



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. JUDICIAL REVIEW APPLN. NO. 33 OF 2019

IN THE MATTER OF: AN APPLICATION BY CHARLES MWANGI MURIU FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF: SECTIONS 18 & 19 OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

BETWEEN

CHARLES MURIU MWANGIAPPLICANT

VERSUS

CHIEF LAND REGISTRARRESPONDENT

AND

BENJAMIN MAKOKHA NYONGESAINTERESTED PARTY

RULING

1. In the Notice of Preliminary Objection dated 24th July, 2019, the Interested Party has averred that the Chamber Summons Application dated 25th June, 2019 (*the Application*) is *sub judice* and an abuse of the court process since there is still pending ELC Appeal No. 11 of 2019 between parties herein concerning the same subject matter, i.e. a dispute over Mavoko Town Block 2/5314 and Mavoko Town Block 2/7680.
2. The Interested Party has averred that the Application seeks to compel a party (*the Respondent*) to undertake a public duty yet no dispute has ever been referred to him, and therefore the Respondent never failed to perform the alleged public duty imposed on him by law and that the Application is mischievous and intended to mislead this court.
3. According to the Interested Party, the Application and the entire suit are incompetent, bad in law, misconceived and an abuse of the Honourable Court's process for failure by the Applicant to disclose material facts relevant to this case, especially the existence and pendency of ELC Appeal No. 11 of 2019 and that the leave to apply for an order of mandamus to operate as stay as sought offends the provisions of Order 53 Rule 1(4) of the Civil Procedure Rules, 2010.
4. It was averred in the Notice of Preliminary Objection that the dispute on the boundaries involve and/or affect the entire two adjoining blocks i.e. Mavoko Town Block 2/2925 and Mavoko Town Block 2/4810 under which the Interested Party's property, Mavoko Town Block 2/7680, and the Applicant's property, Mavoko Town Block 2/5314, fall respectively, which blocks collectively contain a total of about one hundred (100) plots where any slight adjustment would affect all the one hundred plot owners most of whom have already settled in their respective plots.
5. The Notice of Preliminary Objection proceeded by way of written submissions. The Interested Party's advocate submitted that the Applicant did not disclose to this court the subject matter of the dispute in Mavoko CMCC No. 208 of 2018 and subsequent determination, neither did he disclose the existence of ELC Appeal No. 11 of 2019 which challenges the decision of the court to have the dispute to be first referred to the Land Registrar-Machakos.

6. The Interested Party's advocate submitted that the Applicant initially referred the dispute for adjudication to the Machakos County Land Registrar on 25th March, 2019 through a letter dated 22nd March 2019 in compliance with the terms of the Judgment of the subordinate court in Mavoko CMCC No. 208 of 2018, to which an Appeal has been preferred.
7. It was submitted that the Applicant wants to compel a party, who was never asked to perform a public duty and declined to undertake to discharge such duty in compliance with a court Judgment which he is not satisfied with and has appealed against it.
8. Counsel submitted that the law on Preliminary Objections was set out in the *locus classicus* case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696** and affirmed by the Supreme Court decision of **Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 others [2015] eKLR** that Preliminary Objections should purely raise issues of law, and where facts are largely uncontested.
9. It was submitted that ELC Appeal No. 11 of 2019 seeks to challenge the determination of the subordinate court in Mavoko CMCC No. 208 of 2018 that the dispute between the Applicant and the Interested Party is a boundary dispute, and therefore ought to be determined by the Land Registrar-Machakos.
10. The Interested Party's advocate submitted that if the Applicant succeeds in ELC Appeal No. 11 of 2019, then there would be no need for the Respondent, or the Land Registrar-Machakos or any other Registrar for that matter to resolve the dispute as per the terms of the Judgment in Mavoko CMCC No. 208 of 2018 or to be compelled to do so by this court.
11. Counsel submitted that if the converse was to happen and this Application succeeds, and the Respondent is compelled to resolve the boundary dispute as prayed, and subsequently the Applicant succeeds in ELC Appeal No. 11 of 2019 and the court returns the verdict that the nature of the dispute between the Applicant and the Interested Party is ownership, then there would be a conflict of two court orders of the same court wherein compliance of one means being contemptuous of the other.
12. It was submitted that even in cases where the subject matter is not substantially in issue, but the determination of one case would have a bearing on the determination of the other and/or would resolve the related issues in contention in another cause, then the court is obligated to invoke the overriding objective principles and dismiss such a case to promote prudent use of judicial time.
13. Counsel relied on the cases of **Republic vs. Registrar of Societies - Kenya & 2 others Ex-parte Moses Kirima & 2 others [2017] eKLR** which followed with approval the Court of Appeal decision of **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. NAI. 6 of 2010, Barclays Bank of Kenya Ltd vs. Elizabeth Agidza & 2 Others [2012] eKLR** and **Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013) eKLR**.
14. It was submitted by the Interested Party's advocate that the prayer for leave to apply for mandamus to compel the Respondent herein is untenable because no boundary resolution dispute was ever referred to the Respondent for adjudication; that there is still pending ELC Appeal No. 11 of 2019 which challenges the decision of the Magistrate's Court that the dispute between the Applicant and the Interested Party is a boundary dispute, therefore subject for resolution by the Land Registrar; and that the Respondent lacks power and jurisdiction to resolve the dispute between the Applicant and the Interested Party.
15. It was submitted by counsel that Order 53 Rule 1(4) of the Civil Procedure Rules, 2010 clearly and unambiguously provides that the grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the Application, or until the judge orders otherwise.
16. It was submitted that there is, therefore, no discretion to grant stay under Order 53 where what is sought and granted is only leave to apply for mandamus. Accordingly, it was submitted, in **Re: Justus Nyangaya and Social Democratic Party Nairobi HCMA 1132 of 2002 Nyamu, J (as he then was)** held that at leave stage, it cannot be ordered that leave to apply for a mandamus order do operate as stay because logically there can be nothing to stay in respect of the leave for mandamus unlike orders of certiorari and prohibition where such leave can be ordered by a Judge operate as stay.
17. The submissions by the Ex-parte Applicant are not on record.
18. This suit was commenced vide a Chamber Summons Application dated 25th June, 2019 and filed on 8th June, 2019 (*the Application*) seeking for the following prayers:
 - a) *That leave be granted to the Applicant herein to apply for Judicial Review Orders, to wit, an order of Mandamus compelling the Respondent to resolve the boundary issue relating to properties registered as Mavoko Town Block 2/5314 and Mavoko Town Block 2/7680.*
 - b) *That the grant of leave herein do operate as a temporary relief/stay of any further construction, building, development and/or any other activities in the property registered as Mavoko Town Block 2/7680 in so far as it encroaches Mavoko Town Block 2/5314 until the determination of this Judicial Review Application or until such further orders of this Honourable Court.*
 - c) *That costs of this Application be provided for.*
 - d) *That such other or further relief as this Honourable Court may deem just and expedient to grant.*

19. When the Application, which is ordinarily heard *ex parte*, came up for hearing, this court directed the Applicant to serve the Respondents and the Interested Party for hearing of the Application *inter-partes*. The order of the court was informed by the provisions of

Order 53 Rule 4 (1) of the Civil Procedure Rules which provides as follows:

*“The grant of leave under this rule to apply for an **order of prohibition or an order of certiorari** shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:*

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter-partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

20. The Chamber Summons Application dated 25th June, 2019 (*the Application*) has been challenged on the ground that the same is *sub judice* and an abuse of the court process since there is still pending ELC Appeal No. 11 of 2019 between parties herein concerning the same subject matter, i.e. dispute over Mavoko Town Block 2/5314 and Mavoko Town Block 2/7680.

21. The pendency of ELC Appeal number 11 of 2019 has not been denied by the Ex-parte Applicant. The Interested Party annexed the Memorandum of Appeal filed in ELC Appeal number 11 of 2019. One of the grounds of the said Memorandum of Appeal is to the effect that the learned Magistrate erred in finding that the dispute before the lower court was a boundary dispute as opposed to ownership.

22. That being the case, it follows that the issue that was before the lower court in Mavoko SPMCC No. 208 of 2018 on whether the dispute could be resolved by the Land Registrar is still alive before this court. The Applicant is guilty of material non-disclosure for failing to disclose the existence of ELC Appeal No. 11 of 2019 involving the suit properties in question, Mavoko Town Block 2/7680 and Mavoko Town Block 2/5314, and its relation with the suit herein. The filing of these proceedings, while the Appeal challenging the decision of the lower court is pending is abuse of the court process.

23. I say so because if the Applicant herein, who is also the Appellant in the Appeal, succeeds in ELC Appeal No. 11 of 2019, then there would be no need for the Respondent, or the Land Registrar-Machakos or any other Registrar for that matter, to resolve the boundary dispute as per the terms of the Judgment in Mavoko CMCC No. 208 of 2018 or to be compelled to do so by this court.

24. If the converse was to happen and this Application succeeds, and the Respondent is compelled to resolve the boundary dispute as prayed, and subsequently the Applicant succeeds in ELC Appeal No. 11 of 2019 and the court returns the verdict that actually the nature of the dispute between the Applicant and the Interested Party is ownership, then there would be a conflict of two court orders of the same court wherein compliance of one means being contemptuous of the other.

25. It is therefore obvious that the determination of ELC Appeal No. 11 of 2019 would have so much impact on this Application and *vice versa*, and the filing of these proceedings was not only premature, but an abuse of the court process.

26. For those reasons, I find the Notice of Preliminary Objection dated 24th July, 2019 to meritorious. The Chamber Summons dated 25th June, 2019 is struck out with costs to the Interested Party.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30TH DAY OF APRIL, 2021.

O. A. ANGOTE

JUDGE