



**Republic v Chief Magistrate’s Court at Malindi & 2 others; Bracco (Exparte);
Glitter Venture Company Limited (Interested Party) (Miscellaneous Civil
Application 54 of 2021) [2023] KEELC 17540 (KLR) (19 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17540 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS CIVIL APPLICATION 54 OF 2021**

MAO ODENY, J

MAY 19, 2023

**IN THE MATTER OF: ARTICLES 20 (3), 22, 23, 40,
47, 48 & 50 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: SECTION 2,7 ,8, 9, 10 (1) AND 11 OF
THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

REPUBLIC APPLICANT

AND

THE CHIEF MAGISTRATE’S COURT AT MALINDI 1ST RESPONDENT

THE LAND REGISTRAR KILIFI 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

AND

SUSSANA BRACCO EXPARTE

AND

GLITTER VENTURE COMPANY LIMITED INTERESTED PARTY



JUDGMENT

1. By a Notice of Motion dated 1st December 2021 the Ex-parte Applicant herein Sussana Bracco sought the following orders;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. A declaration that the proceedings leading to the judgment of the 1st Respondent delivered on 6th August, 2021 and all consequential orders made in Malindi CMCC No. 15/2020 Paolo Bisetto v Glitter Ventures Company Limited were and are invalid, procedurally flawed, ultra vires, void and of no legal effect.
 - e. An order of certiorari to remove into this court for the purpose of quashing the proceedings and judgment of the 1st Respondent delivered on 6th August, 2021 and all consequential orders made in Malindi CMCC No. 15/2020 Paolo Bisetto v Glitter Ventures Company Limited.
 - f. An order of Prohibition prohibiting the 2nd Respondent from acting upon or giving effect to the judgment of the 1st Respondent delivered on 6th August, 2021 and all consequential orders made in Malindi CMCC No. 15/2020 Paolo Bisetto v Glitter Ventures Company Limited.
 - g. An order that this application do operate as a stay of execution of the judgment of the 1st Respondent delivered on 6th August, 2021 and all consequential orders made in Malindi CMCC No. 15/2020 Paolo Bisetto v Glitter Ventures Company Limited.
 - h. Further or in the alternative damages arising from the matters herein and interest thereon.
 - i. An order directing the hearing of the application for judicial review be expedited pursuant to Section 8 of the Fair Administrative Actions Act (Act No. 4 of 2015).
 - j. And that all necessary and consequential directions be given.
 - k. An order for costs.
2. The application was supported by the affidavit sworn by Susanna Bracco dated 1st December 2021 where she deponed that the 1st Interested Party is the registered owner of the land known as Chembe/Kibabamshe/367 whereupon the 1st Interested Party has partly developed a hotel and ancillary services together with serviced apartments known as St. Thomas Residence & Resort.
3. She further deponed that the 1st Respondent offered to sell to her Apartment No. 4 and 5 in the said development and upon paying the necessary consideration, she became the registered proprietor as sub-lessee.
4. It was further the Applicant's case that the 2nd Interested Party took out proceedings in the Chief Magistrates' Court at Malindi against the 1st Interested Party in Malindi CMCC No. 15/2020 seeking inter alia orders directing the 1st Interested Party to transfer and hand over possession of the said apartment to the 2nd Respondent. It was her contention that the 2nd Interested Party was aware of the fact that she was the proprietor of a lease from the 1st Interested Party of the said premises.



5. The Applicant also stated that there was no compliance with mandatory material procedures and conditions precedent, procedural fairness and that there were errors of law in the proceedings and decision by the 1st Respondent awarding the 2nd Interested Party her property without giving her an opportunity to be heard.
6. The Applicant further deponed that there is grave danger that the 2nd Respondent may act on the directions issued by the 1st Respondent and thereby cause to be changed the records held by the 2nd Respondent in respect of the Ex-Parte Applicants properties known as Apartments No. 4 and 5 St. Thomas Residence and Resort erected on Title No. Chembe/ Kibabamshe/367 unless the orders in this application are granted.
7. In response to the application, the 1st Interested Party filed a Replying affidavit sworn by Gilbrto Pezzotta on the 5th June, 2022 where he admitted to having sold to the Ex-Parte Applicant Apartments No. 4 and 5 located in St. Thomas Residence & Resort as per the applicant's exhibit 3,4 and 5. That the two apartments were subject of a suit in Malindi CMCC No. 15 of 2020 and that despite the registered owner of the two apartments, the applicant herein was not included as a party to the suit and in fact the lower suit proceeded ex-parte and has since filed an application to set aside the ex-parte proceedings including the Judgment.
8. The 2nd Interested Party filed grounds of opposition on grounds that the application is incurably defective as it offends the provisions of Orders 53 of the Civil Procedure Rules 2010 as no leave has been sought by the Applicant and or granted by this Honourable court for the Applicant to institute these proceedings, that the orders sought by the Applicant are not tenable in Judicial review since the Applicant is challenging the merits of the decision which is not tenable in a Judicial review application.
9. Counsel also stated that this court has no jurisdiction to hear and determine the as the proper forum is the subordinate court which is primarily ceased with the matter and further, that the 1st Interested Party had already obtained orders against the execution of the Judgment dated 6th August, 2021 and as such, the present application is an abuse of the court process.
10. Further that the Applicant filed a suit against the 2nd Interested Party being Malindi CMCC Land Case No. 123 of 2021 Sussanna Bracco v. Kennedy Otieno & 2 Others where the Applicant is seeking similar orders where the subordinate court has granted injunction orders dated 11th December, 2021.

Ex -parte Applicant's Submissions.

11. Counsel for the Ex-parte Applicant filed submissions on the 13th July, 2022 and stated that an application for judicial review can be brought under the provisions of Section 8 and 9 of the [Law Reform Act](#) and currently, applications can be brought under the provisions of Article 23 (3) of [the Constitution](#) and Part 111 Fair Administration Act No. 4 of 2015.
12. Counsel relied on the case of Republic v Magistrates Court, Mombasa; Absin Synegy Limited (Interested Party) Judicial Review E033 of 2021 (2022) KEHC 10 (KLR) and submitted that the present application is brought under Article 23 of [the Constitution](#) and the Fair Administrative Act which do not require one to seek leave as proclaimed by the Respondents and the 2nd Interested Party.
13. Counsel submitted that the issue for determination is whether in the absence of inclusion of the ex-parte Applicant who is the registered proprietor of Apartments No. 4 and 5 at St. Thomas Residence resort erected on title No. Chembe/Kibabamshe/367 Malindi the Judgment in Malindi CMCC No. 15/2020 should stand.



14. Mr. Ole kina submitted that the 2nd Interested Party deliberately failed to sue the registered proprietor of the subject apartments and that he may now seek to evict the ex-parte Applicant and as such, special circumstances exist in this case to grant the orders sought herein. Counsel highlighted the provisions of Articles 19, 20, 22, 23, 40, 47 and 50 of *the Constitution* and submitted that the provisions of Section 4(3) of the *Fair Administrative Action Act* dictate that where administrative action is likely to adversely affect the rights and fundamental freedoms of any person, the administrator shall give the person affected by the decision adequate notice of the nature of the proposed action and an opportunity to be heard and to make representation including the right to cross examine witnesses where applicable. He also relied on the provisions of Section 7, 9 and 10 of the said Act.

1st 2nd And 3rd Respondents' submissions

15. Counsel submitted that the Ex-Parte Applicant's judicial review application does not raise any judicial review grounds at all and further stated that the Applicant has not established any illegality, irrationality or procedural impropriety in the procedure followed by the 1st Respondent as cited in the Ugandan case of *Pastoli vs Kabali District Local Government (2008) 2 EA* where the court held that in order to succeed in such an application, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety.
16. Mr. Mkala submitted that the Ex-parte applicant's application if entertained will drag this Honourable court into the merits of the decision made by the 1st Respondent which is not the purpose of judicial review and relied on the cases of *Peninah Nadako Kilishwa v Independent Electoral Boundaries IEBC & 2 others (2015) eKLR* and *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001*.
17. It was counsel's submission that Judicial Review does not deal with contested issues of facts which require parties to adduce evidence and be cross examined and instead as in the case of *Republic v Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 others* the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact.
18. On whether the Applicant has established any cause of action as against the 1st, 2nd and 3rd Respondents, counsel submitted that the Applicant is yet to establish any cause of action against the 1st, 2nd and 3rd Respondents and that the present application is intended to distract the 1st and 2nd Respondents from discharging their statutory duties.

2nd Interested Party's Submissions

19. Counsel identified issues for determination as follows: whether leave should be sought before filing judicial Review, whether Judicial Review is applicable in this case and whether the decision of the Chief Magistrate court was ultra vires.
20. On the 1st issue for determination, counsel submitted that the failure by the ex-parte Applicant to seek leave to commence these proceedings renders this application incurably defective. Counsel highlighted the provisions of Order 53 Rule 1 and submitted that it is mandatory that an applicant seeking Judicial Review must seek leave before filing the substantive application. Counsel relied on the case of *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996*.



21. On the 2nd issue for determination, counsel submitted that judicial review is a remedy of last resort and courts require that all other avenues of redress be first utilized in relation to the actions or decisions of a public body. Counsel further submitted that the orders sought by the Applicant are not tenable in Judicial Review since the Applicant is challenging the merits of the decision and not the process and relied on the case of *Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd* Civil Appeal No. 185 of 2001.
22. On whether the decision of the Chief Magistrate was ultra vires, counsel submitted that in order to succeed in an application for Judicial Review, the ex-parte Applicant has to show that the decision of the Chief Magistrate in CMCC No. 15/2020 or the act complained of is tainted with illegality, irrationality and procedural impropriety and relied on the case of *Pastoli vs Kabale District Local Government Council & Others* (2008) 2 EA 300.

Analysis And Determination.

23. This is an application brought under Articles 20(3), 22,23, 40, 47, 48 and 50 of *the Constitution* and Sections 2,7, 8, 9, 10 and 11 of the *Fair Administrative Action Act* seeking orders of certiorari, prohibition and a declaration that the proceedings leading to the Judgment in Malindi CMCC No 15 of 2020 are invalid procedurally flawed ultra vires and of no effect hence should be removed to this court for purposes of quashing.
24. The issues for determination as was raised by the Respondents is whether the Applicant ought to have sought leave before filing this application and whether this application has merit.
25. Article 47 of *the Constitution* provides for the right to a Fair Administrative Action and to give effect to Article 47, Parliament enacted the *Fair Administrative Action Act*. Section 2 of the act defines an “administrative action”

“to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.”
26. In the case of *Matagei v Attorney General; Law Society of Kenya (Amicus Curiae)* (Petition 337 of 2018) [2021] KEHC 460 (KLR) (Constitutional and Human Rights) (13 May 2021) the court held that :

“It is observed that the FAA Act does not make any reference to the requirement for leave before commencement of judicial review proceedings and in fact disdains undue regard to procedural technicalities in judicial review applications by providing at section 10(1) that:

“An application for judicial review shall be heard and determined without undue regard to procedural technicalities.”

.....The FAA Act appears to have created a new legal regime for review of administrative action. This regime is more aligned to articles 23 and 47 of *the Constitution* and should be the sole foundation of judicial review in this country.
27. Similarly, in the case of *National Social Security Limited v Sokomanja Limited* (2021 eKLR) the Court observed as follows:

“Judicial review as a relief is provided for in among others; Article 23 (3) of *the Constitution* of Kenya 2010, section 8 of the *Law Reform Act* Chapter 26 Laws of Kenya, section 13(7) of



the *Environment and Land Court Act* 2011, section 7 of the *Fair Administrative Action Act* 2015 and the Common law. In my view, no leave is required to seek judicial review as a relief under Article 23(3) of *the Constitution* where proceedings are instituted to enforce the Bill of Rights under Article 22 of *the Constitution* or where proceedings have been brought under section 7 of the *Fair Administrative Action Act*, 2015 for the review of an administrative action. Such leave is also not required under the *Environment and Land Court Act* 2011 before such relief is sought.

Leave is however still required in my view where an applicant for judicial review moves the court under the *Law Reform Act* Chapter 26 Laws of Kenya and Order 53 of the Civil Procedure Rules. Following the promulgation of *the Constitution* of Kenya, 2010 and *Fair Administrative Action Act*, 2015, applicants for judicial review orders have a choice. They can anchor their judicial review applications under *the Constitution* of Kenya 2010 and/or the *Fair Administrative Action Act*, 2015 in which case they will not need leave of the court or go for the same relief under the *Law Reform Act* Chapter 26 Laws of Kenya and Order 53 of the Civil Procedure Rules like in the present case and be bound to seek leave of the court.”

28. This application was brought under Articles 20(3), 22,23, 40, 47, 48 and 50 of *the Constitution* and Sections 2,7, 8, 9, 10 and 11 of the *Fair Administrative Action Act* and not under Order 53 which would require leave to be sought and granted before filing this application. There is no leave required under the FAA Act before filing an application for review. It follows that the application is properly before the court but the issue to be determined is whether the court can use its discretion to grant the orders sought.
29. In the case of Republic v Principal Magistrate, Voi Law Court; Mwakina (Exparte); Kishamba B Group Ranch & 2 others (Interested Party) (Judicial Review Application 7 of 2021) [2022] KEELC 3001 (KLR) (4 May 2022) (Judgment) the court held that:

“A court will weigh several factors, including the presence of alternative remedies, the conduct of the parties, public policy, or whether in the circumstances, judicial review remedies are the most appropriate.

In the subject case, it will be observed that the motion herein attempts to set aside a decision of a court, not a decision of an administrative body. In as much as the acts and in some instances some decisions of subordinate courts may be subjected to judicial review, in my opinion, courts should be very slow, and there needs to be very special circumstances, before the High Court and courts of equal status, allow a decision of a subordinate court to be quashed by way of judicial review. This is because within the court system there are mechanisms for addressing grievances arising out of court decisions. One has avenue to seek for the setting aside of the order; or seek review of the order; or file an appeal. In the circumstances of our case, these options were certainly available to the ex parte applicant. In fact, when a matter or an application proceeds ex parte, it is very common to see litigants invoking the court’s own jurisdiction to set aside its own orders.

That right was open to the ex parte applicant. He had the avenue of filing an application for the setting aside of the ex parte orders and seek orders for the application for injunction to be heard inter partes. He would within that application have had the opportunity to give his reasons why the orders granted ex parte ought to be set aside. Applications to set aside ex parte orders or judgments are routinely made and a court has discretion to set aside its



own ex parte orders. I am not persuaded that filing a judicial review application to quash any order given ex parte before a Magistrate is the correct path to take.

29. I have extensively quoted the above case because it resonates well with the current case. This Court is empowered under Article 23 of *the Constitution* to in any proceedings brought under Article 22 of *the constitution*, to grant appropriate reliefs including an order of Judicial Review. *The Constitution* of Kenya, 2010, has given the High Court jurisdiction to review the administrative actions of public (and private) bodies under Article 47 of *the Constitution* as read together with Article 23.
30. It is on record that there was a judgment which was delivered on 6th August 2021 by the 1st Respondent in Malindi CMCC No 15 of 202 which is the subject matter in this application. It is further not disputed that the 1st Interested Party had already obtained orders against the execution of the Judgment dated 6th August, 2021.
31. It is also not disputed that Ex- parte Applicant filed a suit against the 2nd Interested Party being Malindi CMCC Land case No. 123 of 2021 Sussanna Bracco v. Kennedy Otieno & 2 Others where the Applicant has sought orders for injunction and the same were granted on 11th December, 2021 which the Applicant did not disclose to the court.
32. The Applicant wants the court to set aside the judgment of the lower court vide this application and yet she is pursuing alternative remedies in the subordinate court. For the Applicant to succeed in this application she must show that the process leading to the judgment was tainted with illegality, irrationality and procedural impropriety as was held in the case of Pastoli vs Kabale District Local Government Council & Others (2008) 2 EA 300.
33. No such evidence has been provided to the court to show that the process was tainted to the disadvantage of the Applicant. The applicant seems to challenge the judgment on the ground that the Trial Magistrate heard the matter without the Applicant's involvement as a party. Courts hear matters that are filed before them, with the parties sued or joined as parties. Courts do not look for parties to suits. This is a matter that the Applicant can use the same court that handled it to remedy it. This court cannot find fault in the process of adjudication before the lower court if there is none.
34. A party who has an interest in a suit can apply to be joined as party or an Interested Party and apply to set aside the ex parte judgment of file an appeal. The Applicant has filed another suit to secure her rights in the suit land and the 2nd Interested Party has also filed an application which has stated the execution of the impugned judgment.
35. I find that the application lacks merit and is accordingly dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF MAY, 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

