



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION 211 OF 2011

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

REPUBLICAPPLICANT

AND

1. CHIEF MAGISTRATE’S COURT, MACHAKOS

2. THE ATTORNEY GENERAL.....RESPONDENTS

VERSUS

1. BENSON NJERU MURIRIA

2. SYOKIMAU FARM LIMITED.....INTERESTED PARTIES

EXPARTE

GILBERT MAGERA NORU

RULING

By an *exparte* application dated 6th September, 2011 and filed in court the following, **Gilbert Magera Noru**, hereinafter “*the applicant*” sought leave to commence judicial review proceedings in the nature of *certiorari* to quash the judgment and decree of the Chief Magistrate’s Court, Machakos CMCC No. 350 of 2011 dated 27th July, 2011 and all subsequent orders and or proceedings. He also wanted that the grant of leave sought do operate as stay of any decree or order issued pursuant to the judgment of the said case. Finally he asked for costs of the application to be borne by the respondents.

The sole ground upon which the applicant sought the above prayers against the Chief Magistrate’s Court, Machakos and the Attorney General hereinafter “*the 1st and 2nd Respondents*” and **Benson Njeru Muriria** and **Syokimau Farm**, hereinafter “*the 1st and 2nd interested parties*” was that, the 1st Respondent lacked jurisdiction to hear and determine disputes over ownership of land registered under the Registration of Titles Act.

According to the Applicant, he was the registered proprietor of all that pieces or parcels of land known as L.R.No. 12715/133 and 12715/132 hereinafter “*the suit premises*”. On 6th August, 2011, he came across a Notice in his name posted in the Star Newspaper of that day stating that judgment had been entered against him on 29th July 2011, Machakos CMCC No.350 of 2011 hereinafter “*the case*”. He was pleasantly surprised as he was not aware of any case having been filed against him in any court. On 8th August, 2011 his advocate informed him having perused the court record that indeed a judgment had been entered against him on 29th July, 2011. That the case had then proceeded *ex parte*. Following an order of substituted service by advertisement issued by court and which advertisement was carried by the People Newspapers.

Armed with this information, he immediately took out an application seeking to set aside the said *ex parte* judgment on account of the said court lacking jurisdiction and also due to the fact that the advocate acting for the 1st Interested Party did not have a Practising Certificate at the time he filed the suit. However, 1st Respondent having heard the application, declined to order a stay of execution pending the outcome of the hearing of the application *inter partes*. Nonetheless, it is the applicant’s view that the 1st Respondent acted *ultra vires* in deciding on ownership of the suit premises which were registered under the Registration of Titles Act.

The *ex parte* Application for leave came before **Ang’awa, J** on 9th December, 2011 when the leave was granted. The judge also ordered that the leave so granted do operate as stay.

On 20th September, 2011, the Substantive Motion was duly filed and served on all the parties concerned; if the affidavit of service on record by **Sylvester Kibera Maina** on record is anything to go by. However, only the 2nd Interested Party chose to respond. It did so by filing a Notice of Preliminary Objection on a point of law and a replying affidavit.

In its notice of Preliminary Objection, the 2nd Interested Party protested that the Applicant had failed to comply with the orders of this court issued on 9th September, 2011 as to service of the Notice of Motion and Statement on the respondents and interested parties, the applicant had also failed to comply with the mandatory provisions of Order 53 rule 4 and 7(1) respectively.

In the replying affidavit, it deponed that the application had been made in bad faith with the sole aim of causing delay and denying the interested party the parcels of land in issue. The application too did not comply with the mandatory of provisions of section 8 and 9 of the Law Reform Act.

When the application came before me, for *inter partes* hearing on 24th April, 2012. **Mr. Kibera** and **Mr. Kasyoka**, learned counsels for the applicant and 2nd interested party respectively, agreed to canvass the application by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

To my mind, this application is a gross abuse of the process of the court. It is common ground that the applicant filed an application with the 1st respondent seeking to set aside the *ex parte* judgment and decree obtained by the 1st interested party in the case. In the same application, he also prayed for a stay of execution of the aforesaid judgment and decree pending the hearing and determination of the application *inter partes*. Finally, he also prayed for the case to be struck out on account of its incompetence. The grounds in support of the application are aware that *ex-parte* judgment was irregularly obtained against the applicant as he was not served with summons to enter appearance. That the suit was fatally defective as it offended the provisions of section 2 of the Registration of Titles Act and finally that the case had been filed by an unqualified person. One can readily see that one of the grounds in support of this judicial review application is lack of jurisdiction by the trial court to hear and determine the case as it touched on the suit premises registered under the Registration of Titles Act. Infact, that is the main ground upon which the applicant has sought to have the case in the 1st Respondent’s court struck. This is the same ground advanced in these proceedings. The applicant is seeking an order of *certiorari* to quash

the judgment and decree on account of want or excess of jurisdiction by the 1st respondent. So that the issue of excess or want of jurisdiction by the 1st respondent is alive in this court as well as with the 1st respondent.

The only prayer which has been dealt with in the application before the 1st respondent is for stay which has been denied. Otherwise, the remainder of the application is still alive and pending with the 1st respondent. The respondent will have to decide whether to set aside the judgment on account of want of proper service of summons to enter appearance, in which event, the applicant will have a window of opportunity to ventilate his defence as regards jurisdiction. Further, there is a prayer for striking out the plaint on the same ground. The 1st respondent will no doubt have to address that issue if the application is allowed to proceed for interpartes hearing. If it is struck out on that account the applicant will have obtained what he is seeking in these proceedings.

I do not however, think that it is proper that a party should be allowed to maintain or invoke contemporaneously and simultaneously two parallel judicial process over the same dispute. It leads to unnecessary multiplicity of suits with resultant expenses. Such conduct often lead to absurd results. This court and indeed, the law frown on such practices.

It is interesting, rather instructive that the applicant has only sought an order of *certiorari* directing that the judgment and decree in this case and all subsequent orders be declared *null* and *void* and be removed and brought forth to this court for purposes of being quashed. Once this is done what will be the fate of the case? The case will no doubt remain alive. This is the absurdity I am talking about.

The applicant seems to have been miffed by the 1st respondent's refusal to stay the execution of the judgment and decree dated 29th July, 2011 despite his repeated applications. That cannot be a ground for moving this court for judicial review. In my view, the 1st respondent is best placed to deal with the application wholesome. It will resolve the issues raised in this application once and for all. The applicant submitted himself to the jurisdiction of the 1st respondent by filing the application. Let him exhaust the process. Even if he loses, there is avenue of an appeal.

Parties should always know that the judicial orders are discretionary. A party may well make up a case for judicial review orders of *certiorari*, *prohibitory* or even *mandamus*, but the court in the exercise of its discretion deny him the same if it finds his conduct offensive and frowns upon it. There is no evidence that the applicant has abandoned the application before the 1st respondent in favour of these proceedings. As it is therefore the applicant is playing a game of poker with two courts, this court and the 1st respondent. A party cannot be allowed to do so. It is either this court or the 1st respondent. Since the application in the 1st court has been dealt with partly, was even filed first and some of the prayers may effectively determine the case, the instant proceedings are unnecessary. Indeed if the suit is struck out as prayed, the applicant would have gained more than this court can offer. I am only being asked to quash part of the proceedings before the 1st respondent. In the end I will leave the case intact.

The application lacks merit. Accordingly it is dismissed with costs to the 1st interested party.

DATED, SIGNED and DELIVERED at MACHAKOS this 12TH day of JULY 2012.

ASIKE-MAKHANDIA
JUDGE