REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIV SUIT 66 OF 00

REPUBLIC……APPLICANT

VERSUS

THE CHIEF MAGISTRATE'S COURT…….RESPONDENT

AND

JACKSON KYAVANGA KAMALA……...…….INTERESTED PARTY

RULING OF COURT

The ex-parte applicants' Notice of Motion is dated 31.3.2000. The prayers therein are for the issuance of the Orders of Prohibition and Certiorari. The also seek for an order dismissing the suit No.CMCC No.198 of 1994.

The facts as I understand them from the record before me are as follows: The Interested Party is a former husband of the 1st ex-parte applicant and apparently the father of the 2nd and 3rd exparte applicants. The Interested Party's marriage with 1st applicant was terminated, after which either of them remarried. The dispute is over a landed property known as L.R/539/SecIII/MN, situated at Mtwapa. The source of contention between them is whether the said property is owned jointly or whether it is owned by either, independently. It is a developed property capable of yielding rents. There appears to be a dispute concerning its value today and/or when Mombasa CMCC No.198 of 1994 was filed. The claim was filed by the Interested Party against the Exparte applicants herein plus a third party known as Rudolf who is not an applicant in this matter. It was filed in the lower court on 21.2.1994. The substantive clauses in the said plaint are 5, 6, 7 and the following prayers. It is important to quote them: -

"5. The First, Second, Third and Fourth Defendants illegally trespassed upon the said premises and have occupied the said premises since December, 1993 without the l awful consent of the plaintiff.

6. The plaintiff further states that the First Defendant has been collecting rent from other tenants in the said building on the pretext that she is the landlady knowing very well that she has no justifiable and/or legal in terest upon the said building.

7. The Plaintiff states that the first defendant has already collected unlawfully Kshs.2100/= in form of rents from the other tenants."

The prayers that followed were in accordance with the quoted paragraphs. The applicants entered their defence on 9.3.1994 through B.W. Kenzi, Advocate. The defence in effect denied that the Interested Party herein had locus standi to bring the suit since the plot, according to the applicants, belonged to a person called Jacinta Kamene who was then already dead, but was a daughter of the first Exparte applicant and a sister to the 2nd, 3rd and 4th exparte applicants. The defence also claimed that the property was originally bought as an empty plot by the 1st Exparte applicant and developed by her. On 22.12.1998 the case came for a hearing before L. Achode, SRM. Munyithya Advocate appeared for the plaintiff/Interested Party. The court having been satisfied that the Exparte applicants who were the defendants therein had been properly served, she decided to hear the case, the absence of the Exparte applicants notwithstanding. She recorded the evidence adduced by the Interested Party herein and at the close of the case she entered judgment for the Interested Party in the following terms: -

"……The court finds that the plaintiff as proved on a balance of probability that he is the owner of the suit premises. The court therefore grants prayers (a) and (c) as prayed in the plaint, prayer (b) having been abandoned."

As a matter of fact, it will be noticed that judgment was entered as shown above in accordance with procedure rules. It was however an exparte judgment which might or could be set aside on reasonable grounds, if any, to be adduced by the party aggrieved.

The records confirm that the prayers granted against the defendants in that claim were for damages for trespass and an order for eviction of the defendants (exparte applicants) from the suit premises and costs.

On 27.1.1999 the Interested Party sought for an eviction order and the help of the Court Bailiff and Police for smooth eviction process. The eviction warrant was executed on 28.1.1999 by removing the Exparte applicants from the suit premises.

By an application by Chamber Summons dated 12.2.1999 the Exparte applicants probably due to that eviction, sought to set aside the proceedings and judgment dated 22.12.1998. They also prayed that the eviction order issued in favour of the Interested Party herein and executed against them on 28.1.1999, be vacated together with all the subsequent orders so that the main suit could go for a hearing inter partes. This application has never been prosecuted although it was filed through a firm of experienced advocates. However, the record shows that on the day it was filed, it was so done under a certificate of urgency and Mr. Tindika Advocate then appearing for the Exparte applicants obtained a hearing date for 17.2.1999. On 17.2.1999 the application was pushed to 19.2.1999 for mention. At the same time L. Achode SRM disqualified herself from the case because she had dealt with a related matter which was according to her, very acrimonious. The case was accordingly put before F.N. Muchemi, S.P.M on 29.3.1999 who decided that the case be put before another magistrate. This happened on 21.4.1999 when it was put before H.M. Njiru S.R.M and the magistrate fixed the application on 5.5.1999 for hearing but it was again refixed on 31.5.1999.

It is not clear what happened thereafter but on 20.7.99 the matter came before F.N. Muchemi who certified it urgent at the request of Mr. Magolo advocate and fixed it for a hearing on 3.8.99. She at the same time stayed execution of the decree which had been earlier ordered. However, strangely, the matter was at the behest of Mr. Munyithya again placed before the same Hon. Magistrate on 23.7.1999 and the same magistrate changed the hearing date in the absence of Mr. Magolo from 3.8.99 forward, to 27.7.1999. On 27.7.99 both Mr. Magolo and Mr. Munyithya appeared before H.M. Njiru SRM to prosecute and/or defend another application dated 23.7.1999, filed by Musinga & Co. Advocates who were now appearing for the Interested Party herein. It would appear that the Advocates were concerned that orders were being made by the Hon. Magistrate at the instance of one party in the absence of the other and when the other party could also come later, the court could change the order at the instance of the second party in the absence of the first party.

In his said application Mr. Musinga sought the following prayer: -

" That for the purpose of upholding the dignity of the court, the rights of the applicants and the course for

natural justice, the mandatory order issued, exparte on 20.7.1999 be set aside pending the hearing of the application dated 19.7.1999 inter par tes."

It would appear that his worry at the time was that the order of court made by Hon. Muchemi, staying execution in the CMCC No.198 of 1994, was incongruous with the others on the record since execution had already been long completed and the defendants (exparte applicants) had been evicted. So a stay according to him made no logical or legal sense. The application was filed by Magolo, Ochuka & Co. Advocates and it formally sought to stay the execution of the decree in the main suit dated 22.12.1999. It also sought for an order, that the application of 12.2.1999 for setting aside of the main decree be heard urgently.

Mr. H.M. Njiru heard the Interested Party's application on 27.7.1999 where both Mr. Munyithya and Mr. Magolo tried to outdo each other, as they have done throughout their conduct of this case. The Hon. Magistrate delivered his ruling on 17.3.2000. It was to the effect that the exparte order dated 20.7.1999 should be set aside. This means that the order of Hon. Muchemi staying the execution of the main order dated 22.12.1998 was set aside. The Hon. Magistrate H.M. Njiru found from the record that apart from the 1st exparte applicant (1st defendant) who hired the suit premises and who had been evicted by the order of court the 2nd and 3rd defendants, had not lived in the premises. He also stated that if they had later during the legal battles decided to join the battle also, they must nevertheless vacate forthwith. He also ordered that the applications to set aside judgment and the other dated 19.7.1999 do proceed to a hearing on priority basis.

The applications came before Hon. Njiru for mention from time to time without progressing. The hearing of the application to set aside dated 12.2.99 and once more fixed for a hearing on 30.9.99 just thinned out and disappeared. On 30.11.99 the application of 12.2.99 aforementioned could not be heard because although served and the case was fixed in court. Mr. Magolo and his clients did not attend because he now claimed that he had no instructions.

In the meantime the plaintiff/Interested Party, went ahead to try and obtain vacant possession of the premises after the court had ordered that execution should proceed by his order of 20.7.1999. But the 1st defendant (exparte applicant) made it impossible for the warrant of to be effected. As a result the plaintiff/Interested Party sought for a warrant of arrest as mode of execution and for detention in civil jail. This was granted on 1.12.99 when the 1st defendant/1st exparte applicant was ordered to civil jail for 30 days. But by 1.3.2000 the order to arrest her had not been effected and the court sought a final attempt to do so by the court Bailiff. The help of O.C.S Kijipwa which was sought earlier to help the Bailiff was not forthcoming. By 29.3.2000 when the case came for mention before Hon. Mushelle, P.M, neither party appeared. They clearly were tired or were they?

Things having reached this stage and Mr. Magolo feeling aggrieved for his clients the exparte applicants herein, proceeded to the High Court for leave to file a motion for Judicial Review Orders of Certiorari and Prohibition. It will be recalled that Certiorari was to recall all orders made by the magistrate which the exparte applicant felt were without jurisdiction, to quash them. This includes the orders in CMCC No.198 of 1994 which the applicants state, the lower court had no jurisdiction to make and which therefore they believed should be quashed and more particularly the orders of Judgment entered in the case dated 22.12.1998 (Mr. Magolo refers it as dated the 2.12.1998). He argues that the value of the suit property is over 4 million and accordingly S.R.M, Achode had no jurisdiction to hear and determine it as she did. Thirdly, they also seek that this court dismisses the said suit CMCC No.198/94. My brother Waki J. granted leave to file the Notice of Motion now before me under Order 53 and the relevant rules thereunder. That is the Notice dated 31.3.2000. In reply Mr. Munyithya for the Interested Party argued that the application cannot succeed and gave the following reasons: -

1. That the exparte applicants have no locus standi as the property even going by their own affidavit evidence, since the property the subject of the suit belongs to a third party, Jacint a Kamene, deceased in respect of whom no Grant of Letters of Administration has ever been obtained by the applicants.

2. That the Interested Party and the Registrar of the High Court have never been served with the Notice

and other documents required to b e served under Order 53, Rule 1(2) (3) and if served, were not served in accordance with the said Rules.

3. That the application is bad in law because it is not accompanied by the orders or judgments that are being challenged, nor was the application bun dle accompanied by a verifying affidavit in respect thereof, served upon the Registrar before the application came for a hearing in accordance with Order 53 Rule 7.

4. That Order 53 cannot be used by this court to strike out a civil case proceeding before another court even if it is a junior court.

5. That there are no proceedings going on in CMCC No.198/94 to be prohibited by a Prohibition Order as the case was finally decided on 22.12.98. What is going on under the case are execution proceedings.

6. That all application being now drastically challenged by the Review Orders, were never challenged or applied to be set aside if they aggrieved the parties who now challenge them.

7. That the targeted orders were valid orders, all within the jurisdiction of the court that made them and are not liable for quashing.

8. That this application does not generally comply with Order 53 of the Civil Procedure Rules.

I have carefully considered all the arguments from both sides and the material placed before me in support of each party's arguments. I do state that the reason why I recorded the facts behind this application in detail is to bring out the salient issues that led to the filing of this application. It will clearly have been noted by now that the judgment entered in CMCC No.198 of 1994 on 22.12.1998, is still intact. It was entered after the court got satisfied that the defendants therein were properly served with a hearing notice to attend and defend the case but were not in court without explanation or excuse. It is my view and I so hold that she acted properly and within the Civil Procedure Rules to allow the Plaintiff therein to proceed to formally prove his case ex-parte. She acted according to law when she finally entered the judgment for the plaintiff therein. She never exceeded any lawful authority or acted outside or contrary to any provisions of the law. If the defendants therein had not been actually served with hearing notice, the defendants who are the exparte applicants herein, would have applied to set aside the exparte proceedings and judgment in question. This they intended to do when they made the application dated 12.2.1999 which for reasons only known to them and their counsel has never been heard. Perusal of records confirms that the application was fixed for a hearing only once or twice and in those occasions it would appear that it was the fault of the defendant's counsel that made it not to be heard. In my view, other reasons aside, it was wise of the applicants not to target the said judgment for a judicial review for reasons to be discussed hereafter.

The exparte applicant targeted quashing only the order of Mr. Njiru, S.R.M of 30.11.1999 and all other orders subsequent thereto. I will first examine the order of 30.11.1999. I have carefully examined the records both the typed one and the honourable magistrate's hand-written ones. The order made on 30.11.1999 by Mr. Njiru S.R.M reads: -

"Order: Ruling on 1.12.1999." The first part of the prayer of his application seeks that this court recalls the above order and quashes it. The question that immediately arises is whether the above order was made without jurisdiction or in excess of the jurisdiction of the honourable magistrate. The Interested Party infact argued that the order is not useful to them and could be quashed. But having considered the matter carefully I have come to the conclusion that the said order was a normal order, and one made within the jurisdiction of that court. It is not illegal, nor is it beyond jurisdiction. It is therefore not amenable to quashing by the Order of Certiorari. I will be quick to add that although Mr. Munyithya on several relevant occasions on the record, even during the hearing of this application indeed raised the issue that the order targeted was never made on 30.11.1999, Mr. Magolo failed to be moved; and if he was indeed moved, he did not respond to it. Furthermore this court went out of the way to grant him an adjournment and leave to file an additional affidavit at a terribly late hour upon the grounds given therein to allow him put his house in order; a rear chance indeed especially where the special Order 53 is concerned. Instead he

filed a tiny skeletal self sworn affidavit which did not deserve the court's effort of having granted the opportunity in the first place.

Turning now to the other orders it is difficult to understand which orders in particular Mr. Magolo's application had in mind. There are five orders shown to have been made after the order of 30.11.1999. I have carefully read them. It is my view that they are all valid procedural orders made within the court's jurisdiction except probably the order of 1.12.1999 which is substantive. Having carefully read the order of 1.12.99 I venture to say, without concluding, that this is probably the order that Mr. Magolo's clients, the exparte applicants herein targeted instead of the order of 30.11.1999 aforementioned. The record confirms that on 30.11.99, the honourable H.M. Njiru S.R.M heard an application dated 25.10.99 in which the Interested Party herein sought for an order of arrest of the 1st exparte applicant for failure to vacate the suit premises, and obstruction against the court orders giving the Interested Party vacant possession as per the provisions of section 51 of Civil Procedure Act. Mr. Magolo did not attend court that morning purportedly on the ground that he had not been instructed to do so. How he was not instructed when he was all along on record and chasing the matter is difficult to appreciate. The honourable magistrate made an order that he would give the ruling on 1.12.1999. On the latter date the magistrate having considered the material before him allowed the application by making an order that the 1st exparte applicant herein be arrested and put in prison for 30 days and the Interested Party be put in possession of the suit premises Plot No.539/Sect.111/Mtwapa – MN. This, in my view, is what may have prompted these application for Judicial Review. But as can be seen, the circumstances under which it was made are those that can be considered lawful. This was an order therefore properly made and made within the proper jurisdiction of that court that made it. The learned magistrate did not over-step the jurisdiction as a magistrate nor did he overstep the jurisdiction donated by S.51 of the Civil Procedure Act. Moreover he was enforcing a decree properly and lawfully made under the judgment of that court in CMCC No.198 of 1994 which todate is valid, although being exparte, could be liable to setting aside under the application dated 12.2.1999 if proper reasons were put forward. Strangely enough also, the orders targeted by the ex parte applicants to be quashed are minor orders, all related to execution of the decree dated 22.12.98.

The decree itself is not directly targeted for quashing but careful reading between the lines do confirm that the applicants are attempting to circumvent the provisions of the law governing the setting aside of judgments. What would happen to the still lawful judgment and decree of 22.12.1998 if the later orders in execution thereof are quashed as requested by Mr. Magolo while the said judgment and decree remain intact and in limbo? A decree-holder has a right to enjoy the fruits of his judgment unless there is a compelling lawful reason to deprive him of that right. Also, Judicial Review Orders are discretionary orders which this court will grant to a party who comes to this court with clean hands. Can the ex-parte applicants who have tried to circumvent proper court orders and are trying to use what may amount to dishonest or unconventional or even dubious methods to obstruct lawful court order be regarded as parties who deserve the order sought? I would say, no without much hesitation. This is a clear case where the injuries caused upon the applicants can be said to have been caused upon themselves or through their own advocates. In my view, the ex parte applicants' approach to this matter almost throughout the active period of this case has amounted to an abuse of court process. The orders of Mr. Njiru, S.R.M. of 30.11.99 and other orders thereafter following are accordingly not amenable to quashing as prayed.

The ex parte applicants, also sought for an order to stricke out the lower court suit, CMCC No.198 of 1994. Throughout the prosecution of this application Mr. Magolo did not state why or under what provision of law the suit should be struck-out by this court. The suit was a trespass suit brought by the Interested Party herein. He gave some evidence that he bought the suit premises, Plot No. LR/539/Sec.111/MN, Mombasa, situate at Mtwapa. He produced a kind of Transfer duly stamped and registered. He stated in the evidence he adduced in court on 22.12.98 that he, developed the structure now on the plot. He adduced evidence towards proving a case of trespass against the exparte applicants. All this evidence although exparte was unchallenged in court. The court accepted the evidence and made a finding in favour of the Interested Party. The issue of the value of the property did not arise then and was not considered by the court. It cannot at this stage and in this application be decided whether or not the issue of the value of the plot was or was not relevant lest I prejudice other proceedings that might possibly follow. However, I do not find on the record any reason or legal basis presently why I should strike out

the said suit, especially when a valid judgment given thereunder still stands. I accordingly, decline to do so.

I now turn to the prayer for the Order of Prohibition. Mr. Magolo wanted the Senior Resident Magistrate, or any Magistrate, within the Chief Magistrate's court to be prohibited from entertaining proceedings with or dealing with CMCC No.198 of 1994. His grounds for this call was that the courts should be prohibited from continuing to make irregular and prejudiced orders. I have carefully perused the records and indeed I have tabulated earlier in this ruling almost all the orders that were made by the magistrates and when and why they were made. I confess that I have not seen in the records any order that was made outside of the jurisdiction of the court that made them. But if there was any irregular one, such could easily be challenged and possibly negated within the normal provisions of the Civil Procedure Act and Rules, either by setting them aside or by reversing them in appeal. Review Orders are not normal orders that can be resorted to each time a party wishes to reverse an order or judgment he does not like. The Order of Prohibition will issue from this court to the lower court, in respect of this case, to forbid it from continuing to act contrary to the relevant law or in excess of jurisdiction or beyond its jurisdiction. It is a futuristic order. Evidence must be before this court as a matter of certainty that the lower court is set to act unlawfully as defined above before this court can issue the said drastic order. I see no such evidence before me. The evidence there is on the record suggests no illegality and no act of excess of jurisdiction. I hold accordingly, that the Order of prohibition does not lie in this case.

The Interested Party also raised certain preliminary issues that must be determined. He argued through Mr. Munyithya that the ex-parte applicants did not have locus standi to bring this application. He based his argument on the ground that in the defendants' defence filed in CMCC No.198 of 1994, the ex parte applicants admitted that the property LR No.539/Sect.III/MN situated at Mtwapa neither belonged to the Interested Party nor to them. In paragraph 4 of the said defence the ex parte defendants had stated that the property belonged to one Jacinta Kimene who was at the time deceased. As stated somewhere in this Ruling, the said Jacinta Kimene (deceased) was the daughter of the 1st ex parte applicant and a sister to 2nd and 3rd ex parte applicants herein. If the basis of the applicants' claim to the property is based on the above blood relationship, it might be argued that the applicants indeed had to arm themselves with a Grant of Letters of Administration before they could have the locus standi in the suit. But it is my view and finding therefore, that while the issue might be a meritorious subject in the said suit, CMCC No.198 of 1994, it may not be our concern here where the Review Orders are the subject. Put differently, judicial review process is not concerned with private rights or the merits of the decision herein being challenged by the ex-parte applicants, but with the process of how the said decision was arrived at. The merits or otherwise of the suit below are not relevant. That is to say that the fact that the issue of locus standi might possibly have been successfully raised in CMCC No.198 of 1994, it is not however, an issue that can affect the decision of this court in its process of determining whether r not an order of judicial review should issue.

A second issue that the Interested Party raised to be decided by this court is whether the ex-parte applicants herein failed to serve the required Notice and other documents required to be served under Order 53 rule 1(2) and (3) and whether the application itself was time-barred or not. These were raised by Mr. Munyithya, but the ex parte applicant chose not to say a word about them. I have examined the records of 24.3.2000 when the ex parte applicants appeared before my brother Waki, J. Mr. Magolo stated before him that the whole suit and orders made by the court were without jurisdiction, because the suit property was of a jurisdiction beyond the court. He also stated thus:-

"I am aware that any non -disclosure or reliance on erroneous facts in an ex -parte application would vitiate any orders."

This is a very interesting but highly misleading statement in my view. It behoved Mr. Magolo to clearly disclose to the Honourable Judge that he had not served the required notice and other relevant documents as required to be served under Order 53, Rule 1. It was also very relevant and obligatory of him todisclose that the targeted order or decision was made on 22.12.1998, well beyond the six months as provided by Order 53, Rule 2 of the Civil Procedure Rules, which as this court understands and accepts, is based upon the provisions of Section 9 of the Law Reform Act, Cap.26. The situation on the records before me is that

Mr. Magolo failed to disclose these fundamental facts to Waki, J., and yet Mr. Magolo could dare to declare to the court that he knew the consequences of failure to fully disclose the above facts and defaults. For some reason not recorded, the court did not make inquiry of the said fundamental facts and requirements although in my view it was incumbent upon the ex parte applicant to satisfy the court that those very necessary issues had been complied with before they could expect to get the orders sought under Order 53 Rule 1(2) and (3) and Rule 2 aforementioned. As it stands and appears from the record the ex parte applicants did not only fail to serve the required Notice and other documents to the registrar before the application for leave was heard but failed to disclose such failure and default to his Lordship, Justice Waki. Can it be easily argued that had Mr. Magolo made full disclosure as he ought, Waki, J., would have given the leave to file the Notice of Motion for the Orders of Certiorari and Prohibition? When Mr. Munyithya for the first time raised the issues before me, Mr. Magolo suddenly sought for leave to file a supplementary affidavit. He did not specifically seek for extension of time to serve the notice and the documents. He ignored or evaded the issue completely. My finding is therefore that the leave granted to the ex parte applicants was defective and amounted to no leave at all for failure to serve the required Notice upon the Registrar. The situation was never rectified at any stage thereafter and indeed could not be rectifiable.

I would further hold that even if the ex parte applicants could try to rectify it by trying to comply with the said mandatory requirements aforesaid, assuming of course that this court had power to grant leave to rectify and grant it, they could not manage to cure the incompetence of the application. This is because the purpose of serving the Notice under Order 53, Rule 1(3) is to enable the Attorney-General, at that early stage of the application for leave to intervene and oppose such application if he so wishes. The upshot in respect to this ground therefore is that this application was incompetent ab initio and liable to be struck out. Had I considered this ground first, there would have been no need toconsider thereafter the other grounds that I have considered substantively and made findings thereon. I therefore took this course deliberately in order to make, otherwise, alternative findings which, under the circumstances, I found necessary.

Before I make the final orders, I am persuaded to state that the parties herein, particularly the exparte applicant, could have been advised better by their learned counsel. The latter have instead wasted a lot of the parties' time and funds. I also suggest without deciding, that this is a matter which should have been quickly and firmly handled, in its early stage in the lower court especially by Mr. Magolo. It is sad that the application dated 12.2.1999 for setting aside the exparte judgment, the origin of the acrimony in these proceedings could have by now have been heard and determined once and for all. The hearing and determination of the application could determine firmly the rights of the parties herein at that stage. But unfortunately, that could not be, due to the conduct of the counsel. This situation where the process of court is deliberately being brought into disrepute should not be allowed to continue in this case and should be brought to an immediate end. This court is of the view therefore that the said application dated 12.2.1999 should be heard by this court forthwith.

The upshot of all the canvassing is that the exparte applicant's application is rejected in toto and dismissed with costs to the Interested Party.

Under section 18(1)(b) of the Civil Procedure Act, I order that CMCC No.198 of 1994 be and is hereby transferred to the High Court at Mombasa. The same shall be mentioned before any Judge sitting on the Civil Bench with a view of fixing for urgent hearing the application dated 12.2.1999. In the meantime, the ex parte applicants are ordered to vacate the suit premises on or before 15.10.2002 and in default they shall forthwith be arrested and be brought before this court to be dealt with according to law. It is so ordered.

Dated and delivered at Mombasa this 8th day of October, 2002.

D. A. ONYANCHA

JUDGE