



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 67 OF 1992

MUNICIPAL COUNCIL OF MOMBASA.....APPLICANT

VERSUS

ALIBHAI KANJI & OTHERS.....RESPONDENT

EX - PARTE LADHA

RULING

There is here an application for judicial review seeking orders of *certiorari* and *mandamus* under order LIII of the Civil Procedure Rules.

Basically, it is alleged that the property No 302 section V/MN registered in the name of one Alibhai Kanji should not have been sold by an auctioneer who purported to execute a decree issued Magistrate's Court because the purported service of the summons to enter appearance in the case had not been effected in the manner prescribed by the Rules, and the decree therefore void. It is pertinent to recall that the suit had been filed by the Municipal Council of Mombasa to recover the outstanding arrears of rates in respect of the same plot.

The applicants are the sons of the late Alibhai Kanji. In paragraph 8(i) of their statement they averred as follows:

“That the summons was served allegedly on the late Alibhai Kanji who died on the 2nd of March 1994 at his residence on the 16th of August 1991 when he purportedly refused to sign for the service of the summons.”

In some ways the issues raised by this application are similar to the High Court Misc Civil Case No 69 of 1990 where it was held that where it is proved that there was a defective or no service of the process but which followed by an “unseemly hurried court proceedings and orders”, the High Court would invoke its jurisdiction of the judicial review and make orders of *certiorari*, *mandamus* or prohibition in favour of the aggrieved party. But one has to hasten to say here that the Court's duty on such an application as the instant one will only confine itself to the question of legality ie whether the inferior court or tribunal committed an error of law or committed a breach of natural justice or reached a decision which no reasonable tribunal could have reached.

It must always be remembered that the remedy of *certiorari* is discretionary; and is available to the High Court for the purpose of ensuring that the lower court do not abuse or exceed their powers and

thereby make irregular and oppressive orders.

It is obvious that if there was no requisite service of summons but instead a deliberately false return by process server, the subsequent proceedings which presupposed that there was proper service must have been a nullity: the orders which resulted from such proceedings would be indefensible and have to be quashed. Mr Gikandi has raised a preliminary point whose thrust is that the applicant did not issue notice nor did he obtain the leave of court both of which are mandatory requirements under the Rules before the Rules in LN 164 of 1992 purportedly abolished them.

It is common ground that the original court file and record are irretrievably lost and thus, Mr Gikandi's arguments seeking to discredit the applicant's advocates can only be of a conjectural nature. But in reply Mr Gautama contended that there was no basis for the submission made by Mr Gikandi. It is true that Mr Gikandi did not point out the basis for his submission. I have even been shown a copy of the order for leave. On what basis then can the preliminary objection be upheld? Recently my attention was drawn to the case of *Kenneth Stanley Njindo Matiba v Attorney General* HCCC Application No 790 of 1993 in which a bench of three judges refused to strike out an application for *certiorari* for want of notice and/or leave. They concluded that if leave had been sought it would almost invariably have been granted. Likewise, I hold that if the requisite leave had, by some inadvertence, not been sought, then I should give it.

For reasons which I have adverted to it is clear that the application itself relates to fundamental issues which must be determined on merits.

I disallow the objection. I view it as of a time wasting tactic. I give costs to the applicant.

Dated and Delivered at Mombasa this 23rd day of June 1994.

I.C.C.WAMBILYANGAH

JUDGE



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