



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL CAUSE NO. 669 OF 2017**

**REPUBLIC.....APPLICANT**

**AND**

**JOAB ONYANGO OLIECH.....EX PARTE APPLICANT**

**VERSUS**

**THE CHIEF MAGISTRATE'S COURT**

**(MILIMANI COMMERCIAL DIVISION).....1<sup>ST</sup> RESPONDENT**

**THE HON. THE ATTORNEY GENERAL....2<sup>ND</sup> RESPONDENT**

**LILIAN MIDWA.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. By a Chamber Summons dated 29<sup>th</sup> November, 2017, the applicant herein, **Joab Onyango Oliech**, seeks the leave of this Court to apply for orders of certiorari, prohibition and mandamus against the ruling of **Hon. G. A. Mmaksi (Mrs) SPM** made on 25<sup>th</sup> September, 2017 in CMCC No. 487 of 2008 and that the said leave operates as a stay of the said proceedings.

2. According to the applicant, on 16<sup>th</sup> September, 2010, Lifeline Traders Auctioneers proclaimed his house hold goods in alleged execution of a judgement in CMCC No. 87 of 2008. Upon making inquiries in respect thereof he found that the 3<sup>rd</sup> Respondent had filed a plaint in respect of a tort that occurred on 11<sup>th</sup> January, 2005. The applicant contended based on legal advice that such an action is statute bared upon the lapse of 3 years hence in his view there was no cause of action against him.

3. It was averred that the applicant moved the Court for stay of execution of the said judgement as he had never been served with the suit papers. It was the applicant's case that the 3<sup>rd</sup> Respondent procured a stranger to the said suit to swear a replying affidavit in opposition to his said application and whereas his advocates filed submissions in respect thereof, none were filed by the 3<sup>rd</sup> Respondent and as a result, on 3<sup>rd</sup> August, 2011, **Hon. L A Arika** delivered a ruling on behalf of the late **Hon. P. Nditika** in which the Court agreed with the applicant by holding that the mandatory provisions for service to a soldier had not been followed and the application for stay was successful.

4. It was averred by the applicant that he was neither aware of an appeal having been filed against the said decision nor was there an application for review thereof. Instead, the 3<sup>rd</sup> Respondent's Advocates applied to amend the names in the pleadings and decree in the said sit from **Joam Oliech** to **Joab Onyango Oliech**. To the applicant since a decree is not a pleading the same cannot be amended. However the 3<sup>rd</sup> Respondent did not proceed with the said application. It was however the applicant's view that by seeking to amend the said documents, the 3<sup>rd</sup> Respondent conceded that he had sued the wrong person.

5. However the 3<sup>rd</sup> Respondent's advocates proceeded after 6 years to extract a Notice to Show Cause why execution should not issue and to have **Hon. G A Mmasi** overrule **Hon. P. Nditika**. It was averred that the former did sign a Notice for the applicant to show cause despite the existence of the ruling of the 3<sup>rd</sup> August, 2011 showing that the applicant had not been served. It was the applicant's case that **Hon. G A Mmasi** adopted a position unknown to law that the defence for a tort which obtains under section 4(2) of the **Limitation of Actions Act** also elapses after some period of time. The said Magistrate was also accused of having ignored the fact that the 3<sup>rd</sup> Respondent never sought to extend the summons and that the said suit having remained unserved for almost 10 years had already abated.

6. According to the applicant, **Hon. G A Mmasi** on 25<sup>th</sup> September, 2017 dismissed hi preliminary objection without any legal basis and disregarded his replying affidavit as well as his submissions despite the fact that the same was not opposed.

7. On behalf of the applicant, it was submitted by **Mr Mbuthia** while reiterating the foregoing that in signing the Notice to Show Cause, the 1<sup>st</sup> Respondent allowed execution against someone else who was never served.

### 3<sup>rd</sup> Respondent's Case

8. In opposing the application the 3<sup>rd</sup> Respondent relied on the ground that the application is an abuse of the process as the applicant has recourse by filing an appeal against the impugned ruling before the High Court Civil Appeals Division pursuant to section 65 of the **Civil Procedure Act** which he had neglected to pursue.

9. It was submitted on behalf of the 3<sup>rd</sup> Respondent by Mr Kissinger that the Notice to Show Cause that was exhibited to the supporting affidavit ad not yet been canvassed before the 1<sup>st</sup> Respondent and that what was heard was a preliminary objection which sought to strike out the suit. In the said ruling the Court found that it was *functus officio* since judgement had already ben entered and therefore the issue of limitation could not be taken after judgement.

10. According to the Learned Counsel since the preliminary objection was based on law nothing barred the 3<sup>rd</sup> Respondent from opposing the same by way of oral arguments. Learned Counsel reiterated that this application is an abuse of the Court process since the applicant can file an appeal and therefore has an alternative remedy which ought to be pursued. In fact it was revealed that the applicant was aware of this fact and did apply for leave to appeal which leave was granted by the appeal was never pursued. It was submitted that the applicant has neither sought a review of the 1<sup>st</sup> Respondent's decision nor applied to set aside the judgement. Hence the application should be dismissed with costs.

### Applicant's Rejoinder

11. In his rejoinder, **Mr Mbuthia** submitted that the applicant had made two applications but had been given a deaf ear. In his view a look at the ruling delivered on 25h September, 2017 shows that the Court has already decided on the Notice to Show Cause and going back to the said Court would just be an academic exercise.

12. It was his case that since the applicant is not a party to the proceedings in the lower Court he cannot appeal. While admitting that the applicant had applied for leave to appeal it was his submission that the

applicant is entitled to change his mind.

### **Determination**

13. I have considered the issues raised herein.

14. The requirement for leave was explained by a three judge bench comprising **Bosire, Mboghli-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321**, Nyamu, J (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353**.

15. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

**“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”.**

16. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

17. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

**“If he [the Applicant] fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers...”**

18. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, the Court stated:

**“Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court’s discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him.... Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of *John vs. Rees [1970] Ch 345 at 402*. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration.”**

19. This position was appreciated by **Majanja, J** in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between Vania Investments Pool Limited and Capital Markets Authority & Others* in which the learned Judge expressed himself as follows:

***“I do not read the Court of Appeal to be saying that the Court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in *Oceanfreight Transport Company Ltd vs. Purity Gathoni and Another Nairobi HC Misc. Appl JR No. 249 of 2011 [2014] eKLR*, “In my view, the reference to an “arguable case” in *W’Njuguna’s Case* is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view.” The duty of the court to consider the facts is not lessened by the mere conclusion that the case is frivolous, or that leave is underserved by examining the facts...Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose.”***

20. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. The grant of leave being an exercise of discretion the conduct of the applicant must also be considered.

21. In this case, the main ground for opposing the application is that there is an alternative remedy available to the applicants which remedy the applicants intended to invoke by seeking leave to appeal but decided not to pursue the same.

22. The applicant’s grievance seems to be that though he is not a party to the proceedings in the lower Court a Notice to Show Cause has been taken against him in respect of a judgement which was not given against him in proceedings which are themselves time barred. However the said Notice to Show Cause is yet to be heard. The applicant however contends that the effect of the ruling of 25<sup>th</sup> September, 2017 is that the Notice to Show Cause has been disposed of. I have looked at the said ruling and I disagree that the Notice to Show Cause was disposed of by the said ruling. In his ruling the 1<sup>st</sup> Respondent stated that “all through the defendant has been on record as he has been duly served.” That statement, according to the applicant seems to contradict an earlier finding by the same Court presided over by a different Magistrate on 3<sup>rd</sup> August, 2011 that “the mandatory provision of service to a soldier was not followed”. I have perused the earlier ruling and I do not find it to state that service was never effected on the applicant herein. The Court simply found that the procedure for service on a soldier was not followed and left it at that. What has intrigued me is the fact that the applicant only chose to seek stay of execution without more. That with due respect is a very unusual way of challenging a decision.

23. It is however my view that the issue whether the applicant has ever been served is yet to be determined and the statement by the 1<sup>st</sup> Respondent in the ruling of 25<sup>th</sup> September 2017 reproduced hereinabove was purely *obiter*.

24. What is however clear is that the Notice to Show Cause is yet to be dealt with. The applicant's contention that that hearing is an academic exercise in my view has no basis. As was held by **Justice Mohammed Ibrahim** in the Supreme Court case of **Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 others [2014] eKLR**:

**“A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchal system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court”.**

25. If on the other hand the applicant is aggrieved by the decisions dismissing his preliminary objection, nothing stops him from filing an appeal against the said ruling. Whereas he may not have been a party to the hearing of the main suit, and I am not making a finding in respect thereof, he was definitely a party to the proceedings in which he raised a preliminary objection and could with leave of the Court lodge an appeal. He in fact properly sought and was granted the said leave but decided to “change his mind” as his learned counsel submitted. No reason has been given for this change of mind to an alternative that was clearly available to him.

26. Section 9(2), (3) and (4) of the *Fair Administrative Action Act*, No. 4 of 2015 provides:

***(2) 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.***

***(3) 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).***

***(4) 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.***

27. It is however my view that the onus was upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. This was the position adopted by the Court of Appeal in **Republic vs. National Environment Management Authority [2011] eKLR**, where the Court held that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment,

**“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case**

**which would remove it from the appeal process set out in the statute with respect we agree with the judge.”**

28. Therefore as was stated by Nyamu, J (as he then was) in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:**

**“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief...”**

29. This Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013 held that:

**“...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute.”**

30. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425,** where it held that;

**“Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure...In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions.”**

31. 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. In **Re Preston [1985] AC 835 at 825D** Lord Scarman was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.

32. Lord Chancellor, Lord Hailsham of St. Marylebone in the House of Lords decision in **Chief Constable vs. Evans [1982] 3 ALL ER 141,** stated at p 143 as follows with respect to the judicial review remedy:

***“This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for declaration, is intended to protect the individual against abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner”.***

33. Mumbi Ngugi, J in **Rich Productions Limited vs. Kenya Pipeline Company & Another [2014],**

explained why the Court must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

**“The reason why the Constitution and law establish different institutions and mechanisms for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 of the Constitution to supervise bodies such as the 2<sup>nd</sup> Respondent such supervision is limited in various respects, which I need not go into here. Suffice it that it (the court) cannot exercise such jurisdiction in circumstances where parties before court seek to avoid mechanisms and process provided by law, and convert the issues in dispute into constitutional issues when it is not.”**

34. In this case it is my view that to grant leave to the applicant as sought would be pre-emptive of the decision that the 1<sup>st</sup> Respondent is likely to arrive at after hearing the Notice to Show Cause.

35. Section 9(2) of the *Fair Administrative Action Act* is clear that this Court is barred from reviewing an administrative action or decision until the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. The Legislature must be taken to have been aware that these proceedings only challenge the process while an appeal challenges the merits of the case yet they still, in their wisdom, provided that parallel proceedings are not permissible as long as they challenge the same decision. Accordingly, if what may be achieved by the alternative remedy is substantially the same as what is sought in the judicial review proceedings, a party ought not to be allowed to have a double-pronged attack on the same decision. In my view even without the provisions barring such a course, to proceed in that manner would amount to playing lottery with the Court and render legal proceedings a circus. That clearly is an abuse of the Court process.

36. Instances that constitute abuse of the Court process were set out in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229** as including the following cases:

**(a) “Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.**

**(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.**

**(c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.**

**(d) (sic meaning not clear))**

**(e) Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.” [Emphasis added].**

76. It is therefore clear that a party cannot invoke two jurisdictions at the same time merely because he is relying on different grounds in both matters. As was held in **Mitchell and Others vs- Director of Public prosecutions and Another (1987) LRC (const) 128**

**“ ...in civilized society legal process is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties .It can be used properly ,it can be used improperly, and so abused. An instance of this is where it is diverted from its proper purpose, and is used with some ulterior motive, for some collateral one or to gain some collateral advantage, which the law does not recognize as legitimate use of that process. But the circumstance in which abuse of process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes extrinsic evidence only. But if and when it is shown it**

**happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instance. Others attract the res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop proceedings, or put an end to it. This inherent power has been used time and again to put a summary end to a process which seeks to raise and have determined an issue which has been decided against the party issuing it in earlier proceedings between the parties**". [Emphasis added].

37. Whereas, this Court may in exceptional cases excuse the failure to invoke the alternative dispute resolution mechanisms provided under the law, where such mechanisms have yet to run their usual course or are abandoned midstream as the applicant did here by disregarding the appeal in respect of which leave was sought and granted, and proceed to commence judicial review proceedings or *vice versa* amounts to abuse of the process of the Court.

38. In my view by granting the applicant permission or leave to commence judicial review proceedings as sought herein would amount to this Court abetting abuse of its process. Since the decision whether or not to grant leave is discretionary, one of the factors which the Court will consider in deciding whether or not to grant it is the conduct of the applicant.

39. In this case it is my view and I hereby hold that the applicant's conduct, which amounts to playing lottery with the due process, disentitles him to the leave sought and the same ought not to be granted.

#### **Order**

40. In the premises I decline to grant leave and without such leave these proceedings are rendered still-born.

41. It follows that these proceedings are incompetent and are hereby struck out but with no order as to costs as the judicial review proceedings proper were yet to be commenced and as the merit of the applicants' case is yet to be determined.

42. I however, in the exercise of this Court's supervisory jurisdiction pursuant to Article 165(6) of the Constitution direct that further proceedings in Nairobi Milimani CMCC No. 487 of 2008 be undertaken before any other Magistrate other than **Hon. G Mmasi (Mrs)**.

43. It is so ordered.

**Dated at Nairobi this 18<sup>th</sup> day of December, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Masaviru for Mr Mbuthia for the applicant**

**CA Ooko**