



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW**

**MISCELLANEOUS APPLICATION NO. 631 OF 2017**

**IN THE MATTER OF ARTICLES 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF  
JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF STEPHEN KITHINJI NGARUTHI**

**AND**

**IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT MILIMANI COMMERCIAL  
COURTS CIVIL CASE NO. 3927 OF 2017**

**AND**

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF JUDICIAL  
REVIEW FOR ORDERS OF CERTIORARI PROHIBITION PURSUANT TO ORDER 53 OF  
THE CIVIL PROCEDURE RULES 2010**

**BETWEEN**

**STEPHEN KITHINJI NGARUTHI ..... APPLICANT**

**VERSUS**

**THE CHIEF MAGISTRATE COURT AT MILIMANI..... 1<sup>ST</sup> RESPONDENT**

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

**LUCY NCEKEI..... INTERESTED PARTY**

**RULING**

1. The ex parte applicant STEPHEN GITHINJI NGARUTHI seeks from this court vide a chamber summons dated 22nd October 2017, leave of the court to institute Judicial Review orders of:

*a) Certiorari to remove into this court and quash the decision of the 1<sup>st</sup> respondent Chief Magistrate's Court at Milimani made on 7<sup>th</sup> June 2017 and all other consequential orders and actions thereof in Nairobi Chief Magistrate CC 3927 of 2017 between Lucy Ncekei and Stephen Kithinji Ngaruhi.*

*b) Prohibition to prohibit the 1<sup>st</sup> respondent Chief Magistrate's Court at Milimani Law Court CC 3927 of 2017 between the applicant and interested party herein.*

*c) That grant of leave does operate as a stay of the proceedings or any further actions thereof in Nairobi Chief Magistrate's CC 3927/17 between the applicant and interested party herein.*

*d) That costs be provided for in any event.*

2. The application is predicated on the grounds on the face of the chamber summons, the statutory statement and verifying affidavit and annexures.

3. The ex parte applicant's case is that the interested party herein Ms Lucy Ncekei filed suit vide Milimani Chief Magistrate CC 3927/2017 and obtained orders of injunction restraining the ex parte applicant from evicting her from what she calls her matrimonial home.

4. The interested party also filed an application in the said civil suit seeking for interim orders and the court granted her injunctive orders restraining the ex parte applicant herein from threatening to evict, evicting or otherwise interfering with the interested party's quiet living in the suit premises pending hearing and determination of the application interpartes.

5. It is claimed that the OCS Buruburu Police Station or incharge of Local Administration Police was ordered to supervise and enforce the court order of injunction. The trial magistrate ( Honourable G.A. Mmasi (Mrs) Senior Principle Magistrate also directed that the application be served for interpartes hearing on 20<sup>th</sup> June 2017 before Honourable Ocharo, Senior Resident Magistrate.

6. Upon the ex parte applicant herein being served with the application and injunctive orders, he filed an application under certificate of urgency and a replying affidavit under protest. He also filed a preliminary objection to the applications in the subordinate court contending that the court had no jurisdiction to determine matters involving ownership, use, occupancy and title of land and in particular, ownership of LR No. Nairobi/Block 82/1589. He also contended that the issues raised in the plaint dated 30th May 2017 and the application raised issues of matrimonial property and the Chief Magistrate's Court lacked jurisdiction to determine the matter; and that without prejudice to the foregoing, the court lacked jurisdiction to determine the suit as the property in question is not matrimonial property as envisaged by the Matrimonial Property Act, 2013; the applicant also claimed that the suit discloses no reasonable cause of action.

7. The applicant herein who was the defendant in the said suit also filed an applications under certificate of urgency seeking the trial court to stay and discharge the ex parte orders of injunction given on 6<sup>th</sup> June 2017, while urging the court to strike out/ dismiss the suit with costs.

8. The ex parte applicant claims that the alleged matrimonial home on the suit land belongs to him as it was jointly owned by him and his deceased wife **Helen Igoki Kithinji** and that after her demise, he petitioned for letters of administration vide High Court Succession Cause No. 2235 of 2009. That he was issued with a grant which grant was confirmed on 11<sup>th</sup> June 2012 distributing the property to the applicant and his three children sired with the deceased Helen Igoki Kithinji in varying shares. That therefore there is no way that the interested party herein who was merely invited into his home as a 'visitor' after she had been evicted from her Karen Home could have acquired rights over the ex parte

applicant's home and property which he co-owned with his late wife.

9. As is the norm, the learned trial magistrate heard the preliminary objection inter partes and delivered her ruling on 25<sup>th</sup> August 2017 dismissing it with costs. It was then that the ex parte applicant herein did on 23<sup>rd</sup> October 2017 file the chamber summons herein, after about 2½ months seeking leave to institute Judicial Review proceedings challenging the jurisdiction of the Chief Magistrate's Court to hear and determine the dispute before her which he claims revolves around ownership and occupancy of his home by the interested party herein and whom he calls a 'visitor'.

10. In the view of the ex parte applicant, the trial magistrate is purporting to set aside/revoke the orders of confirmation of a grant in his favour as issued by the High Court in the succession Cause No. 2235/2009. The ex parte applicant takes issue with the interested party's claim in the lower court at paragraph 4 of her plaint where she alleged that she participated in the purchase of the property which she claims is her matrimonial property.

11. In the view of the ex parte applicant, the interested party's claim will affect the rights of the applicant and his children as they live in the home. He urged the court to grant leave as prayed.

12. The chamber summons was opposed by the respondents represented by the Attorney General who filed grounds of opposition dated 14<sup>th</sup> November 2017 contending that the application lacks merit and is based on misconception of the law; that the applicant had not addressed any grounds in his statement of facts as filed to warrant leave; that the application is an attempt to appeal against the ruling of the 1<sup>st</sup> respondent albeit disguised as a Judicial Review application; that the 1<sup>st</sup> respondent acted within jurisdiction in issuing the impugned order of 7<sup>th</sup> June 2017 and was within his mandate in issuing the interim injunction and that the application here is clearly an abuse of the court process and should be dismissed forthwith with costs.

13. The interested party Lucy Ncekei filed a replying affidavit sworn by herself on 10<sup>th</sup> November 2017 deposing that the affidavit sworn by the applicant is defective because it does not bear a date when the same was sworn and commissioned. She denies ever claiming for ownership of the subject property. She asserts that a married woman who moves into a house whether owned or rented by her husband is entitled to live in that house as matrimonial home hence the trial magistrate had jurisdiction to issue orders that she did and to try the suit before her because she was not dealing with matrimonial property but matrimonial home. That she moved into the house as the wife to the applicant, not because she was evicted from her rental house in Karen.

14. Parties' advocates and the interested party acting *prose*, argued the application orally before me on 5th November 2017 wholly adopting and replicating their pleadings and or affidavits on record and maintaining their respective positions as reproduced above.

15. With the applicant's counsel Miss Kiniti submitting that the trial court has no jurisdiction to hear and determine the issues before her which attempt amounts to revoking the confirmed grant in the succession cause which is determined.

16. Miss Maina for the respondents added that the applicant should have appealed against the dismissal of the preliminary objection instead of filing Judicial Review and that the trial court properly addressed itself to the issues before her.

17. Ms Lucy Ncekei also relying on her sworn replying affidavit submitted emphasizing that the verifying affidavit by the applicant is fatally defective as it is not dated; that in the statutory statement she is not described as a party and that she was only included in the reliefs sought. The interested party maintained that she never sought ownership of the matrimonial home as alleged by the applicant. That she only sought justice to restrain the applicant from evicting her and harassing her including withholding of her clothings. She believes that the lower court has jurisdiction to hear and determine the dispute before it. She urged the court to dismiss the application for leave.

18. In a brief rejoinder, Ms Kiniti maintained that the interested party had laid claims of purchaser of the matrimonial property and that the preliminary objection raised before the trial court was well founded but that the Chief Magistrate's Court acted outside its powers.

### **DETERMINATION**

19. I have considered the foregoing and in my view, the issues for consideration are whether this court should grant leave and if so whether such leave should operate as stay of proceedings before the Chief Magistrate's Court in CM CC 3927/17. But first is the competency of the ex parte applicant's verifying affidavit which is not dated though signed by him. In my view, failure to date a document or an affidavit which is duly filed cannot be fatal to the proceedings especially where the document is filed in court as part of the proceeding and as the document is duly signed. The situation would have been different if the applicant's affidavit had not been signed, for ownership. I am therefore in agreement with Miss Kiniti that the defect identified is a mere technicality and this court can, under Order 19 Rule 6 of the Civil Procedure Rule admit any affidavit notwithstanding the defect therein which does not go to the substance of the case. The date of the document can safely be inferred to be the date when it was filed in court.

20. The interested party also raised an issue that she was not described by the applicant and that she only features in the reliefs sought, which means that the applicant had no intention of enjoining her to these proceedings. In my humble view, the defect identified is a mere procedural fault or flaw which is curable by application of Article 159(2) (d) of the Constitution which is clear that justice shall be administered without undue regard to procedural technicalities, as the interested party is now a party to these proceedings and has had her day in court.

21. I now delve into the main issues of leave and if it is merited, whether leave should operate as stay.

22. For the applicant to be granted leave to apply for Judicial Review remedies of Certiorari and Prohibition as stipulated in Sections 8 and 9 of the Law Reform Act and Order 53 Rule 1 of the Civil Procedure Rules, he must appreciate that the power to grant or decline leave to apply is a discretionary power vested in the court and therefore that discretion must, like all other judicial discretions, be exercised judiciously and not capriciously or whimsically.

23. The jurisdiction to supervise the subordinate courts and therefore interfere in their exercise of jurisdiction over a matter is clothed in this court by Article 165(6) of the Constitution. But that jurisdiction vested in this court is not jurisdiction to police the exercise of discretion by the subordinate court.

24. The applicant must satisfy this judicial review court that he has a prima facie arguable case to warrant an indepth investigation at the substantive hearing before leave to apply can issue.

25. Leave stage, it has been held, not once, is a filter whose aim 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 **Matiba vs Attorney General Nairobi High Court Miscellaneous Application No. 790/1993**). In **Republic vs County Council of Kwale & Another, Ex parte Kondo and 57 Others Mombasa HCC Miscellaneous Application 384/1996**, Waki J made it clear when he stated, inter alia,

***“ The purpose of application for leave to apply for Judicial Review is firstly to eliminate at an early stage any application for Judicial Review which are either frivolous, vexatious or hopeless and secondly, to ensure that the applicant is only allowed to proceed to the substantive hearing is the court is satisfied that there is a case 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 felt 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 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 interpartes 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."*

26. The yardstick for leave was captured in **Mirugi Kariuki vs Attorney General** civil Application No. 70/1991 [1990-1994] [1992] KLR 8 in the following terms:

*"The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power...the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter... It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person's legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he 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... In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for the orders sought."*

27. In **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Television Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199**, the Court of Appeal was of the view 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.

28. 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.... Like the Biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. One can safely state that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of Donoghue vs. Stephenson in the last century. 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.*"**

29. From the foregoing decisions which have stood the test of time, leave is discretionary and not mandatory exercise of the court's jurisdiction. If the court hearing the application for leave is of the view that there is an arguable prima facie case for consideration at the substantive stage, the court will grant leave so as to accord the applicant an opportunity to ventilate his grievances. However, where it is clear that the applicant is using this court as an appellate forum and or where the court is satisfied that there are other available efficacious alternative remedies which the applicant could have resorted to, as stipulated in section 9 of the Fair Administrative Action Act, 2015, the court will not grant leave.

30. This court warns itself of the dangers of delving into the merits of the claim before the trial court as that would prejudice the parties' positions and the trial magistrate would be placed in an embarrassing situation especially where it has pronounced itself on the issue of her jurisdiction to hear the dispute before her, as this is not an appeal challenging the decision to hear the matter before her.

31. Nonetheless, it is the pleadings before the lower court that are before this court for examination to determine whether the allegations that the lower court is acting ultra vires has substance from whence this court must ascertain the arguability of the intended application for judicial review orders.

32. In the plaint dated 30th May 2017 filed by the interested party herein against the applicant, all the 3 prayers seek for injunctive orders both mandatory, prohibitory and directory against the applicant, from evicting the interested party from their matrimonial home; and general damages for physical, psychological and emotional injury/suffering. There is no single claim for ownership of the alleged matrimonial home or property by the interested party. However, in her affidavit in support of her interlocutory application for injunction sworn on 30<sup>th</sup> May 2017, she claims that she had been customarily married to the applicant for now close to three years and that the applicant had kicked her out of the home yet they ran joint businesses together. She deposed that she was homeless after being kicked out of the home.

33. The applicant in reply thereto deposed that the interested party is merely a visitor in his home not a wife and that neither can she lay claim to his home which he acquired with his late wife and which he was issued with a grant as confirmed in the named succession cause.

34. My very humble view of this matter is that the applicant having raised the issue of jurisdiction of the lower court to hear and determine the matter and having challenged the ex parte orders issued on 7<sup>th</sup> June 2017 by the Chief Magistrate's Court, he had the option of either appealing against the ruling/decision of the trial court on jurisdiction or, since the said applications for injunction and for setting aside/discharging the injunction are still pending before the trial court, he proceeds to have them determined on their merits before he can make a decision whether or not to appeal against the orders issued, depending on the outcome.

35. Even assuming that the trial magistrate erred in finding and holding that it has jurisdiction to hear and determine the dispute before her, what the applicant herein contests is not ordinary jurisdiction. It is jurisdiction conferred by the Constitution on the courts contemplated in Article 162(2)(b) of the

Constitution in this case, the Environment and Land Court; which has jurisdiction to hear and determine disputes relating to the environment and the use and occupation of and title to, land. Similar jurisdiction can be found in Section 13 of the Environment and Land Court.

36. In Article 165(5) (b) of the Constitution, this court is expressly barred from hearing and determining disputes exclusively reserved for the courts contemplated in Article 162(2) of the Constitution. It therefore follows that this court would not, in any event, have the necessary jurisdiction to hear and determine the issue of whether or not the trial court has jurisdiction to hear and determine disputes contemplated in Article 13 of the Environment and Land Court Act.

37. That jurisdiction is vested in the Environment and Land Court where, then, the applicant herein should have filed his application for leave to institute Judicial Review proceedings and not before this court.

38. It is trite law that jurisdiction is everything without which, this court acts in vain. This court does not exercise jurisdiction on behalf of Environment and Land Court.( See **Owners of Motor Vessel “Lilian S” vs Caltex Oil (K) Ltd [1989] KLR 1.**

39. Section13(7) of the Environment and Land Court Act empowers the Environment and Land Court to make orders including prerogative orders. The Environment and Land Court enjoys exclusive original and appellate jurisdiction to hear and determine disputes and appeals from subordinate courts and tribunals on matters falling under the jurisdiction of the Environment and Land Court.

40. That being the case, I find and hold that the applicant has not demonstrated that this court has the jurisdiction to grant leave to apply to challenge the proceedings and decision of the subordinate court which would otherwise be within the powers of Environment and Land Court; neither has he demonstrated that he has an arguable prima facie case capable of inquiry by this court at the substantive stage.

41. For those reasons, I am inclined to decline the application for leave. I proceed and dismiss it and order that each party shall bear their own costs of the application.

**Dated, signed and delivered in open court at Nairobi this 11th day of December 2017.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr Mogaka h/b for Kiniti for the applicant

Mr Munene h/b for Miss Maina for the Respondents

Ms Ncekei the Interested Party in person