



Republic v Chief Magistrate's Court, Malindi; Raindrops Limited (Exparte) (Miscellaneous Application 2 of 2022) [2022] KEHC 11806 (KLR) (15 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION 2 OF 2022**

OA SEWE, J

AUGUST 15, 2022

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS
UNDEER SECTIONS 8 & 9 OF LAW REFORM ACT, CHAPTER 26 OF THE
LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES**

AND

**IN THE MATTER OF AN APPLICATION BY RAINDROPS LIMITED FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

BETWEEN

REPUBLIC APPLICANT

AND

THE CHIEF MAGISTRATE'S COURT, MALINDI RESPONDENT

AND

RAINDROPS LIMITED EXPARTE

RULING

[1] The ex parte chamber summons dated 25th July 2022 was filed under Articles 159 and 169 of *the Constitution* of Kenya, Sections 8(1), (2) and (3) of the *Magistrates Courts Act*, No. 26 of 2015, Sections 8 and 9 of the *Law Reform Act*, Chapter 26 of the Laws of Kenya, Order 53 Rules 1, 2, 3 and 4 of the *Civil Procedure Rules*. The applicant also relied on Sections 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya. It seeks the following orders:

- [a] Spent;
- [b] that leave be granted to the applicant to apply for:



- [i] An order of Certiorari to remove and to bring before this Court for purposes of quashing the proceedings known as Malindi CMCC No. E182 of 2022: County Government of Kilifi v SBM Bank (Kenya) Limited & Raindrops Limited and or any orders, rulings, judgments, authority, decision of the respondent made therein;
 - [ii] An order of Prohibition prohibiting the 1st respondent and or any other Magistrate within the Republic of Kenya from conducting, entertaining hearing or in any other manner whatsoever proceeding with the case known as Malindi CMCC No. E182 of 2022: County Government of Kilifi v SBM Bank (Kenya) Limited & Raindrops Limited;
 - [iii] An order of Mandamus directing the respondent to lift and set aside the injunctive orders dated the 6th July 2022, the extension thereof and any other consequential order that may have been issued in Malindi CMCC No. E182 of 2022: County Government of Kilifi v SBM Bank (Kenya) Limited & Raindrops Limited;
 - [iv] An order that the costs of the proceedings in Malindi CMCC No. E182 of 2022: County Government of Kilifi v SBM Bank (Kenya) Limited & Raindrops Limited be provided for;
- [c] That the leave do operate as a stay of proceedings, order dated 6th July 2022 extended to 20th July 2022 or any further consequential proceedings and orders in Malindi CMCC No. E182 of 2022: County Government of Kilifi v SBM Bank (Kenya) Limited & Raindrops Limited.
- [d] That the costs of the application be provided for.
- [2] The application was premised on the ground that the learned magistrate, Hon. Elizabeth Usui Katiwa, Chief Magistrate, sitting at the Chief Magistrate’s Court at Malindi in CMCC No. 182 of 2022: County Government of Kilifi v SBM Bank (Kenya) Ltd & Raindrops Ltd acted ultra vires by issuing and extending interim orders while being aware that she lacked the jurisdiction to do so. The applicant further contended that in so doing, the learned chief magistrate issued orders that were in conflict with the order given by the High Court at Malindi in Malindi HCCC No. 9 of 2015: Raindrops Ltd v County Government of Malindi as well as the order of the Court of Appeal in Malindi Civil Appeal No. E057 of 2021.
- [3] It was further contended by the applicant that, after unsuccessfully moving the Court of Appeal in Civil Application No. 84 of 2016 for review of the consent order for the payment of Kshs. 3,969,016/= on or before the 5th of every month towards the salaries of 218 employees involved in the collection and banking of cess and parking revenues in the County of Kilifi from SBM Bank Account No. 0198094843001, the County Government of Kilifi filed Malindi CMCC No. 182 of 2022 before the 1st respondent and obtained the impugned orders. Hence, the applicant asserted that the orders granted in Malindi CMCC No. E182 of 2022 amount to a collateral attack on the orders of the High Court as well as the orders of the Court of Appeal. The applicant added that, unless quashed, the orders of the 1st respondent will lead to an embarrassing situation and a direct contravention of *the Constitution*, which provides for the hierarchy of the Courts.
- [4] The application was served on the respondent and Grounds of Opposition filed herein dated 4th August 2022 as hereunder:
- [a] The application is incompetent, untenable, frivolous, scandalous, vexatious and devoid of substance as there is no demonstration on how the respondent acted ultra vires or contravened and or violated constitutional or legal provisions or the rules of natural justice;



- [b] The application as read together with the Statutory Statement is incurably defective, incompetent, untenable, frivolous, scandalous, vexatious and devoid of substance while the Verifying Affidavit is full of falsehoods and misrepresentations of facts and law, inconsistent and unsupported conclusions and tailored and stage-managed to unfairly and improperly hoodwink the Court;
 - [c] The application for leave to operate as stay of proceedings is premature because the Order dated 6th July 2022 and extended on 20th July 2022 is an interim order as the respondent has not made a final determination in Malindi CMCC No. E182 of 2022;
 - [d] That any order for stay at this stage would give the remedy sought in the substantive application for judicial review and render the proceedings before the trial court nugatory;
 - [e] The application offends the provision of Order 53 Rule 3 of the Civil Procedure Rules as the parties to the lower court proceedings have not been served with the application;
 - [f] The applicant has a remedy of appeal and where sufficient reason exists, review; and that the application for the remedy of judicial review is therefore an abuse of the court process;
 - [g] The interim orders complained of by the applicant were made by the respondent in exercise of the court's judicial function as conferred by law and within its jurisdiction as provided under Section 8 of the Magistrates Courts Act No. 26 of 2015;
 - [h] The applicant has presented all its issues before the Chief Magistrate's Court and the lower court exercised its mandate after considering all the facts.
- [5] On behalf of the County Government of Kilifi, a Replying Affidavit was filed herein, sworn on 4th August 2022 by Henry Faraji Chipinde who described himself as the County Solicitor of the County Government of Kilifi. He averred that the impugned orders were made by Hon. Usui in the exercise of her judicial function as conferred by law; and therefore the applicant ought to have filed an appeal instead.
- [6] The application was urged orally on 5th August 2022 and learned counsel briefly highlighted the main grounds in support of their respective positions. This being the threshold stage, I need only satisfy myself that sufficient cause has been shown to warrant the grant of leave. In this respect Order 53 Rules (1) (2) provides that:
- “An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on”
- [7] The rationale for the above provision was well explicated by Hon. Waki J. (as he then was), in *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others*, Mombasa HCMCA No. 384 of 1996 in which he quoted the following expressions of Lord Diplock in *Republic v Inland Revenue Commissioners Ex parte National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617:
- “The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly 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. The



requirement that leave must be obtained before making an application for judicial review is designed 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...Leave may only be granted therefore 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 partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.

[8] With the foregoing principles in mind, I have looked at the application for leave and the accompanying statement. There is no gainsaying that the application has been made within the 6 months' period stipulated in Order 53 Rule 2 of the *Civil Procedure Rules*; and that the applicant has shown sufficient interest in the subject matter before the lower court and arguable grounds to warrant the issuance of the prerogative orders sought. Moreover, I subscribe to the view that with the entrenchment of the judicial review jurisdiction in *the Constitution*, leave is no longer a prerequisite. Thus, I entirely agree with the position taken by Hon. Mativo, J. (as he then was) in *Republic v Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited* [2019] eKLR that:

- “27. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. First, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Second, the right to access the Court is now constitutionally guaranteed. This makes the requirement for leave unnecessary. Third, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3)(f). Fourth, section 7 of the Fair Administrative Action Act[17] provides that "any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. Section 7 (2) of the act provides for grounds for applying for Judicial Review.
28. Court decisions should boldly recognize *the Constitution* as the basis for Judicial Review. Judicial review is now a constitutional supervision of public authorities involving a challenge to the legal validity of the decision.[18] Time has come for our courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed “theory of a holistic interpretation of *the Constitution*. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the Courts to control the exercise of public power are now regulated by *the Constitution*.
29. It is my conclusion that time has come for Parliament to consider the relevancy and constitutionality of the provisions of the *Law Reform Act* [19] and the *Civil Procedure Act*, 2010 which prescribe a litigant must seek courts



leave before approaching the court. This is because our 2010 Constitution guarantees access to justice. The right to approach the court received a seal of constitutional approval, courtesy of Article 48 of *the Constitution*. This in my view rendered provisions of the law that require a litigant to seek courts leave to commence Judicial Review proceedings obsolete."

[9] I am therefore satisfied that, on the facts presented before me, the applicant is entitled to leave. As to whether leave should operate as stay I have taken into account the position taken in *Taib A. Taib v The Minister for Local Government & Others* Mombasa HCMISCA. No. 158 of 2006 that:

"... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act...."

[10] In this case, the decision has already been made. Accordingly, the question as to whether or not that decision ought to be quashed belongs to the substantive application and cannot be determined at this ex parte stage. Thus, what can be forestalled are consequential or further proceedings.

[11] In the result, the application dated 25th July 2022 is hereby allowed and orders granted as hereunder:

- [a] That leave be and is hereby granted to the applicant to apply for:
 - [i] An order of Certiorari to remove and to bring before this Court for purposes of quashing the proceedings known as Malindi CMCC No. E182 of 2022: County Government of Kilifi v SBM Bank (Kenya) Limited & Raindrops Limited and or any orders, rulings, judgments, authority, decision of the respondent made therein;
 - [ii] An order of Prohibition prohibiting the 1st respondent and or any other Magistrate within the Republic of Kenya from conducting, entertaining hearing or in any other manner whatsoever proceeding with the cases known as Malindi CMCC No. E182 of 2022: County Government of Kilifi v SBM Bank (Kenya) Limited & Raindrops Limited;
 - [iii] An order of Mandamus directing the respondent to lift and set aside the injunctive orders dated the 6th July 2022, the extension thereof and any other consequential order that may have been issued in Malindi CMCC No. E182 of 2022: County Government of Kilifi v SBM Bank (Kenya) Limited & Raindrops Limited;
- [b] The application be filed and served within 21 days from the date hereof;
- [c] That the leave do operate as a stay of proceedings and any further consequential orders in Malindi CMCC No. E182 of 2022: County Government of Kilifi v SBM Bank (Kenya) Limited & Raindrops Limited.
- [d] That the costs of the application be costs in the substantive application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 15TH DAY OF AUGUST 2022.



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OLGA SEWE

JUDGE

