



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW NO. 19 OF 2018

IN THE MATTER OF: APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF: ARTICLES 2, 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 40, 47, 48, 50 & 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF: THE CIVIL PROCEDURE ACT, CAP 21, LAWS OF KENYA; AND THE LAW REFORM ACT, CAP 26, LAWS OF KENYA;

BETWEEN

ATUL SHAH.....EX PARTE APPLICANT

VERSUS

THE HON. DEPUTY REGISTRAR,

HIGH COURT OF KENYA AT MOMBASA.....RESPONDENT

AND

NAKUMATT HOLDINGS (UNDER ADMINISTRATION.....1ST AFFECTED PARTY

IDEAL LOCATIONS LIMITED.....2ND AFFECTED PARTY

RULING OF THE COURT

1. Pursuant to leave granted on 9th March, 2018, the Ex-Parte Applicant filed the substantive motion dated 12th March, 2018 seeking the following orders:

a) THAT an Order of Certiorari do issue removing to the High Court and quashing the proceedings taken before the Respondent on 6/03/2017 in MOMBASA ELC CASE NO. 400 OF 2017: IDEAL LOCATIONS LIMITED VERSUS NAKUMATT HOLDINGS LIMITED & ANOTHER, approving a Decree of even date without regard to due procedure as provided by express, mandatory provisions of the law;

b) THAT an Order of Certiorari do issue removing to the High Court and quashing the decision of the Respondent rendered in MOMBASA ELC CASE NO. 400 OF 2017: IDEAL LOCATIONS LIMITED VERSUS NAKUMATT HOLDINGS LIMITED & ANOTHER, executing and sealing a Decree of even date without regard to due procedure as provided by express, mandatory

provisions of the law;

c) THAT an Order of Mandamus do issue compelling the Respondent to approve, execute and seal a proper Decree with regard to due procedure as provided by express, mandatory provisions of the law;

d) THAT costs of this application be in the cause.

The application was premised on the grounds set out in the Statutory Statement dated 9th March, 2018 and those in the verifying affidavit of ATUL SHAH sworn on 9th March, 2018.

2. The Ex-parte Applicant alleges that vide a Plaint filed on 3/11/2017 and amended on 16/11/2-17, the 2nd Affected Party sued the Applicant and the 1st Affected Party seeking declarations in respect of a sub-lease agreement dated 9/06/2014 as between the 2nd Affected Party and the 1st Affected Party, as well as orders in respect of vacant possession and/or eviction with regard to the 1st Affected Party's occupation of suit premises Reference No, 14407 and 16088, Section 1, Mainland North, Mombasa Municipality (CR 42055 and CR 46440). The Ex-Parte Applicant on claims that the 2nd Affected Party on 23/11/2018 sought summary judgment but the same was opposed and a ruling delivered on 5/03/2018 which was in favour of the 2nd Affected Party.

3. The Ex-parte Applicant contends that it was aggrieved by the decision and lodged a Notice of Appeal. However, the Ex-parte Applicant claims that despite the notice of appeal, the 2nd Affected Party unilaterally extracted the Decree that was the subject of the Ruling contrary to provisions of the law. Further, the Ex-parte applicant claims that on 7/03/2018 the 2nd Affected Party stormed into the suit premises and forcefully evicted the 1st Affected Party. The said action, the Ex-parte applicant claims, caused the 1st Affected Party's goods to be looted and destroyed.

4. The Ex-parte applicant contends that the Respondent did not discharge her duties within the confines of the law and as result violated the ex-parte applicant's rights under Articles 27, 28, 29, 40, 47, 48 and 50 of the Constitution.

5. It is the Ex-parte Applicant's case that the Respondent's acts and/or omissions are unfair, unconstitutional, irrational, unreasonable, illegal and against the Provisions of the Fair Administrative Action Act.

6. It is also the Ex-parte Applicant's case that if the orders sought are not granted, the 1st Affected Party would suffer irreparable damage as its goods would be wasted and its goodwill and commercial reputation destroyed.

The Response

7. The 2nd Affected Party opposed the application by way of Grounds of Opposition dated 12th March 2018. The 2nd Affected Party contends that this court lacks the jurisdiction to hear this matter in light of provisions of Article 165 (2) (b) of the Constitution and Section 13 of the Environment and Land Court, 2011. Therefore, the matter should be heard by the Environment and Land Court which issue the Decree in question. In further support of this assertion, the 2nd Affected Party claims that the Decree was signed and sealed by the Deputy Registrar of the Environment and Land Court yet the proceedings herein have been instituted against the Deputy Registrar of the High Court.

8. The 2nd Affected Party states that Section 12 of the Environment and Land Court Act provides that a party aggrieved by a decision of the Deputy Registrar can apply for review before the Environment and Land Court and not the High Court.

Hearing and Submissions

9. The application came up for hearing on 20th March, 2018. Parties made oral submissions to the application. Mr. Mutiso appeared for the Ex-parte Applicant, Mr. Wachira for the Respondent and Mr. Oluga for the 2nd Affected Party.

10. Mr. Mutiso submitted that the Decree issued on 6/03/2017 was not secured in a participatory way and this was in contravention of Order 21 Rule 8 of the Civil Procedure Rules which provides that a party may prepare a draft decree and submit to the other party who shall then approve it and the Registrar shall confirm that it has been properly drawn then proceed to seal it. Counsel submitted that Order 21 Rule 8 is couched in mandatory terms hence participation by all parties in preparation of a decree is mandatory.

11. Mr. Mutiso submitted that Section 2 of the Civil Procedure Act and Sections 18 and 20 of the High Court Organization and Administrative Act and section 11 of the Environment and Land Court Act make provisions for the Registrar but do not grant the Registrar including a Deputy Registrar the power to sign and seal the Decree. Counsel contended that it is only Order 21 Rule 8 that mandates the Deputy Registrar of the High Court to sign and seal a decree from the High Court and the Environment and Land Court.

12. As regards the proceedings to be quashed, Mr. Mutiso submitted that anything minuted on court record by a judicial officer qualifies as proceedings hence the minutes by which the decree was issued by the Deputy Registrar are proceedings which can be quashed.

13. Mr. Wachira, learned Counsel for the Respondent submitted that the correct procedure was not followed before signing and sealing of the Decree by the Deputy Registrar as parties did not exchange a draft of the Decree. Counsel suggested that this failure should be remedied by the Court exercising its supervisory jurisdiction and quashing the decision.

14. Mr Oluga for the 2nd Affected Party submitted that this court lacked the jurisdiction to entertain this matter as the Decree in question

was issued by the Deputy Registrar in the context of the Environment and Land Court thus this matter should be placed before the Environment and Land Court as the process of issuing a decree cannot be divorced from the process leading up to the decree.

15. Mr. Oluga contended that Judicial Review proceedings were not a preserve of the High Court and cited Section 13 (7) (b) of the Environment and Land Court Act which provides that the Environment and Land Court can grant prerogative orders.

16. In relation to whether the proper Respondent had been enjoined to these proceedings, Mr. Oluga submitted that Registrar of the Environment and Land Court is appointed under Section 9 of the Environment and Land Court Act, while the Registrar of the High Court is appointed under Section 18 of the High Court Organization and Administration Act, the implication being that Registrars under the different regimes cannot replace one another.

17. Mr. Oluga submitted that the Ex-parte applicant should have sought reprieve under Section 12 of the Environment and Land Court Act which provides that a party aggrieved by a decision of the Registrar can file a review before the court.

18. In terms of merits of the application, Mr. Oluga submitted that where an applicant applies for proceedings to be quashed, he or she should provide a copy of the proceedings. In this case, Counsel argued that there were no proceedings hence this court cannot quash what does not exist. Secondly, Counsel contended that it is not mandatory for a party to draft a Decree and give it to the other party to approve as the word "May" is used in Order 21 Rule 8. Further, Counsel pointed out that the ex-parte applicant was not challenging the quality of the Decree or that it did not conform to the judgment.

19. In rebuttal, Mr. Mutiso submitted that Article 23 of the Constitution and Sections 8 and 9 of the Law reform Act clothe only the High Court with Judicial Review powers hence this matter cannot be entertained by the Environment and Land Court. Counsel also clarified that the Ex-parte applicant was challenging the procedure leading up to issuance of the Decree and not the merits of the Decree.

20. As regard seeking reprieve under Section 12 of the Environment and Land Court Act, Mr. Mutiso submitted that the Ex-parte Applicant could not file a review because the functions of the Registrar under the Act are not said to include signing and sealing of a Decree. Counsel argued that these functions were only provided under Order 21 Rule 8 and thus the remedies sought herein were most appropriate.

Analysis and Determination

21. Having carefully considered the application and submissions by counsel, the following issues arise for determination by this court:

- a) Whether this court has the jurisdiction to entertain this matter.
- b) Whether the Decree in question was issued in accordance with the law.

a) Whether this court has the jurisdiction to entertain this matter.

22. The 2nd Affected Party submitted that this court did not have the jurisdiction to entertain this matter. Counsel argued that Decree was issued by the Deputy Registrar within the broader context of the Environment and Land Court hence the matter should have been brought before that court as the process of issuance of the degree cannot be divorced from the process leading up to the decree which took place before that court. Additionally, the 2nd Affected Party contended that the Environment and Land Court can deal with Judicial review matters as Section 13 (7) (b) of the Environment and Land Court Act allows the court to issue prerogative orders. Alternatively, the 2nd Affected Party submitted that the Ex-parte Applicant can seek reprieve under Section 12 of the Environment and Land Court Act which allows a party that is aggrieved by the decision of the Registrar to file a review before that court.

23. The Ex-parte Applicant disagreed. The Ex-parte applicant submitted that Article 23 of the Constitution and Section 8 and 9 of the Law Reform Act donate to the High Court power to entertain judicial review proceedings. Further, the Ex-parte Applicant submitted that a review under Section 12 of the Environment and Land Court would not be appropriate as the mandate of the Registrar to sign and seal a Decree is provided under Order 21 Rule 8 of the Civil Procedure Rules.

24. The issue of jurisdiction is always a pertinent issue in any suit. If a court lacks jurisdiction it cannot proceed with the matter thus the need to determine this issue at the earliest stage. This was the position in the case of **Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Limited [1989]KLR 1** where the court observed as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonable plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obligated to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

25. Article 162 (2) of the Constitution provides that Parliament shall establish court with the status of the High court to hear disputes relating to employment and labour relations and environment and the use and occupation of and title to land. It is pursuant to this Article that the Environment and Land Court was established and its parent statute, Environment and Land Court Act enacted. On the other hand, Article 165 of the Constitution establishes the High Court which is clothed with unlimited original jurisdiction in criminal and civil matters.

26. Article 165 (6) of the Constitution provides that the High Court has supervisory jurisdiction over the subordinate courts and over any

person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. It is in exercise of such supervisory jurisdiction that the High Court entertains judicial review proceedings. However, Article 165 (5) (b) warns that the High Court cannot exercise jurisdiction reserved for courts established under Article 162 (2) of the Constitution.

27. The Ex-parte Applicant submitted that Article 23 of the Constitution, Section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules provide that the High Court shall entertain judicial review proceedings. I do agree. However, are judicial review proceedings a preserve of the High Court? Can the Environment and Land Court entertain judicial review proceedings?

28. It is not in dispute that the genesis of the Decree in question was a land matter before the Environment and Land Court. However, the ex-parte applicant contends that he cannot initiate judicial review proceedings before that court but rather is mandated by the law to do so before this court.

29. Section 13 of the Environment and Land Court Act provides the Jurisdiction of that court. At sub-section (7) the Act provides as follows:

(7) In exercise of its jurisdiction under this Act, the Court shall have the power to make any order and grant any relief as the Court deems fit and just, including-

- a) Interim or permanent preservation orders including injunctions;**
- b) Prerogative orders;**
- c) Award of compensation;**
- d) Specific performance;**
- e) Restitution;**
- f) Declaration; or**
- g) Costs.**

It is quite evident that the Environment and Land Court has the jurisdiction to issue judicial review remedies.

30. As I understand it, the genesis of this matter was suit before the Environment and Land Court which dealt with a sub-lease agreement between the 2nd Affected Party and the 1st Affected Party. This dispute fell squarely within the jurisdiction of the Environment and Land Court as it dealt with the occupation/use and title of the suit land. Subsequently, the matter was heard and a ruling was delivered on 5th March, 2018. A Decree was then extracted which is now the subject of the instant judicial review proceedings. Being that the Environment and Land Court Act gives jurisdiction to the court to grant prerogative orders, I see no reason as to why this matter would not have been dealt with in that court as the dispute falls within the ambit of Article 162 (2) of the Constitution.

31. In the case of **Republic v. Chairman, National Land Commission & 2 others ex-parte Peter Njore Wakaba & Macharia Kinyanuhi [2016] eKLR** Odunga J held as follows:

“The applicants appreciate that these proceedings could have been instituted before the ELC. In my view the matters which fall within the ambit of Article 162 (2) of the Constitution must be matters within the exclusive jurisdiction of the said specialized courts. However, where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of the Constitution...where however, it is clear that the court has no jurisdiction, it would be improper for the court to give itself jurisdiction based on convenience. As was held by Justice Mohammed Ibrahim in Yusuf Gitau Abdalla v. Building Centre (K) Ltd & 4 others [2014] eKLR:

“A party cannot be heard to move a court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex court”.

In this case, it is clear that the dispute falls squarely within the provisions of Section 13 (2) of the Act. The reliefs sought herein arise out of a determination of the issues falling within the said provision which basically deal with interests in land. In my view the applicant’s contended right to be heard stem from their right yet to be determined interest in the suit land.

In this case, I am not satisfied that the applicants’ case is completely removed from the jurisdiction of this court though I am satisfied that the dispute can be properly dealt with by the ELC. This court ought not to readily clothe itself with jurisdiction when other Constitutional organs have been bestowed with the jurisdiction to entertain the same.”

32. In the case of **Kellico Limited v. National Land Commission & 3 others [2016] eKLR** , Okong’o J observed as follows:

“There cannot be a vacuum in law. Sections 13(1) and (7) of the ELC Act are wide enough to cover all disputes falling within the jurisdiction of this court including violations of public law rights and the remedies that the court can give.”

33. Further, Section 12 (1) of the Environment and Land Court Act provides a party aggrieved with the decision of the Registrar with an avenue to review the decision before a Judge of that court. A Judge before who such a review is lodged is empowered by sub-section (2) to confirm, modify or reverse the decision of the Registrar. In this case, the Respondent in signing and sealing the decree in question was acting as the Deputy Registrar of that court for all intents and purposes. I find no reason as to why the Ex parte Party would not have approached the same court and sought a review of the Respondent’s decision.

33. It is the finding of this court that the current application is a matter within the purview of the Environment and Land Court. Further, there is a live matter in that court on the same issue. Even if this court had concurrent jurisdiction with the ELC, prudence would require that the matters be heard and determined under one roof. The current proceedings in this court if allowed to continue can only add confusion to the matter in ELC with a possibility of conflicting decisions. For the foregoing reasons and because there are ongoing proceedings on the matter in the Environment and Land Court, the Notice of Motion dated 12th March, 2018 is dismissed. Parties shall bear own costs of the application.

Dated, Signed and Delivered in Mombasa this 3rd day of May, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Nyambane holding brief for Mr. Mutiso for Ex parte Applicant

Ms. Mwanasumba for 2nd Affected Party

Mr. Kaunda Court Assistant