



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. JUDICIAL REVIEW NO. 12 OF 2012

REPUBLIC APPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE..... RESPONDENT

EX-PARTE:RAJEN MALDE & 4 OTHERS

CHRISTUS MWASHO..... INETERESTED PARTY

RULING

1. Before court for determination is the ex parte Applicant's Notice of Motion dated 27th February, 2012 which seeks the following orders:

(a) An order of prohibition to prohibit the Respondent (and any other subordinate court) from hearing the applications dated 24th February 2011 and 5th April, 2011 or any other applications or proceedings seeking to illegally enforce the alleged judgment and decree made against the Defendant in **Senior Principal Magistrate's Court Civil Case No. 5517 of 2003 (Chritus Mwasho vs. Elegant Cars Limited & Others)** as against the ex parte Applicant.

(b) Costs of the Application be provided for.

2. The Application is based on the following grounds:

(a) That the subordinate court failed to determine the question of jurisdiction and illegality according to the law.

(b) The attempt to enforce the alleged Judgment of the Subordinate Court (a nullity itself) against the ex parte Applicants is unlawful, illegal and an abuse of the process of the court.

(c) The Applicants are not and cannot be said to be the agents, servants and directors of Elegant Cars Limited, a company that was dissolved on 30th December, 2008 and hence a non-existent entity since then.

(d) The attempt to enforce the alleged judgment as against the said company through the current

Civil Procedure Rules with retrospective effect is unlawful and illegal and in contravention of the Applicant's right to a fair trial and administrative action.

(e) The Subordinate Court process is being abused and it continues to usurp jurisdiction that it lacks.

(f) The Subordinate Court is acting in a wrongful and fundamentally unfair manner such that no reasonable tribunal or court could accede to or uphold would otherwise do (sic).

3. The background of this case is that the Interested Party herein filed **Mombasa Principal Magistrate's Court Civil Case No. 5517 of 2003: Christus Mwasho vs. Elegant Cars Limited** (hereinafter "PMCC No. 5517 of 2003") in which an Order was made on 6th September, 2004 by Hon. Kwema, SRM compelling the Defendant, Elegant Cars Limited to release to the Interested Party Motor Vehicle Registration Number KAQ 418K and to pay the Interested Party Kshs. 50,000 within 30 days.

4. The case subsequently proceeded to hearing after which judgment was delivered and decree issued on 3rd February, 2011.

5. While the case was still pending, the Defendant company, Elegant Cars Limited, was dissolved through Gazette Notice No. 175 dated 30th December, 2008.

6. On 25th February, 2011, the Interested Party filed an application in PMCC No. 5517 of 2003 seeking *inter alia* that the execution of the said decree be allowed to proceed against the ex parte Applicants in their capacity as directors of the dissolved Defendant Company.

7. On 5th April, 2011, the Interested Party filed a Notice of Motion in PMCC No. 5517 of 2003 alleging that the Ex-Parte Applicants had violated the Order of 6th September, 2004 by selling the subject Motor Vehicle. The Interested Party sought orders that the court do investigate the circumstances leading to the sale of the Motor Vehicle and that the Court do penalize the ex parte Applicants for disobeying the Court Order.

8. On 11th March, 2011, the ex parte Applicants herein filed a Notice of Preliminary Objection dated 10th March, 2011 to the Interested Party's Application dated 24th February, 2011. The Objection was that the subordinate court lacked jurisdiction to hear or determine the said Application by reason of the fact that the Defendant is not a partnership but a limited liability company with its own corporate personality.

9. On 22nd September, 2011, the lower court delivered its Ruling on the Preliminary Objection by the ex parte Applicants and held that the same cannot be heard and determined on its own and cannot lead to the determination of the application without hearing of the same on merit. The Objection was dismissed.

10. The ex parte Applicants contend that the Respondent subordinate court acted in excess of its jurisdiction by arrogating itself jurisdiction that it did not have. Their argument, as I understand it, is that the moment the Preliminary Objection was raised on its jurisdiction, the subordinate court had no option but to determine that objection first before proceeding with the matter and that by dismissing the Preliminary Objection and ordering that the same be heard together with the application, the subordinate court acted in excess of and without jurisdiction hence subjecting itself to judicial review remedies.

11. As rightly submitted by the ex parte Applicants, judicial review court is only concerned with the process leading to the making of a decision and not the merits of the decision itself. The ex parte Applicants rightly quoted the following paragraph from the case of **MUNICIPAL COUNCIL OF MOMBASA VS. REPUBLIC & ANOTHER [2002] eKLR**, where the Court of Appeal held that:

"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made?"

In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters?”

12. The ex parte Applicants have raised several grounds in support of their Application. Most of those grounds, touch on the merits of the issues that were before the lower court. For instance, the question of liability of the ex parte Applicants in light of the dissolution of Elegant Cars Limited is one that touches directly on the merit of the issues for the lower court’s determination. The same cannot form a basis of judicial review application.

13. The only issue, in my considered view, that merits consideration in the circumstances of this case is whether the subordinate court acted in excess of its jurisdiction in rendering its impugned Ruling. The subordinate court ruled that the issues raised in the Preliminary Objection cannot be heard and determined on their own and cannot lead to the determination of the application without being heard on merit. Thus, according to the ex parte Applicants, by that Ruling, the subordinate court failed to determine the question of jurisdiction and illegality according to the law first and thus rendering its decision amenable to judicial review.

14. The order of prohibition is an order, issuing out of the High Court of justice, and directed to a subordinate court, or tribunal which forbids that court or tribunal to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land.

15. In **REPUBLIC VS. LONDON ELECTRICITY COMMISSIONERS JOINT COMMITTEE COMPANY LIMITED [1924] 1KB 171** discussing the remedies of **Certiorari** and **prohibition**, Lord Atkin said –

“I can see no difference in principle between certiorari and prohibition except that the latter may be invoked at an early stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quash on certiorari, I think prohibition will be to restrain it from exceeding its jurisdiction.”

16. In the same case, Lord Denning said –

“(… the remedy of prohibition) is available to prohibit administrative authorities from exceeding their powers or misusing them. In particular, it can prohibit a licensing authority from making rules or granting licences which permit conduct which is contrary to law.”

17. Procedurally therefore, when a question of jurisdiction is raised in court, the court is bound to make a finding on whether it has jurisdiction before it can proceed to hear the matter.

18. In this matter, a preliminary objection was raised before the lower court. After due consideration of the point raised, the court ruled that the point did not warrant determination of the issue first, but would be determined together with the application.

19. The question is whether that determination was made without or in excess of jurisdiction of the lower court. In my respectful opinion, the lower court even if it were wrong, and in my opinion it was not wrong to do so, that determination did not deprive it of the jurisdiction to do so, or breach of any law.

20. In my opinion, any person aggrieved by that Ruling, had only recourse in the appellate process. By making a determination that a preliminary objection is not an objection that can lead to the determination of the issue at hand, and instead ordering that the matter proceeds on merit, it cannot be said that the lower court acted in excess or without jurisdiction. The objectors, the ex parte Applicants still had opportunity to raise the issue during the hearing of the application and the court must always bear in mind the classic exposition of what constitutes a preliminary objection in the case of **MUKISA BISCUITS COMPANY LIMITED VS. WEST-END DISTRIBUTORS LIMITED [1969] EA 696**.

21. In this case, the Applicants are not saying that the learned trial magistrate did not have jurisdiction to hear the case by reason of say, limitation of time, or by lack of pecuniary jurisdiction, or by reason of any other statutory limitation on its jurisdiction. All the ex parte Applicants are saying is that they raised a preliminary point which ought to have been determined first, and that the failure to do so amounts to illegality in law. Since that was the ex parte Applicants' case, the Ruling of the court on the issue raised before it cannot be a subject of judicial review but an appeal. Judicial review, it must be re-emphasized concerns itself with process and not merits of the case.

22. For those reasons, the ex parte Applicants' Notice of Motion dated 27th February, 2012, fails and is dismissed with costs to the Respondents.

23. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 13th day of May, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Odengo holding brief for Khagram for ex parte Applicant

Mr. Makuto for Respondent

Mr. S. Kaunda Court Assistant