



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 275 OF 2011

BETWEEN

MARY WAIRIMU GIKUNJU APPELLANT

AND

REPUBLIC 1ST RESPONDENT

CHIEF MAGISTRATE, NYERI 2ND RESPONDENT

PETER KING'AI WANG'OMBE 3RD RESPONDENT

THE CHAIRMAN, KIENI EAST

LAND DISPUTE TRIBUNAL 4TH RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nyeri

(Sergon, J.) dated 29th July, 2011

in

Judicial Review No. 19 of 2010)

JUDGMENT OF THE COURT

[1] This is an appeal from the ruling of the High Court (Sergon, J.) dated 29th July, 2011 wherein the court struck out the Judicial Review proceedings instituted by the appellant. The genesis of this matter goes back to an *ex parte* Chamber Summons dated 3rd February, 2010, in which the appellant sought leave to institute Judicial Review proceedings. This was by way of an order of *certiorari*, quashing the proceedings and award in Kieni East Land Disputes Tribunal (Tribunal). She also sought for an order of prohibition restraining the Chief Magistrate Court at Nyeri from adopting the said award as a judgment of the court.

[2] The appellant was duly granted the leave on 3rd February, 2010 by the High Court (*Sergon, J.*)

which also was to operate as stay of execution of the proceedings of the Tribunal until the determination of the substantive application. Subsequently, the appellant filed the substantive motion dated 22nd February, 2010. According to the matters that were deposed to in the supporting affidavit, the appellant and one John Macharia Wangombe (deceased) entered into a sale agreement dated 21st August, 1990 wherein the appellant agreed to sell 4 acres of L.R No. Nyeri/Naro Moru/ 734 (suit property) to the deceased for a consideration of Kshs. 90,000/=.

[3] The appellant was unable to transfer the suit property to the deceased due to an outstanding loan over the property. Consequently, she decided to move onto the suit property and offered the deceased a portion of 4 acres in an alternative plot measuring 8 acres which she owned. According to the appellant, the deceased refused to take the alternative plot and the appellant thereupon offered to refund the money he had paid. Subsequently, the deceased died on 2nd February, 2003 and the 3rd respondent and one Eva Wambui were issued with letters of administration over his Estate. The 3rd respondent is the deceased's brother.

[4] Peter King'ai Wang'ombe, the 3rd respondent filed a claim in before Kieni East Land Disputes Tribunal seeking an order compelling the appellant to transfer the suit property to the deceased's children. The tribunal in its award dated 27th August, 2009 ordered the appellant to transfer the suit property. The award was forwarded to the Chief Magistrate's Court at Nyeri for adoption. However, before the adoption of the award the appellant filed the aforementioned application.

[5] The grounds upon which the appellant relied on in support of her application were that the Tribunal sought to enforce a sale agreement to land, when it lacked jurisdiction to do so; the Tribunal sought to enforce a sale agreement to land that was void by dint of the **Land Control Act**; the Tribunal entertained a claim that was statute barred; the Tribunal proceeded to determine a claim on title to land which was beyond its statutory jurisdiction, thus the entire proceedings and the award of the Tribunal were *ultra vires*, illegal and contrary to statutory provisions.

[6] In response to the application, the 3rd respondent filed a replying affidavit and disclosed that the appellant had previously filed Judicial Review proceedings in the High Court being **J.R No. 38 of 2009** (herein after referred to as the 1st application) seeking similar orders that is; leave to apply for orders of *certiorari* quashing the proceedings, and award of the Tribunal, and an order prohibition restraining the Chief Magistrate's Court at Nyeri from adopting the said award.

[7] On 30th September, 2009 the appellant was granted leave to file the substantive motion and the said leave operated as stay of the Tribunal's proceedings. The appellant filed the substantive motion on 16th October, 2009 and subsequently, filed a Notice of Withdrawal of the 1st application on 29th January, 2010. The 3rd respondent challenged this fresh application (hereinafter referred as the 2nd application) dated 3rd February, 2010. He contended that leave was obtained without first disclosing to the High Court Judge, that the appellant had already obtained leave on 30th September, 2009 to institute similar Judicial Review proceedings; that the time granted to file substantive motion, begun to run on 30th September, 2009 when the appellant was initially granted leave in the 1st application; the subsequent filing of the second substantive motion on 23rd February, 2010 was out of time. The 3rd respondent contended that the 2nd application was an abuse of the court process and urged the Judge to dismiss the 2nd application with costs.

[8] By a ruling dated 29th July, 2011 Serгон J., concluded that the appellant was guilty of material non-disclosure and that she had abused the court process. The learned Judge struck out the substantive motion dated 22nd February, 2010 with costs to the 3rd respondent. It is against that decision that the appellant has preferred this appeal which is based on the following grounds:-

- ***The learned Judge erred in law in striking out the substantive application on the grounds of material non-disclosure whereas the subject non-disclosed facts were not relevant to the matter***

at hand.

- ***The learned Judge erred in law by exercising the discretion to dismiss the substantive application injudiciously.***
- ***The learned Judge erred in law in considering facts that were not relevant to the substance of the matter at hand.***
- ***The learned Judge erred in law in failing to appreciate the overwhelming merits of the substantive application vis-a-vis the perceived technicalities.***

[9] Parties to this appeal consented to prosecute this appeal by way of written submissions. Mr. Kingori learned counsel for the appellant emphasized that the learned Judge struck out the Judicial Review proceedings on the ground that the appellant was guilty of material non-disclosure, for failing to disclose that she had previously filed a similar application which she subsequently withdrew. According to counsel for the appellant, the issue which falls for consideration before this Court is, whether the aforementioned non-disclosure by the appellant was material to call such a drastic step, e striking out of the entire suit.

[10] It was submitted that in considering the materiality of the non-disclosed fact, the Court should bear in mind that, whether the fact is of sufficient materiality depends on the importance of the fact to the issues which were to be decided on the application. It was argued that Judicial Review proceedings being special in nature requires disclosure of only material matters which are relevant for the proper and fair determination of the issue(s) at hand. That the issue at hand in the said proceedings was the validity of the award of the Tribunal and the non-disclosure of the previous withdrawn application was not material to the determination of the said issue. It was the appellant's case that the failure to disclose the 1st application was innocent because the appellant perceived the same as not being relevant to the determination of the matter. The appellant relied on the decisions in ***Brink's-Mat Ltd. -vs- Elcombe & Others, (1983) 3 ALL ER, 188 & Tweed -vs- Parades Commission for Northern Ireland, (2007) 2 WLR, 1.***

[11] Counsel for the appellant further submitted that the requirement for leave to institute an application for Judicial Review is a procedural step provided under **Order 53** of the **Civil Procedure Rules**. That the leave sought is permission or authority of the court to file Judicial Review proceedings and before such leave is granted, the court has to be satisfied *inter alia* that the intended action is not time barred. Thus once leave was granted in the 1st application on 30th September, 2009 and the substantive application filed within the requisite time, the leave granted became spent; by the time the 1st application was withdrawn the leave had already become spent. Therefore, the appellant had to seek fresh leave in the 2nd application to file the Judicial Review proceedings. Finally counsel submitted that the only remedy which was available to the 3rd respondent if he was aggrieved with the leave granted, was to seek the discharge or setting aside of the leave. The appellant urged the Court to allow the appeal.

[12] In opposing the appeal, Mr Ombongi learned counsel for the 3rd respondent submitted that the appellant had not come to court with clean hands. This is because she failed to disclose to the learned Judge in her 2nd application that she had previously filed a similar application, obtained leave and subsequently withdrew the application. The 3rd respondent maintained that the non-disclosure was deliberate, malicious and abuse of the court process. In support of the aforementioned submissions the 3rd respondent relied on ***Re M and N (minors) (wardship publication of information) (1990) Fam 211, 229*** where Lord Donaldson of Lynton MR. stated,

“it cannot be too strongly emphasised that those who seek ex-parte injunctions are under an obligation to make the fullest and most candid disclosure of all relevant circumstances known to them.”

According to counsel for the 3rd appellant, the appellant's failure to disclose the previous application caused the learned Judge to grant a second leave while the earlier leave was still subsisting. That the non-

disclosure was material because the learned Judge would not have granted the second leave if he knew the existence of the earlier leave that was granted in the 1st application. According to the 3rd respondent, this was clearly an abuse of the court process. The 3rd respondent maintained that the learned

[13] It is not in dispute that the appellant in making her application dated 3rd February, 2010 did not disclose that she had previously filed a similar application, obtained leave and subsequently withdrawn the same. Based on the foregoing, we have formulated the following three issues for determination;-

1. ***Was the non-disclosure by the appellant material?***
2. ***What is the effect of withdrawing Judicial Review proceedings and subsequently filing fresh proceedings?***
3. ***Did the learned Judge exercise his discretion judiciously in striking out the Judicial Review proceedings?***

[14] It is trite law that whenever a litigant seeks an *ex parte* order such as the one which was sought by the appellant, leave to institute Judicial Review proceedings, he/she is required to disclose to the court all material facts relevant to such an application. In *Uhuru Highway Development Ltd -vs- CBK & 2 others - Civil Appeal No. 140 of 1995*, Omolo, J.A expressed himself as follows:-

“I also agree. The applicant went before Githinji J. on 6th January 1995 pleading urgency. It obtained an ex-parte injunction. Order 39 rule 3 (1) of the Civil Procedure Rules (Revised), permits the granting ex-parte injunction but it must clearly be understood that a party who goes to a judge in the absence of another side assumes a heavy burden and must put before the judge all relevant materials including material which is against him.”

In *Andria (Vasso) (1984) 1 QB 477* at page 491, Lord Goff (as he then was) observed that-

“It is axiomatic that in ex parte proceedings there should be full and frank disclosure to the court of facts known to the applicant, and that the failure to make such disclosure may result in the discharge of any order made upon the ex parte application, even though the facts were such that, with full disclosure, an order would have been justified.”

See also the decision in *Llyods Bowmaker Ltd -vs- Britiannia Arrow Holdings p/c (larena third party) (1988) 3 ALL ER 178*, wherein Balcombe LJ held,

“On any ex parte application, the fact that the court is asked to grant relief without the person against whom the relief sought having the opportunity to be heard makes it imperative that the applicant should make full and frank disclosure of all the facts known to him...”

[15] Did failure by the appellant to disclose the 1st application amount to material non-disclosure? It is imperative in answering the aforementioned question to consider what amounts to a material fact. The *Black's Law Dictionary, 8th Ed* defines material as-

“of such nature that knowledge of the item would affect a person's decision making.”

In determining whether the appellant was guilty of material non disclosure, the Court has to first consider if the undisclosed fact was material to the decision to grant leave in the 2nd application. In *Brink's-Mat Ltd. -vs- Elcombe & Others (supra)*, it was held that whether a fact is material depends on the importance of that fact to the issue to be decided. Scrutton LJ in *R-vs- Kensington Income Tax comrs exp princess Edmond de polgnac (1917) KB 486* held,

“the material facts are those which it is material for the Judge to know in dealing with the application as made”

[16] Secondly, it is imperative for the Court to take into account the motive or intention of the appellant's failure to disclose the 1st application. Hancox CJ. In ***Tiwi Beach Hotel Ltd -vs- Stamm – Civil Appeal No. 63 of 1990*** held that in determining whether a litigant is guilty of material non disclosure it is important to consider his intention or motive. Hancox CJ. In distinguishing the decision of this Court in ***Owners of the Motor Vessel “Lillian S” -vs- Caltex Oil (Kenya) Ltd (1989) KLR 1 & R-vs- Kensington Income Tax comrs exp princess Edmond de polgnac (supra)*** held that the non-disclosure in the said cases were of a different nature from the one in ***Tiwi case***. He stated that in the two cases there was clearly a motive to deceive by non-disclosure. In respect of ***Lilian S*** case he expressed himself as follows:-

“ It followed in the Lilian S that the applicants for the warrant of the arrest of the ship had failed in their duty of candour to the Court. But it must have been plain to Caltex, and particularly to their employee Mr. Kariuki, that if they had revealed the true facts to the Judge, the court would never have given them the relief sought. So there is an obvious motive to deceive, by misrepresenting the true facts Caltex could obtain the arrest of the ship, which would be of immense advantage to them in pursuit of their claim.”

[17] Thirdly, the Court should also consider whether the appellant gained some advantage over the 3rd respondent by failing to disclose the existence of the 1st application. Kwach, JA in the ***Tiwi Case*** held,

“ Secondly, even assuming for the purposes of argument only, that the existence of the agreements was a material fact, a matter over which I entertain a considerable degree of doubt, it has not been shown on the evidence that the respondent gained some advantage over the appellant by failing to disclose their existence.”

[18] Therefore, was the appellant guilty of material non-disclosure? ***Order 53*** of the ***Civil Procedure Rules*** provides in part:

Order 53 rule 1

- 1. No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.***
- 2. An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.***
- 3. The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.***
- 4. The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:***

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

Order 53 rule 2

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

[19] The application for leave is made *ex parte* accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. **Order 53 (3)(1)** stipulates that once leave is granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court. Therefore, the leave sought is to enable a party to file the substantive application for determination. In this instant case, the appellant sought leave to apply for an order of *certiorari* and *prohibition*. The High Court in considering the application for leave had to take into account two factors. Firstly, without going into the matter in depth, whether based on the material provided by the applicant there is an arguable case for granting leave. In **Aga Khan Education Service Kenya -vs- Republic & 3 Others – Civil Appeal No. 257 of 2003** this Court said:-

“We think both Mr Inamdar and Mr Kigano are generally agreed on the principles of law applicable in these matters. They are agreed that in order to enable a judge to grant leave under Order 53, there must be prima facie evidence of an arguable case and for that proposition both counsel rely on this Court’s decision in: IN THE MATTER OF AN APPLICATION BY SAMUEL MUCHIRI WANJUGUNA & 6 OTHERS and IN THE MATTER OF THE MINISTER FOR AGRICULTURE AND THE TEA ACT, Civil Appeal NO 144 OF 2000 in which the Court approved and applied the principles to be found in the English case of R V SECRETRAY OF STATE, ex p. HARBAGE [1978] 1 ALL ER 324 where it was stated thus:

“It cannot be denied that leave should be granted, if on the material available, the court considers without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court, to the judge who granted leave to set aside such leave – see Halsbury’s Laws of England, 4th Edition Vol 1 (1) paragraph 167 at page 1276.”

See also the decision in ***Republic -vs- Attorney General & another- Civil Appeal No. 8 of 2002.***

[20] Secondly, since in this case the appellant sought an order of certiorari to quash the decision of the Tribunal, the court was required to consider during the *ex parte* application whether the application was made not later than six months after the decision of the Tribunal. The decision of the tribunal was dated 27th August, 2009 while the 2nd application for leave was dated 3rd February, 2010. Clearly the learned Judge granted leave to the appellant on 3rd February, 2010 to file the Judicial Review proceedings after being satisfied that the appellant had aforementioned factors.

[21] As illustrated from the foregoing, the filing and subsequent withdrawal of the 1st application was not material for the determination of the leave application. Further, it was not established that the appellant had concealed the 1st application intentionally with the motive of gaining advantage over the 3rd respondent.

[22] On the issue as to whether the time within which the appellant was supposed to file the substantive motion continued to run from 30th September, 2009 despite the withdrawal of the 1st application; and whether her failure to disclose the aforementioned fact caused the learned Judge to grant the second leave while the earlier one was still subsisting, we can do no better than reproduce the provisions of

Order 53 rule 3(1)

When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

[23] Based on the foregoing provision of the law, it is clear that an application for Judicial Review can only be made after leave of the Court is obtained. See **Order 53(1)**. This Court in **Uwe Meixner & another -vs Attorney General Civil Appeal No. 131 of 2005** held that leave of the court is a prerequisite to making a substantive application for judicial review. In **Republic -vs- Communications Commission of Kenya & another – Civil Application No. 175 of 2000**, this Court expressed itself as follows:-

“In our view, the fallacy in Dr. Kiplagat's contention lies principally in his assuming that it is the chamber summons application for leave to apply for the orders which originates the proceedings under Order 53. The proceedings under that order can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted.” Emphasis added.

[24] Therefore, once the 1st application was withdrawn the leave which was granted on 30th September, 2009 was spent and could not be the basis of filing another substantive application for judicial review orders. This is because as pointed out in the aforementioned decision a substantive motion for judicial review can only be filed pursuant to the leave granted to file the said motion. Therefore, the appellant correctly applied by a fresh application dated 3rd February, 2010 for leave to institute judicial review proceedings.

Did the learned Judge exercise his discretion judiciously in striking out the Judicial Review proceedings?

[26] On the last issue whether the Judge exercised his discretion judiciously in striking the 2nd application. The Judge was obviously exercising his discretion. It is trite law that before this Court can interfere with the learned Judge's discretion it must be satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or, that he misapprehended the law or failed to take into account some relevant matter. In **Mbogo & Another- vs- Shah (1968) E.A. 93** at page 95, Sir Charles Newbold P. held:

“.....a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....”

[27] In this case, we are of the view that the Judge misapprehended what constitutes material non-disclosure. This is because as clearly illustrated above that fact was not material to the determination of the 2nd application for leave and neither was it material for the determination of the substantive motion which was based on the validity of the Tribunal's decision.

[28] In the upshot the ruling dated 29th July, 2011, is hereby set aside and the substantive application dated 22nd February, 2010 is reinstated and remitted for hearing before the High Court by a different Judge other than Sergon, J. Costs to the appellant.

Dated and delivered at Nyeri this 26th day of February, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR