



**Republic v Chief Magistrate, Milimani Commercial Courts & 4 others; Owiti
t/a Cousin Motor Works & 4 others (Interested Parties); Kagau (Suing as the
Administrator of Eustace Kagau Kangwere (Deceased)) & 2 others (Exparte) (Application
E101 of 2023) [2024] KEHC 10279 (KLR) (Judicial Review) (16 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10279 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E101 OF 2023**

**J NGAAH, J
AUGUST 16, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**THE CHIEF MAGISTRATE, MILIMANI COMMERCIAL COURTS 1ST
RESPONDENT**

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE COUNTY LAND REGISTRAR, EMBU 4TH RESPONDENT

THE COUNTY GOVERNMENT OF EMBU 5TH RESPONDENT

AND

**PATRICK ODUNDO OWITI T/A COUSIN MOTOR WORKS INTERESTED
PARTY**

NEW EMBU UHURU GARAGE LIMITED INTERESTED PARTY

AHAMED ALI GEDI INTERESTED PARTY

**RAPHAEL MURIITHI NYAMU, WALTER NYAMU KARIUKI AND VICTOR
MWAI KARIUKI (Suing as Administrators of the Estate of Joseph
Kariuki Nyamu (Deceased)) INTERESTED PARTY**

**JOYCE WANJIKU NJOKA, MARGARET KAIRU NJOKA, GRACE
KARAU NJOKA AND TERESIA GATURI NJOKA (Suing as**



**ADMINISTRATORS OF THE ESTATE OF JOSPHAT NJOKA MBIRIAI
(DECEASED) INTERESTED PARTY**

AND

**MOFFAT NYAGA KAGAU (SUING AS THE ADMINISTRATOR OF EUSTACE
KAGAU KANGWERE (DECEASED)) EXPARTE**

MARGARET RACHEL MUTHONI MBOGO EXPARTE

**ARTHUR MUNENE MBOGO (SUING AS ADMINISTRATORS OF THE
ESTATE OF GERSHON JOHN MBOGO (DECEASED)) EXPARTE**

RULING

1. By an application dated 25 July 2023, the applicants have sought for leave from this Honourable Court to file a substantive motion for the judicial review orders of certiorari and prohibition. The prayers for leave have been framed as follows:

- “1. Spent.
2. That the Applicant be granted Leave to commence judicial review proceedings for an Order(s) of Certiorari, to quash the orders made on 19.8.2019 by Honourable I. Orange (Mr) Senior Resident Magistrate sitting at the Chief Magistrate’s Court at Milimani Commercial Courts made in execution of a decree in Civil Suit No.8372/2018 to the effect that an order of inhibition and subsequent sale by public auction of all those parcels of land known as Embu/ Township/269, Embu /Township/270,Embu/Township/347 and Embu/Township/348;
3. That the Applicants be granted Leave to commence judicial review proceedings for an Order(s) of Certiorari to quash the decree and/or the ex parte judgment passed on 22.1.2019 by Honourable I. Orange (Mr) Senior Resident Magistrate albeit at the time identifying himself and/or signing off documents as Honourable K.I Orange(Mr) Senior Resident Magistrate when he entered an ex parte default judgment in favour of the 1st interested party herein against the 2nd interested party herein at the Chief Magistrate’s Court at Milimani Commercial Courts Civil Suit No.8372/2018;
4. That the Applicants be granted Leave to commence judicial review proceedings for an Order(s) of Certiorari to quash the orders made on 30.4.2021 by Honourable D.W Mburu (Mr) Senior Principal Magistrate at Milimani Commercial Courts Civil Suit No.8372/2018 as well as the alleged sale by public auction allegedly conducted on 20.1.2020.
5. That the Applicant be granted Leave to commence judicial review proceedings for an Order of Prohibition to prohibit the Respondents from in any manner whatsoever taking any step to have any and/or all those parcels of land known as Embu/township/269,embu/township/270,Embu/Townshi P/347 and Embu/Township/348 have their leasehold interests whether renewed



or otherwise registered in the name of the 3rd interested party and/or his nominees, assigns and/or anyone claiming through him.

6. That the leave granted do operate as stay of enforcement of the vesting of the leasehold interests in all those properties known as Embu /township/269, Embu /township/270, Embu /Township/347 and Embu /Township/348 in the name of the 3rd interested party and/or his nominees.
2. The application is expressed to be brought under Article 165(6) of *the Constitution*; section 8(2) of the *Law Reform Act*; section 7 of the *Fair Administrative Action Act*, 2015; section 3A of the *Civil Procedure Act*; and, Order 53 of the Civil Procedure Rules. The application is based in a statutory statement dated 25 July 2023 and an affidavit verifying the facts relied upon sworn on even date by Margaret Rachel Muthoni.
3. According to the applicant, on 19 August 2019, Honourable I. Orenge (Mr) a Senior Resident Magistrate sitting at the Chief Magistrate's Court at Milimani Commercial Courts made certain orders in execution of a decree obtained in Civil Suit No.8372/2018 to the effect that an order of inhibition be issued and a sale by public auction does proceed of all those parcels of land known as Embu/ Township/269, Embu/ Township/270, Embu/ Township/347 and Embu/ Township/348.
4. The decree in issue had been issued by the same magistrate on 22 January 2019. The decree was extracted from a judgment obtained ex parte after the defendant defaulted in entering appearance and filing defence. The judgment had been entered in favour of Patrick Odundo Owiti t/a Cousin Motor Works, the 1st interested party in this application against New Embu Uhuru Garage Limited which is named as the 2nd interested party in these proceedings.
5. The applicant's case is that by dint of Section 7(1)(d) of the Magistrate's Courts Act 2015, the pecuniary jurisdictional limit in civil matters for a Senior Resident Magistrate is Kshs.7,000,000/= and, therefore, the jurisdiction of Honourable K.I Orenge (Mr), being a Senior Resident Magistrate at the time he entered the judgment and issued the decree was limited to Kshs.7,000,000/=. The value of the subject matter in the suit in which the decree was issued, on the other hand, was beyond this amount.
6. Nonetheless, a public auction for the sale of the aforementioned parcels of land, in execution of the decree, was conducted on 20 January 2020 where the 3rd interested party was declared the highest bidder. As at the time of filing the application, the 3rd interested party was in the processing of registering the parcels of land in his own name.
7. The applicants are aggrieved by the decree and the orders of sale because they are the registered proprietors of the parcels of land in issue yet they were not parties Milimani Chief Magistrate's Court Civil Suit No. 8372/2018 in which the decree was and the order for sale of their properties were made.
8. In short, it is the applicants' case that the decree and the order for sale were made without jurisdiction and, therefore, this Honourable Court is enjoined to quash the same. As far as the order for certiorari is concerned, the applicants contend they cannot be barred by Order 53 of the Civil Procedure Rules which provides for six months as the imputation period within which the application for certiorari ought to have been filed since the orders sought to be quashed are nullities ab initio.
9. In response to the application the 1st and 3rd respondents filed amended grounds of opposition dated 11 December 2023 in which they have contended that the application is premature, incompetent, and an abuse of the Court process. The application is also said to be fatally defective as it offends the mandatory provisions of Section 9(2) of the *Fair Administrative Action Act*, 2015; Order 53 Rule 2 of the Civil



- Procedure Rules and, Article 160(5) of the Constitution as read together with Section 6 of the Judicature Act.
10. The 2nd respondent also filed grounds of opposition dated 9 October 2023 in which it urged that the instant application is misconceived, unnecessary, unwarranted and an abuse of the court process. The application as against the 2nd respondent is said to be defective and bad in law as it offends the provisions of Article 67 (2) (c) of the Constitution and Section 5 (2)(b) of the National Land Commission Act.
 11. It is the 2nd respondent's case that the National land Commission is not the custodian of land documents and records and, further, that it does not register any registrable interests with regard to suit properties. The 2nd respondent has relied on the Supreme Court case In the Matter of the National Land Commission [2015] eKLR where the court determined the issue on custody of land documents and records and registration of interests in land.
 12. The 2nd respondent argues that there is no cause of action against it to warrant the orders sought by the applicants and, in any event, the orders sought against it are incapable of being enforced.
 13. The 1st interested party filed a preliminary objection dated 20 September 2023 together with a replying affidavit sworn on 27 September by Patrick Odundo Owiti. In the preliminary objection, the 1st interested party has urged that the application offends Section 9 (3) of the Law Reform Act and that the application as drawn contravenes Order 53 Rule 2 of the Civil Procedure Rules, 2010 because the application has been made outside the limitation period. It is urged that the application is fatally defective and incompetent in both form and substance and that it is scandalous, frivolous, vexatious and an abuse of the court process.
 14. In his replying affidavit, Mr. Odundo has sworn that the applicants lack locus standi to bring the intended suit because the properties in issue were owned by the shareholders in trust for the New Embu Company Limited and the same do not belong to the respective estates of the applicants. It is also the 1st interested party's case that the applicants have failed to disclose to the court that they are pursuing other proceedings over the same subject matter and that they have issued notices to appeal against the impugned orders.
 15. According to Odundo, he traded as Cousins Motor Works and, in that capacity, sold and delivered goods worth a sum of Kshs. 7,267, 400.00/= to New Embu Uhuru Garage Limited. The goods were not paid for as a result of which he instituted Civil suit No. 8372 of 2018 at the Chief Magistrates Court, Millimani Commercial Court. Judgment in default of defence was entered by the Honourable I. Orange on 22 January 2019.
 16. In execution of the judgment, Cousins Motor Works filed an application dated 1 August 2019, seeking to attach and sell properties of New Embu Uhuru Garage Limited. The application was allowed on 19 August, 2019 and the properties were advertised for sale through auction on 8 October 2019. However, the judgement debtor, New Embu Uhuru Garage Limited, proposed to settle the amount on 3 October, 2019 but failed to do so, after which it filed an application on 25 November, 2019 seeking stay of execution of a decree. The application was, however, denied.
 17. Objection proceedings seeking to stop the intended sale dated 15 January 2020 were filed by persons purporting to be legal representatives of the judgment debtor. The auction, however, proceeded on 20 January 2020. According to 1st interested party, at the time of filing his suit at the Chief Magistrates Court in Milimani, the pecuniary limit for the Chief Magistrate's Court was Kenya Shillings Twenty Million and he had no hand in the allocation of the matter to Hon. Orange.



18. The application to set aside the judgment was heard and determined by Honourable D.W Mburu(Mr) Senior Principal Magistrate, who dismissed the application. The applicants were granted conditional stay, of execution, by this Honourable Court in in High Court Commercial Appeal No. 005 of 2020. The applicants failed to comply with the conditions set for the stay.
19. Again, the objectors are said to have also filed another application dated 23 October 2020 seeking to review or vary the High Court orders issued on 1 October 2020 but their application was dismissed on 27 May 2021. The applicants went ahead to file another application dated 21 November 2020 which was dismissed with costs on 30 April 2021 and subsequently they appealed these rulings vide HCCA No. E242 of 2021. The applicants also sought to review the ruling of 30 April 2021 by Honourable D.W Mburu (Mr) Senior Principal Magistrate through their application dated 6 October 2022.
20. It is the 1st interested party's case is that the judgement debtor does not deny being indebted to him and that despite consenting to repay the debt, it has failed to do so which has led to endless litigation. The 1st interested party also argues that the purchaser of the properties has been kept from enjoying quiet possession of the property which he purchased legally.
21. The 3rd interested party also filed a replying affidavit sworn by Ahamed Ali Gedi on 8 December 2023. In the Affidavit Mr Ali deposes that the application before this Court is grossly defective, time barred, bad in law and without merit. The deponent reiterates that during a public auction carried out by Anfield Auctioneers on 20 January 2020 with respect to the execution of the decree issued on 22 January 2019, he emerged as the highest bidder and was issued with a certificate of sale with respect to the four parcels of land in issue.
22. The applicants, it is urged, have since kept the 3rd interested party from benefiting from the said properties. Although the 3rd interested party was not party to Milimani Civil Suit No.4208 of 2018, he filed an application dated 4 December 2020 where he sought several orders including an order seeking the 1st respondent to declare the sale of the said parcels of land through a public auction absolute. This application was allowed on 30 April 2021 by Hon.D.W Mburu (Mr.) SPM.
23. The applicants' application dated 6 October 2022 is said to be pending determination before Hon. Cosmas Maundu. The 3rd interested party's argument is that the applicants should not be granted audience by this Court as they have failed to pay costs after suing him in an appeal that was dismissed.
24. At this stage of the proceedings, a judicial review court would not delve into the merits of the applicant's case in the event leave is granted. All the court enquires in an application for leave is whether, based upon the material before it, the applicants' case would be arguable upon further interrogation to such a degree that the court would consider granting any of the reliefs of judicial review.
25. According to Lord Diplock, in IRC V National Federation of Self-Employed and Small Businesses Ltd (1982) 617, (1981) 2 ALL ER 93 the following approach ought to be adopted in considering an application for leave:

“ If, on a quick perusal of the material then available, the court thinks the application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.”

Thus, on this basis, the applicant only has to show not that it is, but that the case might turn out to be, an arguable case.



26. One thing that has come out clearly in response of the applicant's application is that this application is not the applicants' first attempt to impeach the decree and subsequent orders made in the magistrates' court civil case no. 8372 of 2018. They have, for instance, attempted to impeach the inhibition and sale of the properties in issue by way of objection proceedings which apparently, were not successful. They appealed to this Honourable Court in High Court Civil Appeal No. 005 of 2020. I gather this information from copies of rulings delivered by the magistrates court in application No. 8372 of 2018 and this Honourable Court in Civil Appeal No. 005 of 2020.
27. In the magistrates' court's ruling rendered on 30 April 2021, the learned magistrate noted as follows:
- “ 27. From documents filed in support of the application, it is clear that the purchaser was the successful bidder and purchaser of suit properties in a public auction carried out on 20th January, 2020 in execution of the decree herein. There have been various attempts by the objectors to frustrate and delay the realization of the sale. The objectors initially filed an application before this court seeking to stop the sale of the suit properties but as observed earlier in this ruling the said application would appear to have been overtaken by events as the auction was conducted on 20th January, 2020 and the suit properties were sold to the applicant.
28. The objectors then moved to the High Court under HCCA No. 005 of 2020 challenging the auction and seeking among other things to stay the transfer of the suit property to the purchaser. The High Court gave conditional stay of the transfer requiring the objectors deposit the sum of Kshs. 4,000,000/= as security within thirty days of the order. The objectors did not comply with the said order.”

And in the ruling delivered by this Honourable Court on 1 October, 2020, the court noted as follows:

- “In the present case, it was not disputed that the execution of the decree has already taken place and the suit properties sold at an auction as shown in the copies of certificates of sale attached as respondent's annexures P.O.O. 1(a) –(d) to the replying affidavit. My finding is that the respondent established, to the satisfaction of this court that the suit properties were sold to one Mr. Ahmed Ali Gedi on 20th January, 2020. I therefore find that in the circumstances of this case the prayer for stay pending appeal has been overtaken by events.”
28. In a subsequent ruling delivered on 27 May 2021, in an application by the applicants in the instant application (in the same appeal), the court noted thus:
- “The background of the application is that through an earlier application dated 20th January 2020, the applicants moved this court for orders of stay of execution of the decree dated 22nd January 2019. After considering the parties' arguments, the court issued orders to restrain the decree holder from transferring the ownership of the suit properties on condition that the objectors deposit the sum of Kshs. 4 million in a joint interest earning account. As a consequence of these orders, the applicant (s) filed the present application urging the court to review, vary, set aside the said orders.”
29. All these rulings go to show that there are not only alternative procedures for challenging the impugned decree and subsequent orders or processes in the in the magistrates' court civil case no. 8372 of 2018 but also that the applicants have embraced those procedures for appropriate remedies. That being the



case, judicial review remedies would not be available to them. I am minded that the existence of an alternative remedy is never enough to oust jurisdiction in judicial review (see *Leech versus Deputy Governor of Parkhurst Prison* (1988) AC 533 per Lord Bridge at 562D). However, it has been held in *R versus Inland Revenue Commissioners, ex p Preston* (1985) AC 835 that:

“A remedy by way of judicial review is not to be made available where an alternative remedy exists...Judicial review is a collateral challenge: it is not an appeal. Where parliament has provided by statute appeal procedures, as in taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision...”

30. Addressing the same issue in *R versus Peterkin, ex p Soni* (1972) Imm AR 253 Lord Widgery CJ had this to say:

“Where Parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the applicant complains this court should in my judgement as a rule allow the appellate machinery to take its course. The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice where no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere.”

31. The Court of Appeal held in *Speaker of the National Assembly v. Karume, Civil Application No. NAI 92 OF 1992* that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.

32. It is apparent that the applicants have invoked the procedures available under the Civil Procedure Rules and instituted objection proceedings objecting to the sale by auction of what they consider to be their properties and invoked the provisions of the *Civil Procedure Act* to file an appeal against the magistrates court’s decision on the objection proceedings. It is clear from the documents filed by the respondents and interested parties that the impugned decree has been challenged by way of an application for review and appeal. In these circumstances, it is an abuse of due process of this Honourable Court for the applicant to seek to institute judicial review reliefs against the same decree or processes that have not only been challenged elsewhere but also upon which determinations have been made.

33. The other reason why the applicant’s application must fail is that they suppressed these material facts from the court. They have not disclosed that the impugned decree has been challenged elsewhere and that they filed objection proceedings objecting to the execution of the decree only that their attempts in this regard failed. This information only came out when the respondents and interested parties filed their response to the applicants’ application for leave. It has been held that in an application for leave for judicial review, *uberrimae fides* is required and leave will not be granted, or may be later set aside, if there has been deliberate misrepresentation or concealment of material facts in the applicant’s affidavit or affidavits.

34. In *R versus Kensington Income Tax Commissioner, ex parte Princess Edmond De Polignac* (1917) 1KB 495, Viscount LJ addressed this point and stated as follows:

“Where an *ex parte* application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead



the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit.”

35. Having chosen to suppress facts material to their application, the applicant do not deserve leave to file a substantive suit for judicial review reliefs. For reasons I have given, the applicants' application is dismissed with costs to the respondents and interested parties. It is so ordered.

SIGNED, DATED AND POSTED ON THE CTS ON 16 AUGUST 2024

Ngaah Jairus

JUDGE

