



Republic v Inspector General of Police of the National Police Service & 2 others; NCBA Bank Kenya PLC (Exparte Applicant); Ahmed (Interested Party) (Environment and Land Judicial Review Case E004 of 2022) [2023] KEELC 18155 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18155 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E004 OF 2022**

**NA MATHEKA, J
JUNE 21, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

INSPECTOR GENERAL OF POLICE OF THE NATIONAL POLICE SERVICE 1ST RESPONDENT

LAND REGISTRAR, MOMBASA 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

NCBA BANK KENYA PLC EXPARTE APPLICANT

AND

ESTATE OF TAHIR SHEIKH SAID AHMED INTERESTED PARTY

JUDGMENT

1. The application is dated 26th May 2022 and is brought in pursuant to Order 53 Rule 1(2) & 1(4) of the *Civil Procedure Rules*, 2010 seeking the following orders;
 1. This application be certified urgent and it be heard ex-parte in the first instance.
 2. Leave be granted to the Applicant to apply for an Order of Certiorari to remove into the High Court and quash forthwith the undocumented decision of the 2nd Respondent failing/ declining to register the transfer pursuant to a sale by Chargee in a Public auction over subdivision number 1285, of Section 1, Mainland North, Mombasa (CR 14211)



(the Property), between NCBA Bank Kenya PLC and Beatriwan Investments Limited (the Transfer):

3. Leave be granted to the Applicant to apply for a Declaration that the 2nd Respondent's failure to register the transfer of the Property pursuant to a sale by Chargee in a Public auction, between NCBA Bank Kenya PLC and Beatriwan Investments Limited is a violation of the Applicant's constitutional right to property, fair administrative action and fair hearing as guaranteed under Articles 40 (1) and (2), 47 and 50 of the *Constitution* of Kenya, 2010, respectively; and the provisions of Section 4 (1), (2) & (3) of the *Fair Administrative Action Act*, 2015.
 4. Leave be granted to the Applicant to apply for an order of Prohibition preventing the 2nd Respondent from failing, neglecting or refusing to register the Transfer of the Property pursuant to a sale by Chargee in a Public auction, between NCBA Bank Kenya PLC and Beatriwan Investments Limited.
 5. Leave be granted to the Applicant to apply for an order of Mandamus directing the 2nd Respondent to register the transfer of the Property pursuant to a sale by Chargee in a Public auction, between NCBA Bank Kenya PLC and Beatriwan Investments Limited.
 6. Leave be granted to the Applicant to apply for an order of Certiorari to bring to this Court for the purposes of being quashed, the 1st Respondent's decision in its letter dated 20 March 2017 addressed to the 2nd Respondent purporting to impliedly create a restriction on the Property.
 7. Leave be granted to the Applicant to apply for an order of Mandamus directing the 1st Respondent to confirm to the 2nd Respondent that its letter dated 20 March 2017 does not amount to a restriction or a proposed restriction over the properties contained in the said letter.
 8. The grant of leave so granted do operate as a stay of the 2nd Respondent's decision not to register the transfer of the Property pursuant to a sale by Chargee in a public auction, between NCBA Bank Kenya PLC and Beatriwan Investments Limited pending the hearing and determination of these judicial review proceedings.
 9. The costs of this application be provided for in any event.
2. This Application is supported by the annexed Verifying Affidavit of Ibrahim Mbogo together with the Statutory Statement verified on oath by the Applicant is based, inter alia, on the following grounds that the Applicant is the legal owner of all that property known as subdivision number 1285. of Section 1, Mainland North, Mombasa (CR 14211) (the Property). The Applicant acquired its proprietary interest in the Property through a Charge dated 7 April 2015 executed by KAAB Investments Limited (as Chargor), APT Commodities Limited (as Borrower) and NIC Bank Limited (as Chargee) in respect of the Property (the Charge). The Applicant exercised its statutory right of sale of the Property following default of payment obligations and issuance of all relevant statutory notices. The Applicant sold the property to Beatriwan Investments Limited (the Purchaser) by way of auction on 9th April 2021 for Kshs 45,000,000. There is no challenge on the validity of the auction process. The Applicant and the Purchaser subsequently executed a transfer pursuant to a sale by Chargee in a public auction in respect of the Property (the Transfer). The 2nd Respondent, however, refused to register the Transfer once it was presented citing a letter dated 20 March 2017 issued by the 1st Respondent. Notably, the 1st Respondent's letter does not propose the imposition of any restrictions on the Property. The 2nd Respondent's decision is therefore illogical, ultra vires and without legal basis.
3. That by a letter dated 22 October 2021, the Purchaser has demanded for the return of the Purchase Price to the detriment of the Applicant. That the 2nd Respondent's actions have exposed the Applicant



to financial and reputational harm as the Purchaser has demanded a refund of the monies spent in purchasing the property. The Applicant is apprehensive that parties, in future, will eschew buying property sold by the Applicant in its exercise of the statutory power of sale all because of the 2nd Respondent's actions. This will greatly impair the Applicant's banking business and its very existence. The Applicant has informed the Permanent Secretary at the Ministry of Lands and Physical Planning regarding the foregoing. This Honourable Court has jurisdiction to entertain the instant Application and hear the dispute; a position which has been taken by the High Court of Kenya at Mombasa in JR Judicial Review Misc Application No 048 of 2021. It is only just and efficacious for this Honourable Court to intervene and order the 2nd Respondent to register the Transfer. It is a fundamental question of due process and the constitutional edicts on rights to property, fair administrative action and a fair hearing that the 2nd Respondent should not be allowed to arbitrarily, without lawful reason and without giving any formal notice or hearing the Applicant's to refuse to register the Transfer. This Honourable Court should therefore grant the Orders sought pending the hearing and determination of the judicial review motion. The Respondent will not suffer any prejudice if the orders sought are granted since the orders sought simply enforce the Applicant's constitutional and due process rights.

4. This court has considered the application and the submissions therein. The purpose of judicial review was enunciated in the case of *Municipal Council of Mombasa v Republic Umoja Consultants Ltd*, Nairobi Civil Appeal No 185 of 2007(2002) eKLR, where the Court of Appeal held that;

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.

5. It is trite law that a court exercising judicial review jurisdiction is only concerned with the procedural propriety of a decision and not the merits. The court cannot be invited in a judicial review proceeding to act as an appellate court to reverse the decision of the Respondents.
6. This position was adopted by the court in *Associated Provincial Picture Houses, Ltd. v Wednesbury Corporation* (1947) 2 All ER 680. As a result, it is only in exceptional circumstances that the court can consider merits of a decision. These exceptional circumstances were enumerated by the learned Mumbi Ngugi J in *Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (EA) Limited* (2013) eKLR, while citing the *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* (supra) namely:

“where the administrative body has acted outside its jurisdiction, has taken into account matters it ought not to have taken into account, or failed to take into account matters it ought to have taken into account; or that it has made a decision that is ‘so unreasonable that no reasonable authority could ever come to it.’”

7. The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision- making process as was held by



Mumbi Ngugi J in the case of *Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (EA) Limited* (*supra*),

“That the purpose of the remedies availed to a party under the judicial review regime is to ensure that the individual is given fair treatment by the authority to which he has been subjected. The purpose is not to substitute the opinion of the court for that of the administrative body in which is vested statutory authority to determine the matter in question.”

8. It was incumbent upon the Applicant to demonstrate that the decision-making organ, in this case, the 2nd Respondent acted ultra vires in making the impugned decision. In the case of *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another* (2014) eKLR, the court held that;

“Where an Applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”

8. Similarly, in the case of *Commissioner of Lands v Kunste Hotel Limited* (1997) eKLR (E & L) 1 at page 249, the Court of Appeal stated that;

“But it must be remembered that Judicial Review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected”.

9. In *Halsbury’s Laws of England* 4th Edition Volume 2 Page 508 where it is stated that;

“Certiorari is a discretionary remedy which the Court may refuse to grant even when the requisite grounds for its grant exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The judicial discretion of the Court being a judicial one, must be exercised on the basis of evidence and sound legal principles”.

10. This Court will therefore be guided by the above principles and other binding precedents and the relevant laws in determining the matter at hand. The Judicial Review process is concerned with the decision making process and not with the merits of the decision itself. Further, that a Court hearing an application for Judicial Review should not sit as an appellate Court and such orders will not be granted as a matter of course but are a discretion of the Court which must consider if such orders are most efficacious in the circumstances of each case.

11. In the case of *Republic v Inland Revenue Commissioner Ex Parte Opman International* 1986 1ALL ER 328, the Court held that the fact that there is an alternative procedure available to address a particular grievance does not mean one cannot apply for the remedy of Judicial Review. The Court stated that;

“Judicial Review is however the procedure of last resort and is a residual procedure which is available in those cases where the alternative procedure does not satisfactorily achieve a just resolution of the Applicant’s claim”



12. In the case of *Speaker of National Assembly v Karume* CA Civil Application No 92 of 1992 (2008 1 KLR 426), the Court of Appeal stated that where there is a clear procedure to address a particular grievance, it should be followed.

13. Be that as it may, Judicial Review orders are granted at the discretion of the Court. Courts therefore have the discretion to refuse to grant such orders even where a foundation has been laid for the same although such discretion must be used sparingly. In the case of *Bluesea Shopping Mall Limited v City Council of Nairobi & Others* CA Civil Appeal No 129 of 2013 (Nairobi), the Court of Appeal said the following on the issue of discretion in Judicial Review applications:

“In administrative law matters, Courts have discretion to withhold a remedy of Judicial Review even where a substantive foundation has been laid because administrative law remedies are inherently discretionary. But Courts are slow to deny the remedy. The discretion to refuse to grant Judicial Review orders where they are merited must be very sparingly exercised”.

14. In the instant case I find that,

Section 9(2) of the *Fair Administrative Action Act*, No 4 of 2015 provides;

The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

Subsection (3) thereof provides;

The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that Applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

Subsection (4) of the said section however provides:

Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the Applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

15. Be that as it may, the onus is upon the Applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. The Applicant has approached the court seeking judicial review orders against the 2nd Respondent stating that the Applicant sold the property to Beatriwan Investments Limited by way of auction on 9th April 2021 for Kshs 45,000,000. There is no challenge on the validity of the auction process. The Applicant and the Purchaser subsequently executed a transfer pursuant to a sale by Chargee in a public auction in respect of the Property (the Transfer). The 2nd Respondent, however, refused to register the Transfer once it was presented citing a letter dated 20 March 2017 issued by the 1st Respondent. That the 1st Respondent's letter does not propose the imposition of any restrictions on the Property. I have perused the said letter which state that the property in question is among some properties being investigated for conspiracy to defraud and forgery. That these parcels of land were used as security to fraudulently acquire loans from various banks. I find that these are contested matters of fact.



16. Judicial review is a remedy of last resort and ought not to be applied for where there exist appropriate remedies to redress the grievance complained of. I therefore find that these proceedings were prematurely instituted. In the premises, I decline to exercise my discretion in favour of the Applicant as sought herein. It follows that where an Applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties, would be overstepping the judicial review mandate vested upon this Court, the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums of litigation like civil suits where such matters ought to be resolved.
17. In the case of *Republic v Registrar of Societies & 3 others ex parte Lydia Cherubet & 2 others*, Miscellaneous Civil Application 170 of 2016 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. It is my considered view, therefore, that the application lacks merit and it is hereby dismissed with costs to the Respondents.
18. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF JUNE 2023.

N.A. MATHEKA

JUDGE

