REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 16 OF 2015

IN THE MATTER OF: AN APPLICATION BY CLEMENT MUTURI KIGANO FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF: THE COUNTY GOVERNMENT OF MOMBASA RESPECTING PLOT NO. 392/VI/MN/MIKINDANI MOMBASA

BETWEEN

CLEMENT MUTURI KIGANI..APPLICANT

AND

COUNTY GOVERNMENT OF MOMBASA....................RESPONDENT

GRACE W. MUHUTHU...INTERESTED PARTY

RULING

The Application

1. Pursuant to the leave granted by the court on 29th April, 2015 the Ex- parte Applicant filed a Notice of Motion dated 8th May, 2015 praying for the following orders:

> 1. An order of certiorari do issue to call and quash in its entirely the decision of the County Government of Mombasa by the then Municipal Council of Mombasa to cancel the name of MWAKANI NGAO as the rightful allottee and owner of the suit premises being Plot No.392/VI/MN situate at Mikindani and in lieu thereof to substitute and/or transfer and/or allot the same to one Grace W. MAHUTHU.
>
> 2. An order of mandamus do issue directing the County Government of Mombasa to re-instate the said MWAKANI NGAO or his lawful Attorney the Applicant herein as the lawful owner of the suit premises being Plot No.392/VI/MN.
>
> 3. The costs of this application and of leave hitherto be provided for.

2. The motion is premised on the grounds set out in the Chamber Summons dated 28th April, 2015 which sought for the said leave. It is also supported by the Verifying Affidavit of Clement Muturi Kigano sworn on 28th April, 2015 in support of the said Chamber Summons.

3. The Ex-parte Applicant's case is that at all material times one **MWAKARI NGAO** was the owner/proprietor of the piece of land known as **Plot No.392/VI/MN Mikindani Site and Service Scheme** ("*the suit premises*"); By virtue of an irrevocable Power of Attorney registered at the Mombasa Titles Registry on 29th September, 1992 as **No. C.R. PA7065** the said Mwakani Ngao donated to the applicant irrevocable power to *inter alia*,

> "***To act for me and represent me before the Housing Development Department of the Municipal Council of Mombasa any administrative, land revenue judicial or other office or authority and any Court of Law in all the affairs and legal matters relating to the said House***"

4. The Ex-parte Applicant contends that the County Government of Mombasa through the actions of its predecessor the then Municipal Council of Mombasa illegally transferred and/or re-allotted the suit premises to one Grace W. Muhuthu on the guise of non-payment of rates yet no demands for such rates or notices were raised or given to the said Mwakani Ngao or the Applicant as prescribed by the law or at all. In the alternative the Applicant alleges that if such demands were raised and not complied with, the council was not entitled to forfeit or extinguish the Applicant's title on the guise of non-payment of rates or other dues without due process of Court.

5. The Ex-parte Applicant claims that the Council's actions offended the provisions of the Rating Act, (Cap 207 Laws of Kenya) as the alleged re-possession/seizure was high-handed and oppressive on the Applicant and the same is unlawful and/or null and void.

The Response

6. The application is opposed by Grace Wangui Muhuthu who is the Interested Party herein. The Interested Party's case is that on or before 1995 she noticed an advertisement at the Offices of Mikindani Municipal Council Office stating that the then Municipal Council of Mombasa had plots to allocate and willing persons should apply.

7. The Interested Party claims that she made an application and handed it over to the Municipal Council office at Mikindani and on or about 18th October, 1995, she received a letter informing her that her application was successful and that she should pay the requisite fees so that she can be showed the plot. The Interested Party stated that she made the requisite payments and also paid the rates for plot No. 392 going back to 1991.

8. It is the Interested Party's case that she has continually paid the rates for the suit premises. Further, the Interested Party contends that the documents annexed by the Applicant to the application do not prove that MWAKANI NGAO was lawfully allotted the suit premises.

9. The Interested Party alleges that there is a sale agreement between herself and the Municipal Council for the sale of the suit land. Additionally, the Interested Party states that she obtained a title deed in respect of the suit land.

10. It is the Interested Party's case that she has heavily invested on the suit land and the application herein is an attempt by the Applicant to deprive her of her land.

11. The Respondent oppose the application vide a Replying Affidavit sworn by Rose Munupe on 16th July, 2015. The deponent is the Assistant Director, Lands Administration for the Respondent and states that she is conversant with issues raised herein.

12. The Respondent's case is that plot No. 392 /VI/MN was initially allocated to Mwakani Ngao in 1987 by the Respondent and in the same year Mwakani Ngao requested for approval to develop the suit property and a letter was written inviting him to a meeting in Mikindani/Chaani to come identify his plot, explain and demonstrate the procedures in his plan to develop the suit property

13. The Respondent averred that Mwakani Ngao applied for a loan in January 1988 from the then Municipal Council of Mombasa to develop the suit property and the loan was approved. Further, the Respondent states that Mwakani Ngao was informed of the monthly rates he was expected to pay and the period when the payments would commence. However, the Respondent contends that by 15th July 1988, Mwakani Ngao had not paid up his rates and his monthly installments in repayment of the loan advanced to him by the then council.

14. The Respondent claims that a notice was sent to Mwakani Ngao reminding him of the pending payments and informing him that failure to pay would result in the Municipal Council repossessing the suit premises and allotting the same to another person. The Respondent avers that Mwakani Ngao did not make any payments and further notices of non-payment were issued on 26th February, 1990, 31st December, 1991, 10th April, 1993 and a final notice of repossession was issued on 31st January, 1995.

15. The Respondent claimed that it does not have any record of the Power of Attorney as alleged by the Ex-parte Applicant and also the Respondent does not have a record of any payments made by the Ex-parte Applicant in relation to the suit property.

16. It is the Respondent's case that the suit plot was repossessed and allocated to Grace W. Mahuthu, the Interested Party on 18th October, 1995, a letter of allotment was issued to the Interested Party on the same date and a title deed was issued on 17th March, 2009.

Submissions

17. The Ex-parte Applicant filed his submissions on 31st May, 2018 while the Respondent filed its submissions on 26th March, 2018 and the Interested Party filed her submissions on 30th October, 2015.

18. **Mr. Amuga**, learned Counsel for the Ex-parte Applicant submitted that plot No. 392/VI/MN was allotted to MWAKANI NGAO who then assigned his interest in the property to the Ex-parte Applicant vide an irrevocable power of attorney dated 26th September, 1992 which was registered at the Mombasa Titles Registry on 29th September, 1992 as No. C.R. PA 7065. Further, Counsel stated that he informed the Respondent of the assignment of the interest vide a letter dated 26th September, 1992. Mr. Amunga submitted that nether the Ex-parte Applicant nor Mwakani Ngao received any demand for rates or for the intended repossession as claimed by the Respondent.

20. Mr. Amuga submitted that the limitation period provided for under Order 53 Rule 2 of the Civil Procedure Rules does not apply in the instant case. Counsel contended that the provision only applies to applications for leave to remove any Judgment, order, decree, conviction or other proceeding while in this matter the Ex-parte Applicant sought leave to quash the Respondent's administrative action/decision. Counsel relied on the case of **Republic vs. Judicial Commission of Inquiry into the Goldenberg Affair & 3 others, ex- parte Mwalulu**

& 8 others [2004] eKLR where the court observed as follows:

> **"We agree with the appellant's counsel that this rule only covers the specific matters mentioned and the marginal notes clearly say so. In the view of the court six months limitation only affects the specific formal orders mentioned and nothing else…**
>
> **We also apply the maxim ex nihilo nihil fit- "out nothing comes nothing". We hold that nullities are not covered by the six months limitation both on the wording of the rules and as a matter of principle due to the nature of nullities. We further hold in line with the GITHUNGURI VS. REPUBLIC [1986] KLR 1 that this court has inherent powers to exercise jurisdiction over tribunals and individuals acting in administrative or quasi judicial capacity and we would invoke this jurisdiction to quash nullities and illegalities."**

Further, Mr. Amuga argued that the leave granted to the Applicant on 29th April, 2015 was never challenged and thus it remains valid.

21. Mr. Amuga submitted that the Respondent and the Interested Party had not raised the issue of limitation in their pleadings therefore they cannot raise the issue at the submission stage. Alternatively, Mr. Amuga submitted that the application was filed on time as time started to run on 26th November, 2014 when the Applicant became aware of the Respondent's impugned decision and the application herein was filed on 29th April, 2015 before the six months period had lapsed.

22. Mr. Amuga submitted that the purported repossession of the suit property by the Respondent for non-payment of rates and loan arrears was un-procedural and illegal. Counsel contended that the remedy for a rating authority that is owed overdue rates is provided under Section 17 of the Rating Act Cap 267 which states as follows:

> **"17 (1) If, after the time fixed for the payment of an rate, any person fails to pay any such rate due from him and any interest on any such unpaid rate as provided in Section 16 of this Act, the rating authority may cause a written demand to be made upon such person to pay, within fourteen days after service thereof on him, the rate due by such person and interest thereon calculated in accordance with section 16(3) of this Act which demand shall be in the appropriate form in the Second Schedule.**
>
> **17(2) If any person who has had such demand served upon him makes default, the rating authority may take proceedings in a subordinate court of the first class to secure the payment of such rate and interest in the manner hereinafter prescribed".**

Mr. Amuga contended that the Respondent ought to have served a written demand to Mwakani Ngao or to the Ex-parte Applicant to pay the rate arrears within 14 days but no such demand was ever served. After service of the notice, Counsel argued that the only available remedy to the Respondent was to initiate proceedings in a subordinate court to secure payment of the rate arrears.

23. On the issue whether the re-allocation of the suit property to the Interested Party was lawful, Mr. Amuga submitted that the re-allocation was illegal as the repossession of the suit land by the Respondent was un-procedural. Further, Counsel pointed out that the defence by the Interested Party that she was not informed that the suit property has been re-possessed from another person could not stand because the Interested Party's claim lies with the Respondent. Alternatively, Mr. Amuga submitted that when the suit property was allotted to Mwakani Ngao in 1987 the land became alienated and was not available for further alienation to any other person.

24. Mr. Amuga submitted that the Ex-parte Applicant was deserving of the prayers sought as the procedure adopted by the Respondent in re-possessing the suit property was illegal.

25. Mr. Kibara, learned Counsel for the Respondent submitted that the orders sought in this application cannot be issued as it is not possible for this court to make a determination without going into the merits of this case which is not within the purview of Judicial Review. Counsel relied on the case of **Republic vs. Registrar of Titles, ex-parte Kenya Shell Limited [2013] eKLR** where the court stated:

> **"Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are mandamus, certiorari and prohibition. In order to determine the questions in this dispute, it is my view, that it would be necessary to make certain findings in the nature of declarations yet declarations do not fall under the purview of judicial review for the same reason that the court would require viva voce evidence to be adduced to determine the case on the merits before the rights of the parties herein. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. Here, there are serious factual issues which require to be resolved and which go beyond the court's jurisdiction in judicial review proceedings."**

Counsel contended that it was very integral that the persons who swore the affidavits in the instant application be cross examined and this could only be done by way of an ordinary suit filed by way of a plaint.

26. Mr. Kibara submitted that Judicial Review jurisdiction should not be exercised where there exists an alternative remedy or where the decision of the court is likely to affect a 3rd party. To support this assertion Counsel relied on the case of **Republic vs. Registrar of Titles, ex-parte Kenya Shell Limited (supra)** where the court observed as follows:

> **"It is now a cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy or the decision of the court is likely to affect 3rd parties or buyer for value without notice and without affording such parties effective remedy. In Re Preston [1985] AC**

> **835 at 825D Lord Scarman was of the view that a remedy of judicial review should only be made as a last resort."**

Counsel stated that there was a likelihood that the orders sought will lead to another suit by the Interested Party against the Respondent which scenario can be avoided if the claim herein is brought by way of an ordinary suit before the Environment and Land Court.

27. Mr. Kibara submitted that an order of certiorari cannot be issued as the impugned decision was issued in 1995 and the application herein was filed 9 years after in violation of the law which provides that an application for an order of certiorari must be made within six months from the date when the decision was made.

28. Mr. Kaburu, learned Counsel for the Interested Party submitted that a case for Judicial Review had not been established and the Applicant should have filed his claim before the Environment and Land Court. Counsel relied on the case of **Republic vs. Commissioner of Lands & Another, ex-parte Hammer Heads Limited [2013] eKLR** where the court held:

> **"A judicial review application do not deal with the merits of the case but only with the process in other words judicial review application do determine whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view of determining contested matters of fact and in effect determine the merits of the dispute the court would not have jurisdiction in judicial review proceedings to determine such dispute and would leave the parties to ventilate the merits of the dispute in the ordinary suits."**

29. Mr. Kaburu stated that the Interested Party was not aware that the suit plot had been re-possessed from another person and without this notice she applied for the plot and the same was allotted to her after payment of consideration. Counsel contended that the Interested Party had extensively developed the suit plot and urged the court not to deprive her of the suit plot which she had legally acquired.

<u>The Determination</u>

30. I have carefully analyzed the application and the submissions by Counsel. The following issues arise for determination by this court:

> a) Whether the Ex-parte Applicant is time barred from bringing an application seeking the Judicial Review remedy of certiorari.
>
> b) Whether the orders sought should be granted.

a) Whether the Ex-parte Applicant is time barred from bringing an application seeking the judicial review remedy of certiorari

31. The Respondent contended that this application seeks the order of certiorari which cannot be granted as the period provided under Order 53 Rule 2 of the Civil Procedure Rules has lapsed. The Respondent stated that Order 53 Rule 2 provides that leave shall not be granted to apply for an order of certiorari to remove any Judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act. The Respondent averred that the impugned decision herein was in 1995 yet the application was filed in 2015, nine years later which is way beyond the six months provided by Order 53 Rule 2 of the Civil Procedure Rules.

32. The Ex-parte Applicant on its part submitted that the time provided for under Order 53 Rule 2 only applies to applications for leave to remove to the High Court for quashing any Judgment, order, decree, conviction or other proceeding. The Respondent contended that it had obtained leave to quash the Respondent's administrative action/decision which decision is not an order, decree, conviction or other proceeding. Therefore it is exempted from the provisions of Order 53 Rule 2.

33. Order 53 Rule 2 of the Civil Procedure Rules reads as follows:

> **Leave shall not be granted to apply for an order of certiorari to remove any <u>judgment, order, decree, conviction or other proceeding</u> for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.** (emphasis added)

34. I respectfully agree with the Ex-parte Applicant. The above provision applies to Judgments, orders, decrees, convictions or other proceedings. As I understand it, the decision sought to be quashed by the Ex-parte Applicant is not a Judgment, order, decree or conviction. The said decision cannot also be said to have emanated from any proceedings. The decision falls outside the purview of Order 53 Rule 2. The Ex-parte Applicant cited with the approval of this court the case of **Republic vs. Judicial Commission into the Goldenberg Affair & 3 others Ex Parte Mwalulu & 8 others [2004] eKLR** where the Court of Appeal dealt with the question whether a rule falls within the provisions of Order 53 Rule 2. The Court observed as follows:

> **"Order 53 rule 2 reads:-**
>
> **"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the**

appeal is determined or the time for appealing has expired."

a) The position is made even clearer by Order 53 Rule 7 which requires

"that where an order of certiorari to remove any proceedings for the purpose of their being quashed the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record unless before the hearing of the motion, he has lodged a copy thereof verified by affidavit with the Registrar or accounts for his failure to do so to the satisfaction of the High Court." Under 7 (2) it provides "where an order of certiorari is made in any such case as aforesaid the order shall direct that the proceedings shall be quashed forthwith on the removal to the High Court."

We agree with the applicants' counsel that this rule only covers the specific matters mentioned and the marginal notes clearly say so. In the view of the court the six months limitation only affects the specific formal orders mentioned and nothing else. The act of making an ultra vires rule is outside the limitation. Purely on the literal reading and interpretation of the above provisions a rule formulated by a commission falls outside the rules and is therefore in the opinion of the court not covered by the six months limitation. In fact even section 9 of the Law Reform Act a discretion is conferred on the rule making authority to impose the six months' time limitation and it need not have been couched in mandatory times."

35. It is therefore the finding of this court that the application herein is not time barred as the decision sought to be quashed does not fall within the provisions of Order 53 Rule 2.

b) Whether the orders sought should be granted

36. The Ex-parte Applicant seeks the following orders:

1. An order of certiorari do issue to call and quash in its entirely the decision of the County Government of Mombasa by the then Municipal Council of Mombasa to cancel the name of MWAKANI NGAO as the rightful allottee and owner of the suit premises being Plot No.392/VI/MN situate at Mikindani and in lieu thereof to substitute and/or transfer and/or allot the same to one Grace W. MAHUTHU.

2. An order of mandamus do issue directing the County Government of Mombasa to re-instate the said MWAKANI NGAO or his lawful Attorney the Applicant herein as the lawful owner of the suit premises being Plot No.392/VI/MN.

37. The Respondent and the Interested Party contend that the above orders cannot be issued as the matter herein does not fall within the purview of Judicial Review. Their main assertion is that the claim by the Ex-parte Applicant should have been filed as an ordinary suit before the Environment and Land Court. They submit that in order to determine whether the appropriate procedure was followed in repossessing the suit land and re-allocating the same to the Interested Party, this court must examine the validity of the notices sent to Mwakani Ngao and this would necessitate going into the merits of the case which is not within the realm of Judicial Review.

38. It is trite law that Judicial Review proceedings are not concerned with the merits and demerits of a case but rather the decision making process. In the case of **REPUBLIC VS. ATTORNEY-GENERAL & 4 OTHERS, ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014]**, the court held that:

"Judicial review applications do not deal with merits of the case but only with the process. In other words judicial review only determines whether decision-maker had jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision-maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of fact and in effect urges the court to determine the merits of two or more different versions presented by the parties the court would not have jurisdiction in judicial review proceedings to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved…"

39. The Ex-parte Applicant claims that the manner in which the decision to re-possess the suit land was reached by the Respondent was un-procedural and illegal. The Interested Party and the Respondent aver that this matter is pegged on the validity of the notices issued by the Respondent and this being a Judicial Review court cannot delve into this issue.

40. I have carefully read through the application. In my view, the Ex-parte Applicant's application is well within the Judicial Review jurisdiction of this court. The Ex-parte Applicant's main contention is the manner in which the decision by the Respondent to re-possess the suit land was reached. This question can be determined by this court. However, in order to determine this question, this court has to examine or investigate the notices for rent and loan arrears sent to the said MWAKANI NGAO. This would entail going into the merits of the case which is outside the realm of these proceedings.

41. Further, Judicial Review jurisdiction should not be exercised where there exists an alternative remedy which is more appropriate. Judicial Review remedies should only be issued as a last resort. As I understand it, the Ex-parte Applicant lays a claim on the suit land on the basis of the power of attorney given to him by one MWAKANI NGAO and also on the alleged illegality of the re-possession of the suit land. The Interested Party on the other hand, claims to have been lawfully allotted the suit plot by the Respondent without notice that the same had been re-possessed from another. The Interested Party is currently in possession and occupation of the suit land. Any orders issued by this court will have an effect on the Interested Party's right to the suit plot. I would think that justice would be served to all parties if the issues raised are fully determined. I do not think that this proceedings will serve this purpose.

42. Ordinary proceedings before the Environment and Land Court, as suggested by the Respondent, will allow all parties to tender evidence

in support of their positions, witnesses will be cross- examined and the court will determine this matter on its merits. In my view, the remedies that ensue from such proceedings will be more appropriate than those from this proceedings.

43. Judicial Review orders are discretionary in nature. A Judicial Review court may decline to issue Judicial Review orders even when a case for the orders has been made. A court has to weigh the interests of all parties in the matter and find the orders to be the most appropriate. This was the position taken in the case of **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** where the court held that:

> **"Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are mandamus, certiorari and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determination of the case on the merits before declaring who that owner of land is. Judicial Review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application… Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not… It may indeed be true that the notice that is impugned is irregular or unlawful and an order of certiorari would be deserved. Judicial review being discretionary remedy will only issue if it will serve a purpose. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite ground for it 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 discretion of the court being a judicial one must be exercised on the basis of evidence and sound principles. So that in this case, even though this application was properly before this court and the application had merit, the court may not have granted an order of certiorari because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and viva voce evidence at another forum preferably the civil courts."**

44. It is the finding of this court that justice will be done to all parties if the issue of ownership of the suit property is heard and determined in the Environment and Land Court.

45. Therefore, in exercise of my discretion I find that the application herein although merited is not deserving of Judicial Review remedies.

46. For the foregoing reasons the application dated 8th May, 2015 is dismissed. I direct that parties shall bear their own costs of the application.

Dated, Signed and Delivered in Mombasa this 23rd day of October, 2018.

E. K. O. OGOLA

JUDGE

In the presence of: