



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: VISRAM, GATEMBU & ODEK, JJ.A.)
CIVIL APPEAL NO. 44 OF 2013

BETWEEN

MILKA NYAMBURA WANDERI

ALICE WAITHERA MWANGI APPELLANTS

AND

PRINCIPAL MAGISTRATE'S COURT MURANG'A 1ST RESPONDENT

REGISTRAR OF LANDS – MURANG'A 2ND RESPONDENT

PETER MWANGI KAGWANJA 3RD INTERESTED PARTY

MONICA KATHINA JUMA 4TH INTERESTED PARTY

DAVID WAWERU NJOROGE5TH INTERESTED PARTY

(Being an Appeal from the Decision and Ruling of the High Court of Kenya at Nyeri (Ombwayo, J) delivered on 11th October, 2013 in Judicial Review Application No. 34 of 2011)

JUDGMENT OF THE COURT

1. This is an appeal from the decision of the High Court at Nyeri (The Honourable Mr. Justice A. Ombwayo) made on 11th October, 2013, dismissing the appellants' application for leave to apply for judicial review orders of certiorari, prohibition and mandamus.

Background

2. On 19th July, 2011, the appellants presented an application to the High Court under **Order 53 rule 1** of the **Civil Procedure Rules** and **Section 8** and **9** of the **Law Reform Act chapter 26** of the

Laws of Kenya for leave to apply for orders of:

(a) Certiorari to quash the decree or order issued by the 1st respondent, Resident Magistrate, Muranga on 30th December 2010 directing the registration of land parcel number Loc. 19/Rwathia/487(the property) in favour of Peter Mwangi Kagwanja and Monica Kathina Juma, the 1st and 2nd interested parties respectively.

(b) Certiorari to quash decisions of the 2nd respondent, the Registrar of Land, Muranga, dated 15th October 2010 and 8th March 2011 removing a caution on the property lodged by the 1st appellant on 6th May 2010 and issuing a title over the property in favour of the 1st and 2nd interested parties.

(c) Prohibition to restrain the 2nd respondent from effecting further transactions over the property.

(d) Mandamus to compel the 2nd respondent to investigate reasons why the 1st appellant lodged a caution on the property on 6th May 2010 or alternatively to reinstate the caution.

3. The application for leave was based on the grounds that the actions of the 1st and 2nd respondents complained of occurred during the pendency of Nyeri High Court **Civil Suit Number 130 of 2010**, between the 1st appellant and David Waweru Njoroge, the 3rd interested party in which a declaration was sought that the 3rd interested party holds the property in trust for the appellants; that orders were issued in that suit on 5th October, 2010, restraining the 1st and 3rd interested parties from trespassing or interfering with the property; that despite being aware of the pendency of that suit and of the subsistence of a court order made in that suit, the 3rd interested party transferred the property to the 1st interested party by entering into a consent to that effect on 23rd December, 2010, in the Principal Magistrates Court in **SPMCC 442 of 2010**; that based on that consent a decree was issued by the 1st respondent which was presented to the 2nd respondent by the 1st and 2nd interested parties; that based on that decree the 2nd respondent issued a title over the property to the 1st and 2nd interested parties having removed the caution lodged earlier against the title by the 1st appellant.
4. According to the appellants, the transfer of the property and the issuance of a title over the property in favour of the 1st and 2nd interested parties was fraudulent and in breach of the law and was wrongly carried out during the pendency of a suit and in the knowledge of subsistence of court orders and in breach of the appellants proprietary rights and interests over the property which are pending determination in Nyeri **High Court Civil Suit Number 130 of 2010**.
5. The appellants contended that the actions of the interested parties in procuring the registration of the property in the names of the 1st and 2nd interested parties is contrary to law, illegal and a nullity; that the removal of the caution lodged by the 1st appellant against the title by the 2nd respondent was a nullity; that the appellants are entitled to the property as beneficiaries of their mother Grace Wanjiku Njoroge, the true owner of the property which was registered in the name of the 3rd interested party as trustee.
6. It was also the appellants case that in issuing the decree in **SPMCC 442 of 2010** pursuant to the consent entered by the parties in that suit to confer the property on the 1st and 2nd interested parties, the 1st respondent acted in excess of jurisdiction as the orders for the transfer of the property or orders to compel the 2nd respondent to transfer the property to the 1st and 2nd interested parties were not sought in that suit and accordingly a consent judgment could not be issued in the manner in which it was done.

7. With that, the appellants considered that they had made out a case for leave to apply for orders of judicial review.
8. After hearing the application, the learned Judge of the High Court was not satisfied that the appellant's application was merited. In relation to the complaints directed to the 1st respondent for having issued decree or orders in *SPMCC 442 of 2010* pursuant to a consent in excess of jurisdiction, the learned Judge concluded, and we find it necessary to reproduce his ruling at length, that:

***“The exparte applicant has not demonstrated that the Magistrate lacked either statutory or pecuniary jurisdiction to entertain the suit. The said applicant has not shown that the Magistrate had no power to record the consent entered into by the parties. This court finds that the consent entered into by the 1st, 2nd and 3rd interested parties cannot be set aside by judicial review as the same was an agreement between the parties and can only be challenged through an application to set aside the consent in the court that issued the said order and the same can be done only on grounds of fraud or mistake.*”**

***On the issue of rules of Natural Justice, the exparte applicant was not a party to the suit in Murang'a Senior Principal Magistrate's Courts and therefore could not have been involved in the signing of the consent that was filed in court. The applicant's recourse could only have been to file an application to set aside the consent on grounds that the suit land was the subject of a matter in the High Court. It is a trite law that judicial view orders are issued against a public body on grounds of illegality, procedural impropriety and irrationality. The applicant's complaint is not against the judicial officer but against individuals who allegedly fraudulently entered into a consent and transferred the suit land. The judicial officer recording the consent did not act in substantive ultra vires as he acted within the scope of power granted to him by law and therefore no element of illegality has been established. Moreover he did not act in procedural ultra vires as the consent was entered into through the right requirement attached to the lawful exercise of the magistrates power to record the consent as rules of natural justice were complied with.*”**

9. The learned Judge proceeded to hold that the appellants had not established a prima facie case for an order of certiorari to quash the order of the 1st respondent dated 30th December, 2010, and the decree issued on 3rd February, 2011, in *SPMCC 442 of 2010*.
10. Regarding the appellants grievances directed at the 2nd respondent for effecting the orders given in *SPMCC 442 of 2010*, removing the caution lodged by the 1st appellant and issuing a title in favour of the 1st and 2nd interested parties, the learned Judge held that:

“Since the decision of the Land Registrar Murang'a was the execution of the decision of the Principal Magistrate's Court Murang'a it follows that no prima facie case has been established for the court to allow the applicant to commence judicial review process against the Land Registrar as his action was merely in execution of a court order.”

11. There was a further reason the High Court declined to grant leave to the appellants. The court held that the application was statute barred. The learned Judge stated that:

“The court finds that the application for leave is time barred as it was made more than six months after the decision sought to be quashed.”

12. It is against that background that appellants lodged the present appeal contending that the learned Judge of the high Court erred in declining leave.

The appeal and submissions by counsel

13. At the hearing of the appeal before us, Mr. Antony Oluoch learned counsel for the appellants submitted that the learned Judge erred in refusing to grant leave on the basis that the application was time barred; that the Judge was wrong to treat the decisions of the 1st respondent and the 2nd respondent that the appellants intended to quash as one decision; that the decision by the 2nd respondent to issue the title in favour of the 1st and 2nd interested parties was a separate decision from that of the 1st respondent; that in any event the decision of 8th March, 2011, by the 2nd respondent to issue the title over the property in favour of 1st and 2nd interested parties was not caught up by limitation of time; that the learned Judge further misdirected himself as there was also an order for mandamus sought which was not subject to the time limit; that the Judge ought to have considered that the caution lodged on the property by the 1st appellant was removed during pendency of a suit in the High Court and without according the 1st appellant a hearing before removing it.
14. Counsel went on to say that the decree issued by the 1st respondent was a nullity which can be struck out at any time; that the Judge failed to take into account and to apply the principles for the grant of leave; that the object of seeking leave is to protect public bodies from frivolous claims; that the appellants application raised serious issues none of which were frivolous; that the Judge failed to consider that the appellants' had a legitimate expectation and the 2nd respondent ought to have given notice to the appellants prior to the issuance of title in favour of the 1st and 2nd interested parties. Citing ***Anisminic Ltd v Foreign Compensation Commission, [1969] 1 All ER 208***; ***Kenya National Examinations Council v Republic, Civil Appeal No. 266 of 1996***; ***Director of Pensions v Cockar, [2001] 1 EA 38***; ***Keroche Industries Limited v KRA, and Others, [2007] eKLR*** counsel submitted that the 2nd respondent acted unreasonably which rendered his action *ultra vires* and leave should therefore have been granted.
15. Opposing the appeal learned counsel for the 1st, 2nd and 3rd interested parties, Mr. Kenneth Wilson, holding brief for Mr. C. N. Kihara, submitted that the appellants have failed to disclose that during the pendency of the application giving rise to this appeal, the appellants filed a motion in the High Court on 7th March, 2011, which was then withdrawn. Citing the decision of this Court in ***In the Matter of Mukhonye Community Based Organization, [2014] eKLR***, counsel submitted that the appellants failed to satisfy the learned Judge of the High Court that they have an arguable case in order to be entitled to leave; that the appellants failed to make out a case, *prima facie*, for leave orders for judicial review which are issued on grounds of illegality, procedural impropriety and irrationality. In that regard counsel referred us to the decision of the High Court of Uganda in ***Pastoli v Kabale District Local Government Council and Others, [2008] 2 EA***.
16. According to Mr. Wilson there can be no doubt, having regard to the dates when the decisions of the 1st respondent sought to be quashed were made, that the appellants application for leave was time barred having regard to **rule 2 of Order 53** of the **Civil Procedure Rules** and **Section 9(2)** of the **Law Reform Act** which expressly set a time limit of 6 months; that it was the decision of the 1st respondent that led to the decision of the 2nd respondent.
17. Kenneth Wilson holding brief for C. N. Kihara, Counsel for the 3rd, 4th and 5th interested parties, further submitted that learned Judge correctly took the view that the remedy for a party aggrieved by the decree issued by the 1st respondent in **SPMCC 422 of 2010**, Murang'a, following a consent order would have been to apply to set it aside; that it was within the mandate of the 1st respondent to enter a consent and there was no basis for contending that the 1st respondent acted *ultra vires*.
18. In his brief reply, counsel reiterated that the appeal is merited and that application was not time barred in respect of some of the decisions of the 1st and 2nd respondents sought to be challenged.

Our Decision

19. We have considered the appeal and the submissions by learned counsel. The matter of granting leave to apply for orders of mandamus, prohibition and certiorari under rule 2 of **Order 53** of the **Civil Procedure Rules** is a matter of discretion of the Judge in chambers before whom such application is made. For us, as an appellate court, to interfere with the exercise of that discretion, it must be demonstrated that the exercise of that discretion is clearly wrong on account of misdirection on the part of the Judge; or that the Judge acted on extraneous matters or failed to taken into account matters that he should have taken into account. The principle is well articulated in the old and celebrated decision of this Court in **Mbogo & Another – v- Shah, [1968] EA 93**, where it was held that:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”

20. Although the appellants set out 16 grounds of appeal in their memorandum of appeal, the ground urged before us by counsel for the appellants during the hearing of the appeal was that the learned Judge erred in refusing to grant leave on the basis that the application was time barred. Related to that was the complaint that the learned Judge of the High Court was wrong to treat the decisions of the 1st respondent and the 2nd respondent that were the subject of the application for leave as one decision. It was also the appellants’ case that the learned Judge failed to appreciate that the application for leave to apply for orders for prohibition and mandamus was not subject to the time limit of 6 months prescribed in relation to the application for an order of certiorari.

21. **Order 53 rule 2** of the **Civil Procedure Rules** provides that:

“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.”

22. The matters in respect of which the appellants sought leave of the court to apply for judicial review as appearing on the face of the appellants application before the High Court are: decree of the 1st respondent made on 30th December, 2010; decision of the 2nd respondent made on 15th October, 2010, removing the caution over the property; decision of the 2nd respondent made on 8th March, 2011, to issue title to the 1st and 2nd interested parties. The application for leave before is dated 18th July 2011 and was presented to the High Court on 19th July, 2011. It is plain to see that as regards the decree made on 30th December, 2010, and the decision of the 2nd respondent made on 15th October, 2010, the application for leave was undoubtedly made after the expiry of the 6 months window provided under **Order 53 rule 2** of the **Civil Procedure Rules**. In that regard the learned Judge of the High Court was right when he stated that:

“The court finds that the applicant for leave is time barred AS IT WAS MADE MORE THAN six months after the decision sought to be quashed. I agree with the argument by the interested party that judicial review orders operate within certain confines of specified laws which must be strictly followed. Failure to follow this time limits deprives of the Judicial Review Remedies.”

23. In relation to decision of the 2nd respondent made on 8th March, 2011, to issue title over the

property to the 1st and 2nd interested parties, that action was taken in obedience or compliance with a court order made on 30th December, 2010. It is action that cannot be isolated from the order of the court with respect to which the 2nd respondent had a duty to give effect. The learned Judge of the High Court cannot, therefore, be faulted for treating as he did, the order of the court directing the registration of the 1st and 2nd interested parties as proprietors of the property and the action of the 2nd respondent, in giving effect to that order as part of the same transaction. We agree with the learned Judge when he stated in his ruling that “*the decision of the Land Registrar Murang’a was the execution of the decision of the Principal Magistrate’s court Murang’a*” which must be seen as part of the same transaction.

24. The appellants’ further grievance was that the learned Judge failed to appreciate that the application for leave to apply for orders for prohibition and mandamus was not subject to the time limit of 6 months prescribed in relation to application for an order of certiorari. The order of prohibition, leave for which was sought, was to restrain the 2nd respondent from effecting further entries on the register in relation to the property. The order of mandamus, leave of which was sought, was to compel the 2nd respondent to investigate reasons for the removal of the caution lodged by the 1st appellant over the property.
25. In our view, the outcome of the application for leave in relation to the orders of mandamus and prohibition was predicated upon the outcome of the application of leave for the orders of certiorari. Having taken the view, correctly in our view, that a case had not been made out for leave to apply for orders of certiorari to quash the decree of the 1st respondent, the substratum on which leave to apply for prohibition and mandamus was sought disappeared. Having failed to demonstrate, *prima facie*, to the learned Judge of the High Court that the decree was tainted with illegality, irrationality or procedural impropriety there was no basis for the court to grant leave to apply for orders of prohibition and mandamus.
26. For those reasons we are not satisfied that the learned Judge of the High Court misdirected himself in exercising his discretion or that his decision that the appellants failed to establish *prima facie*, a case for leave he is clearly wrong. We accordingly decline the invitation to interfere with the decision of the High Court.
27. For those reasons we dismiss the appeal with costs to the 3rd, 4th and 5th interested parties. The 1st and 2nd respondents who did not participate in the appeal though served shall not be entitled to costs.

Dated and delivered at Nyeri this 18th day of June, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

J. OTIENO ODEK (Prof.)

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/ewm