IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 51 OF 2017

BETWEEN

LUBNA ALI SHEIKH ABDALLA BAJABER................1ST APPELLANT

HANNAN SALIM KARAMA...2ND APPELLANT

AND

THE CHIEF MAGISTRATE'S COURT, MOMBASA...1ST RESPONDENT

THE ATTORNEY GENERAL...2ND RESPONDENT

AMALI SAID ALI..3RD RESPONDENT

(An appeal against the Ruling and Order of the High Court of Kenya at Mombasa (Ibrahim, J.) dated 20th September, 2012

in

***Miscellaneous No. 33 of 2011 (Judicial Review)*)**

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JUDGMENT OF THE COURT

[1] At the heart of this appeal are two sacrosanct principles; *Audi alteram partem*- the person, who has to be affected by a decision has a right to be heard; (no one should be condemned unheard); *and nemo judex in re sua* – the authority deciding the matter should be free from bias. These two principles are embodied in the broader principle of natural justice which is the *sine qua non* of a democratic society and a fair and impartial judiciary. These are principles that are cherished universally in all democracies where the Rule of Law reigns. In our country, the right to be heard, or right to a fair trial is one of the non derogable human rights under Article 25 (c) of the Constitution.

[2] The appellants herein (**LUBNA ALI SHEIKH ABDALLA BAJABER** and **HANNAN SALI KARAMA**) are before this Court claiming that they have never been accorded an opportunity to be heard in a long standing dispute that started before the Magistrates' Court in Mombasa vide CMCC No. 2417 of 2003, and through to the High Court, in a matter which the first appellant claims has divested her of her matrimonial property.

[3] To place the matter in proper perspective, it is necessary to give a short history. The subject of the suit is a house without land which belonged to the appellant's husband. In this concept of *"house without land"*, a person is allowed by the owner of the land to construct a house on the land and utilise it for an agreed period of time on payment of some money. The land is nonetheless not transferred to the owner of the house and remains the property of the registered owner. As at the time the appellants built the premises in question, the land was said to belong to the Swale Nguru family.

[4] It would however appear the land was subsequently registered in the name of **SALIM KARAMA SALIM** (1st appellant's husband), who on 7th June 1999, sold the property together with the developments thereon to the 3rd respondent's late father. **(SAID ALI MOHAMED)**. The deceased is said to have paid the entire purchase price but before the transaction could be completed, the vendor disappeared before executing the formal transfer in favour of the deceased.

[5] The deceased moved to court – vide CMCC No. 2417 of 2003 seeking orders of specific performance against the 2nd appellant so that the transfer documents could be signed and the property transferred to him. Orders were issued by the Chief Magistrate authorising the executive officer to sign the relevant transfer forms. The transfer was completed and the Title Deed issued to the 3rd respondent's father. The 1st appellant did not however vacate the house in spite of several demands that she gives vacant possession.

[6] Instead of vacating the property the appellants herein filed a Chamber Summons in Civil Case No. 2417 of 2013 on, 30th March, 2004 seeking to be joined in the suit (post judgment) and also seeking an order that the judgment which was entered on 28th November, 2003 be set aside. In the meantime, on 21st June, 2004 the 3rd respondent's father filed CMCC No. 3026 of 2004 seeking eviction orders against the appellants who he termed as trespassers on his property. The appellant's application for joinder and setting aside the judgment was dismissed on 24th August, 2004. They then filed an application for review of the orders dismissing that application but it too was dismissed. It is worth noting that the judgment in CMCC No. 2417 of 2003 was never appealed against.

[7] The 3rd respondent then moved the court by way of CMCC No. 3026 of 2004 seeking orders of eviction against the appellants. The same was heard almost four years later, and the appellants were actually heard and allowed to call witnesses. They called a total of five witnesses before 23rd January, 2011 when their counsel applied for an adjournment which the court declined to grant. After being denied the adjournment, counsel for the appellants walked out of court in protest and so the Magistrate proceeded to close the defence case.

[8] Instead of seeking leave to appeal and thereafter appealing against the Magistrate's decision to deny them an adjournment, the appellants moved to the High Court by way of Judicial Review in J.R. Misc. Application No. 33 of 2011, seeking the following reliefs, which we reproduce verbatim-:

> ***1. That the Applicants herein LUBNA ALI SHEIKH ABDALLA BAJABER and HANNAN SALIM KARAMA be granted leave to apply for:-***
>
> > ***a) An order of Certiorari to issue to remove and to bring before this Honourable Court for purposes of quashing the proceedings known as <u>CMCC NO. 2417 OF 2003 SAID ALI MOHAMED –vs- SALIM KARAMA ISLAM</u> and <u>CMCC NO 3026 OF 2004 SAID ALI MOHAMED –vs- LUBNA ALI SHEIKH ABDALLA BAJABER & HANNAN SALIM KARAMA</u> and or any orders, rulings, judgments, authority, decision and or orders of the Respondent made therein.***
> >
> > ***b) An order of Certiorari to issue to remove and to bring before this Honourable Court for purposes of quashing any and all Title Deeds or any other instruments of ownership or any interest whatsoever over and or in respect of all that suit property the subject matter of the proceedings MOMBASA/BLOCK XV/278 that may or have been issued to any other party or third parties other than the 1st and 2nd Ex-parte Applicants.***
> >
> > ***c) An order of Prohibition to issue prohibiting the respondent and or any other Magistrate within the Republic of Kenya and or their servants, employees and or agents from conducting entertaining hearing or in any other manner whatsoever proceeding with the case known as <u>CMCC NO. 3026 OF 2004 SAID ALI MOHAMED –vs- LUBNA ALI SHEIKH ABDALLA BAJABER AND HANNAN SALIM KARAMA</u> against the Ex-parte applicants or issuing any Titles or Leases or any other instruments of ownership or interest in respect of the suit premises or any orders of possession or eviction or any other such or similar order whatsoever other than in the favour or the Ex-parte applicants.***
> >
> > ***d) An order of Mandamus do issue directing the Respondent to order and direct the Registrar of Lands to cancel any and all entries that may have been entered in the respective Register, or any Title Registers and or Title Deeds issued which in any way adversely affects or prejudices the interests in the title to the suit property of the 1st and 2nd Ex-parte applicants rights on or over the parcel of land known as MOMBASA/BLOCK XV/278 the subject matter of these proceedings and to instead register the same in the name of and in favour of the Ex-parte Applicants and issue the Title Deed in their respective names and favour.***
> >
> > ***e) The grant of leave herein do operate as a Stay of proceedings of and any further proceedings in CMCC NO. 2417 OF 2003 and CMCC NO. 3026 OF 2004.***
> >
> > ***f) The costs of this Application be provided for."***

It is clear from the above prayers that the Judicial Review proceedings were not just about the refusal by the learned magistrate to decline the application for adjournment, but encompassed many other prayers including a challenge to the judgment in CMCC NO. 2417 of 2003, which had been determined on 28th November, 2003 and had not been appealed against.

[9] The chamber summons seeking leave to apply for Judicial Review reliefs fell before Judge **M. Ibrahim, J** (as he then was). He analysed the entire history of the matter and fully appreciated the facts and circumstances surrounding the same. The learned Judge observed that the judgment which was being challenged through the Judicial Review proceedings had been delivered more than eight years before the Judicial Review application was filed. He found that by dint of **order LIII Rule 2** of the Civil Procedure Act, the application did not pass muster as the law explicitly provides that the judgment or order sought to be quashed must have been made ***"not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act."***

He also made a finding to the effect that the judgment in question had not been set aside and was still valid. While observing that the applicants sought leave "to prohibit any other magistrate in Kenya from proceeding with the first and second case and from issuing any orders <u>than in favour of the applicants</u>, the learned Judge made a finding that-:

"The magistrates have power to hear and determine the civil dispute in the first and second case including questions of jurisdiction. It has not been shown that all magistrates in Kenya will be acting unlawfully if they presided over the first and second case. In any event, they cannot be ordered to determine the cases in a particular manner as sought by the applicants. This would undermine the principle of independence of the judiciary and impartiality while adjudicating."

[10] On the issue of bias which had been raised against the trial magistrate, the learned Judge held that it was up to the applicants to raise the issue before the magistrate and ask her to disqualify or recuse herself from hearing the matter. Ultimately, the learned Judge found that no *prima facie* case had been made out for leave to be granted and dismissed the application. It is that Ruling that is challenged in this appeal in which the appellants through **Taib A. Taib** advocates raise six grounds of appeal in their memorandum of appeal dated 11th August, 2017, as hereunder:-

1. The learned Judge erred in Law and Fact and misdirected his mind in dismissing the Ex-Parte Applicants' Application seeking leave to commence Judicial Review suit against the Respondents.

2. The learned Judge erred in Law and misdirected his mind by holding that the 1st Appellant a third party in CMCC NO. 2417 OF 2003, SAID ALI MOHAMED –vs- SALIM KARAMA ISLAM whom Judgment in the aforesaid suit negatively affected cannot set aside a judgment.

3. The learned Judge erred in Law and in fact by holding that the presiding Magistrate owed no duty to direct the Registrar to ignore the previous Orders by the same Court and cancel entries made due to the initial orders of the same Court.

4. The learned Judge erred in Law and in fact by ignoring the fact that the Lower Court had no pecuniary Jurisdiction to preside over the 2 suits and therefore acted ultra vires.

5. The learned Judge erred in Law and in fact by holding that the application raised no arguable points to be investigated in a Judicial Review yet the Appellants had alleged that the presiding Court had no jurisdiction.

6. The learned Judge erred in Law and in fact by misdirecting his mind in making a finding that the application raised no arguable points to be investigated in Judicial Review yet the Appellants had alleged that the presiding Court had been biased in reaching its decisions.

[11] The appellants pray that their appeal be allowed with costs; and that the chamber summons dated 27th March, 2011 be allowed as prayed. The appeal was canvassed by way of written submissions with brief oral highlights. As we consider the merits of this appeal, we must be careful not to sit on appeal in the decisions made by the Chief Magistrate in the civil cases before that court. Doing so would be overstepping or remit as no appeal has been filed against those determinations. Our findings must be confined to the findings of (**M. Ibrahim, J)** (as he then was) in his ruling dated 20th September, 2012 declining to grant leave to the appellants to pursue the prerogative orders of Certiorari, Mandamus and Prohibition.

[12] In his submissions, **Mr. Taib** submitted that the learned Judge erred in his finding that the judgment sought to be quashed was eight years old. His submission was that the matter was still proceeding and was live before the magistrate. According to Mr Taib, the matter before this Court as was before the High Court, is one where the appellants' basic constitutional rights have been violated. These include breach of Rules of natural justice or the right to be heard; bias on the part of the magistrates hearing the matter; lack of jurisdiction on the part of the court; right to human dignity; right not to be arbitrarily deprived of property; right to security of person; and the right of access to justice.

Citing this Court's decision in **Mirugi Kariuki Vs Attorney General**, Civil Appeal No.70 of 1991 (1992) KLR 8, learned counsel posited that once breach of Rules of Natural Justice was alleged, and the issue of lack of jurisdiction having been raised, the leave ought to have been granted. He urged us to find that a prima facie case had been made out to entitle the appellants to leave to file Judicial Review proceedings.

[13] According to **Mr Mutubia**, learned counsel for the 3rd respondent, however, there were no live proceedings in CMCC No. 2417 of 2003, the judgment having been entered and the subsequent applications having been dismissed. Learned counsel maintained that the first case had been finalised and Title deed issued to the 3rd respondent and the only matter that was live before the Chief Magistrate was the suit for eviction. The appellants were parties in that suit and they had not been denied a hearing. He supported the learned Judge's finding to the effect that the appellants should go back to that court and proceed with that hearing and raise any issues of bias there. He was of the firm view that there was no bias and that the appellants' right to be heard had not been contravened. He submitted that these proceedings were just another attempt to delay the matter and deny the 3rd respondent fruits of his judgment which was entered in his favour fifteen years ago.

[14] We have considered the entire record before us and the submissions by learned counsel and the applicable law. We remind ourselves that our remit is restricted to considering whether on the material placed before him, the learned Judge erred in declining to grant the appellants leave to file a motion for Judicial Review. The law in this area is well settled. Before we go to the issue of whether a prima facie or arguable case had been established before the learned Judge, we must establish the primary issue of jurisdiction, because as the truism goes, jurisdiction is everything. It is therefore important, as a starting point to determine whether indeed there were any live proceedings in CMCC NO. 2417 OF 2003 which would have been amenable to quashing by way of judicial review. The prayer in the appellants' application was for the quashing of:-

"the proceedings and any other orders, rulings, judgements, authority, decision and or orders of the respondent made therein." (Emphasis applied).

Clearly, this prayer included quashing of judgment that had been rendered 8 years earlier. The Title deeds which had been issued pursuant to that judgment had also been issued several years earlier. Did the learned Judge have temporal jurisdiction to entertain the orders of *Certiorari*?

[15] There is no dispute that orders of *Certiorari* can only lie where the decision sought to be quashed was issued within 6 months of Judicial Review proceedings being filed. How then can the learned Judge be faulted for finding that the impugned judgment and orders issued eight years earlier could not be amenable to judicial review? That was one of the reasons why leave to file the Judicial Review motion was not granted. Without belabouring the point, we find the learned Judge properly interpreted the law on that aspect.

[16] On the order of prohibition, the appellant's prayer was not just in respect of the 1st respondent but "*any other magistrate within the republic of Kenya…*" who were to be prohibited from hearing CMCC NO. 3026 OF 2004. Was that an order that could be granted? All "other magistrates" contemplated in that prayer had not dealt with that matter. They were not parties to those proceedings. How and for what reasons could they be prohibited from handling the matter if it fell before them for hearing? The learned Judge in addressing this issue rendered himself as follows:-

> ***"The Magistrates have power to hear and determine the civil dispute in the first and second case including questions of jurisdiction. It has not been shown that all Magistrates in Kenya will be acting unlawfully if they presided over the first and second case."***

In any event, according to the appellants the prohibition would not issue if the orders granted would be in favour of the respondents. As rightly held by the learned Judge, granting such an order would ***"undermine the principle of the independence of the judiciary and impartiality while adjudicating."***

[17] On the prayer for *mandamus*, they are issued to compel a public officer to perform a public duty which they are enjoined by the law to perform but which they have declined or neglected to perform. Therefore, the fulcrum of an order of *mandamus* is that a statutory duty must be owed to an applicant and the public officer or public body, after being asked to perform the duty, has refused or failed to discharge that duty and there is no other adequate remedy. The question that would arise is whether the learned magistrate had a statutory duty to direct the Land registrar to cancel the Title deed which had been issued to the 3rd respondent. The Chief Magistrate had no duty to order or direct the registrar of Titles to cancel Title Deed where there was no valid order requiring such cancellation. What the learned Magistrate had was the judgment delivered eight years earlier and there was no judgment or order setting it aside. This was clearly captured by the learned Judge in his Ruling. We are not persuaded that the learned Judge misdirected himself on that issue.

[18] On the issue of bias, the learned Judge found that if indeed there was bias, that was an issue to be raised with the concerned Magistrate in the first instance. The appellant had not done so. What is bias? An apt definition of 'bias' can be deciphered from the following passage from the judgment of the Court of Appeal in England in ***Medicament and related Classes of Goods (2001) 1WLR 700*** where the court expressed:

> "***Bias is an attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve. A Judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of the prejudice in favour of or against a particular witness, which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him."***

Nearer home in ***Attorney-General v. Anyang' Nyong'o & Others [2007]1E.A. 12***, the court set the test for bias as follows:

> ***"The objective test of 'reasonable apprehension of bias' is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a Judge did not (will not) apply his mind to the case impartially["] Needless to say, a litigant who seeks [the] disqualification of a Judge comes to Court because of his own perception that there is appearance of bias on the part of the Judge. The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case..."***

The Magistrate against whom allegations of bias were being made was not the one who had heard the case in which the impugned judgement was made. Nor was it demonstrated that she made other orders against the appellants which would have manifested bias on her part. The accusation of bias was based on the fact that the Magistrate declined to exercise her discretion in favour of the appellants by not allowing them an adjournment. Granting or denying an adjournment is purely an act of discretion by the presiding Magistrate or Judge and unless it is demonstrated that such discretion was not exercised judicially or in a judicious manner, within the parameters already defined in law and practice, then the learned Judge could not interfere with the same. We are not persuaded that the allegations of bias were well founded. On the whole, we are unable to fault the learned Judge on these findings.

[19] Leave to file Judicial Review proceedings is not granted as a matter of course or as a mere formality. We reiterate here that the purpose of leave to apply for Judicial Review is to sift the claims to ensure that applications that are frivolous, vexatious, scandalous or those which raise no triable or arguable issues are eliminated at the nascent stage. In other words, before a case can be passed for Judicial Review, the court hearing the application for leave must satisfy itself that the applicant has a *prima facie* or arguable case that calls for consideration by the court sitting on Judicial Review.

[20] We appreciate that the constitution 2010 and the Fair Administrative Action Act have expanded the horizon of Judicial Review. That however is not an issue here as the application for leave was purely pegged on **order 53** of the Civil Procedure **Rules and Section 8 & 9** of

the Law Reform Act, and not on the constitution or the Fair Administrative Action Act, and issues such as the temporal jurisdiction of the court could not be ignored. We think we have said enough to show that the Ruling of the learned Judge delivered on 20th September, 2012 was premised firmly on the law and the same cannot be faulted. We agree that the judgment in CMCC No. 2417 OF 2003 has never been appealed against; and the same still stands. It could not be challenged eight years later by way of Judicial Review.

[21] At the beginning of this this judgment, we expressed that the two issues that form the gravamen of this appeal were the allegations of bias, and denial of the right to be heard. On the issue of bias, as we have stated, the parties ought to have raised that issue before the trial magistrate first before they raised it as a ground for judicial review. That way, she would have been accorded her right to be heard on the issue and also an opportunity to recuse herself if she deemed it necessary to do so.

[22] On the issue of the right to be heard, we have painstakingly gone through this record and noted it's checkered history. We do not wish to comment on the merits of the suits before the Chief Magistrate's Court. We can say however that the appellants were heard and accorded opportunity to be heard. They chose to walk out of court in CMCC NO. 3026 OF 2004 when an application for adjournment was denied. There was in our view no denial of the right to be heard. They were heard on the application to be joined as parties but the same was dismissed. Dismissal of an application does not amount to denial of the right to be heard. They never appealed against that decision. The law was not on their side when they moved to the High Court for Judicial Review orders.

[23] The learned Judge had no option but to disallow leave as the evidence placed before him so dictated. We have said enough to demonstrate that this appeal is for dismissal. The same is hereby dismissed with costs to the 3rd respondent.

Dated and delivered at Mombasa this 14th day of June, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR