



**REPUBLICAP
PLICANT**

VERSUS

THE PRINCIPAL MAGISTRATE

HON. SHADRACK A OKATO OF CHIEF MAGISTRATE

**COURT AT NAIROBI MILIMANI COMMERCIAL
COURT.....RESPONDENT**

AND

**ROBERT
CHESANGINTERESTED
PARTY**

EX-PARTE

EQUITY BANK LIMITED & LUCY NDURURI

JUDGEMENT

In the beginning Robert Chesang who is the interested party herein had in Milimani Commercial Courts Chief Magistrate Civil Case No. 1930 of 2010 sued Equity Bank Limited and Lucy Ndururi who are the 1st and 2nd ex-parte applicants herein and prayed for judgment as follows:-

“(a)Kshs.11,450

(b) General damages

(c) Damages for tort and libel

(d) Damages for breaches of contract

(e) Aggravated, punitive and exemplary damages

(f) Costs of this suit

(g) Interest at commercial rates on (a) (b) (c) (d) and (e) above from 22nd February, 2010 till final payment in full and interest on (f) from the date of judgment till payment in full

(h) Any other relief the court deems fit to grant.”

Through an order dated 7th June, 2010 Shadrack A Okato a Principal Magistrate at Milimani Commercial Courts and who is the respondent in these judicial review proceedings issued orders as follows:-

“(1) THAT a mandatory injunction be and is hereby issued directing and or commanding the respondents to unconditionally and forthwith unfreeze the applicant’s account numbers 0120100307921, 0120191035139,012019135096,0120191035132, 0120291026554, 0120290783826, 0129290783821,

0120394947831, all in the name of the plaintiff.

(2) THAT a mandatory injunction be and is hereby issued directing or commanding the Managing Director of the 1st respondent to release to the applicant Kshs.282, 667/= together with interest at the rate of 18% per annum from 8th February, 2010 till payment in full which had been unlawfully, illegally and fraudulently withdrawn or stolen from the applicant’s account by the respondent or its employees.

(3) THAT a mandatory injunction be and is hereby issued commanding and directing the Managing Director of the 1st respondent to release forthwith to the applicant Kshs.500,000/= (Kenya shillings five hundred thousand) deposited in cash in fixed deposit account number 0120394947831 vide a fixed deposit receipt or certificate EB 049 serial No.124848 together with interest at the rate of 7.5% per annum from 6th February, 2010 till payment in full deposited in the name of the applicant.

(4) THAT the respondent be ordered to pay costs of this application.”

These orders were subjected to an appeal by the ex-parte applicants and the appeal was summarily dismissed by the High Court. The ex-parte applicants moved to the Court of Appeal and at the time of the hearing of this application the appeal had not been determined.

The respondent then proceeded to hear the main suit and in a judgment delivered on 29th March, 2011 the interested party was awarded Kshs.995, 000/=. Subsequently orders were issued in an attempt to execute the judgment.

On 20th June, 2011 the ex-parte applicants moved to this Court and obtained leave to challenge the decisions of the respondent by way of judicial review. Through a notice of motion dated 8th July, 2011 and filed in court on the same day the ex-parte applicants therefore seek orders as follows:-

(1) An Order of Certiorari to remove, deliver up to the Court and quash the proceedings before and judgment of 29th March, 2011 by the PRINCIPAL MAGISTRATE (HON SHADRACK AMATESHE OKATO) CHIEF MAGISTRATE’S COURT AT NAIROBI MILIMANI COMMERCIAL COURTS CIVIL CASE NO. 1930 OF 2010 including the judgment and subsequent proceedings arising therefrom.

(2) An Order of Certiorari to remove, deliver up to the court and quash the Ruling and order of 2nd June, 2011 by the PRINCIPAL MAGISTRATE (HON SHADRACK AMATESHE OKATO), in CHIEF MAGISTRATE’S COURT AT NAIROBI MILIMANI COMMERCIAL COURTS CIVIL CASE NO. 1930 OF 2010 including subsequent proceedings arising therefrom.

(3) An Order of Certiorari to remove, deliver up to the Court and quash the Ruling and order of 14th June, 2011 by the PRINCIPAL MAGISTRATE (HON SHADRACK AMATESHE OKATO) in CHIEF MAGISTRATE’S COURT AT NAIROBI MILIMANI COMMERCIAL COURTS CIVIL CASE NO. 1930 OF 2010 including subsequent proceedings arising therefrom.

(4) An order of Prohibition to prohibit the PRINCIPAL MAGISTRATE (HON SHADRACK

AMASTESHE OKATO) AT CHIEF MAGISTRATE’S COURT AT NAIROBI MILIMANI COMMERCIAL COURTS from proceeding to issue any orders, conduct any proceedings and further hear or determine CHIEF MAGISTRATES COURTS AT NAIROBI, MILIMANI COMMERCIAL COURTS CIVIL CASE NO. 1930 OF 2010.

(5) ANY other of further relief that this Honourable Court may deem fit to grant.

(6) AN order that the costs of this application be provided for.

The grounds upon which the reliefs are sought are found in the statutory statement dated 17th June, 2011. A summary of those grounds will be reproduced later in this judgment. The ex-parte applicants in support of the main notice of motion also filed a further affidavit sworn by Oscar Litoro on 25th July, 2011.

The respondent opposed the application by way of grounds of opposition dated 21st July, 2011 to wit:-

- 1. The Applicants lacks clarity and precision in setting out the alleged violations.**
- 2. The causes of action herein are stale and should not be entertained by the court.**
- 3. The actions alleged by the Applicants have no proof.**
- 4. The basis for attributing the alleged action upon the government has not been set out.**
- 5. The application is frivolous, scandalous vexatious and otherwise an abuse of the court process.**

The grounds of opposition were refined through the submissions dated 15th November, 2011.

The interested party opposed the application through an affidavit sworn by himself on 15th July, 2011. He also filed a “notice of preliminary objection on a point of law” dated 14th July, 2011. The grounds of preliminary objection as contained in the said notice are:-

- 1. That the motion dated 8th July, 2011 and leave granted on 20th June, 2011 are contrary to statute that is sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules.**
- 2. The motion and the judicial review proceedings are contrary to public policy or public interest and policy of the law.**
- 3. The orders sought are not statutorily available to the ex-parte applicants.**
- 4. The applicants are guilty of material non-disclosure.**
- 5. The motion and application for leave does not meet the prerequisite requirements for the grant of the orders sought and the ex-parte applicants have not complied with the law.**
- 6. The verifying affidavit is hearsay, scandalous and not candid.**
- 7. The motion and judicial review proceedings are misconceived, frivolous, vexations, incompetent, improperly before the court and are open abuse of power of judicial review as well as abuse of the court process.**
- 8. The notice of motion is mischievous, malafides, capricious and bad in law and this honourable court should strike it out with costs to the interested party and set aside the orders for stay granted on 20th June, 2011.**

On top of the notice of preliminary objection, the interested party also filed a notice of motion dated 15th September, 2011 which is in line with the preliminary objection. The said notice of motion was supported by an affidavit sworn by himself on 20th September, 2011.

The interested party filed skeletal submissions dated 15th July, 2011 on the preliminary objection. When I directed the interested party to treat the preliminary objection as a reply to the substantive notice of motion, I promised to address the issues raised in the preliminary objection in this judgment. I will therefore consider the skeletal submissions dated 15th July, 2011 along with the submissions on the main notice of motion dated 31st November, 2011.

The submissions filed by the interested party clearly show that the interested party is opposing the application for the following reasons:-

(1.) The subject matter which has given rise to these proceedings is a purely private law matter and thus not amenable to judicial review. Alongside this argument the interested party submitted that the respondent did not exceed his jurisdiction because the mandatory order and the judgement were two distinct decisions.

(2.) The dispute on costs cannot be the subject of judicial review.

(3.) Order 53 of the Civil Procedure Rules cannot oust the Civil Procedure Act and the Constitution. The interested party argues that the applicants ought to have filed an appeal against the respondent's decisions in accordance with the Civil Procedure Act instead of filing these proceedings.

(4.) The applicants had no locus standi to file applications and seek orders before the respondent having failed to enter appearance after being served with summons.

(5.) These judicial review proceedings are invalid and void ab initio. The interested party argues that these proceedings have been brought against Shadrack A. Okato in person and this impinges on the doctrine of judicial immunity in that a member of the judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function. The interested party further argues that these proceedings are meant to harass and intimidate a judicial officer which is contrary to public policy. The interested party also argues that since judicial review orders can only issue against public bodies or quasi public bodies or authorities then it follows that the orders sought cannot issue since **“the respondent SHADRACK A. OKATO is an individual not a public body or institution or an office or a court.”**

To prove that the respondent is named in his individual capacity, the interested party points to the motion dated 8th July, 2011 in which the respondent is named as:-

“The Principal Magistrate (Hon. Shadrack A Okato) of the Chief Magistrate’s Courts at Nairobi, Milimani Commercial Courts.”

(6.) The motion and judicial review proceedings are fundamentally defective. The interested party argued that the Chief Magistrate, Milimani Commercial Courts and the Attorney General were not enjoined in the motion as parties to these proceedings to create the necessary locus standi. The interested party referred this court to the decision in REPUBLIC VS ATTORNEY GENERAL AND ANOTHER [2007] eKLR in support of this argument.

(7.) The mandatory provisions of the law have not been complied with. The interested party submits that the express and mandatory provisions of Order 53 Rules 3(2) of the Civil Procedure Rules was not complied with by the applicants in that the Chief Magistrate, Milimani Commercial Courts was not served. Order 53 Rule 3(2) provides that:-

“The notice shall be served on all persons directly affected, and where it relates to any proceedings

in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.”

(8.) The leave granted was improper and was done in error. The interested party submits that the leave granted on 20th June, 2011 to commence judicial review proceedings offends the mandatory provisions of Section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules.

(9.) The stay was granted in error. The interested party argues that since the ruling had already been delivered then there was nothing to stay.

(10.) The motion of the ex-parte applicants is res judicata. On this issue the interested party submitted that the respondent had in the ruling dated 4th June, 2011 addressed all the issues raised by the applicants before this court and as a consequence the matters being raised before this court are res judicata.

(11.) The orders of certiorari and prohibition are powerless in the circumstances of this case. In attacking the prayer for an order of prohibition, the interested party argued that since the respondent had already made a decision on 14th June, 2011 then there was nothing for this court to prohibit the respondent from doing. As to the prayer for an order of certiorari he argued that the applicants have not asked the court to quash the interlocutory judgment entered on 10th June, 2010, the final judgment delivered on 29th March, 2011 and the decree of 5th April, 2011 so that even if the court were to grant a quashing order, these decisions would still remain untouched.

The applicants did not take the interested party's preliminary objection and notice of motion lying down. They rebutted them through grounds of opposition dated 14th October, 2011 and a replying affidavit sworn by the 2nd applicant on the same date. The applicants also filed submissions dated 24th October, 2011 in response to the said notice of motion and preliminary objection.

The parties filed bundles of authorities in support of their positions. I have read the arguments of the parties, the documentary exhibits and the cited authorities. I will consider all these documents when reaching my decision.

The issues for the decision of the court are found in the arguments placed before the court by the parties. The interested party clearly framed his issues and most of the issues are an attack on the jurisdiction of this court and whether these proceedings are proper. The best place to start is therefore to address the interested party's submissions before coming to the merits of the application.

In the first place the interested party argued that the dispute between him and the ex-parte applicants is a purely private law matter being a contract between him and the 1st applicant. It is his view that the said dispute is not amenable to judicial review. The answer to this argument is simple. The applicants have approached this court on the grounds that the respondent exceeded his jurisdiction. Judicial review is about the decision-making process. Where an applicant alleges that a public body or officer has acted outside the law, the court will enquire into the correctness of the decision by way of judicial review. The respondent is a public officer occupying a public office and his decisions are amenable to judicial review. The interested party's argument must be rejected.

Secondly, the interested party argued that a dispute involving costs is not amenable to judicial review. In line with what I have already stated, it is clear that any unlawful decision made by a public body is a clear candidate for judicial review.

Thirdly the interested party argued that Order 53 of the Civil Procedure Rules cannot oust the clear provisions of the Civil Procedure Act and the Constitution. This argument is based on the fact that the Civil Procedure Act and the Constitution provide alternative remedies to the applicants. To support this argument the interested party cited the decision of the Court of Appeal in **REPUBLIC VS. NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY [2011] eKLR** in which the Court held that:-

“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issues to be determined and whether the statutory appeal procedure was suitable to determine it - see for example R V BIRMINGHAM CITY COUNCIL, ex-parte FERRERO LTD case. The learned trial Judge, in our respectful view considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge.”

I entirely agree with the decision of the Court of Appeal. The facts of that case were however different from the facts of the case before me. In the cited decision the statute had clearly provided for a tribunal to which a party could appeal if dissatisfied with the decision of NEMA. In the case before me the applicants are asking me to exercise my supervisory jurisdiction as provided by Article 165(6) of the Constitution in the following words:-

“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.”

Whereas the applicants had a right of appeal, they had the option of approaching this court by way of judicial review. Of course an appeal would be the better option since a court sitting on appeal has many options when determining a matter. It can address the decision-making process as well as the merits of the decision. A court approached by way of judicial review only looks at the decision-making process and the orders it can make are limited by Order 53 of the Civil Procedure Rules. A party who decides to proceed by way of judicial review is making a dicey choice. Once a party decides to take this slippery road, the court in all fairness should hear him out and make a decision. I am therefore of the view that the applicants have come before the right forum.

I think it is necessary to address the issue of res judicata at this point. The interested party argued that since the applicants had presented the same issues before the respondent and the respondent had made a decision on the issues then the matter is res judicata and this court should not touch this application. The doctrine of res judicata cannot be invoked to defeat the supervisory jurisdiction of this court. As already pointed out this court has supervisory jurisdiction over subordinate courts. A matter that has been dealt with by a subordinate court cannot be said to be res judicata when it comes before this court. The issues placed before this court by the applicants cannot thereof be said to be res judicata.

Still on the same issue, I must state that I do not understand the argument by the interested party that since the applicants did not enter appearance in the lower court then they did not have the locus standi to file the applications which were rejected by that court through the ruling of 14th June, 2011. The interested party continues to argue that the applicants therefore lack locus standi to bring these proceedings because they did not establish locus standi in the lower court by filing a memorandum of appearance. In answer to this hazy argument I can only state that the applicants were the defendants in the lower court case and they have a right to challenge the decisions of that court even though they had not entered appearance.

Fourthly, the interested party argued that the manner in which the application has been titled shows that the magistrate has been sued as an individual and not in his capacity as a judicial officer. The interested party argued that the naming of the judicial officer in person as the respondent undermines the principle of the independence of the judiciary. He quoted extensively from the ruling of Bosire, J.A. in **CIVIL APPLICATION NO. NAI 307 OF 2003 (154/2005 UR), JASBIR SINGH RAI & THREE OTHERS v TARLOCHAN SINGH RAI & FOUR OTHERS**. Among the observations of the learned Judge was that:-

“It is quite clear that the applicants feel that they were not given a fair hearing in the appeal. It is also true that Mr. Justice Shah feels that in the interests of justice and fairness, he should be heard

on the allegations made against him. But what will be the consequences of hearing him in this matter? Hearing him might provide a ready precedent to other Judges who will in future feel hurt by allegations of impropriety against them and they too will seek to defend themselves. That will fundamentally affect the administration of justice as several judicial officers are likely to be made to feel anxious as to the correctness or otherwise of their decisions and their independence will thereby be undermined. They will not feel independent. Yet the issue of the independence of judicial officers is so fundamental that anything which threatens it should be resisted. As stated earlier Section 129 of the Evidence Act protects Judges from answering any questions relating to matters they have handled or they are handling. The policy of the law appears to me to be that a Judge should not be placed in the position Mr. Justice Shah finds himself at the moment. Nor should a Judge be allowed to enter into the arena of litigation concerning matters he is or was seized of.”

Before commenting on the above quoted decision, I will bring on board another argument by the interested party related to this issue namely that the application is defective because the Chief Magistrate Milimani Commercial Courts and the Attorney General have not been joined in these proceedings. In support of this argument the interested party cited the decision of R.P.V. Wendoh, J in **REPUBLIC V. ATTORNEY GENERAL & ANOTHER** in which she stated that:-

“Another point that was not raised is the fact that the Attorney General was not enjoined to these proceedings as a party. The Resident Magistrate cannot be sued in his own capacity as the applicant purported to because under S. 6 of the Judicature Act, Cap 7 Laws of Kenya a judicial officer is protected from any civil proceedings for an act done or ordered by him in the discharge of his judicial duty. Even though the Resident Magistrate was named in the proceedings, the Attorney General should have been enjoined as the legal representative of Government officers and institutions. In fact the 2nd prayer of mandamus is directed against the Attorney General yet he was not made a party to these proceedings. The omission to join the Attorney General to the application renders it fatally defective. I do uphold the third objection that the Applicant has not shown the necessary locus standi in the matter and it is basically because he did not join the necessary parties to this application.”

These arguments by the interested party calls for the answering of two questions namely: Whether the respondent has been sued in his personal capacity or official capacity and whether failure by the applicants to enjoin the Chief Magistrate and the Attorney General renders this application fatally defective.

I agree with Bosire, J.A. that judicial officers should not be put in a position which forces them to look over their backs every time they make a decision. Whenever a judicial officer has to make a decision, he should make such a decision in good faith and without fear that he will be taken to court for making the decision. Whenever a party wants to challenge the decision of a judicial officer by way of judicial review he should not make the judicial officer who made the decision a respondent. The question would then be whether the titling of the application has resulted in these proceedings being proceedings against Shadrack Okato in his personal capacity. The answer will be found in the application for leave. Reading through the chamber summons application dated 17th June, 2011 and the supporting documents, it is clear that the respondent is being sued in his official capacity. He is being challenged for the way he has exercised the powers granted to him by statute. The title and pleadings are clear so that even if Shadrack Okato were to leave judicial service before the hearing of this matter the application would survive such an exit. I am therefore of the view that the respondent has been correctly named. The Chief Magistrate, Milimani Commercial Courts has in the application also been named as the respondent so that the actual respondent is the Chief Magistrate and not Shadrack Okato. The only thing the applicants can be accused of is that they have been generous with words when naming the respondent. I therefore do not agree with the interested party that the magistrate has been sued in his personal capacity.

The other issue is whether failure to enjoin the Attorney General renders this application fatally defective. Wendoh, J in the already cited case of **REPUBLIC VS. ATTORNEY GENERAL & ANOTHER** was of the view that failure to make the Attorney General one of the respondents in an

application like the one before me would be fatally defective.

Who should be named a respondent in a judicial review application? In Blackstone Chambers' **ADMINISTRATIVE COURT: PRACTICE AND PROCEDURE** the authors observe at page 57 paragraph 3-61 that:-

“The defendant will be the public body that has taken the decision complained of or has acted or failed to act in a way that is said to be unlawful. This might be an inferior court or tribunal or any public body performing public functions.”

Lord Woolf, Jeffrey Jowell and Andrew Le Sueur observe at page 112 paragraph 3-003 in **DE SMITH'S JUDICIAL REVIEW** that:-

“Many different non-departmental public bodies (NDPBs) also find the exercise of their functions challenged by judicial review. In cases of doubt as to which public authority is the appropriate defendant; claims may be made against the Attorney General.”

It is not wrong for the Attorney General to be included as a respondent in an application like the one before me. Failure to include the Attorney General as a respondent does not however render the application fatally defective since a proper defendant/respondent has been included. The Attorney General being the chief legal advisor of the Government actually played his role in these proceedings by defending the respondent. In my view therefore the application before me is proper.

Finally the interested party submitted that leave to commence judicial review proceedings was improper since the said leave was granted in contravention of Order 53 Rule 2. Order 53 Rule 2 of the Civil Procedure Rules which is a replica of Section 9(3) of the Law Reform Act provides that:-

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

The interested party argues that the said rule has been flouted in two ways. Firstly that by the time leave was granted the 30 days for appealing had not expired and secondly the interlocutory judgment having been entered on 10th June, 2010 then the six months provided by the rule had lapsed by the time leave was granted.

In my view, it is not mandatory that leave should not be granted before the time for appealing has passed. My understanding of the rule is that a Judge may adjourn the application for leave until the time for appealing has passed. The decision is in the hands of the Judge and he can grant leave even when the time for appealing has not lapsed.

The other argument is that since the interlocutory judgement was entered on 10th June, 2010 then the six months rule was breached by the granting of leave on 20th June, 2011 one year later. This argument is fallacious since the application is directed at the court proceedings and the last decision being challenged was made on 14th June, 2011. The application was therefore brought within six months and leave was properly granted.

I will address the issue as to whether the remedies of prohibition and certiorari are available in the circumstances of this case when I will be looking at the applicants' case. I believe that in answering the interested party's submissions, I have also answered the respondent's arguments.

I now turn to the applicants' case. The case can be summarized in one sentence namely that the

supervisory jurisdiction of this court should be invoked because the lower court's judgment, decree and orders are tainted with jurisdictional irregularities and illegalities. A summary of the applicants' complaints in the statutory statement is found in Paragraph 21 of the further affidavit sworn on 25th July, 2011 by Oscar Litoro as reproduced hereunder:-

“THAT the Ex-parte Applicants sought judicial review and or the supervisory jurisdiction of this Court as the Subordinate Court's conduct, subsequent judgement, decree and orders were marred by jurisdictional irregularities. The Subordinate Court was and is determined to continue conducting the proceedings in Nairobi, Milimani, CMCC No. 1930/2010 ultra vires of the statutory provisions as demonstrated hereunder:-

a) The Subordinate Court entered judgment on 29/3/2011 exceeding its jurisdiction despite having taken cognizance of its jurisdictional limitation in the same judgment and having made a mandatory order on 7/6/2010.

b) The Subordinate Court entertained alleged execution proceedings and even issued further illegal orders whereas the subject matter is beyond its pecuniary jurisdiction notwithstanding that the said fact was made known to the Subordinate Court by Ex-parte Applicants.

c) The Subordinate Court prejudicially frustrated the Ex-parte Applicants' recourse to Appeal and stay of execution against the Order of 14/6/11 immediately after delivery when it refused right of audience to the Ex-parte Applicants to make informal prayer for leave to appeal and stay of execution of the Order of 14/6/211.

d) The Notice To Show Cause (execution proceedings) against the Ex-parte Applicants were and are pending hearing before the Subordinate Court and were and or are likely to be prosecuted against the Ex-parte Applicants who have been barred from moving the said Court unless they satisfy the impugned ruling and Order of 14/6/11.

e) The Subordinate Court neglected to address the jurisdictional illegalities marred in its judgment and orders and was instead determined to continue with the conduct of Nairobi CMCC No. 1930/2010.”

I have carefully gone through the applicants' case and I can identify a two-pronged attack on the respondent's handling of the case that was before him. In the first instance they attack the way the respondent exercised his discretion. The second attack is on how the respondent exceeded his jurisdiction by awarding the interested party a sum of Kshs.1,777,648.00 which was in excess of his pecuniary jurisdiction of Kshs.1 million.

I agree with the interested party that the best way to challenge the exercise of discretion by a subordinate court is through the filing of an appeal. Judicial review is not the best tool to use in such circumstances. A challenge directed at the exercise of discretion is in essence an attack on the merits of the decision. This court exercising its judicial review mandate cannot substitute its discretion for that of the magistrate. This court cannot through this application fault the respondent for the manner he exercised his discretion. That can only mean that the manner in which the magistrate conducted the proceedings before he delivered judgement on 29th March, 2011 was proper in so far as this application is concerned. If the ex-parte applicants had any queries about those proceedings then they ought to have attacked them through an appeal like they did when they challenged the mandatory injunction by filing Appeal No. 210/2010. The ex-parte applicants must therefore fail in that regard.

The remaining question is whether the respondent exceeded his jurisdiction when he awarded the interested party kshs.995, 000/= considering that the mandatory injunction of 7th June, 2010 had a value of kshs.782, 667/=. It is agreed that the respondent's jurisdiction was Kshs.1 million at the material time. The applicants point to this fact as an indicator of lack of jurisdiction on the part of the respondent. The respondent did not address this particular submission. The interested party however took it up robustly and submitted that the mandatory injunction was distinct from the judgment.

It is important to reproduce the arguments of the interested party on this point. He argued that:-

“This purely private law suit which gave rise to the judicial review proceedings in this court contained 2 separate claims which were adjudicated separately and orders made upon each claim separately.

a. Interlocutory application vide motion filed on 30/4/2010 where a mandatory injunction order issued on 7/6/2010. Those proceedings and mandatory order became subject of High Court Civil Appeal No. 210/2010 which was summarily rejected by Justice Sitati and the stolen money released. The respondent Shadrack A. Okato had requisite jurisdiction to grant the mandatory injunction orders on 7/6/2010. Which Magistrate in Kenya does not have jurisdiction to grant injunction?

b. Main suit in the plaint dated 17/3/2010 and filed on 31/3/2010. Summons served on ex-parte applicant. No defence filed. Interlocutory judgment regularly entered on 10/4/2010 for failure to file defence. Assessment of damages done. Final judgment entered, decree drawn, execution followed. The respondent had the requisite jurisdiction to conduct these proceedings and to award damages of Kshs.995, 000/= plus interest at the rate of 12% p.a. until payment in full from 29/3/2011 and costs. The decretal sum plus interest excluding costs as at 31/10/2011 a period of 7 months stands at about 1.1 million. The ex-parte applicants want to avoid paying this amount.

The ex-parte applicants have misguided themselves by compounding the two separate and distinct claims made in the same case CMCC 1930/2010.”

I have carefully considered the submissions on this particular issue. The mandatory injunction was made in the same case in which the judgement was delivered. The mandatory injunction has a monetary value of Kshs.782, 667/=. In the judgement the respondent awarded the interested party Kshs.995, 000/=. The total amount awarded to the interested party in this particular case therefore came to Kshs.1,777, 667/=. That amount clearly exceeded the pecuniary jurisdiction of the magistrate. The interested party was aware that the respondent did not have the jurisdiction to award that amount and that is why he introduced the argument that the mandatory order was distinct from the judgement. This argument cannot be accepted. It is quite clear that the magistrate exceeded his jurisdiction and this court is called upon to activate the judicial review mechanism so as to rectify that error.

As I have already stated, the proceedings prior to the delivery of the judgement on 29th March, 2011 cannot be faulted. In fact the mandatory injunction was appealed against vide Appeal Case No. 210/2010 and the appeal was dismissed. This court cannot therefore look into whatever took place up-to the making of the mandatory order since those proceedings have been dealt with by a superior court through the appeal. There is also no reason to fault the proceedings up-to the judgment. The magistrate proceeded with the trial in the manner prescribed by the law. It is only at the judgment stage that an error which calls upon the intervention of this court was committed. In the circumstances I call to this court the respondent’s judgment dated 29th March, 2011 and all the subsequent proceedings and quash them. Prayers 1, 2 and 3 of the notice of motion are therefore allowed but as amended above. The case is returned to the Chief Magistrate’s Court Milimani so that the magistrate in charge can organize for the file to be placed before any magistrate with jurisdiction, apart from Shadrack Okato, for purposes of assessing damages in accordance with the prayers in the plaint. It is no longer necessary to prohibit Shadrack Okato in terms of the 4th prayer since I have already taken away this matter from him.

Although the applicants have partly succeeded, I direct each party to meet own costs of the application.

Dated and signed at Nairobi this 17th day of July, 2012

W. K. KORIR, J