



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 496 OF 2009

REPUBLICAPPLICANT

VERSUS

CHIEF MAGISTRATES COURT

MILIMANI COMMERCIAL COURTS.....RESPONDENT

EX-PARTE

PHILIP JUMA OKOKO

JUDGEMENT

The ex-parte applicant Philip Juma Okoko was previously the owner of L.R. No. NAIROBI BLOCK 8/1776. The parcel of land was sold to Benson K. Ng'arua, the Interested Party through a public auction held on 21st November, 2008. The applicant did not vacate the premises and the Interested Party moved to Court in **Milimani Commercial Court CMCC 4963 of 2009 Benson Kiruma Ngarua v Philip Juma Okoko** where on 13th August, 2009 an eviction order was issued against the applicant. The applicant was evicted from the suit premises on 15th August, 2009.

The applicant being aggrieved by the decision of the magistrate sought and obtained leave from this Court to commence these judicial review proceedings.

Through the notice of motion dated 15th December, 2009 the applicant therefore prays for orders:

- 1. THAT there be an order of certiorari to remove into the High Court for purposes of quashing the entire proceedings, the ruling of the Resident Magistrate at Milimani Commercial Courts in CMCC 4963 of 2009.**
- 2. THAT there be an order of prohibition, directed to the Chief Magistrate, Resident Magistrate or any other magistrate sitting at the Chief Magistrate's Milimani Commercial Court prohibiting them from mentioning, hearing, continuing to hear or issue any further orders akin to CMCC No. 4963 of 2009**

Milimani Commercial Courts–Benson Kiruma Ngarua versus Philip Juma Okoko.

3. THAT costs of this application be borne by the Plaintiff in CMCC No. 4963 of 2009 one Benson Kiruma.

According to the statutory statement dated 18th August, 2009 the grounds upon which the relief is sought are:

1. **The Respondent acted ultra-vires the Registered Land Act Chapter 300 Laws of Kenya and in particular reference to Section 159: which curtails the Respondent's powers as far as jurisdiction allows.**
2. **The Respondent purported to issue Orders that were well outside his Jurisdiction as the suit premises' current market value is at 6 million shillings, by giving a Ruling on the 13th August, 2009 on the suit premises.**
3. **THAT on the 13th August 2009 the Respondent issued an Order of Eviction against the Applicant at an interlocutory stage.**
4. **THAT on 15th August 2009 the Applicant was evicted from the suit premises Nairobi Block 8/1776.**
5. **THAT the Respondent could not issue such orders as the Registered Land Act Chapter 300 curtails his jurisdiction being a Resident Magistrate whose current Pecuniary Jurisdiction is only Kshs.800,000/=**
6. **THAT the Orders of 13th August 2009 are null and void ab initio.**
7. **THAT the applicant was never granted an opportunity to be heard and this goes against the grains of the Principles and Rules of Natural Justice.**
8. **THAT the Applicant has a prima facie case raising triable issues that should be heard on merit and determined as such.**
9. **THAT the Applicant stands to suffer further irreparable loss and damage having been so evicted on the 15th August, 2009.**

10. **THAT in the circumstances its improper, against the Rules of Natural Justice and abuse of the due process of the law to allow the said Civil Suit No. 4963/09 to continue as the Ex-parte Applicant stands to suffer irreparable loss and serious prejudice.**

The respondent conceded the application.

The Interested Party opposed the application through his replying affidavit sworn on 18th February, 2013. Through the affidavit he informed the Court that he bought the property in question through a public auction on 21st November, 2008. The property was transferred to his name on 12th May, 2009. He averred that he sent notices to the applicant requesting him to vacate the property but he refused to do so. He later filed **Nairobi CMCC No. 4963 of 2009** seeking eviction orders and obtained orders after the applicant failed to file any response despite service.

The Interested Party also avers that after eviction the applicant, on 22nd September, 2009 filed **Nairobi H.C.C.C. 445 of 2009** seeking preservation orders as the property was unoccupied and an order was indeed issued. That on 5th November, 2009 the order was discharged and the Court found that he was entitled to possession of the premises.

The Interested Party contends that the respondent acted within his jurisdiction by issuing the eviction order.

Is this Court, at the moment, still seized with jurisdiction to hear and determine this matter? The Interested Party annexed to his replying affidavit the orders issued by Lady Justice Koome, J (as she then was) in **Nairobi Milimani Commercial Courts H.C.C.C. No. 445 of 2009**. The orders issued on 5th November, 2009 are as follows:

1. **THAT the Notice of Motion dated 22nd September, 2009 be and is hereby stood over generally.**
2. **THAT the interim order of preservation of the suit premises issued by this Court on 22nd September, 2009 be and is hereby discharged.**
3. **THAT the Defendant be and is hereby entitled to possession of the suit premises.**
4. **THAT today's costs be to the Defendant.**

Did the learned Judge through Order No. 3 validate the Magistrate's eviction order? If so would this Court not be reviewing the decision of a superior court were it to make a decision on the Magistrate's orders? This particular issue was never raised or addressed by any of the parties but this is an issue of law which the Court must address. In my view when the Judge directed that the Interested Party was entitled to possession of the suit premises, she had directly or indirectly confirmed the impugned decision. Any attempt to question the decision of the respondent will be a waste of time. Even if this Court finds that the respondent acted without jurisdiction, such finding will be of no use to the applicant since there is an order from the High Court giving possession of the suit premises to the Interested Party.

Onyancha, J in a ruling delivered in this matter found that the decision of the trial Magistrate was susceptible to judicial review. I have no issue with that finding. The question is whether judicial review is the most efficacious remedy in the circumstances of this case. The applicant had the option of filing an appeal but he did not do so. The property in question had already changed hands. The issue of ownership cannot be addressed through these proceedings. It is clear that by the time the property was sold to the Interested Party the applicant had already filed **Milimani High Court Civil Case No. 612 of 2008** against the Housing Finance Company of Kenya alleging that it wanted to unlawfully exercise its statutory power of sale. The position of that matter is unknown but it is the matter that is useful to the applicant as it would determine whether the sale of the property was legal. This Court will be acting in futility were it to quash the decision of the respondent since the issue of ownership will remain unresolved.

In my view, this application has no merit. The same is dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 14th day of May, 2014

W. KORIR,

JUDGE OF THE HIGH COURT