



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW MISC. APPLICATION NO. 9 OF 2015**

**MICHAEL MUNGAI .....APPLICANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF COURT REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....4<sup>TH</sup> RESPONDENT**

**KENYA COMMERCIAL BANK LIMITED**

**HOUSING FINANCE COMPANY OF KENYA LIMITED/KENYA**

**BUILDING SOCIETY LIMITED**

**CLEOPHAS OGUTU**

**CHRISTOPHER AVISA &**

**OTHERS.....SUSPECTS (INTERESTED PARTIES)**

**RULING**

1. By a Notice of Motion dated 13<sup>th</sup> January, 2015 filed in this Court on 14<sup>th</sup> January, 2015, the ex parte applicant herein, **Michael Mungai**, seeks the following orders:
1. **This matter be certified as urgent for instant disposal in accordance with the High Court urgency rules.**
2. **That the Hon. Court order the Respondents and the agents to correct and delete all the irregular illegal and unlawful false, unauthorized misleading and offensive entries, events, documents, certificates and accounts affecting the Applicant as part of the execution of served lawful court decrees.**
3. **That Hon. Court order the Respondents and their agents to remove the intruders from the Applicants' home on LR Nairobi block 111/530 as part of the reinstatement process that was ordered by the High Court of HCCA 335 of 1997.**
4. **That the Hon. Court order the Respondents and their agents to arrest, charge and prosecute Christopher Avis, Cleophas Ogutu and the others for contempt of the court intrusion,**

- forgery, fraud false accounting , house breaking, theft and other contempt related crimes as described in the notice to sue the Respondents and annexure.
5. That the Hon court grants the Applicant (Decree holder) the costs of this application and any other relief that the honourable court deems fit to grant the Applicant (Decree Holder) against the Respondents.
  2. The application is based on the Statement filed the same day in which the following grounds are stated:
    - a. That the Constitution and laws of Kenya prohibit the state and or any other person from discriminating or arbitrary seizing the possession, ownership, rights, occupation and enjoyment of the Applicants home and private properties the way the Respondents are now doing, using false, unauthorized, misleading and offensive entries, events, documents, certificates and accounts affecting the Applicant. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have been aiding the suspects and their agents to obstruct the course of justice using the 3<sup>rd</sup> and 4<sup>th</sup> Defendants in contravention of the laws, constitution, rules procedures and regulations that govern our Country Kenya. Thus interfering with the Applicant's Constitutional and legal rights as a citizen of Kenya and also obstructing execution of served court decrees, orders and rulings.
    - b. The Respondents and the suspects are claiming to have executed orders that were given by Justice Ringera and Justice Osimo on 2001 and 2002 yet these orders were reviews (with their knowledge) in 2003, for contravening the prejudice and subjudice rules. The documents and accounts that were used to get the said orders were also found to be fraudulent, illegal and outlawed by the high court. In 2001 and 2003.
    - c. That the Constitution, laws and rules of this Country also prevent the state from protecting proprietors of properties which were obtained unlawfully by the suspects. Unfortunately the Respondents and their agents are protecting the suspects and aiding them suspects to commit contempt of the court and other contempt related offences with impunity due to their (Respondents) ignorance, negligence and discriminations on the basis of economic and social status against the Applicant.
    - d. That consequently the Applicant is now pleading with this court to have the suspects arrested and punished as ordered by the High Court (Justice Mabeya) in HCCC 1026 of 2001 and the Hon. Justice Okwengu in HCCA 335 of 1997 for the stated contempt and contempt related offences.
    - e. The Applicant has urged the court to uphold the rule of law and order that the Respondents and their agents be stopped from denying the correctness, accuracy of the application, affidavit, and other supporting documents. (Including served accounts, bills notices, warnings, court ruling, orders decrees etc) and bills that was served on them.
    - f. That instead of settling this dispute as decreed/ordered the High Court of Kenya with support of Court of Appeal, and the Deputy CJ on behalf of Supreme Court, the Respondents and their agents are taking advantage of Court delays to commit contempt and other contempt related offenses with impunity.
    - g. Consequently the Applicant (decree holder) is urging this Honourable Court to exercise its inherent, statutory and constitutional authority to stop any further accumulations and covering up of crimes by the Respondents. Thus effecting the execution notices which have already been served to the Respondents and suspects.
    - h. The Respondents and the suspects are causing a lot of embarrassment, humiliations, hardships, torture and other degrading events against the Applicant with impunity, contrary to the constitution, laws and rules of Kenya.
    - i. It is only fair, just and equitable that this matter be concluded urgently as the suspects have taken the Applicants home, money and other properties unconstitutionally, illegally, unlawfully, un procedurally and in contempt of court decrees, orders, directives, rulings, warnings and notices. This has resulted in a lot of losses, damages, costs, actions, causes, parties etc which are increasing and accumulating every day.
  3. The application is supported by an affidavit sworn by the Applicant himself on 13<sup>th</sup> January, 2015

in which he deposed that since 1997 he and other persons unknown to the Court have colluded with the interested parties over misappropriation of public utilities and funds with the aid of the respondents instead of the respondents adhering to their constitutional obligations to prosecute authors of criminal offences.

4. From the grounds and the supporting affidavit what comes out though not very clearly is that the applicant is seeking orders in execution of orders issued in HCCA No. 35 of 1997 and for arrest, charge and prosecution of the interested parties for inter alia contempt of Court.
5. The commencement of an application for judicial review, as this application from the heading of these proceedings purports to be, is governed by Order 53 rule 1(1) and (2) of the **Civil Procedure Rules** which provides:

**1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.**

**(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavit verifying the facts relied on.**

6. It is therefore clear that before any application for judicial review simpliciter is made, unless brought in a Constitutional Petition pursuant to Article 23 of the Constitution, prior leave to do so must be sought and obtained otherwise such an application would be rendered incompetent.
7. The applicant however contends that he was granted leave to apply for the judicial review in HCCA No. 35 of 1997. However, as was rightly held in **Republic vs. The Chairman Kabras Land Disputes Tribunal & Another Ex Parte Jeremiah Luchombo Kakamega HCMA No. 112 of 2006:**

**“Nowhere in Order 53 do the rules require the Motion filed under rule 3(1) of Order 53 to be filed as a separate matter distinct from the leave or in a file other than the file in which leave is granted. Rule 1(2) of Order 53 clearly requires, that the application for leave must be accompanied by a statutory statement and affidavits verifying the facts relied on. These are the documents that support the Notice of Motion filed under rule 1(3). Indeed, under rule 4(1) of Order 53, copies of the statement accompanying the application for leave are required to be served with the notice of motion and copies of any affidavits accompanying the application for leave are required to be supplied on demand. Moreover, under rule 4(2) of Order 53, the Court may on hearing of the notice of motion allow the statutory statement filed with the application for leave to be amended and may allow further affidavits. Considering that under rule 3(1) of Order 53 once leave is granted under Rule 1 of Order 53 an applicant is required under rule 3(1) of the Order to file only a Notice of Motion, it becomes quite clear that it makes sense to have the motion filed in the same file as the application for leave.”**

8. Apart from that it must be remembered that the substantive legislation empowering the Court to grant judicial review orders currently is the **Law Reform Act**, Cap 26, Laws of Kenya more particularly sections 8 and 9 thereof. The parameters of the said sections were the subject of a judicial pronouncement in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** where it was held:

**“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 the 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..... Even if the respondents had filed documents, they would be copies that would not be sufficient to**

**establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.”**

9. In the matter before me neither such leave has been obtained nor is the applicant seeking orders contemplated under section 8 of the **Law Reform Act**. A party in my view ought not to invoke public law proceedings in order to enforce reliefs which ought to be enforced by way of private law proceedings such as execution proceedings under Order 22 of the **Civil Procedure Rules** save in circumstances under which a relief by way of *mandamus* is the only available remedy. Judicial review, it has been said time and again is a relief of last resort and ought not to be treated as an alternative mode of redress to remedies available under the civil law process
10. With respect to contempt of court the law that governs contempt of court proceedings pursuant to section 5 of the **Judicature Act**, Cap 8 Laws of Kenya is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the **Judicature Act**.
11. The High Court of Justice in England comprises three (3) divisions – the Chancery, the Queens Bench and the Family Divisions. It is true that following the implementation of **Lord Woolf’s “Access to Justice Report, 1996”**, the **Rules of the Supreme Court** of England are being replaced with the **Civil Procedure Rules, 1999** and pursuant thereto the Court of Appeal in the above decision recognised that on 1<sup>st</sup> October, 2012 the **Civil Procedure (Amendment No. 2) Rules, 2012**, came into force and Part 81 thereof effectively replaced Order 52 of the **Rules of the Supreme Court** which was the Order dealing with the procedure for seeking contempt of Court orders in the High Court of Justice in England, in its entirety. Under Rule 81.4 which deals with breach of judgement, order or undertaking, referred to as “application notice”, **the application is made in the proceedings in which the judgement or order was made or undertaking given** and the application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. The Court of Appeal held that leave or permission is no longer required in such proceedings (relating to a breach of a judgement, order or undertaking) as opposed to committal for interference with the due administration of justice or in committal for making a false statement of Truth or disclosure statement.
12. It is therefore clear that a party ought not to commence fresh proceedings in order to obtain contempt of court orders where the alleged contempt was committed in another suit or proceedings.
13. Having considered the application herein, it is my view and I hold that this application is incompetent.

## **Order**

14. It follows that the Notice of Motion dated 13<sup>th</sup> January, 2015 together with these proceedings are hereby struck out but with no order as to costs.

**Dated at Nairobi this 18<sup>th</sup> day of February, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***The Applicant in person***

