



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELC (JR) CASE NO.2 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEEDURE RULES 2010 AND

IN THE MATTER OF THE LAW REFORM ACT AND ALL OTHER ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER OF THE PRINCIPAL MAGISTRATE'S COURT AT SIAYA LAND CASE NO. 35 OF 2018

AND

IN THE MATTER OF THE LAND ACT AND LAND REGISTRATION ACT LAWS OF KENYA

AND

IN THE MATTER OF L.R NO. NORTH GEM/SIRIWO/806

BETWEEN

JOAB ONYANGO WAROM.....APPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE'S COURT.....RESPONDENT

AND

JOAB ODENY OGALO.....INTERESTED PARTY

RULING

Introduction

1. The proceedings of the impugned judgement have not been availed to this court but what can be deciphered from the judgement and decree is that the interested party filed suit dated 7/11/2017 against the *ex parte* applicant in **Siaya PM-Land Case No.35 of 2018** praying among other orders to be declared the bona fide proprietor of land parcel number **NORTH GEM/SIRIWO/806 (the suit property)**.

2. By its judgement dated 12/04/2019, the respondent dismissed the interested party's claim and *ex parte* applicant's counterclaim and ordered both parties to vacate the suit property and on its own motion, proceeded to appoint one John Oyoko as an administrator of the estate of Samuel Opiyo Oyoko who was a previous registered owner of the suit property. Aggrieved by the judgement of the court, the *ex parte* applicant filed the instant chamber summons that is the subject of this ruling.

Applicant's case

3. The applicant's chamber summons dated 17/12/2020 seeks the following verbatim reliefs:

1. Spent.

2. That this honourable court be pleased to grant leave to the applicant to institute an application for an order of judicial review in the nature of certiorari to remove and bring to the high court for purposes of quashing the following: - (a) The judgement, decrees and orders of the principal magistrates' court at siaya in Land Case No.35 of 2018 issued on the 18th day of June 2019 and 3rd day of September 2020.

3. That the grant of leave does operate as stay of execution and/or implementation of the proceedings and decisions referred to in prayer 2 above.

4. That costs be in the cause.

4. The summons is supported by a statement of facts and affidavit verifying the facts both dated both 17/12/2020 and annexures thereto. The summons is grounded on the following main grounds: (i) the respondent acted ultra vires by appointing *suo moto* an administrator to the estate of Samuel Opiyo Oyoko and, (ii) contrary to the decree of the court, the respondent *suo moto* unjustifiably ordered the *ex parte* applicant to be evicted from suit property thus sitting as an appellate court in its own judgement.

Respondent and interested party's case

5. Despite service, the respondent and interested party have not filed responses to the application.

Submissions

6. The *ex parte* applicant filed written submissions dated 3/11/2021. He contended that by dint of **Section 99** of the **Civil Procedure Act**, the court became *functus officio* post judgement and consequently, it was erroneous for the respondent to disturb its judgement by its order dated 3/09/2020. On this he placed reliance on the case of **Raila Odinga & 2 others vs Independent Electoral & Boundaries Commission & 3 Others (2013) eKLR**. He submitted that contrary to **Sections 48** and **49** of **The Law of Succession Act** and **Sections 7** and **9** of the **Magistrate Court Act**, the respondent acted ultra vires by appointing an administrator on behalf of the estate of a deceased person. On this he placed reliance on the case of **Council of Civil Service Unions v Minister for the Civil Service**.

7. The respondent and interested party did not file any written submissions.

Analysis and determination

8. Though the respondent and interested party have not filed responses to the application and the application is unopposed, this court has to determine the application on its own merits.

9. Having considered the application, statement of facts, affidavit verifying the facts and annexures thereto, these are the issues for determination; (i) whether the *ex parte* applicant has established grounds for the court to grant the leave sought, and (ii) if the answer to issue (i) is in the affirmative, whether the leave shall operate as a stay of the implementation of the decisions of the respondent.

I will proceed to analyze the legal and jurisprudential framework on the issues in a sequential manner.

10. **Article 47** of the **Constitution** and **Section 13 (7)** of the **Environment & Land Court Act** clothes this court with jurisdiction to preside over judicial review cases. The procedure for moving the court in an application for judicial review is governed by **Order 53** of the **Civil Procedure Rules**.

11. The intent of leave before filing a substantive notice of motion is to ensure frivolous and vexatious applications that are an abuse of the court are weeded out by the courts. This position was upheld in the case of **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows;

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration... It is an exercise of the court's discretion but as always it has to be exercised judicially.”

12. Has the *ex parte* applicant established grounds for the court to grant leave sought? The answer to this issue lies in understanding the parameters that have been settled by law. in the case of **Mirugi Kariuki Vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** the court of appeal held thus:

“If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave”

13. This court has analyzed the pleadings filed by the *ex parte* applicant together with the impugned judgement and decree and there is a discrepancy on the date on the face of the chamber summons and that of the impugned judgement. The former reads the date of the judgment

as18/06/2019 while the latter reads 18/04/2019. Though this could be an oversight or a mere typographical error, it cannot be overlooked by this court because it goes to the substratum of the issues in dispute. It is trite law that parties are bound by their pleadings and the court cannot *suo moto* amend a party's pleadings. This position was upheld in the case of **Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR** where the Court of Appeal held:

“we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings ... It also follows that a court should not make any findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings”

14. It would be imprudent for this court to drag a litigant to the seat of justice if his pleadings are fatally defective. In the case of **Crescent Construction Co Ltd vs Delphis Bank Limited [2007] eKLR** the court held as follows;

“...the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest of care and caution. This comes from the rules of natural justice that the court must not drive away the litigant, however weak his case may be, from the seat of justice. This is a time-honoured principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”

15. In light of the foregoing discrepancy, it is the finding of this court that the *ex parte* applicant's application for leave to institute an application for an order for judicial review fails. I need not say more on the 2nd issue.

16. Because the respondent and interested party did not file responses to the application, this court shall not award costs to them.

a) **The *ex parte* applicant's chamber summons dated 17/12/2020 is hereby struck out.**

b) **There shall be no orders as to costs.**

RULING DELIVERED IN OPEN VIRTUAL COURT DATED, SIGNED AND DELIVERED THIS 18TH DAY OF NOVEMBER 2021

In the Presence of:

No appearance for the *ex parte* applicant

Mr. F. Owuoro for the interested party

No appearance for the respondent

Court assistant: Sarah Ooro

HON. A. Y. KOROSS

JUDGE

18/11/2021