



IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC.CAUSE NO. 807 OF 2011

**IN THE MATTER OF : AN APPLICATION FOR THE ISSUE OF A
VESTING ORDER IN FAVOUR OF TWALIB A. RUGUNDA THE PLAINTIFF
IN PRINCIPAL MAGISTRATE'S COURT AT KWALE LAND CASE NO. 12
OF 2010**

MWANAJUMA ALI BUWA

TWALIB AKIDA RUGUNDA APPLICANTS

- VERSUS -

SADDIQ GHALIA RESPONDENT

RULING

[1] An application dated 20th September, 2011 praying for orders that

1. *That service of the application be dispensed with in the first instance.*
2. *That in the interim the court makes an order preventing the Applicants from dealing with the suit properties by disposing, charging, alienating and in any manner whatsoever interfering with the suit properties.*
3. *That the titles to the suit properties, issued in the names of the applicants, be surrendered and cancelled forthwith and the suit properties to revert to the Estate of the late Sadiq Ghalia.*
4. *That the costs of the application be provided for.*

[2] The application was filed by the applicants. The basis for the application was the allegation that Twalib A. Rugunda applied for a vesting order in pursuant to Kwale Principal Magistrate's Court order in land case no. 12 of 2010 and that, that order was deceitful exercise and it defrauded the estate of the late Sadiq Ghalia. Also fixed for hearing was the Notice of Preliminary Objection by Saleem Ghalia the executor of the estate of Sadiq Ghalia raising objection that Twalib A. Rugunda the applicant in the application dated 2nd September, 2011 in which the challenged vesting orders were given, lacked locus standi to bring that application of 2nd September, 2011, that the action could not be commenced by way of Notice of Motion and that the said motion was contrary to Article 50 of the Constitution, that the respondent was condemned unheard, that the orders were against natural justice an a nullity and that by the time the said application was heard the Environment and Land Court Act 2011 had come to effect and the Land Disputes Tribunal Act No. 18 of 1980 had been repealed by Sec. 31 of the said Act and finally

that the applicant in the application of 2nd September 2011 had not set aside the consent orders in Misc. Civil Application No. 76 of 2010 J.R.

The history

[3] Twalib Akida Rugunda filed a case in the Land Disputes Tribunal at Msambweni Dispute No. 12 of 2010, between Twalib Akida Rugunda vs Saddiq Ghalia. The case was apparently heard in December 22, 2009 and an order was ordered by the Tribunal and sanctioned by the Principal Magistrate Kwale as follows;

1. That Land Plot No. Kwale/Msambweni 'A'/1708,1707,1704 and 1706 to be reverted to one title Kwale/Msambweni 'A'/1666.
3. That the titles to be canceled which are currently owned by Saddiq Ghalia.
4. That it is further ordered that fresh title deed be issued in the names of 1). Mohamed Said Dosa 2). Mwanajuma Ali Buwa 3). Twalib Akida Ragunda 4). Suleiman Said Suleiman 5). Mwanapili Tumbu Mbaruku on their own and on behalf of the entire clan members of Dosasa, Mizes, Suleimans, Mwanazis, Mchasasa and Kombos with immediate effect.
5. That Mr. Saddiq Ghalia back his money Kshs. 100,000/- by the clan members soonest possible.

This was on 14th May, 2010.

[4] On 23rd day of August 2011 a consent was entered and signed by the Deputy Registrar in Miscellaneous application No. 76 of 2010 and signed by all the parties before the Chief Msambweni Location as follows:-

"REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA DISTRICT REGISTRY

MISCELLANEOUS CIVIL APPLICATION NO. 76 Of 2010 (J.R.)

IN THE MATTER OF: An application by SADIQ GHALIA for leave to apply for Judicial Review Orders.

IN THE MATTER OF: The Civil Procedure Rules O.LIII Rules 1,2,3 and 4

AND

IN THE MATTER OF: (1) The Land Disputes Tribunal at Msambweni

Dispute No. 12 of 2010

(2) Kwale Principal Magistrate's Court

(3) Kwale District Land Registrar

IN THE MATTER OF: Plot Title Number: KWALE/MSAMBWENI/"A" 1703 And 1704

BETWEEN

REPUBLIC OF KENYA

AND

1. THE MSAMBWENI LANDS DISPUTES TRIBUNAL 1ST RESPONDENT
2. KWALE PRINCIPAL MAGISTRATE'S COURT 2ND RESPONDENT
3. KWALE LAND REGISTRAR3RD RESPONDENT

EX-PARTE

SADIQ GHALIA APPLICANT

AND

SAID DOSA 1ST INTERESTED PARTY

MWANAJUAM ALI BUWA 2ND INTERESTED PARTY

TWALIB AKIDA RUGUNDA 3RD INTERESTED PARTY

SIAD SULEIMAN SAID 4TH INTERESTED PARTY

MWANAPILI TUMBU MBARUKU 5TH INTERESTED PARTY

ORDER

UPON READING the consent letter dated 23rd August, 2011 signed by the Counsel for the Applicant, Counsel for the 1st, 2nd & 3rd respondents and the interested parties and filed in Court on 23rd August, 2011

IT IS ORDERED BY CONSENT THAT:-

1. An Order be and is hereby issued against the 1st Respondent quashing its award in Lands Dispute No. 12 of 2010 relating to Plots Title Number Kwale/Msambweni "A"/1703 and 1704 and further in any way affecting Plots Kwale/Msambweni "A" /1662 and 1705.
2. An Order be and is hereby issued against the 2nd respondents quashing its judgment dated 7th April 2010 in respect of Plots Title Number Kwale/Msambweni "A"/1703 and 1704 and further in any way affecting Plots Kwale/Msambweni "A"/1662 and 1705.
3. An Order be and is hereby issued against the 3rd Respondent restraining whether by itself, its servants or employees or agents or otherwise howsoever from interfering and/or affecting the rightful ownership of the Applicant in Plot Numbers Kwale/Msambweni "A"/1703 and 1704 and further affecting Plots Number Kwale/Msambweni "A"/1662 and 1705 or in any way arising from the judgment dated 7th April 2010 for 2nd Respondent.
4. Each Party to bear its own costs.

GIVEN under my hand and the seal of the Court this 23rd day of August, 2011

ISSUED on this 23rd day of August, 2011.

DEPUTY REGISTRAR

HIGH COURT OF KENYA

MOMBASA."

[5] On 2nd September, 2011 Twalib A. Rugunda brought a Notice of Motion praying among other prayers that the Principal Magistrate Land Case No. 12 of 2010 be confirmed and made absolute in favour of Mwanajuma Ali Buwa and Twalib A. Rugunda as proprietors of parcels of land known as Kwale/Msambweni 'A' 1706, 1707 and 1708 and Kwale/Msambweni A1703,1704 and 1705 be quashed as per consent of the parties dated 14th May, 2011 and that Land Registrar do effect changes as prayed accordingly. This application did not disclose to the court the existence of Judicial Review No.76 of 2010 and its consent orders. Mr. Twalib Akida Rugunda and all the other parties had signed the said court order and the Deputy Registrar signed the same on 23rd August 2011. These orders related to the very same pieces of land.

[6] The application for vesting order found its way to Lady Justice Maureen Odero on 5th September, 2011. Relying on the said application and unaware of the Judicial Review consent orders previously made setting aside the Land Dispute Tribunal order and the adoption of the said orders by the Principal Magistrate Kwale, directed that the vesting orders in the suit land be made in terms of the orders of the Principal Magistrate Kwale made on 14th May, 2010. The titles were issued by the Land Registrar Kwale pursuant to those orders of the Learned Judge.

Analysis

[7] The applicant in this application urged the court to set aside the orders made by the Court in that the proceedings were incompetent, that Mr. Twalib Akida Rugunda had no locus standi to file his application, That the rules of natural justice were violated and that the court had no jurisdiction to grant the prayers sought. The Notice of Motion was attacked as an improper way to move the court. That the proceedings were a nullity. That the applicant was not a judgment debtor and the respondent was not a judgment creditor and no decree was held by either party. That the applicant misrepresented to Odero J that the consent in the judicial review was not challenged, That there was a decree of the court in the Judicial Review and that everyone was bound by it. It was said that a fraud was made before the court and the applicant should not benefit from it. Finally that the consent could not be impeached in that application, The application had to go to the Judicial Review itself. That the proceedings of the application of 2nd September 2011 was ex parte and the respondents representatives who were already known to the applicant were not involved. That rules of natural justice and Article 50 of the Constitution were flouted.

[8] The advocate for the applicant in reply said that on locus standi, the applicant was in person. That there is no intended sale of the property and that all properties are intact. That the correct procedure was followed. That everything was done properly.

[9] Was Mr. Twalib Akida Rugunda unaware of the order of 23rd August, 2011 made by the High Court at Mombasa in Miscellaneous Civil Application No. 76 of 2010 JR when he made his application dated 2nd September, 2011 to the same High Court to ask for the decision of the Land District Tribunal and a confirmation thereof by the Kwale Principal Magistrate? He was not. He had just signed a consent on Miscellaneous Civil Application No. 76 of 2010 on 23rd August, 2011 whereby the orders of the Lands Dispute Tribunal No. 12 of 2010 were quashed. This order related to Title Numbers Kwale/Msambweni 'A' 1703 and 1704, 1662 and 705 and 'A' 1703, 1704,1662 and 1705. The consent culminated on the court order of 23rd day of August, 2011. Exactly 10 days later he filed the application of 2nd September, 2011 aforesaid. The order of 23rd August is still alive todate. It has never been disturbed. The application of 2nd September, 2011 was therefore referring to Msambweni land dispute tribunal decision in case 12 of 2010 and a confirmation thereof by the Principal Magistrate's Court Kwale, which determination and confirmation had ceased to exist. These facts were not brought to the attention of Odero J when she was requested to confirm the Msambweni Land Tribunal decision and a confirmation thereof by the Kwale Principal Magistrate's Court. I have no doubt in my mind that had Odero J been apprised of the true position she would not have granted the orders that she did.

[10] What has our Superior Courts said in circumstances like these, when parties flout court orders?

In Civil Appeal No. 59 of 1993 Omega Enterprises Kenya Ltd appellant and Kenya Tourist Developments Corporation and two others the Court of appeal Gicheru J A quoted Lord Diplock in Isaacs v Robertson [1894] 3 ALL E.R 140 page 142

"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where The person affected by an order believes it to be irregular or even void. LORD COTTENHAM, L.C., said in Chuck v. Cremer (1846) 1 Coop temp Cott 338 at 342, 47 ER 884 at 885). A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey. it. It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must be not be disobeyed. Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court is in contempt and may be punished by committal or attachment or otherwise."

[11] The order of 23rd August, 2011 was flouted and disobeyed by the applicant with impunity. In the application of 2nd September 2013 the applicant mislead and misinformed the court. He had no locus standi to bring the application of 3rd September 2011. He had disobeyed the consent order of 23rd August, 2011. The orders he got on 5th September 2011 from the court were null and void himself having disobeyed the court orders of 23rd August, 2011. There was no suit or order upon which the orders made on 5th September, 2011 could be based. Those orders of 2nd September, 2013 are hereby set aside.

In the final analysis what orders should be made?

The Orders

The Preliminary Objection herein is sustained. The application dated 20th September, is allowed as prayed with costs.

Dated and delivered in open Court at Mombasa this 4th day of September, 2014.

S. MUKUNYA

JUDGE

4.9.2014

In the presence of:

Were Advocate for the applicant

Kasmani Advocate for Oraro Advocate for the respondent.