



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. 54 OF 2015

IN THE MATTER OF: SECTION 4(3)(B), 5(2)(B) AND (C), 7(2)(ii), 9, 11(1) OF THE FAIR ADMINISTRATION ACTIONS ACT NO. 4 OF 2015

AND

IN THE MATTER OF: SECTION 63 OF THE FOREST ACT CAP 385 LAWS OF KENYA

AND

IN THE MATTER OF: ARTICLE 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE PRINCIPAL MAGISTRATE’S COURT AT LAMU CASE NO. 34 OF 2015 BETWEEN ABDULWAHIDI MOHAMED ALIAS OTHERWISE VERSUS F. M. MANG’EE – ECOSYSTEM CONSERVATOR LAMU COUNTY AND KENYA FOREST SERVICE

AND

IN THE MATTER OF: A RULING OF THE PRINCIPAL MAGISTRATE SITTING IN LAMU ON 10TH NOVEMBER, 2015

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE LAMU MAGISTRATE’S COURT.....RESPONDENT

AND

ABDULWAHIDI MOHAMED ALIAS OTHERWISE.....INTERESTED PARTY

EX PARTE: KENYA FOREST SERVICE

RULING

1. Pursuant to leave granted by this court on 25th November, 2015, the Kenya Forest Service, the ex parte Applicant filed on 15th December, 2015, a Notice of Motion dated 11th December, 2015 (the Application) and sought the following orders -

- (a) the Hon. Principal Magistrate did not (and does not) have the requisite jurisdiction to issue an injunction or similar remedy, whether ex parte or otherwise.
- (b) the Hon. Principal Magistrate did not (and does not) have the requisite statutory jurisdiction to investigate, make any orders and/or grant any relief in respect of the Interested Parties Notice of Motion application dated 2nd November, 2015.
- (c) in receiving, entertaining, hearing and otherwise dealing with the said case, the Hon. Principal Magistrate has acted without jurisdiction or alternatively outside or in excess of statutory jurisdiction contrary to Section 63(2) of the Forests Act, [Cap. 385, Laws of Kenya]
- (d) the order made by the Magistrate's Court sitting at Lamu on 10th November, 2015 is ultra vires and hence a nullity *ab initio*.

2. The application was grounded upon the Statutory Statement attached to the Chamber Summons dated 23rd November, 2015 filed on 25th November, 2015. the Affidavit Verifying the Facts of Zakaria Simani Khazalwa sworn on 23rd November, 2015 and the grounds on the face of the Application and the written submissions dated 12th November, 2015, and filed on 18th November, 2015.

THE APPLICANT'S CASE

3. The Applicant's case is that the Respondent did/and does not have the requisite jurisdiction to issue an injunction or similar remedy whether ex parte or otherwise. In the same vein, the ex parte Applicant argued that the Respondent did not (does not have) jurisdiction to investigate, make any orders and/or grant any relief in respect of the Interested Parties Notice of Motion dated 2nd November, 2015.

4. The ex parte Applicant also argued that in receiving, entertaining, hearing and otherwise dealing with the said case, the Respondent acted without jurisdiction or alternatively outside or in excess of statutory jurisdiction contrary to Section 63(2) of the Forest Act (Cap 385, Laws of Kenya). The ex parte Applicant concluded that the decision of the Respondent was *ultra vires* and hence a nullity *ab initio*. On those grounds, the ex parte Applicant urged the court to allow the application.

THE RESPONDENT'S CASE

5. The application was however opposed. In the Grounds of Opposition dated and filed on 12th April, 2016 the Respondent contended that the application –

- (a) was misconceived, frivolous, vexatious and an abuse of the process of the court;
- (b) the Respondent had jurisdiction to determine the matters in issue in Lamu PMCC No. 34 of 2015;
- (c) the rules of natural justice were not breached;
- (d) the Applicant had not appealed from and/or applied to set aside the orders complained of;

(e) in the absence of an appeal and/or an application to set aside the orders complained of the judicial review orders are not available to the Applicant;

(f) the application flies in the face of Section 9(2) of the Fair Administrative Action Act;

and that it should therefore be dismissed with costs to the Respondent. Apart from the said Grounds of Opposition the Respondent did not file any other submissions.

ISSUES AND ANALYSIS

6. I have considered the ex parte Applicant's counsel's submissions as well as the grounds of opposition filed by the Attorney-General on behalf of the Respondent. There is basically one question or issue for determination, and that is whether the Respondent had the necessary jurisdiction to grant the orders in the suit before it. The alternative issue is whether the ex parte Applicant exhausted other equally convenient beneficial and effective alternative remedies available pursuant to Section 9(2) of the Forests Act, (Cap 385, Laws of Kenya) and Section 9(2) of the Fair Administrative Action Act 2015, before filing suit in the Respondent's court.

7. I agree with the submission by counsel for the ex parte Applicant, that the Respondent did not then (and does not) now have the requisite jurisdiction to investigate, make any orders and/or grant any relief in respect of proceedings in Lamu PMCC No. 34 of 2015. A court is a creation of statute and it has only those powers granted to it by the law or statute – **Kenneth Stanley Njindo Matiba vs. Daniel Toroitich Arap Moi (Nairobi Civil appeal No. 241 of 1993)**. And where the court has no jurisdiction it must down its tools. (**Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1**).

OUSTER OF JURISDICTION

8. Whereas every litigant has a constitutional right to have his say in court (Article 48, of the Constitution), the jurisdiction of the court in particular matters or instances can be ousted or restricted by statute. In **Eliud Wafula Mailo vs. Minister of Agriculture & 3 others [2016]eKLR** the Court of Appeal cited with approval the views of the learned authors of Halsbury's Laws of England, Volume 10, paragraph 319 where it *inter alia* says –

"The subject's rights to access the courts may be taken away or restricted by statute..."

And at paragraph 723 the said authors say -

"Where a tribunal with exclusive jurisdiction has been specified by a specific statute to deal with claims arising under a statute, the county court's jurisdiction to deal with these claims is ousted, for where an Act creates an obligation to, and enforces the performance of it, it cannot be enforced in any other manner."

9. In this regard, Section 63(2) of the Forests Act provides in part as follows –

"63(2) the provisions of the Environment Management and Coordination Act regarding the reference to the Tribunal under that Act shall apply to the settlement of disputes arising under this Act."

10. The National Environment Tribunal is established under Part XII of the Environment Management and Coordination Act 1999 (EMCA), and provides for the manner in which the tribunal is to be instituted and its operations. More specifically, Rule 69 of the Forests (Participation in Sustainable Forest Management) Rules 2009, provides as follows –

"A person who is aggrieved by the decision of the service with respect to an application

for authorization or the action of the service with respect thereto, may appeal to the Appeals Tribunal under the Environment Management and Coordination Act.”

11. The Application in Lamu PMCC No. 34 of 2015 was purportedly under among other provisions, **Section 3(2) of the Forest Act**. Clearly under the foregoing Section 63(2) and Rule 69 of the Forest Rules 2009, such dispute ought to have been brought before the National Environment Tribunal established under EMCA.

12. A question or issue of jurisdiction is a matter of law and not a merely technicality. It goes to the root of the claim, and is not curable even under Article 159 (2) of the Constitution.

13. Any court without jurisdiction should down its tools. In an instance where the court proceeds, then its decision amounts to naught. On this ground alone the application herein succeeds. There is however another ground why the ex parte application should succeed, failure to exhaust alternative remedies.

OF ALTERNATIVE REMEDIES

14. Where an enabling statute provides for an alternative remedy which is equally efficacious, and the applicant opts to file suit or come to court, such action will be misconceived, and liable to be quashed by order of certiorari. In this case, the Interested Party did not exhaust other equally convenient, beneficial and effective alternative remedies, available to him pursuant to Section 63(2) of the Forests Act, and Section 9(2) of the Fair Administrative Actions Act before filing action in the Magistrate’s Court.

15. In **REPUBLIC VS. COUNTY GOVERNMENT OF KIAMBU ex parte Fechim Investments Limited [2016]eKLR**, V. Odunga J cited with approval the view of the High Court on the question of availability of other remedies to a litigant.

“30. In Republic vs. the Commissioner of Lands, ex parte Lake Flowers Limited (Number HC Misc. Application No. 1235 of 1998) it was held that the availability of other remedies can be an important factor in exercising whether or not to grant the relief. In the Republic vs. The Rent Restriction Tribunal and Z N Shah & S M Shah ex parte M M Butt (Court of Appeal No. 47 of 1980), the Court of Appeal held that if there is an equally convenient, beneficial and effective remedy available a court will generally decline to exercise its discretion in favour of an applicant for a prerogative order.”

16. Likewise, in the County of Kiambu case (supra) Odunga J continued ...

“...secondly, the availability of the alternative remedies which are equally convenient, beneficial and effective is pursuant to Section 9(2) of the Fair Administrative Action Act 2015, a barrier to the exercise of the court’s favorable discretion. The said Section provides –

“The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

33. As the applicant has clearly not exhausted the remedies available to it under Section 38 of the Physical Planning Act, this application is also misconceived.”

DISPOSAL

17. The upshot of the foregoing is that the Interested Party having filed suit in the lower court in Lamu, the learned Principal Magistrate acted without jurisdiction and/or acted outside and in excess of statutory

authority contrary to Section 63(2) of the Forests Act to receive, entertain, hear and otherwise deal with the said case. The proper forum to hear and determine the Interested Party's claim would have been the National Environment Tribunal. The Principal Magistrate had no jurisdiction to hear and determine the matter and as such therefore, all the consequential orders issued are ultra vires and hence a nullity ab initio.

18. Equally, the Interested Party, having failed to explore and exhaust the availability of alternative remedies, which are equally convenient, beneficial and effective, the suit before the lower court was misconceived, and fatally defective, and equally liable to be quashed by order of certiorari.

19. In the circumstances therefore, there shall issue an order to bring to this court and quash by order of certiorari the proceedings, and orders in Lamu Principal Magistrate's Court Case No. 34 of 2015. There shall also issue an order of prohibition, prohibiting the said court, or the Principal Magistrate from further proceeding with the said case or similar matter between the Interested Party and the ex parte Applicant.

20. As the excess mangrove poles were harvested for purposes of renovating a place of worship, a mosque at Lamu, I direct that each party shall bear its own costs.

21. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 7th day of June, 2016.

M. J. EMUKULE, MBS

JUDGE

In the presence of:

No Appearance for Applicant

Miss Lutta holding brief Makuto for Respondent

No Appearance for Interested Party

Mr. Silas Kaunda Court Assistant