REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 503 OF 2015

IN THE MATTER OF AN APPLICATION BY PAUL KARANJA KAMUGE T/A DAVISCO AGENCIES, SIMON PETER KARANJA AND FRANKLIN IMBEZI FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS AGAINST HON CHESANG (MS) RESIDENT MAGISTRATE, MILIMANI CHIEF MAGISTRATE'S COURT

AND

IN THE MATTER OF MILIMANI CHIEF MAGISTRATES COURT CIVIL SUIT NO. 7209 OF 2015

AND

IN THE MATTER OF THE ORDERS OF MILIMANI CHIEF MAGISTRATES COURT (HON. CHESANG) ISSUED ON 2ND DECEMBER 2015)

AND

IN TH MATTER OF ENVIRONMENT AND LAND COURT ACT, CHAPTER 12A OF THE LAWS OF KENYA

IN THE MATTER OF THE MAGISTRATE'S COURT ACT, CHAPTER 10 OF THE LAWS OF KENYA

IN THE MATTER OF ARTICLES 10, 47 AND 62 OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC .....APPLICANT

VERSUS

HON. CHESANG (MS) RESIDENT MAGISTRATE.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

KENYA AFRICAN NATIONAL UNION.....INTERESTED PARTY

EX PARTE: PAUL KARANJA KAMUNGE T/A DAVISCO AGENCIES

SIMON PETER KARANJA

FRANKLIN IMBEZI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 31st December, 2015, the ex parte applicants herein seek the following orders:

> **1. An order of certiorari to remove to this honourable court to be quashed the decision of honourable Chesang (MS) Resident Magistrate, Nairobi – Milimani Chief Magistrates Court, made on 2/12/2015 Civil Suit No 7209 of 2015; Kenya African National Union – vs- Paul Karanja Kamunge, Simon Peter Karanja & Franklin Imbezi, sanctioning the eviction of the applciants from their property on known as residential plot B Jericho Estate off Shule Road without a hearing at all or due process; and in excess of her jurisdiction.**
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> **2. An order of mandamus compelling the 1st Respondent to set aside all the proceedings taken before court (Hon. Chesang (Ms) RM, and all the orders issued on Milimani Chief Magistrates Court Civil Suit No. 7209 of 2015; Kenya African National Union –vs- Paul Karanja Kamunge, Simon Peter Karanja & Franklin Imbezi by the learned Magistrate in excess of her jurisdiction.**
>
> **3. Costs.**

Applicants' Case

2. According to the applicants, the 1st and 2nd applicants are the joint owners of all that property on known as residential plot B Jericho Estate off Shule Road (hereinafter referred to as the suit property) having purchased the same from the 3rd Applicant and one, **Eston Sabari Odongo.**

3. They contended that they purchased the suit property from the 3rd applicant on 13th November, 2013 vide a Sale Agreement of the even date having paid Kshs 5,000,000.00 to the 3rd Applicant. However the value of the said property had since then accelerated to over Kshs 10,000,000.00.

4. It was averred that on 2nd December, 2015 the Interested Party instituted Milimani Chief Magistrates Court Civil Suit No, 7209 of 2015 between **Kenya African National Union -vrs- Paul Karanja Kamunge, Simon Peter Karanja & Franklin Imbezi** seeking permanent injunction restraining the ex parte applicants from entering and/or constructing/building any structure or in any other way interfering with the Interested party's quiet possession of the suit property and further that the officer commanding police division, Buruburu ensures compliance of the order/decree and security. Contemporaneous with the above suit, the Interested party also filed a notice of motion of the even date seeking to restrain the applicants from trespassing into the suit premises, destroying the interested party's property, obstructing/blocking the construction works, and in/or in any other way interfering with the interested party's quiet possession until the application was heard and determined.

5. It was deposed that on the same date, the learned Magistrate purported to issue orders restraining the ex parte applicants from trespassing into the suit premises, destroying the interested party's property, obstructing/blocking the construction works, and in/or in any other way interfering with the interested party's quiet possession. It was the applicants' case that the said orders were issue without jurisdiction and unlawfully divested them of their property.

6. To the applicants, the impugned orders which are by their very nature final in nature were issued without according them a hearing, or at all as mandated by law.

7. It was disclosed that on 8th December, 2015, the applicants moved the said court (**Hon. Chesang (Ms) RM**) by their applicant of the even date seeking to vary and/or set aside the said orders but the learned magistrate declined to entertain the said application but instead summoned the ex parte applicants' advocate to her chambers and told him to "do what he liked". The said Magistrate further refused the applicants application for leave to appeal against the said decision.

8. It was the applicants' case that, by issuing the impugned orders, the learned magistrate helped the interested party achieve its motive of divesting them of their property without a hearing and without following the due process of the law. It was reiterated that the impugned orders were issued in finality and that nothing was left to be tried in the main suit pending before the learned magistrate.

9. The applicants averred that while acting as above, the 1st respondent failed to comply with the law, instead electing to arbitrarily deal with the suit property and rid them of their property and divested them of all their rights to and interests over their properties aforesaid in consequence of which they have been deprived of their constitutional right to property without lawful cause. They further asserted that their rights to secure protection of the law and constitutional entitlement to fair administrative action will continue to be violated through the actions herein; and through the threatened actions.

Respondent's Case

10. In opposition the application, the Respondent averred that the matter was instigated by way of an application dated 2nd December 2015 and after perusal of the Replying Affidavit therein, she was satisfied that the Applicant had a good case and therefore granted the Applicant prayers (a), (b), (c) and (e) of the application with condition to serve the opposing party for the hearing on of 11th December, 2015 for prayer (d) of the application. It was disclosed that on 12th December, 2015 (sic), both parties were represented by their advocates but **Mr. Abdikadir** for the Respondent had not filed his replying affidavit but instead filed a fresh application to set aside the previous orders. **Mr. Mariaria** on the other hand insisted that the orders granted be confirmed in the absence of a replying affidavit opposing his application.

11. The Respondent deposed that as a result of the heated exchange in open court, particularly from **Mr. Abdikadir**, she deemed it fit to handle the matter in chambers to avoid unnecessary attention and embarrassment on the parties and herself. While in chambers, the Respondent invited parties to relook at their applications afresh or agree but they failed to agree and the acrimony went on for a further two hours.

12. According to the Respondent, in order to avoid the orders being confirmed as prayed by **Mr. Mariaria**, she invited **Mr. Abdikadir** to file a response to the application dated 2nd December, 2015 but he initially refused though afterwards he accepted when the Respondent pointed out the problems with his application, that is, that the annextures to his application were conflicting as to how his client had come into the possession of the subject property, an indication that his client did not have a prima facie case.

13. It was deposed by the Respondent that having managed to cool the tempers of both parties, she made an order in terms of the order dated 11th December, 2015 as shown in the proceedings.

14. It was therefore the Respondent's case that the matter before her was not of eviction but injunction and vacation thereof and that no decision was made on the ownership of the suit property. It was averred that a Resident Magistrate's court has jurisdiction to issue orders of injunction as provided for under order 40 of the ***Civil Procedure Rules***. In this case, the orders were not in their nature final since parties were invited for an inter partes hearing on prayer (d) of the application dated 2nd February, 2015, which in her opinion was the final order sought in the application.

15. The Respondent however denied that she told the applicant's counsel to "do what he liked" but instead the applicant's counsel put her to a great task of cooling down his temper after which she did not dismiss his application but consolidated it with the previous application dated 2nd December, 2015, noting that "both applications seek ownership of the suit property" and proceeded to grant the applicant's counsel leave to file a replying affidavit so that he could put his house in order regarding the conflicting ownership documents he had filed.

16. The Respondent averred that the applicant's counsel was misleading this Court as to the proceedings of 11th December, 2015. She denied that leave was sought but disclosed that the applicant's counsel instead requested for typed copies of proceedings and the prayer was rewarded by the granting the same. The Respondent explained that the applications are dated 2nd December, 2015 and 7th December, 2015 were consolidated but had not been heard in compliance with the order of the this Court issued on 18th December, 2015.

Interested Party's Case

17. The application was similarly opposed by the interested party, Kenya African National Union (KANU).

18. According to KANU, the suit property is registered in its name and not the ex parte applicants. Apart from the issues touching on the merits of the case pending before the Respondent, it was averred that the 3rd ex parte applicant herein as the interested party's agent, takes care of the suit premises on behalf of KANU and that KANU has neither sold the suit land to him or authorized him to do so.

19. It was disclosed that the issue before the subordinate court is that of an injunction (restraining orders) and not land dispute or ownership and therefore the subordinate court has jurisdiction to entertain it.

20. It was however averred that the subordinate Court never issued orders to KANU to evict the ex parte applicants from the suit land at all. To KANU, the allegations that the 1st respondent declined to entertain the applicant's application for variation of her orders in CMCC No. 7209/2015 was false. KANU narrated its own version of the events and averred that the ex parte applicants filed an application under certificate which was entertained by the 1st respondent herein, certified urgent and fixed for inter partes hearing on 11th December, 2015. It was contended that while KANU's advocate was ready to hear both KANU's application dated 2nd December, 2015, the ex parte applicants' advocate sought for adjournment and leave of the court to file a further affidavit in response to KANU's replying affidavit to the said ex parte applicants application dated 7th December, 2015. Further, the Court (subordinate) was ready to hear the applicant's application for variation but it is the ex parte applicants who were not ready to prosecute their application before the lower court.

21. It was therefore averred that it was not procedurally correct that the subordinate court should have allowed the ex parte applicants' application in the lower court on its motion as the same was opposed. It was averred that neither the ex parte applicants or their lawyer/advocate sought leave of that court to appeal against any orders at all on the 8/12/2015 and that the deponent's averments in paragraph 11 of the affidavit were untrue.

22. It was contended that the orders sought to be review/quashed/set aside herein, were issued on an application made under order 40 of the ***Civil Procedure Rules*** and that the appeal thereof being the automatic, leave to appeal is not pre-requisite at all. It was reiterated that the learned magistrate only issued restraining orders against the ex parte applicants and not orders of eviction.

Determination

23. I have considered the issues raised in the instant application.

24. In this case, it is important to revisit the Court's judicial review jurisdiction. Article 47 of the Constitution is emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

25. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the Judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

26. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

27. Whereas the general position is that in judicial review, the Court is only concerned with the process through which the decision is arrived at rather than the merits of the decision itself, in practice, the distinction between the two is rather blurred. That this is so was appreciated by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR,** where the Court expressed itself at paras 55-58 as hereunder:

> **55. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, *Section 7 (2) (l)* of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the**

traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in *Article 24 (1) (b)* and *(e)* of the *Constitution to wit* that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.

56. Analysis of *Article 47* of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. *Section 7 (2) (f)* of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; *Section 7 (2) (j)* identifies abuse of discretion as a ground for review while *Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i)* and *(iv)* deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

57. In Mbogo & another -v- Shah (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in Mbogo -v- Shah *(supra)* and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

58. The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act,* there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e)* and *(h)* of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.

28. It is however important to note as was held by the East African Court of Appeal in **East African Community vs. Railways African Union (Kenya) and Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.

29. I associate myself with the holding in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** to the effect that:

> **"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."**

30. In this case, it is the applicants' case that the Respondent granted final orders of eviction before hearing the applicants. From the copy of the impugned order it is clear that the Respondent granted the following orders relevant to this ruling:

> **1. That the Defendants/Respondent by themselves, their respective agents/servants and/or/whomsoever is claiming on their behalf/instructions be and is hereby directed and/or ordered to remove the red soil/material and any other illegal structures, from the suit premises and/or in the alternative the Plaintiff be and is hereby allowed to remove the said red soil/materials and/or any other related items from the entrance of the suit premises.**
>
> **2. THAT the Defendants/Respondents, their agents, their servants and whomsoever is acting on their instructions/behalf be and is hereby restrained from trespassing into the suit premises, destroying the Plaintiff's property, from obstructing/blocking the construction works, and/or in any other way interfering with the Plaintiff's quiet possession, of the suit premises; more specifically known as KNU Offices Plot, Harambee, Nairobi, situated at Jericho Estate pending inter partes hearing on 11/12/2015.**
>
> **3. THAT the Officer Commanding Police Division, Buru Buru be and is hereby ordered to ensure compliance of the Court order and that security prevails.**

31. It is clear that the order which was granted was in the nature of mandatory injunction. That such an order ought only to be granted in exceptional circumstances is now trite. In **Kenya Breweries Limited & Another vs. Washingtone O. Okeyo Civil Appeal No. 332 of 2000 [2002] 1 EA 109** the Court of Appeal stated as follows:

> **"A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application…A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction".**

32. However in **Belle Maison Ltd vs. Yaya Towers Ltd Civil Case No. 2225 of 1992** the Court appreciated that a mandatory injunction ought and must be invoked to aid law.

37. It is therefore clear that in appropriate cases mandatory injunctions may be granted. As to whether the Respondent was warranted in doing so can only be a matter for an appellate tribunal as opposed to a judicial review court. From the said order it is clear that there was no express order of eviction contrary the applicant's contention. Whereas the order seemed to suggest that the suit property belonged to the interested party, in my view since in an interlocutory application, any finding can only be peremptory and not final, such finding does not bind the Court that will eventually hear the suit.

38. The applicant further contends that the Respondent's conduct of the proceedings before her manifested bias towards the interested party. The rule on bias was restated in **Porter and Weeks vs. Magill (House of Lords) [2001] UKHL 67** where it was held that:

> **"In assessing whether there had been bias, the court should take all relevant circumstances into account: The ultimate question is whether the proceedings in question were and were seen to be fair"**.

39. This was the position taken by the Court of Appeal in its majority judgement in **Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge Civil Appeal No. 79 of 1998 [1995-1998] 1 EA 134** in which **Lakha, JA** it expressed himself as hereunder:

> **"In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit…There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; "The judge was biased."**

40. In **Omolo, JA**'s view, once it is accepted that a judge was in fact biased against a party then the question of any notional fairness in the eventual outcome of the dispute becomes merely academic. Bias must however be distinguished from mere strong language. I am not satisfied that the use of a strong language in a decision *ipso facto* constitutes bias. As was held in **Ogang vs. Eastern and Southern African Trade and Development Bank (PTA Bank) [2003] 1 EA 217:**

> **"Mere strong language by a judge does not establish bias since dialogue between the bench and the bar is commonplace and the views expressed therein do not necessarily amount to a predetermination of issues."**

41. Therefore whereas a Court's language may be unnecessarily strong, it does not necessarily amount to a manifestation of bias. As held in **Devji Ladha Patel vs. Nathabhai Vashram Patel Civil Appeal No. 16 of 1943 ([1944] 11 EACA 15:**

> **"Though the letters were couched in strong language, when it is agreed by the parties that the arbitrators shall send their remarks it must be in contemplation that such remarks will include comments on the evidence and reasons for believing or disbelieving the evidence…If one arbitrator is assiduous in the performance of his duties and the other is not that is no ground for setting aside the award of the umpire. Much less could it be regarded as proof of misconduct on the part of the umpire."**

42. As was held by **Apaloo, JA** (as he then was) in **Haji Mohammed Sheikh T/A Hasa Hauliers vs. Highway Carriers Ltd. [1988] KLR 806; Vol. 1 KAR 1184; [1986-1989] EA 524:**

> **"If the Judge introduced into his consideration of the application extraneous matters and founded his decision either partly or wholly on them, then the exercise of his discretion can properly be faulted. But if there is evidence on record to justify the Judge's feeling that the genuineness of the defence was open to suspicion, there is nothing extraneous in the observation...One's experience teaches one that charges of bias or ill-will against a Judge or adjudicator are usually made by defeated litigants often motivated by disappointment at**

adverse verdicts. Where a party or his advocate's conduct is deserving of judicial censure, strong language by the Judge in condemnation of that conduct cannot properly be stigmatised as bias or judicial hatred. Nor does it justify an appellate Court in substituting its discretion for that of the trial court regardless of the facts, or provide such Court a warrant for exercising that discretion in favour of a party, who, on the facts, is entirely undeserving of it."

43. In this case, the facts allegedly constituting bias on the part of the Respondent are strenuously contested. This Court cannot, based on such contested facts make a determination that the Respondent was biased as against the Applicant.

44. Before concluding this decision, I must comment on the propriety of involving police in the execution of orders emanating from civil proceedings. In **Kenya Commercial Bank vs. N J B Hawala Civil Application No. 240 of 1997**, the Court of Appeal held that the Police have no legal basis for participating in an attachment. A similar view was taken in **Khaminwa & Khaminwa vs. Jubilee Insurance Co. Ltd. Nairobi HCCC No. 1304 of 1995** where the Court held that Police should not be involved in eviction. In **Kamau Mucuha vs. The Ripples Ltd. Civil Application No. Nai. 186 of 1992 [1990-1994] EA 388; [1993] KLR 35**, **Kwach, JA** expressed himself as follows:

"The only valid criticism of the order of the Judge as of now, but which does not swing the scale one way or the other in this application is the direction that the assistance of the police should be enlisted to secure compliance by the applicant. The police should never be involved in securing compliance with court orders as there is specific provision for the enforcement of an injunction under Order 21 rule 28 of the Civil Procedure Rules."

45. Whereas in exceptional cases, the Court may be entitled to direct that police maintain law and order during the execution of its decisions, it is clear that the police have no role otherwise in the execution of civil process. It is however my view that such exceptional order ought to be granted only where there is satisfactory evidence of the likelihood of a resistance to the execution of the said decisions and ought not to be dished as a matter of course or simply for the asking. Resort to police assistance per se, though improper, cannot however be the basis of quashing of otherwise validly granted orders.

46. Having considered the material before me I am unable to grant the orders sought in this application.

Orders

47. In the premises this application fails and is dismissed with costs. However as fairness is the hallmark of judicial review jurisdiction, and for the purposes of not only justice being done but also being seen to have been done, I direct that further proceedings in Milimani CMCC No. 7209 of 2015 do proceed before any other magistrate with jurisdiction to hear the same other than **Hon. Chesang, RM**.

48. Orders accordingly.

Dated at Nairobi this 30th day of January, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Abdulhakim for the applicants

CA Mwangi