applicants argued that in the Nairobi Misc. Application No.46 of 2020, they had not filed a substantive motion and therefore the provisions of section 8(3) and 8(5) cannot be invoked. I do not think that this is correct. There was a final order which had been made when the Ex-Parte Applicant had been refused leave Ex-Parte . The ex-parte Applicants filed an application seeking to have the order reviewed. Again this was not granted. The Judge instead made an order that the two applications be served for hearing interpartes . When the two applications came up for inter-partes hearing on 17th September 2020, the Ex-Parte Applicants or their lawyers were not present. The two applications were dismissed. It does not matter whether the order of dismissal was from an application for leave or from a substantive application for judicial review. As Justice Makhandia (as he then was) observed, it is an order from the judicial proceedings which should be appealed against and not necessarily from one arising out of the substantive application. I therefore find that I do not have jurisdiction to entertain the application dated 13th July 2020 and 1st August 2020.

16. On the second issue, it is not clear the Ex-parte Applicants were engaging in forum shopping. Having failed to get leave with stay and the application for review having been set for inter-partes hearing, the Ex-parte Applicants moved to Mombasa and filed a similar application without disclosing that they had filed a similar application in Nairobi

17. The Application in Mombasa was filed on 22nd June 2020 while the one in Nairobi was still pending. The Ex-Parte Applicants purported to withdraw the Nairobi application after they had obtained leave to bring judicial Review proceedings as well as some interim stay. The filing of the Mombasa application was clearly an abuse of the process of the court. I therefore uphold the preliminary objection and abuse of the process of court. I proceed to dismiss the application dated 13th July 2020 and the one dated 1st August 2020 with costs to the Respondent and interested party.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF FEBRUARY 2021.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

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Court Assistant: Hilda

E.O.OBAGA