



Kihingo Village (Waridi Gardens) Management Limited v Attorney General & 2 others (Judicial Review E033 of 2023) [2023] KEHC 17923 (KLR) (Judicial Review) (24 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17923 (KLR)

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

JUDICIAL REVIEW E033 OF 2023

JM CHIGITI, J

MAY 24, 2023

BETWEEN

KIHINGO VILLAGE (WARIDI GARDENS) MANAGEMENT LIMITED APPLICANT

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

THE REGISTRAR OF COMPANIES (BUSINESS REGISTRATION SERVICES) 2ND RESPONDENT

JAMES NDUNGU GETHENJI 3RD RESPONDENT

JUDGMENT

Brief Background

1. The Applicant moved this court through a Notice of Motion Application dated March 15, 2023 – under Article 10, 19, 20, 22, 23, 27, 47 & 50 of the *Constitution; Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*; Sections 3, 4, 7, 8, 11 of the *Fair Administrative Action Act* No 4 of 2015, Section 2 of the *Vexatious Proceedings Act* – for orders that:

1. The matter be certified urgent and the court be heard Ex-Parte in the first instance.
2. Pending the hearing and determination of this Application inter parties a temporary interdict be issued staying the 2nd Respondent's decision dated March 7, 2023 and maintaining the status quo ante prior to March 7, 2023 in accordance with the arbitral award dated July 28, 2016 and adopted as a decree in ELC No 1225 of 2013 Kifaru Investments Ltd & Others v Kihingo Village (Waridi Gardens) Ltd and Kihingo Village (Waridi Gardens) Management Ltd, that



was implemented by the Applicant's majority shareholders at the Special General Meeting held on April 13, 2019

3. The 3rd Respondent be ordered to forthwith produce the company resolution of Kihingo Village (Waridi Gardens) Management One Limited authorising the filing of the complaint dated December 13, 2022 and all past complaints filed by his advocates and file the same in his response to the application.
4. This Honourable Court be pleased to issue urgent directions on the filing of Responses and submissions for the determination of the Application, within 30 days of the date of filing to allow the court of sufficient time to render its determination within 90 days from the date of filing the Application in accordance with Section 8 of the [Fair Administrative Actions Act](#).
5. A Declaration do issue that the decision of the 2nd Respondent dated March 7, 2023 revoking his earlier decision dated January 29, 2021 was unlawful, capricious, unreasonable, procedurally unfair and in breach of the rules of natural justice as no notice of the complaint December 13, 2022 was given to the Applicant who was condemned unheard and violated the Applicants fundamental rights to a fair hearing and fair administrative action under Articles 50 and 47 of [Constitution](#) and Section 4 of the [Fair Administrative Action Act](#).
6. A Declaration do issue that the decision of the 2nd Respondent dated March 7, 2023 was an abuse of court process as the matter is *res judicata* and a collateral attack on:
 - a. The arbitral award dated July 28, 2016 *Kifaru Investments Ltd & Others v Kihingo Village (Waridi Gardens) Ltd*
 - b. ELC No 1225 of 2013 *Kifaru Investments Ltd & Others v Kihingo Village (Waridi Gardens) Ltd and Kihingo Village (Waridi Gardens) Management Ltd*.
 - c. The judgment delivered in HCCC No E229 of 2019- *Kihingo Village (Waridi Gardens) Management One Limited versus William Pike & Another*.
 - d. Nairobi Civil Appeal No E099 of 2021 *William Pike & Others v Kihingo Village (Waridi Gardens) Management One Ltd & Others*
 - e. Nairobi Civil Appeal No E069 of 2022 *Fredrick Gitahi Gethenji v Director of Criminal Investigations & Others*.
 - f. Comm E188 of 2021 *James Ndungu Gethenji v FAPCL & Ano*
7. A Declaration do issue that the 3rd Respondent lodged the complaint dated December 13, 2022 without any resolution from the directors or shareholders of Kihingo Village (Waridi Gardens) Management One Limited rendering the complaint a nullity.
8. A Declaration do issue that the 3rd Respondent is a vexatious litigant who should be investigated by the 1st Respondent pursuant to Section 2 of [Vexatious Proceedings Act](#) for instituting court proceedings and the complaints culminating in the complaint dated December 13, 2022 which is a collateral attach on the arbitral award dated July 28, 2016 and in breach of the sub judice and res judicata rules.
9. An Order Of Certiorari be issued to remove to this Court for purposes of quashing the decision of the 2nd Respondent dated March 7, 2023.
10. An Order Of Prohibition be issued prohibiting the 1st and 2nd Respondents from setting aside the 2nd Respondent's decision contained in the letter dated January 29, 2021 and from



entertaining any complaint by the 3rd Respondent, his servants, employees or agents howsoever and in any manner whatsoever from challenging the Special General Meeting Resolution of April 13, 2019 by the shareholders of the Kihingo Village (Waridi Gardens) Management Limited.

11. An Order striking out the complaint dated December 13, 2022 for want of authority from the directors/shareholders of Kihingo Village (Waridi Gardens) Management One Limited.
 12. An Order Of Mandamus be issued directing the 1st Respondent within 30 days of the court order to formally commence proceedings against the 3rd Respondent pursuant to Section 2 of the [Vexatious Proceedings Act](#) for habitually and persistently and without any reasonable ground instituting vexatious proceedings and complaints against the Applicant, 95% of its shareholders and directors.
 13. A Permanent Order Of Interdict be issued against the 3rd Respondent his servants, employees or agents howsoever and in any manner whatsoever from making any complaint or application whatsoever to set aside the shareholders' resolutions dated April 13, 2019 other than pursuing his cross appeal in Nairobi Civil Appeal No E099 of 2021 William Pike & Others v Kihingo Village (Waridi Gardens) Management One Ltd & Others.
 14. The court be pleased to award aggravated and exemplary damages against the Respondents jointly and severally for violating the Applicant's fundamental constitutional rights.
 15. Costs of this application on a full indemnity basis to be borne by the Respondents jointly and severally.
2. The Application is supported by an Affidavit dated March 15, 2023, deponed by Gitahi Gethenji, a director and shareholder of the Applicant, and also a director of Kihingo Village (Waridi Gardens) Management One Limited.
 3. In response to and in opposing the Application, the 1st Respondent filed their Grounds of Opposition dated April 4, 2023, on the grounds:
 1. That the Application is frivolous, vexatious, and an abuse of court process.
 2. That the Application as drafted offends the provisions of Section 8 & 9 of the [Law Reform Act](#) and Order 53 Rule 1 of the Civil Procedure Rules 2010.
 3. That the application is defective as public law orders cannot issue against a private person (the 3rd Respondent).
 4. That the Application as presented offends the provisions of Articles 27 and 48 of the [Constitution of Kenya, 2010](#).
 5. That the Order of Mandamus sought against the 1st Respondent contravenes the provisions of Section 2(1) of the [Vexatious Proceedings Act](#).
 6. That the order of mandamus as sought against the 1st Respondent is premature as there was no formal request and there was no failure and/or neglect of performance of any legal.
 7. That application as presented is unmerited as it seeks to direct the 1st Respondent to exercise discretion in a particular manner which is not in the purview of Judicial Review.



8. That the application is based on contradictory allegations which borders on mere belief, suspicion and speculations and hence incapable of any Judicial Review determination.
 9. That this Application be dismissed with costs to the 1st Respondent.
4. In further opposition to the Application, the 2nd Respondent filed its Replying Affidavit dated April 17, 2023, and sworn by Hiram Gachugi, an assistant registrar of companies. In the main, it denied that it infringed on the right to fair administrative action of the Applicant, considering that all parties were invited to make representation on the issues before making its decision.
 5. The 3rd Respondent filed his Replying Affidavit dated March 22, 2023 wherein James Ndungu Gethenji –who identified himself as the Chairman of the company in sum averred that the instant suit had not been sanctioned by the company, being Kihingo Village (Waridi Gardens) Management Limited.
 6. He further averred that the law firm of Wamae & Allen Advocates have no instructions from the company to represent it in this instant proceedings and prayed to this court for the entire suit and proceedings to be struck out in limine.
 7. The parties filed their respective written submissions in line with the directions of the court. The Applicant’s submissions are dated April 24, 2023, the 1st Respondent’s submissions are dated May 4, 2023, 2nd Respondent’s submissions are dated August 5, 2020 while the 3rd the Respondent’s submissions are dated April 27, 2023.
 8. Parties submitted on various issues and aspects of the case; however, for purposes of this judgment the court will focus on the submissions on the preliminary issues raised.
 9. The Applicant contends that the Law Reform Act does not apply to Article 47 of the Constitution, and the Fair Administrative Act. Further, that there is no requirement for leave to be obtained before judicial review proceedings are instituted under the Fair Administrative Action Act. The applicant relied on the cases of Dry Associates Ltd v Capital Markets Authority and Another, [2012] eKLR, and James Gacheru Kariuki & 22 others v Kiambu County Assembly & 3 others [2017] eKLR.
 10. According to the 1st Respondent, the instant Application is defective for failing to comply with the provisions of Order 53 Rule 1 of the Civil Procedure Rules, 2010. It was submitted that the Applicant, despite seeking judicial review orders, did not seek leave to commence judicial review proceedings.
 11. At the end of their submissions, the 1st Respondent prays for the Application to be dismissed with cost, for being unmerited. The Applicant relies on the case of Republic v Chief Magistrate Milimani Commercial Courts & 2 others Ex-Parte Fredrick Bett [2022] eKLR.
 12. The 2nd Respondent, and the 3rd Respondent submitted on the issues/aspects of merit of the case, which for purpose of this judgment, I shall not be considering the same, at this stage.

Analysis and Determination

13. I have considered the Application, the Responses thereto, the annexures, the counsel’s submissions, and authorities cited therein.
14. This court has to determine the issue whether this substantive application is properly before this court without first seeking leave.



15. It is a requirement of the law under Order 53 Rule 1 of the Civil Procedure Rules 2010, that an Applicant must seek leave to institute judicial review proceedings. The section stipulates that, Applications for mandamus, prohibition and certiorari to be made only with leave.

“(2) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.”

16. Leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the Applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.

17. In the case of Republic v County Council of Kwale & Ex Parte Kondo & 57 Others, Mombasa HCMCA No 384 of 1996 where Learned Judge held that leave may only be granted if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the Applicant; the test being whether there is a case fit for further investigation at a full inter parties hearing of the substantive application for judicial review. Granting of leave to file for judicial review is an exercise of the court’s discretion, but as always it has to be exercised judiciously.

18. In the instant case, the Applicant conceded that it did not seek leave to institute judicial review proceedings. The Applicant’s main argument was that there is no legal requirement for leave to be obtained before filing substantive judicial review application, for applications brought under the *Fair Administrative Action Act*.

19. In Aluochier v Independent Electoral and Boundaries Commission & 17 others (Civil Appeal E176 of 2022) [2022] KECA 952 (KLR) (29 July 2022) (Judgment) Neutral citation: [2022] KECA 952 (KLR) the Court of Appeal (faced with a similar issue of leave, as in the instant case) observed that,

“25. In view of the foregoing, we reach the inescapable conclusion that Order 53 Rule 1 applies in mandatory terms. It is the procedure therein prescribed that the appellant ought to have complied with before approaching the High Court without first seeking leave, as though his Motion were an appeal to the High Court. (Emphasis Ours)

26. The above-mentioned procedural defects rendered the application before the Court fatally defective...

27. A question then arises as to whether the appellant’s Motion as characterized by the foregoing procedural defects would find cure in Article 159(2) (d) of the Constitution, which mandates courts and tribunals to administer justice without undue regard to technicalities of procedure. It would not. We agree with the learned Judge that Article 159(2) (d) of the Constitution could not come as a saving grace to the applicant. That Article cannot be used to circumvent mandatory rules of procedure laid down in statute law.

28. In Raila Odinga vs the Independent Electoral and Boundaries Commission and 3 Others [2013] eKLR is instructive.



In its decision, the Supreme Court had this to say:

“Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.”

29. We do not tire to remind litigants that mandatory rules of procedure, as is Order 53 Rule 1 of the Civil Procedure Rules, are not merely a cosmetic add-on to substantive law. They cannot be likened to a pack of cherries from which one’s choice to pick is as good as the choice not to. Indeed, the observance of such rules is mandatory, and for good reason.

As Kiage JA observed in this Court’s decision in *Nicholas Kiptoo Arap Korir Salat vs. the Independent Electoral and Boundaries Commission and 6 Others* [2013] eKLR:

“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

30. We have said enough of this matter, which to some might appear trivial, though fundamental in the determination of the issue as to whether the appellant’s Motion for review of the 1st Respondent’s decision stood the competency test weighed against mandatory rules of procedure. Having carefully considered the appeal before us, the judgment of the High Court and the respective positions of the parties considered against the Constitution, the statute and judicial precedents relevant to the issue, we reach the inescapable conclusion that the appellant’s appeal must fail. It is hereby dismissed with costs to the respondents.”

Disposition:

20. I am bound by the said decision of the court of Appeal, that in Judicial Review proceedings, obtaining leave of court is mandatory step before filing the substantive application.



21. Since none has been filed by the Ex parte Applicant, this court lacks jurisdiction to get into the merits of the case.

Order:

The Notice of Motion Application dated March 15, 2023 is defective for want of leave, and the same is struck out with cost.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY, 2023.

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J. CHIGITI (SC)

JUDGE

