



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: OKWENGU, MAKHANDIA & SICHALE, J.J.A)**

**CIVIL APPEAL NO.203 OF 2011**

**BETWEEN**

**DUNCAN NDURACHA ..... APPELLANT**

**AND**

**FUAD MAHMOUD MOHAMMED ..... 1<sup>ST</sup> RESPONDENT**

**MARIAM MOHAMED ..... 2<sup>ND</sup> RESPONDENT**

**SENIOR RESIDENT MAGISTRATE’S**

**COURT AT MOMBASA ..... 3<sup>RD</sup> RESPONDENT**

*(An appeal against the judgment and decree of the of the High Court of Kenya at Mombasa (Ibrahim, J.) dated 31<sup>st</sup> January, 2011*

*in*

*H.C. Misc. Appl No. 1 of 2011.)*

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**JUDGMENT OF THE COURT**

By an *exparte* chamber Summons application dated 10<sup>th</sup> January, 2011, **Fuad Mahamoud Mohammed** (*then as an ex parte applicant*) sought the following orders *inter alia*, against Duncan Nduracha, the appellant herein, (*the then 1<sup>st</sup> respondent*) and against Mariam Mohamed and the Senior Resident Magistrate’s Court Mombasa (*the then and the current 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively*;

*“1. Leave be granted to the applicant to apply for prerogative orders of certiorari, prohibition and mandamus as more particularly set out in the grounds of the statement, filed herewith.*

*2. The grant of such leave do operate as a stay of dealings of whatever nature including although not limited to transferring, leasing, charging or in any other way dealing with the suit property known as MN/1/3966 Nyalı Mombasa.”*

The application was premised on the grounds that the Senior Resident Magistrate's court in Mombasa **SRMCC No. 3088 of 2010** had dealt with the suit property without jurisdiction as under **section 2** of the Registration of Titles Act (RTA) (now repealed), it was only the High Court which was vested with the jurisdiction to deal with matters touching on titles registered under the RTA.

The first respondent obtained leave and proceeded to file a Notice of Motion dated 10<sup>th</sup> January, 2011 seeking the following prerogative orders:

*(a) An order of certiorari be issued to remove to the High Court, Resident Magistrate's Court Civil Case No. 3088 of 2010 between **Duncan Nduracha vs Mariam Mohamed** for the decision reached thereon to be quashed.*

*(b) An order of prohibition to prohibit the said Duncan Nduracha and/or any other person claiming under him from setting foot upon or continuing with occupation on the premises known as **MN/1/3966 Nyali Mombasa**.*

*(c) An order of mandamus directing that the exparte applicant herein Fuad Mahmoud Mohamed do forthwith take possession and occupation of the aforesaid premises known as **MN/1/3966 Nyali Mombasa**.*

The application for Judicial Review was based on similar grounds as set out in the chamber summons of 10<sup>th</sup> January 2011. The Notice of Motion was supported by the 1<sup>st</sup> respondent's affidavit sworn on 10<sup>th</sup> January 2011 and by the statement. However, no copy of such statement was included in the record of appeal. Nonetheless, from the impugned judgment subsequently rendered, **Ibrahim, J.** (as he then was) restated the contents of the statement as follows:-

*(a) That the Resident Magistrate's Court has no jurisdiction to deal with property registered under the Registration of Titles Act, Cap 281 Laws of Kenya.*

*(b) Under section 2 of the said Act, only the High Court is vested with jurisdiction to hear and determine matter relating to property registered under the Act.*

*(c) The applicant has at all material times been a purchaser in possession in respect of the property known as MN/1/3966 Mombasa Nyali.*

*(d) On the 29<sup>th</sup> November, 2010, one Duncan Nduracha sued Mariamu Mohamed claiming to be the new owner of the suit premises, MN/1/3966 and seeking among others, an eviction order in the following terms:*

*'An eviction order compelling the defendant by itself, servants, agents and/or legal representative to move out of the plaintiff's property situated in Kisauni, namely land reference number MN/1/3966.'*

*(e) Consequently, the said Duncan Nduracha was issued with eviction orders apparently to evict Mariamu Mohamed from the suit property.*

*(f) There is no person known by the name Mariamu Mohamed who has ever resided in the suit property.*

*(g) The applicant strongly believes that the said Mariamu Mohamed is a creation and decoy of Duncan Nduracha to enable him obtain orders in order to evict the applicant.*

*(h) The resident magistrate's court therefore acted without jurisdiction in the matter.*

*(i) In the circumstances, the decision of that court is illegal, null and void, calling for quashing ex debito justitiae.*

(j) *The eviction of the applicant was a nullity and illegal as the same violated the fiercely guarded natural justice principle of audi alteram partem.*

(k) *In monetary terms, the Senior Resident Magistrate has no jurisdiction to determine any matters relating to the suit property.*

(l) *By creating a non-existent defendant in the suit RMCC 3088 of 2010, Duncan Nduracha was perpetrating and perpetuating a fraud of gigantic proportions upon the court, and to defeat the due process of the law which had been set in motion in the pending High Court suits listed for hearing on the 17<sup>th</sup> February, 2011.*

(m) *The applicant and his family are now staying with friends in some rented premises. This is an eerie occasion for them considering that their eviction came at the beginning of the end year festive season.*

(n) *To avoid a situation where a party uses the courts to entrench an illegality, Duncan Nduracha ought to be removed from the suit premises and the applicant reinstated therein.*

(o) *It is illegal and unlawful and against the provisions of section 52 of the I.T.P.A (Group 8 Act) for any party to effect transfer of a property which is the subject of pending litigation.”*

It was in light of the foregoing that the 1<sup>st</sup> respondent had instituted the aforesaid Judicial Review Proceedings.

The appellant opposed the application, and filed a notice of preliminary objection dated 19<sup>th</sup> January, 2011 and a replying affidavit sworn on even date. In his affidavit the appellant opposed the 1<sup>st</sup> respondent's Judicial Review application on the basis that the review sought was against him as an individual, yet a judicial review application is meant to be directed to decisions of public bodies engaged in judicial or quasi-judicial jurisdictions; that he purchased LR No.MO/1/3966 from one James Kamore Njomo; that he duly informed the 2<sup>nd</sup> respondent who was then living in the house; that when the 2<sup>nd</sup> respondent refused to move out, he instituted by way of proceedings for her eviction.

The matter was heard by **Ibrahim, J.** who rendered his ruling on 31<sup>st</sup> January, 2011 as follows:-

*“I therefore do hereby grant an order of eviction as against the 1<sup>st</sup> respondent from the suit premises L.R.No.MN/1/3966, compelling the 1<sup>st</sup> respondent, by himself, servants, agents, legal representatives’ licencees, tenants or otherwise to forthwith vacate and move out of the suit property.*

*The order of Eviction shall be issued forthwith and enforced immediately and with immediate effect. The order shall be enforced by the court Bailiff or one appointed by the court and the O.C.S. Nyali Police Station who shall provide appropriate security. Upon the said enforcement, the applicant shall be reinstated into possession and occupation in the premises forthwith.”*

It is in respect of that ruling that the appellant now appeals. Suffice to state that no appearance was entered on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and neither were there any pleadings filed on their behalf in the High Court.

Though the appeal is mounted upon 21 grounds, the same can be summarized as follows:

(a) *“That the learned Judge erred in hearing the motion despite the fact that James Kamore and Mariam Mohamed, who were affected parties had not been served with the application. Further, that the Judge was in error when he failed to hold that the lady who attended court was in fact the said Mariam Mohamed the evictee.*

(b) That the Judge erred in allowing and relying upon a further affidavit that had been filed without leave of court; while in the same breath denying the appellant's advocate audience to enable him respond to the said affidavit.

(c) That the learned Judge erred by making up his mind at the leave stage about whether or not to restore the 1<sup>st</sup> respondent onto the suit premises and later on ignoring the appellant's case and submissions; that the Judge rendered his decision without allowing the appellant to be heard; a decision also founded on intimidation of the 2<sup>nd</sup> respondent by the Judge.

(d) That the Judge erred in converting a Judicial Review application into a Notice to show cause.

(e) That the Judge erred in allowing a certiorari order without having seen the order sought to be quashed as none had been annexed to the application.

(f) That the learned Judge also failed to appreciate that certiorari was unavailable as the 1<sup>st</sup> respondent neither claimed to be a tenant nor an owner of the property; and instead engaged in mixing up and engaging in unlawful exercise of the court's jurisdiction.

(g) That the learned Judge erred in failing to acknowledge that failure to effect service of summons was not fatal."

In his written submissions and oral submissions before us the appellant through Mr. Nyangau, learned counsel was critical of the way Ibrahim, J. conducted the 1<sup>st</sup> respondent's Judicial Review application. He faulted the Judge for having determined the application before it was heard; for converting "the hearing of the 1<sup>st</sup> respondent's application into a notice to show cause by the appellant why the order of the subordinate court in Mombasa **SRMCC No.3088 of 2010** should not be quashed" instead of the 1<sup>st</sup> respondent urging his application; for proceeding to hear the application without ascertaining whether James Kamore Njomo, the previous owner of the suit property had been served; in finding that there was no person known as Mariam Mohamed and engaging in a *tete-a-tete* with a lady in court whom the Judge ruled was not Mariam Mohamed; in intimidating **Hon. Kizito**, the learned magistrate who had given orders in favour of the appellant in Mombasa **SRMCC No.3088 of 2010**; in quashing the order complained of without a copy of the said order being attached to the review application contrary to **Order 53 rule 7(1)** of the Civil Procedure Rules; in engaging Hon Kizito privately and in the absence of the appellant; in finding that an order for eviction was issued before summons to enter appearance had been issued and that "**Order 36 rule 1 of the Civil Procedure Rules under which jurisdiction to grant eviction orders is given, does not require that summons to enter appearance be served first while such application can be heard or granted;**" acting in excess of his jurisdiction; for issuing orders as if it was sitting on appeal against the orders of Hon Kizito; for usurping powers under the guise of supervisory control of the High Court and finally that the learned Judge removed himself from the position of an arbiter and ceased to be impartial. The applicant relied on the following authorities:-

1. *Zakayo Michumbu Kibwange vs Lydia Kaguna Japheth & 2 others (Mombasa C.A. No.31 of 2013).*

2. *Stephen S. Pareno vs Judicial Service Commission of Kenya: C.A. No.120 of 2014.*

3. *The Chief Constable of the North Wales Police vs Evans [1982] 3 ALL ER 141.*

Mr. Gikandi, learned counsel for the 1<sup>st</sup> respondent opposed the appeal. He urged us to find that the appellant is estopped from raising the issue that the Notice of Motion of 10<sup>th</sup> January 2011 proceeded without service to all parties as the appellant did not raise this objection during the said hearing; that no appeal was filed against the order of 10<sup>th</sup> January 2011 reinstating the 1<sup>st</sup> appellant onto the suit property; that the 2<sup>nd</sup> respondent was non-existent and was a creation of the appellant who purported to have effected service of the application upon her; that the Judge properly exercised his supervisory role as a

High Court besides being vested with inherent jurisdiction to do justice. As regards the complaint that the application for *certiorari* was missing the order sought to be quashed and the complaint of engaging a woman who was in court without giving the appellant the right to test the veracity of what she said, it was Mr. Gikandi's submissions that courts are guided by substantive justice as opposed to procedural lapses. He relied on the following authorities:-

1. *Lazarus Estates Ltd vs Beasley* [1956] IQB 702 at 712-713.
2. *Farley (Aust) Pty Ltd vs JR Alexander & Sons (Q) Pty Ltd* (1946) 75 CLR 487 at 493.

On our part, we have considered the record, the judgment, the grounds of appeal the authorities cited, as well as the respective written submissions. This being a first appeal, the court is obligated to reconsider and re-evaluate the evidence in its totality. (See **Selle & Another v Associated Motor Boat Company Limited & Others** [1968] EA 123 where it was held:-

*“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has already failed on some point to take account of particular circumstances or probabilities material to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”*

Firstly, it is common ground that no summons to enter appearance were ever taken out by the appellant. It was Mr. Nyangau's contention that it was proper for a trial court to issue an order of eviction, service of summons notwithstanding. It was his further contention that non-service of the summons was a non-fatal defect. However, the effect of non-service was that neither the 1<sup>st</sup> nor 2<sup>nd</sup> respondent were made aware of the proceedings in court. The appellant nonetheless obtained orders from the magistrate's court, albeit the lack of service of the summons as well as a hearing notice of the application for eviction. The appellant now defends the said orders stating that non-service of summons to enter appearance is a non-fatal defect. It is possible in certain instances where service of summons has been dispensed with to obtain orders in a suit filed even before the summons are served, in the instant case the appellant obtained final orders to wit the eviction of the 1<sup>st</sup> respondent, before service of the summons to enter appearance and without an order for the service of summons to be dispensed with in the first instance.

The summary procedure envisioned under **Order 36** are inapplicable in this case as summary procedure do not obviate the need for service of the summons to enter appearance. The proviso to **Order 36(1)** states that:-

*“Where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for the amount claimed...”*

In this case, the 1<sup>st</sup> respondent was not served and he cannot be faulted for not filing a defence. It was imperative for the appellant to have first served the summons so as to enable the respondent to appear if he so wished and only then could summary judgment be invoked in default of appearance and/or filing of defence. Such was not the case herein as no summons to enter appearance was taken out. It was therefore proper for the learned judge to quash the orders of Hon. Kizito as failure to do so is tantamount to condemning one unheard. This would of course offend the principle of natural justice requiring one to be heard before being condemned. We find that failure to have the summons served appears to have been a deliberate move to ensure that the 1<sup>st</sup> respondent side of the story never saw the light of day.

The appellant has also faulted the superior court's judgment for its failure to find that the 1<sup>st</sup> respondent did not serve *James Kamore* and *Mariam Mohamed*. These two never appeared anywhere in these proceedings. Indeed the trial judge found that the 2<sup>nd</sup> respondent was a decoy used to fraudulently obtain

the eviction orders. The learned judge summed up the purported 2<sup>nd</sup> respondent's position as follows:-

*“She is a ghost brought to life by the applicant to claim service of the application to justify and warrant the grant of eviction orders ...”*

We could not agree more.

Besides, this is an issue that was never raised at the hearing of the Judicial Review application and whereas it is trite law that the court can only address itself on issues placed before it, we find that the appellant is estopped from raising this issue as the lack of service of the Judicial review application was never canvassed at the trial.

The appellants' other submission was that the High Court had no jurisdiction to supervise the lower court. In our view this is an erroneous position. **Article 165(6)** of the Constitution provides:

*“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over a superior court.*

*(7) For purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice”*

As earlier stated, it is common ground that the orders issued by the magistrate's court in **Mombasa SRMCC 3088 of 2010** were issued without any summons having been served on the 1<sup>st</sup> respondent. It is also common ground that these orders formed the crux of the matter on the Judicial Review lodged before the High Court. As such, it was only proper that the learned Judge would want to have light shed on what transpired before the learned magistrate. No defence or reply appears to have been filed on behalf of the said court in the Judicial Review proceedings. It was therefore proper for the learned judge to seek an explanation from the magistrate who handled the matter.

It matters not that the parties should have been involved in such enquiry; as the appellant is keen to suggest. The High Court has the jurisdiction to invoke supervisory jurisdiction to review decisions and proceedings of subordinate courts. Such supervisory jurisdiction can be invoked by the court of its own motion (see ***Twaher Abdulkarim Mohamed v IEBC & 2 others [2014] eKLR***. See also ***Law Society of Kenya v Centre for Human Rights and Democracy and 13 Others [2013] eKLR*** where this Court differently constituted stated that it would uphold the supervisory jurisdiction of the High Court, in cases where there has been blatant abuse of the rules of natural justice.

We are of the view that the present case presents a situation where the rules of natural justice were blatantly and unapologetically trampled upon by both the appellant and the learned resident magistrate. The superior court cannot be faulted for having validly invoked **Article 165(6)** and **(7)** of the Constitution in exercising its supervisory role. We are in agreement with Mr Gikandi for the 1<sup>st</sup> respondent that certiorari is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court. In this case the appellant obtained an order for eviction without the 1<sup>st</sup> respondent being served with the summons let alone the fact that there was no hearing of the substantive suit to warrant the issuance of final orders of eviction. Consequently, the 1<sup>st</sup> respondent who was completely in the dark of the court process was evicted. The learned judge described the whole episode as *“devilish and demonic.”* The judge may have been so incensed and used strong language but this is understood given the blatant abuse of the judicial process by the appellant and the learned resident magistrate. Indeed, the learned judge appraised the parties of all the steps he undertook in a bid to unravel the truth. Upon perusal of the lower Court's file and upon his inquiries, he found that no summons had been issued, nor applied for and yet the learned Magistrate proceeded to issue drastic orders against the 1<sup>st</sup> respondent. He then summoned Hon. Kizito who had granted the order of eviction in SRMCC No. 3088 of 2010 on 21<sup>st</sup> December, 2011. In the interest of transparency, the learned Judge placed on record his deliberations with Hon. Kizito.

Lastly, the appellant also contended that the learned Judge ought not to have reinstated the 1<sup>st</sup> respondent onto the suit premises after having held that prohibition and mandamus could not issue. As rightly stated by the Judge, an order of mandamus can only issue as against an administrative body. The unavailability of this order did not however limit the jurisdiction of the court to grant an order of *certiorari* to quash the decision of the Court in SRMCC No. 3088 of 2010. It follows that once *certiorari* was granted, the order that was used to place the appellant onto the suit land was extinguished as a result of which the parties were entitled to revert to where they were.

The appellant's other complaint was that the learned Judge proceeded to quash the decision of the learned resident magistrate without the order being sought to be quashed being annexed to the Judicial Review application. With respect, this is not a legal requirement stipulated under the provisions of **Order 53**. It is evidential as opposed to a legal requirement besides, Mr. Nyangau for the appellant who participated in the proceedings in the lower court, did not raise the issue. It is now too late in the day to do so in an appeal.

The upshot of the above is that this appeal stands dismissed with costs to the 1<sup>st</sup> respondent. It is so ordered.

**Dated and delivered at Mombasa this 12<sup>th</sup> day of March, 2015.**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F.SICHALE**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR**