Republic v Principal Magistrate, Voi Law Court; Mwakina (Exparte); Kishamba B Group Ranch & 2 others (Interested Parties) (Judicial Review Application 7 of 2021) [2022] KEELC 3001 (KLR) (4 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3001 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION 7 OF 2021

M SILA, J

MAY 4, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

PRINCIPAL MAGISTRATE, VOI LAW COURT ..... RESPONDENT

AND

BENSON MLAMBO MWAKINA ..... EXPARTE

AND

KISHAMBA B GROUP RANCH ..... INTERESTED PARTY

MWANAISHA SAIDA SHARIFF ..... INTERESTED PARTY

HELLEN TALU MWAFUE ..... INTERESTED PARTY

JUDGMENT

1. On April 15, 2021, the *ex parte* applicant was granted leave to file suit for the prerogative orders of prohibition and certiorari against the Principal Magistrate's Court, Voi in respect of the suit Voi Magistrate's Court Civil Suit No E006 of 2021, Hellen Talu Mwafue vs Shariff Mwanaisha Saida and Benson Mwakina. The main motion was subsequently filed seeking an order to prohibit Hon CK Kithinji and/or any other judicial officer in Voi Law Courts from hearing the case and for certiorari to quash orders made on January 29, 2021 and February 10, 2021.

2. To put matters into context, the 2nd interested party (Hellen Talu Mwafue) is the plaintiff in the suit before the Magistrate where she sued the ex parte applicant (Benson Mwakina) as the 1st defendant and the 3rd interested party (Shariff Mwanaisha Saida) as 2nd defendant. She sued them to restrain them from

land measuring approximately 7 acres that she claimed to own, being Plot No 771 said to be located partly in Kishamba B Group Ranch and partly in Ndara A Adjudication area. She displayed a title to 7 acres within Ndara A and averred that she was yet to get title to her 2 acre portion in Kishamba B Group Ranch. She claimed that through a dubious process, her land was arbitrarily awarded to the ex parte applicant. In the suit she wanted the defendants permanently restrained from the land. Together with the plaint she filed an application for injunction. The application for injunction came up ex parte on January 29, 2021 where the court (Honourable CK Kithinji, Principal Magistrate) ordered that status quo be maintained and the application be served for inter partes hearing on February 10, 2021. On 10 February 2021, the matter came up before Hon Kithinji, with only Mr Motuka, counsel for the 2nd interested party (plaintiff) recorded as being present. The Magistrate noted that there was an affidavit of service on record showing that the defendants were duly served. She proceeded to allow the application in terms of prayers 2 and 3 (prayer 2 being the order for interim injunction pending hearing of the application inter partes, and prayer 3 being the prayer for injunction pending hearing of the suit). She directed that the matter be mentioned on March 17, 2021.

3. In this suit, the ex parte applicant contends that there is procedural impropriety in the manner in which the case was dealt with. He contends that the Magistrate made irrational, contradictory and final orders without according him a hearing. He contends that the Magistrate acted in total disregard to ethical values and integrity and that his rights to own property were violated. He stated that subsequent to the orders given, his land was invaded. In his affidavit and statement he avers that on February 9, 2021, he was informed by the OCPD, Voi, that his office was served with an order arising out of the case in the Magistrate's court. That subsequently he instructed the law firm of M/s MS Shariff & Company Advocates to file a notice of appointment of advocate which was done on February 10, 2021. He averred that he was informed by Ms Shariff that she had instructed one McMillan Edwin Jengo, another advocate, to hold her brief. He states that the matter was not listed nor was it called out in open court. He avers that he has been informed by Ms Shariff that Mr Jengo made an inquiry and the Magistrate informed him that the case had a mention date of March 17, 2021. The following day, February 11, 2021, he received by whatsapp message, the orders issued on February 10, 2021. The orders as issued are that they were issued in chambers in presence of Mr Motuka advocate and he claims that his advocates were at the time waiting in open court for the inter partes hearing. He also contends that two contradictory orders were given, one pending hearing of the application, and the other pending hearing of the suit. He avers that pursuant to the orders, the 2nd interested party invaded his land. He asserts that he was never served and that the affidavit of service filed was false and he has pointed out to what he considers to be defects in the same. He also raises issue that the plaint filed is fatal as it does not have a verifying affidavit, nor was it accompanied by a list of witnesses, statements or documents, and despite these glaring defects, the 2nd interested party still got orders. He states that no ruling was written and no criteria given as to why the orders were granted. He claims that to date he is yet to be served with the pleadings and he has been condemned unheard.

4. The motion is also supported by the affidavit of McMillan Edwin Jengo, an advocate of the High Court of Kenya. He deposed that on February 10, 2021 he had matters before Hon Kithinji in Voi law courts and that the court clerk of Ms Shariff, one Donald, asked him to hold brief for Ms Shariff, with instructions that service has not been effected upon the defendants. He deposed that the case did not appear in the daily cause list and he annexed a copy of the cause list. He deposed that the case was never called out in court and that he rose and inquired from the presiding magistrate of the position of the matter. At that point, the magistrate asked the court assistant to call out the file but she was informed that the file was not in court. He avers that the Honourable Magistrate then checked her laptop and informed him that the matter was scheduled for mention on March 17, 2021. He deposed that at no

time did it come to his attention that the matter had already been dealt with and neither was he given this information when he made the inquiry.

5. The 2nd interested party filed a replying affidavit to oppose the motion. She first asserted her right to the disputed land and affirmed giving instructions for the case before the Magistrate's court to be filed. She further asserted that the defendants in the suit were served and pointed to the affidavit of service filed. She avers that the ex parte applicant did not act diligently to defend his case. She added that there is no evidentiary proof to substantiate the claim that Mr Jengo was instructed to hold brief for Ms. Shariff, such as a message or email, or that the matter was not called out. She wondered whether Mr Jengo appeared physically or virtually. She refuted the claim that her suit is fatally defective. On the alleged contradictory order her view was that this was simply a mistake.

6. Nothing was filed on behalf of the respondent though I did allow Mr Makuto, learned State Counsel on record for the respondent, to make brief oral submissions. Mr Mutubia, learned counsel for the *ex parte* applicant made written submissions which I have gone through and taken into account before arriving at my decision. Mr Motuka, relied on the affidavits on record.

7. I have considered the matter and take the following view :-

8. It is apparent that the 2nd interested party had filed suit against the *ex parte* applicant and with the suit, she also filed an application for injunction. Orders were given that the application for injunction be heard on 10 February 2021. The record of the court shows that on the day, the matter proceeded ex parte, with only counsel for the 2nd interested party being present. In this suit, the *ex parte* applicant impugns the action of the Magistrate in proceeding to hear the case. He has of course raised various issues which I have already revealed above and it is not necessary to repeat them here.

9. I will start by saying that although the remedy of judicial review may be available to a party, it is not in all instances that the court must grant the orders sought, even if they are orders that the court has jurisdiction to grant. This is because judicial review orders are discretionary and there may be circumstances that militate against the court exercising its jurisdiction to grant the orders. This was addressed in the case of *Republic vs Judicial Service Commission ex parte Pareno* (2004) Eklr. Nyamu J, observed, with approval, *dicta* made in the case HC Misc 805 of 1990 *R v The Commissioner for Co-operative Development Kariobangi Housing and Settlement Cooperative Society Ltd Exparte David Mwangi & 13 Others* (unreported). In that case Bosire J quoted as follows from *Halsbury's Laws of England* 4th Ed Vol II page 805 para 1508.

> "Certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles."

10. Nyamu J, further quoted *The Supreme Court Practice Rules, 1997 Vol 53/1-14/6* as follows :-

> "Even if a case falls into one of the categories where judicial review will lie the Court is not bound to grant it; the jurisdiction to make any of the various orders available in judicial review proceedings is discretionary. What order or orders the Court will make depends upon the circumstances of the particular case."

11. On the same point, Mativo J, in the case of *Republic v University of Nairobi Ex Parte Jackan Mwanyika Mwasi* (2018) eKLR, stated as follows :-

> 62. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.
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> 63. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration or perform its duties, or where the judge considers that an alternative remedy could have been pursued.

12. It will thus be seen from the above decisions that although a court may be seized with jurisdiction to make prerogative orders in the matter before it, it is not mandatory for the court to exercise that jurisdiction. A court will weigh several factors, including the presence of alternative remedies, the conduct of the parties, public policy, or whether in the circumstances, judicial review remedies are the most appropriate.

13. In the subject case, it will be observed that the motion herein attempts to set aside a decision of a court, not a decision of an administrative body. In as much as the acts and in some instances some decisions of subordinate courts may be subjected to judicial review, in my opinion, courts should be very slow, and there needs to be very special circumstances, before the High Court and courts of equal status, allow a decision of a subordinate court to be quashed by way of judicial review. This is because within the court system there are mechanisms for addressing grievances arising out of court decisions. One has avenue to seek for the setting aside of the order; or seek review of the order; or file an appeal. In the circumstances of our case, these options were certainly available to the ex parte applicant. In fact, when a matter or an application proceeds ex parte, it is very common to see litigants invoking the court's own jurisdiction to set aside its own orders. That right was open to the *ex parte* applicant. He had the avenue of filing an application for the setting aside of the ex parte orders and seek orders for the application for injunction to be heard inter partes. He would within that application have had the opportunity to give his reasons why the orders granted ex parte ought to be set aside. Applications to set aside ex parte orders or judgments are routinely made and a court has discretion to set aside its own ex parte orders. I am not persuaded that filing a judicial review application to quash any order given *ex parte* before a Magistrate is the correct path to take. There will need to be very special circumstances for the High Court and courts of equal status, to allow such application. This, as I have said, is because the avenue to apply to set aside is within the purview of the Magistrate's court. There is also the remedy of review or appeal. If the High Court and courts of equal status allow such applications, or allow applications for judicial review for every perceived infraction of a magistrate, then I can guarantee you that this is all that we will be doing, because Magistrates' courts make thousands of orders every day. I do not believe that public policy would want to encourage such a practice.

14. There are many reasons that the *ex parte* applicant has raised to support his view that the *ex parte* orders should be set aside. Nothing stopped him from filing an application to set aside and nothing stopped him from raising these issues within such application. He could point out to the court the flaws in the

affidavit of service; he could also demonstrate to court that he was not served; he could also point out that the matter was not in the cause list. The court that issued the order is the court that is seized with all circumstances giving rise to the orders impugned and is therefore that court which is best suited to hear whether or not the orders should be set aside. I am not persuaded that the right avenue was to file a judicial review motion to quash the orders.

15. Within this application, I sense that the *ex parte* applicant has gone personal. You need not go personal when you feel that a judicial officer has made an error or has given an order which you are not happy with. In as much as the *ex parte* applicant tries to impute ill motive upon the Magistrate, I have no evidence of such. Magistrates, Judges, and judicial officers need to be allowed their space to work and make orders that they deem fit in the circumstances. Of course it is not expected that everybody will be happy with orders that may be made. But these orders are made in the course of professional duty, and litigants ought not, as a result of what they consider to be an inappropriate order, now have vendetta against the judicial officer.

16. For the above reasons, I decline to go to the merits or otherwise of this motion. If the *ex parte* applicant still wishes to have the ex parte orders set aside, he is at liberty to proceed to apply to have them set aside within the case before the Magistrate's Court at Voi.

17. I have seen that within this motion, the *ex parte* applicant wants an order to prohibit the Magistrate's Court at Voi from hearing the subject dispute. It is not alleged that the court has no jurisdiction and I ask myself on what basis I would prohibit the Voi Magistrate's Court from hearing the case. I wouldn't even issue an order to prohibit Hon Kithinji from hearing the case for I see nothing that would prevent her from hearing an application to set aside the *ex parte* orders. In fact, she is the Magistrate best suited to hear the application because she knows what transpired on the day that the impugned orders were made. Nothing has been placed before me which would make me order the case to be heard by another Magistrate as I find the allegations made against her person to be completely unsubstantiated. Neither am I persuaded to issue an order of *certiorari* to quash the orders that she made. As I have said there is avenue to apply for these orders to be set aside within the suit itself.

18. From the foregoing, it will be seen that I see no substance in this motion. It is hereby dismissed with costs to the 2nd interested party. The orders issued which stayed the suit before the Magistrate from proceeding pending hearing of this suit are hereby lifted. That case to proceed in the normal manner to its logical conclusion.

19. Judgment accordingly.

DATED AND DELIVERED THIS 4 DAY OF MAY 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA