IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 167 OF 2009

BETWEEN

HENRY NJAGI MURUARIUA …….…… APPELLANT

AND

A.O. OKELLO, DISTRICT COMMISSIONER

MBEERE DISTRICT ……..…… 1ST RESPONDENT

GUTU NTHARANO ……..……..….. 2ND RESPONDENT

(An appeal against the Ruling of the High Court of Kenya at Embu

(Karanja, J.) delivered on 3rd June, 2009

in

H.C Misc. Applic. No. 18 of 2008 (JR)

****

JUDGMENT OF THE COURT

1. On 17th April 2008, the appellant filed a Notice of Motion dated 11th April, 2008 seeking an order of *certiorari* under the provisions of ***Order LIII Rule 3 (1)*** of the ***Civil Procedure Rules*** and ***Sections 8 & 9*** of the ***Law Reform Act***, Cap 26, Laws of Kenya. The face of the application contained the following phrase: TAKE NOTICE that pursuant to leave granted by this Honourable Court on 14th April 2008, this Court shall be moved on the 7th day of July, 2009 at 8.00 o'clock in the forenoon or so soon thereafter by counsel for Henry Njagi Muruariua for orders that this Honourable Court be pleased to issue an order of *certiorari* to remove into the High Court for purposes of its being quashed the order of Mr. A.O. Okello, Mbeere District Commissioner in Land Adjudication Appeal Case No. 228 of 2000 dated 22nd September, 2006.

2. When the aforementioned Notice of Motion dated 11th April, 2008 came up for hearing before the High Court (Karanja, *J. as she then was*), the learned Judge dismissed the Motion without considering the merits holding that the Motion was premised on an order that was not supported by law; for the Motion to

succeed the same must be premised on a lawful order granting leave.

3. To appreciate the tenet of the ruling dated 3rd July, 2009 by the learned Judge, we hereby reproduce the salient aspects of the ruling where the Judge expressed herself as follows:-

"The ex-parte applicant herein filed the application for leave to apply for an order of certiorari against the decision of District Commissioner Mbeere District in Land Adjudication Appeal Case No. 228 of 2000 dated 22/9/2006 on 14th March 2008. That was almost 2 years after the said decision was made. I have keenly perused this file. I do not see any application seeking an enlargement of time to enable the ex-parte applicant file the said application for leave. …Even if enlargement of the time had been sought (which does not appear to be the case), it is trite law now that the court has no jurisdiction to enlarge time within which to file an application for leave in cases of certiorari. The leave relied on in this case was therefore issued per incuriam. I appreciate the fact that the said leave was not set aside or even challenged by counsel for the respondents. I am also alive to the fact that it was granted by a judge of contemporaneous jurisdiction as myself. I am not nonetheless sitting on appeal against that order. I believe firmly however that I should not grant the orders sought in the main notice of motion which is premised on an order that is not supported by law. For the notice of motion dated 17th April 2008 to succeed, the same must be premised on a lawful order granting leave. The law requires that such an order be made following an application for leave filed within 6 months since the decision challenged was made. This requirement is of material importance and non-compliance will render all other subsequent orders emanating therefrom voidable. Accordingly, my finding is that the notice of motion dated 17th April 2008 does not have the support of the law. I am unable to even consider the merits or otherwise of the same and order that the same be and is hereby dismissed with costs to the 2nd respondent."

4. Aggrieved by the dismissal , the appellant lodged this appeal citing the following grounds in a memorandum of appeal lodged on 15th July, 2009:

i. ***The learned Judge erred in finding that the leave to apply for an order of certiorari should not have been granted to the ex-parte applicant.***

ii. ***The learned Judge erred in finding that no order for extension of time to apply for leave had been made and no leave had been obtained.***

iii. ***The learned Judge erred in rejecting an order of certiorari granting the leave without any application by the respondent or any other person while the same had been granted.***

iv. ***The learned Judge erred in ignoring the merits of the application and making no order or decision as to the decision of the determination of the appeal by the District Commissioner Mbeere.***

5. At the hearing of the appeal, the appellant was represented by learned counsel, Mr. D. M. Kamanda while the 1st respondent was represented for State Counsel, Mr. Makori Okello and the 2nd respondent by learned counsel, Mr. Okwaro Muyodi.

6. Counsel for the appellant relied on the grounds of appeal as set out in the memorandum of appeal. Counsel in elaborating the grounds of appeal, submitted that the ex-parte applicant had applied and sought leave to file the Notice of Motion seeking the order of *certiorari*; that the application for leave was heard and leave granted by the Hon. Justice Khaminwa; that the Hon. Justice Khaminwa in granting leave was aware that the application for leave was made out of the six month period from the date when the decision of the District Commissioner sought to be quashed was made. Counsel submitted that the learned Judge (W. Karanja, J.) erred in dismissing the Notice of Motion dated 14th April, 2008 on her own motion without any application having been made by either party to the suit; the learned Judge (W. Karanja, J.) erred and misdirected herself in sitting on appeal against an order or decision made by a Judge/court of coordinate jurisdiction; the Judge erred in dismissing the Notice of Motion on

technicalities and ignored the merits of the application; that a court of law should strive to deliver substantive and not technical justice. He argued that the learned Judge erred in failing to appreciate that once leave to file the Notice of Motion had been granted, a court of coordinate jurisdiction had no jurisdiction to question the leave as granted. If any party was dissatisfied with the leave as granted, the remedy available was either to lodge an appeal to the Court of Appeal or an application seeking review of the order granting the leave. In the instant case, there was no application for review before the learned Judge who erred in delivering a ruling on an issue that was not raised and canvassed; the learned Judge determined the issue *suo moto* without prompting and hearing of the parties.

7. Counsel for the 1st respondent in opposing the appeal , urged this Court to find that the ruling by the High Court (Karanja J.) was sound in law and fact. It was submitted that ***Section 9 (3)*** of the ***Law Reform Act*** as read with ***Order 53 rule 2*** of the ***Civil Procedure Rules*** prescribes a specific time of six months within which an application for leave to apply for an order of *certiorari* must be made. The *ex-parte* applicant who is the appellant in this matter never sought leave within the mandatory and requisite six months; even if leave was granted by the Honourable Lady Justice Khaminwa, from the word go, the purported application and the leave so granted was statute barred and a nullity. ***Order 50 rule 6*** of the ***Civil Procedure Rules*** is a general provision that should not be used against the specific provision in ***Order 53 rule 2*** which fixes the six month limit for an application for an order of *certiorari*. Counsel cited the case of ***Benjamin Leonard Mafay – v- United Africa Company Limited (UK) 1962 AC 152*** in support of the submission tha the leave granted by Khaminwa J. was void. Counsel quoting from the ***Benjamin case supra*** submitted that –

"if an act is void, then in law it is a nullity, it is not only bad, but incurably bad…and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

8. Counsel posited the question whether the High Court had jurisdiction to extend the six month time limit specified in ***Order 53 rule 2*** of the ***Civil Procedure Rules***. It was submitted that Lady Justice Khaminwa erred in granting leave and extending the six month time limit. Counsel citing the case of ***Justus Makahnde Itoli & another – v- Loice Alili Omboto & 3 others (2013) eKLR*** submitted that courts have no power to extend the six month time limit for seeking leave to apply for an order of *certiorari*. In ***Justus Makahnde Itoli & another – vs- Loice Alili Omboto & 3 others (supra)*** a preliminary objection was raised during the *interpartes* hearing of the Notice of Motion. The preliminary objection was challenging the *exparte* leave which had been granted. The High Court in the said case upheld the preliminary objection and set aside the leave granted. It was submitted that the learned Judge (Karanja J.) was right in the ruling she delivered; she exercised the court's inherent jurisdiction to prevent a miscarriage of justice from taking place.

9. Counsel for the 2nd respondent in opposing the appeal, associated himself with the submissions by counsel for the 1st respondent. He emphasized that the purported leave granted to the appellant was a nullity and the learned Judge was right in law in invoking her inherent jurisdiction upon discovering that leave was not properly granted. A court cannot shut its eyes to a nullity; courts must decide matters based on facts and law and if the facts disclose a nullity, then the court is correct in applying the law to remedy an action that is a nullity. Counsel submitted that the court has jurisdiction to act *suo moto* to remedy an act that is a nullity. In the instant case, there was no point for the Judge to consider the merits of application that was fatally defective and founded on a nullity.

10. We have considered submissions by counsel for the appellant and the respondents. There are two critical issues in this appeal. First, is whether the learned Judge (Karanja, J.) erred in law in proceeding *suo moto* to make and deliver a ruling on an issue that was neither pleaded nor canvassed before her; second, whether the learned Judge had jurisdiction to determine the legality or otherwise of the leave that had been granted by Hon. Lady Justice Khaminwa - a judge of competent and coordinate jurisdiction.

11. In the instant case, it is not in dispute that the learned Judge (Karanja, J.) proceeded *suo moto* in questioning and determining the legality of the leave that had been granted by the Hon. Lady Justice Khaminwa. Before the Judge, there was no application to set aside or review the leave already granted.

In the case of ***Galaxy Paints Co. Ltd. – vs - Falcon Guards Ltd.- EALR (2000)2 EA 385,*** it was stated that the issues for determination in a suit generally flow from the pleadings and a court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination. Unless expressly permitted by an enabling statute or rule or principle of law, when a court acts *suo moto* (and without inviting the parties to make submissions on the issue) the right to be heard which is a principle of natural justice is violated. A right to a hearing is a fundamental right and as this Court stated in the case of ***Richard Ncharpi Leiyagu -vs- Independent Electoral and Boundaries Commission and 2 others***, ***Nyeri C.A. No. 18 of 2013,***

"***The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law".***

12. In the instant case, the record shows that the learned Judge (Karanja, J.) did not accord the parties an opportunity to be heard on the issue of legality or otherwise of the leave that had been granted by Khaminwa J. This Court in ***Njuguna – v- Minister for Agriculture (2000) EA 184*** observed that the proper procedure for challenging leave which has already been granted is to apply under the inherent jurisdiction of the Court, to the Judge who granted leave to set aside the orders made. It is our view that an alternative avenue would be to either raise a preliminary objection in the hearing of the substantive Notice of Motion or lodge an appeal before this Court to challenge the validity of the leave already granted if the issue has been considered on merit by the High Court.

13. In the present case, the face of the Notice of Motion dated 14th April, 2009 clearly stipulates that leave was granted on 14th April, 2008. No application challenging the leave that had already been granted was filed before the learned Judge. Hierarchy of courts must be observed and a Judge of coordinate jurisdiction cannot set aside a decision of another Judge. Further, a Judge of coordinate jurisdiction cannot without hearing the parties *suo moto* set aside leave that has already been granted or exercise the powers of an appellate court. In the present case, we observe that the learned Judge was alive to the fact that she was dealing with the issue of leave that may well have been considered by a Judge of competent and coordinate jurisdiction. Being alive to this fact does not vest the Judge with jurisdiction to exercise the powers of an appellate court or set aside orders of a Judge of coordinate jurisdiction or the power to handle the issue *suo moto* in disregard to the rules of natural justice. Even if Lady Justice Khaminwa erred in law (of which we make no determination on this), the proper procedure would have been for the learned Judge (Karanja, J.) to invite the parties to make submissions on the legality or otherwise of the leave already granted. There is need for procedural certainty in litigation. It has often times been stated that rules of procedure are the handmaidens of justice, the procedure enunciated in the case of ***Njuguna – v- Minister for Agriculture (2000) EA 184*** for setting aside leave that has already been granted should be followed.

We are of the view that the learned Judge erred in law in sitting on appeal against a decision of a Judge of competent and coordinate jurisdiction. The learned Judge further erred in proceeding *suo moto* and violating the rule of natural justice; the inherent powers of a court does not oust the rules of natural justice that require all parties to be heard.

14. Counsel for the respondents submitted that the leave granted by Lady Justice Khaminwa was a nullity from the beginning and that there is no power vested in the High Court to extend the six month time limit in ***Order 53 rule 2*** of the ***Civil Procedure Rules*** for making an application for an order of *certiorari*. This submission ought to have been made at the High Court in a hearing to determine the legality or otherwise of the leave already granted – as already stated, the parties were never given an opportunity to make such submissions.

15. For the reasons stated above, we find that this appeal has merit and we hereby set aside the ruling delivered by the High Court on 3rd June, 2009 and all consequential orders ensuing therefrom. It is our considered view that the procedure stated in the case of ***Njuguna – v- Minister for Agriculture (supra***) or the procedure adopted in ***Justus Makahnde Itoli & another – v- Loice Alili Omboto & 3 (supra)*** should be followed and all parties must be heard. Each party is to bear its/his own costs in this appeal.

Dated and delivered at Nyeri this 16th day of December, 2014.

ALNASHIR VISRAM

…….

JUDGE OF APPEAL

MARTHA KOOME

……..

JUDGE OF APPEAL

J. OTIENO-ODEK

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR