



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MOMBASA**

**Civil Miscellaneous Application 345 of 2009**

**IN THE MATTER OF CRIMINAL CASE NO. (M). 3004 OF 2009 (MUNICIPAL COURT)**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE AN APPLICATION FOR  
JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**1. S.C. MUTHEE, CHIEF BUILDING INSPECTOR, MUNICIPAL COUNCIL OF MOMBASA**

**2. HON. M.K. MWANGI (S.R.M.) – MUNICIPAL COURT  
..... RESPONDENTS**

**AND**

**1. MOHAMED HATIMY**

**2. HATIMY GROUP LIMITED ..... INTERESTED PARTIES**

**EX-PARTE APPLICANTS**

**1. SALIM SAID KOI**

**2. DZOMBO MWAGAMBO**

**MGANGA**

**3. ATHMAN HASSAN**

**4. KAINGU SANGA**

**5. SAFARI KAHINDI**

**MUTUGI**

**6. MARGARET M.**

**AMIGO**

**7. ABDULRAHMAN**

**8. HAMADI KO**

**ALIAS TOLLE ABAA**

**9. DONDO MUKALA**

**10. SEIF MOZA**

**11. SAFARI MANZI**

**12. SAID MUSA**

**13. ADAM ABAAS SWALEH**

**NASSER**

**14. HASSAN MOHAMED**

**15. HAFSWA ABDILLAHI**

16. ROBERT OMWENGA

17. DAVID J.O. OTIENO

18. GEORGE

MWANDENGE

19. PHILIP ASIYO

20. NASSIR KABAYA

### RULING

Before court is the Ex-parte applicant's Notice of Motion dated 24<sup>th</sup> august 2009 seeking Judicial Review orders of –

***“1. PROHIBITION/INJUNCTION directed to the interested parties herein restraining them or whoever acting on their behalf from proceeding with Criminal Case No. (M) 3004 of 2009, MUNICIPAL PROSECUTOR –VS- MOHAMED HATIMY and HATIMY GROUP LIMITED, and/or giving any further orders therein.***

***2) CERTIORARI directed to the 2<sup>nd</sup> Respondent to bring to the high Court to be quashed the 2<sup>nd</sup> Respondents Decision and/or Ruling and/or Judgement, ordering the interested parties and the 1<sup>st</sup> Respondent to demolish all structures on Plot Nos. 203/1/MN, 204/1/MN, 222/1/MN and 967/1/MN Bamburi.***

***3) That costs of this application be provided for”***

The application was supported by the supporting affidavit of **SALIM SAID KIO. MR. KENGA** Advocate acted for the Ex-Parte Applicants, **MR. KHATIB** represented the Interested Parties whilst **MR. ONSERIO** represented the Honourable Attorney General. It was agreed by consent that the application be disposed of by way of written submissions and by 4<sup>th</sup> June 2012 all parties had duly filed their written submissions.

The subject matter of this application are the properties on Plot Nos. 203, 204, 221 and 967 Mainland North Bamburi (hereinafter referred to as the ‘suit property’). I have carefully considered the submissions made by counsel. It has come to my attention that there are two (2) other High Court suits pending in the High Court in Mombasa involving the same suit property and the same parties. These are **HCCC 69 of 2007, HATIMY GROUP –VS- DZOMBO MWAGAMBO and 3 OTHERS** and **HCCC (OS) No. 76 of 2007 SALIM SAID KOI –VS- HATIMY GROUP**. Certain pertinent orders have already been issued by the High Court in respect of the two pending suits. I am concerned that with full knowledge of the existence of the High Court suits the ex-parte Applicants have proceeded to file this present application to be heard by yet a third high Court Judge. This means that due to the several suits pending over the same subject matter there is likely to be issued conflicting decisions in each suit. This is

not desirable at all. The parties must desist from engaging the courts in this type of merry-go-round. Filing of additional causes when suits are still pending over the same subject matter must be discouraged. I am mindful of Section 6 of the Civil Procedure Act which provides:

***“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they are any of them claim litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”***

There exist already two High court suits filed **before** this application was filed. In order to preserve the dignity of the courts and in order to avoid possible conflicting decisions by courts of concurrent jurisdiction I decline to rule on this matter at this stage as I feel it would better serve the interests of justice to have the two earlier suits determined first.

**Dated and Delivered in Mombasa this 11<sup>th</sup> day of July 2012.**

**M. ODERO**  
**JUDGE**

In the presence of:

Mr. Were holding brief for Mr. Kibara for 1<sup>st</sup> Respondent

Mr. Hamza holding brief for Mr. Khatib and Mr. Kenga