



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 114 OF 2010

REPUBLIC.....APPLICANT

=VERSUS=

- 1. MUNICIPAL COUNCIL OF MOMBASA**
- 2. THE SENIOR RESIDENT MAGISTRATE'S COURT MOMBASA**
- 3. MAKURI ENTERPRISES AUCTIONEERS**
- 4. REGISTRAR OF TITLES, MOMBASA.....RESPONDENTS**

A N D

ABDULHAKIM ABDALLA.....INTERESTED PARTY

JUDGEMENT

1. The ex parte applicant moved this court vide his notice of motion dated 18th October 2010 and filed in court on 27/10/10 seeking the following reliefs:

1) That this court be pleased to issue an order of certiorari to bring to this court and quash the proceedings and judgement of the 2nd Respondent delivered on 12. 4. 2010 by Hon. SRM, Mr. T. Gesora in Mombasa CMCC no. 3631 of 2009, the Municipal Council of Mombasa vs Haron Silvano Andima and the consequential actions listed thereunder in paragraphs (i) – (xii).

2) Cost of the application be provided for.

2. The application is supported by the grounds on the face of it and the statement and verifying Affidavit of Elizabeth Saringi Namayi. The application was opposed by the Respondents vide a preliminary objection dated 1. 4. 2011 and the interested party by a Replying Affidavit sworn on the 23rd June 2016.

3. The advocates for the parties agreed to file written submissions in arguing the motion. The ex parte applicant filed their written submissions on 3rd March 2016, 1st & 3rd Respondents submissions was filed on 14th September 2016, and interested party's submission was filed on 16th September 2016. All the submissions were supported by case law annexed. I have had occasion to read both the pleadings, the submissions and case law and will make references as need be.

4. The brief background of and the genesis of this claim is that the 1st Respondent had a claim for rate arrears brought against the ex parte applicant before the 2nd Respondent in Mombasa CMCC 3631 of 2009. The suit proceeded undefended and judgement entered and decree issued in favour of the 1st Respondent on 12th April 2010 in respect of title number 496/1/MN. Pursuant to execution of the decree, the 3rd Respondent sold the property and the Interested Party apparently bought the land in an auction said to have been conducted on 30th April 2010. Thereafter the Interested Party obtained the vesting order and was registered as the owner of the suit land by 4th Respondent. The Ex applicant is unhappy with this process and has challenged the same under the different heads listed.

5. The grounds upon which Judicial review orders ought to be granted have been well laid out by the Court of Appeal in the case of **Emfil Limited vs Registrar of Titles & 2 others (2014) eKLR** where they cited the quote from the case of **Pastoli vs Kabale District Local government Council & others (2008)2 E.A 300** as follows:-

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.... Illegality is when the decision making authority commits an error of law in the process of taking or making the act the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instance of illegality.”

6. The exparte applicant submitted that the Magistrate did not have jurisdiction to summon a party living in USA at the time of the service purported summons. That the ex-applicant was living in the USA as evidenced by the power of attorney exhibited as “ESNM-1”. He also stated that the purported service by registered post and allegedly affixing at a door is a nullity. Lastly that there was failure to adhere to the Rules of service outside Kenya. On the 1st point, I note that the Magistrate does not summon parties to appear before him/her in civil cases since the case belong to litigants and services of summons is an obligation imposed on parties under the applicable rules to carry out once they have presented their case in court. The responsibility of the court is to ensure that service of summons to enter appearance is effected properly upon the person sued before judgement is entered. In this instance where the exparte applicant is disputing the manner of service, my opinion is that the proper forum to challenge the process was before the trial magistrate by adducing facts to support his version of events in which case the trial magistrate would be able to make appropriate orders whether or not to set aside the exparte proceedings. Service of court process does not fall under the category of those to be determined through judicial review proceedings.

7. Order 5 of the Civil Procedure Rules provides for different methods of effecting court process. The exparte applicant admits that order 5 rule 14 requires services on the person of the defendant but also allowing for alternative service such as affixing the summons on the suit premises. Similarly, section 17 (4) of the Rating Act allows for the procedure of service adopted by the 1st Respondent in effecting service of the summons. However the applicant says this alternative method was rushed. The exparte applicant goes on to question the contents of the affidavit of service sworn by Mr. Gikunju for failing to indicate the time he attempted to serve on the various dates mentioned and that the postal address used to register the summons does not belong to him. All these issues being raised on the mode of service are questioning the merit of the decision of the trial magistrate. The process followed by the 1st Respondent is provided in law and cannot be said to be a nullity as is being submitted by the applicant; if he was dissatisfied with the way service was effected then he had an alternative remedy to apply for review and or setting aside of the ex parte proceedings or appeal the finding of the magistrate. It is my considered opinion that the current proceedings is trying to make this court usurp the seat of the trial magistrate by asking me to issue orders of setting aside. I do not agree that I have such powers being a superior court than the one who made that decision given the manner in which the court has been approached.

8. The decree made on 12th April 2010 has not been appealed against or set aside or reviewed. The 1st Respondent referred this court to the provisions of section 25 of the Rating Act which confers jurisdiction on magistrates to hear and determine suits concerning recovery of rates by local authorities. Once the decree is issued, section 17 (7) of the Rating Act allows the application of the Civil Procedure Act to secure the payment of any unpaid rates and **to the execution of any decree or order granted or made in any such proceedings.** My understanding of this subsection is that the Civil Procedure Act/Rules is called into play by the Rating Act during the execution process. The exparte applicant does not deny that this was not purely a civil debt. Service of entry of judgement is only applicable after entry of interlocutory judgement. The decree being executed was a final decree of court with competent jurisdiction to hear and determine the dispute.

9. If the execution was not done in accordance with the law, and rules the court to determine whether such a failure occurred is the court that issued the decree and or the court where the decree was sent for execution. This applies to issues raised by exparte applicant on the prohibitory order, terms and conditions of sale, notification of sale

All these processes were pursuant to the execution of the decree of the 12th April 2010. The applicant has not demonstrated the unreasonableness in the execution process. The 3rd Respondent was only acting as an agent of the court and the 1st Respondent did not make any independent decision. For as long as the decree remained in force, their actions cannot be separated from the decision of the 2nd Respondent.

10. In conclusion, I am persuaded by the submissions of the 1st & 3rd Respondents and the Interested Party’s submission that the exparte applicant had an alternative remedy to present his grievance. The judicial review process adopted was not the proper avenue to ventilate the grievances he put forth, since the court’s powers are limited under this process. Most of the cases cited by exparte applicant inter alia

i) Margaret Nyaarmai Theuri vs A.G & 4 others (2014) eKLR related to vetting of police officers

ii) Polycarp Kanyugo vs County Government of Kirinyaga (2014) eKLR dealt with the issue that leave to apply for judicial review orders is not automatically granted. The Judge quoted Halsbury’s laws of England, 4th edition page 91 which states that Judicial Review is a process by which the high court exercises its supervisory jurisdiction over proceedings and decisions of interior courts or tribunals who carry out quasi-judicial functions or who are charged with the performance of public duties and act.

iii) Raytheon Aircraft Corporation & Another vs Air Al-faray limited (2005) eKLR which was a commercial dispute and proceeded as a civil case and not by way of Judicial Review proceedings.

11. For the reasons given herein above, it is my considered opinion and I so hold that the order of certiorari to bring to this court and quash the proceedings and judgement of the 2nd Respondent delivered on 12th April 2010 in MSA CMCC 3631 of 2009 cannot be granted and is hereby refused. The same is dismissed with costs to the 1st & 3rd Respondent and the Interested Party.

Dated and Delivered at Mombasa this 15th Day of January 2018

A. OMOLLO

JUDGE