



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Miscellaneous Civil Case 29 of 2009

MOHAMED AHMED AMANAAPPLICANT
VERSUS
RESIDENT MAGISTRATE, LAMU RESIDENT'S COURT1ST RESPONDENT
HUSSEIN ABDULREHMAN ALWI.....2ND RESPONDENT
THE ATTORNEY GENERAL3RD RESPONDENT

A N D

OMAR ALI AHMED1ST INTERESTED PARTY
YAHYA SHYAMUTY2ND INTERESTED PARTY

RULING

The Chamber Summons application dated 10th June 2009 is made under Rule 20 and 21 of the Constitution of Kenya (supervisory jurisdiction and protection of fundamental rights and freedoms of the individual) High Court Practice and Procedure Rules 2006 (LN No. 6 of 2006), Rule 3 and 4 of the High Court Practice and Procedure) and section 65(2) of the Constitution.

It seeks for stay of proceedings, actions, events, trial, any steps in the proceedings and/or litigation whatsoever in relation to SRMCC at Lamu No. 1 of 2009 Hussein Abdulrehman Ali v Omar Ali Mohamed and Anor.

Further, that any litigation pending before any court of law in respect of question of rights over parcel No. Lamu/Block 1/2 belonging to the applicants or the period where the applicant is alleging contravention of his fundamental rights, until the constitutional reference is determined.

A declaration that the applicant's fundamental rights and freedom under section 75 of the Constitution have been contravened by the respondents in that:

- (1) The applicant's right over the property have been trampled upon by virtue of the institution of Civil Suit No. 1 of 2009 at Lamu Lower Court
- (2) The applicant's right of interest to their property have been trampled upon by virtue of decisions in civil suit No. 1 of 2009 which purports to confer proprietary rights to other persons including the second respondent (Hussein Abudlrehman Alwi) without any reasons of law and facts.
- (3) The applicant's rights to property and the protection of the law have been transgressed and compromised by the respondent's actions.
- (4) The respondent's acts are contrary to and not within the realm of the expectations under section 75(1) (a) (b) and (c) of the Constitution.
- (5) The respondent's acts are tantamount to abuse of the court processes and therefore

unconstitutional in the circumstances.

The application is based on grounds that:

- (a) This court has jurisdiction to supervise and oversee exercise of judicial discretion and proceedings by administrative bodies and agents of the Government such as the 1st respondent (the Resident Magistrate Lamu Court)
- (b) The intrusion on the applicant's property is illegal and contradiction of the Constitution of Kenya Section 75.
- (c) The 2nd respondent is abusing the court process by interfering with the applicant's rights over the property.
- (d) The petitioner (Mohammed Ahmed Amana) has been exposed to torture, and harassment at the hands of the police without having committed any offence whatsoever.
- (e) The applicant will suffer irreparable damage if their unfettered rights are not reinstated unconditionally.

The other grounds are merely a repetition of what has already been stated here.

In the supporting affidavit sworn by the petitioner, he states that he was appointed the trustee of Kenya African Union (KANU) by virtue of the Trustee Act, and he holds title to parcel No. Lamu/Block 1/2 and therefore has the requisite locus.

As the registered trustee of the Lamu Kanu Branch, he never authorized the 2nd respondent (Hussein Abudlrehman Alwi) or any other persons, to interfere with his proprietary rights.

Meanwhile the 2nd respondent has commenced proceedings in the lower court which are geared towards obtaining rights over the subject property without consulting the absolute owner.

In the course of that litigation, the court has granted orders whose cumulative effect has been to deprive applicant his right of ownership and transferred petitioner's rights in the property to strangers, through a procedure which did not involve his participation.

The application is opposed, and the 2nd respondent in reply states that the petition and chamber summons application are misguided, misconceived and are totally unnecessary. It is his contention that the petitioner is not a party to Lamu SRMCC No. 1 of 2009 which he seeks to have stayed and in which no adverse order are sought against him. Further that petitioner ought to have applied to be joined in the Lamu matter as an interested party. 2nd respondent's contention is that Lamu SRMCC No. 1 of 2009 is an ordinary civil case arising out of a breach of contract between the 2nd respondent and the defendants in the said matter explaining that those defendants have threatened to breach the said contract and so the issue of contravention of the petitioner's fundamental constitutional rights does not arise; and it is improper to turn all contract cases into Constitutional issues aimed at prejudicing, embarrassing and delaying the fair and quick trial of such cases.

Respondent also questions whether the appointment of applicant as a trustee of KANU (Lamu Branch empowers him to institute court proceedings on behalf of KANU.

At the hearing of the application, Mr. Mungai for the applicant submitted that the certificate of lease confers on the petitioner an absolute right over the property registered under the Registered Lands Act (RLA). It is the applicant's contention that the proceedings in Lamu SRMCC No. 1 of 2009 have resulted in the acquisition of his proprietary rights – so that the injunctive order issued by the court in Lamu was obtained without due process.

He explains that the applicant's attempts to participate in the Lamu matter were thwarted by the magistrate who refused to allow his prayer to be joined as a Third Party.

He explains that, the property is being used by the 2nd respondent to carry out a business and the respondent obtained vesting orders over the property from a court of law – so that the continued occupation of the property is unlawful and violates applicant's rights as respondents have acquired the property under the exemption envisaged under section 75. He points out that respondent is not a tenant on the property, there is no lease or payment of rent to any party yet applicant is being driven out of his own property and this is being fortified by granting of injunctive orders. Mr. Mungai has cited various decided cases by Meme V R Misc. Cr. App. 495/03 and Wanjuguna v R Misc. Cause 710/02.

He has also invited the court to consider extracts from Law of Constitution by Dicy, Discourse on the Fundamental Freedom of property where the sanctity of property rights is discussed. He also seeks to rely on the Petition No. 185 of 2008 – Law Society of Kenya v Attorney General and COTU.

It is Mr. Mungai's argument that the petitioner is a Trustee and under Cap 164, he has power to claim.

The application is opposed, Mr. Mwadilo for the respondent seeks to rely on the replying affidavit and the notice of preliminary objection. The preliminary objection raised the issue of petitioner having no locus standi to institute the suit and the petitioner is in utter and complete abuse of the process of the court.

Mr. Mwadilo pokes holes at the procedure adapted by the applicant saying under section 65 rule 2 of the Constitution, an application such as this should be by way of Originating Notice of Motion yet this is a Chamber Summons application. Further, that despite this being a constitutional petition, there is no such petition filed, the status of the petitioner is also questioned, Mr. Mwadilo argues that nothing has been presented to this court to confirm that petitioner is a trustee. He argues that even if the title shows the petitioner as one of the trustees, annexure Ex1 shows other individual's names as trustees – meaning he holds title along with others and there is no authority presented to show he has been allowed to file this case. Further does this affidavit empower applicant to institute cases on behalf of KANU? Mr. Mwadilo's contention is that although the applicant's claim to be raising the issue of protection of right to private property, yet in view of the annexures, that is not private property but public property which is not covered by section 75 of the Constitution.

He insists that there is no evidence that petitioner applied to be enjoined in the Lamu matter and that his application was dismissed. Mr. Mwadilo submits that the procedure applicant should have adopted was for Judicial Review for certiorari and prohibition and not a petition OR the petitioner/applicant could have filed an application for injunction against 2nd respondent for trespass, but as matters stand, the entire application is an abuse of the court process and Rules 20 and 21 do not apply nor do the cited cases have any relevance. However Mr. Mungai's contention is that under Rules 20 and 21, the application should be by chamber summons and not originating summons.

He argues the property belongs to KANU and is therefore private property. Section 65(2) of the Constitution of Kenya gives the High Court jurisdiction to supervise any civil or criminal proceedings before a sub-ordinate court and to make such orders as may be considered appropriate for the purpose of ensuring that justice is duly administered by those courts.

The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and provisions confirmed by subsection (2).

The High Court Practice and Procedure Rules 2006 provides as follows:

“unless a matter is specifically provided for under section 67 or section 84 of the Constitution or any other law, a party who wishes to invoke jurisdiction of the High Court, under section 65 of the Constitution SHALL do so by way of Originating Notice of Motion”.

So the procedure adopted by the applicant in the matter before this court is not proper. Does the applicant have locus to institute this suit?

It is correct that there is no document presented to this court showing that applicant was appointed trustee

of KANU, but he seeks to rely on the lease document annexed MAA1 referred to him and others i.e Ali Abderehman Mharus Mohammed, Ahmed Aman (applicant) Mzamu Omar Mzamu; as trustees of KANU; leasing the property to the four (4) – whatever it is worth, it shows that applicant has certain proprietary rights and interest over the parcel Lamu Block 1/1203. If he is a trustee – does that give him authority to bring an action such as this? Under Cap 164 where one is appointed a Trustee, a certificate issues to that effect and once such a certificate issues then they have the power to sue and be sued in their corporate name – here there is no such certificate – only a lease document.

Of greater significance however are the issues raised and the prayers sought *visa vis* the procedure adopted. It is apparent what is being sought is for this court to re-examine and control the powers, functions and procedures adopted by the Lamu Resident Magistrate's Court through court process; with the intention of amending or altering the action taken by that court. This fits in well with the definition of what constitutes Judicial Review.

To my mind, applicant is attempting to contest the Lamu Resident Magistrate's court and to order that the 2nd respondent be prohibited from even filing a suit relating to that parcel of land. I think all the decisions and texts quoted here are misplaced – the orders sought would in effect be quashing the orders made by the Lamu court – applicant therefore has the option of either moving the court by way of Judicial Review and seek for orders of certiorari and prohibition OR appeal against the decision made by the Lamu Court of denying him participation in the matter as an interested party, or sue the 2nd respondent for trespass and seek an injunction.

This application mixes up issues touching on merits of the decision of the trial court and private rights – I concur with Mr. Mwadilo that the application is an abuse of court process and cannot be allowed in its present context. The upshot is that the application is dismissed with costs to the respondents.

Dated and delivered this 2nd day of **March 2010** at Malindi.

H. A. Omondi
JUDGE