



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISCELLANEOUS CIVIL APPL. NO. 314 OF 2015

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS UNDER ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010 THE LAWS OF
KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010, THE NATIONAL LAND
COMMISSION ACT NO 5 OF 2012 AND LAW REFORM ACT, CAP 26 OF THE LAWS OF
KENYA**

AND

**IN THE MATTER OF THE NATIONAL LAND COMMISSION, THE COUNTY LAND
MANAGEMENT BOARD, KAJIADO, THE COUNTY GOVERNMENT OF KAJIADO**

AND

IN THE MATTER OF ADAN ABDULLAHI KADIYE

AND

IN THE MATTER OF YUSSEF MUHUMED ABDI

***EX-PARTE* : YUSSUF MUHUMED ABDI**

RULING

Introduction

1. By a Chamber Summons dated 22nd September, 2015, the applicant herein, **Yussuf Muhumed Abdi**, seeks the following orders:

- 1. That this application be certified as urgent and that the same be given a hearing date on a priority basis.**
- 2. That the Applicant be granted leave to apply for an order of Certiorari to quash the decision of the National Land Commission and the County Land Management Board – Kajiado, to revoke the Applicant’s ownership of Plot Number 1593 ”A”- Business Namanga Trading Centre within Kajiado County.**

3. That the Applicant be granted leave to apply for an order of Mandamus to compel the County Government of Kajiado to restore and reinstate the Applicant as the lawful allottee of Plot Number 1593 “A” – Business Namanga Trading Centre within Kajiado County.
4. That the leave granted to operate as a stay of the decision of the National Land Commission and the County Land Management Board, Kajiado.
5. That the court makes such other and further orders as are necessary and expedient in the circumstances of this case.
6. That the costs of this application be costs in the cause.

Applicants’ Case

2. According to the applicant, on 27th April, 2011 he was duly registered by the then Olkejuado County Council as the lawful allottee of Plot 1593’a’ – Business Namanga Trading Centre within Namanga Centre in Kajiado County (the suit property) having acquired the same from the previous owner, **Adan Abdullahi Kadiye**. Although he later transferred the same to his brother, he subsequently re-transferred the same to himself.

3. However by a notice dated 4th June, 2014 the Secretary of the County Land Management Board, Kajiado (the Board) invited the applicant to attend the said Board’s sitting scheduled for 9th June 2015 to address a complaint lodged by the said **Adan Abdullahi Kadiye**. The said sitting was adjourned to 23rd June 2015 and on appearing on the said date the applicant was informed that the Board had deliberated on the matter and determined that the property be reverted to the said **Adan Kadiye** and the County Government of Kajiado proceeded to revoke the transfer to him and reinstated the said **Adan Kadiye** as the allottee thereof.

4. It was the applicant’s case that this decision violated the rules of natural justice and that it is only Court of law that is empowered to hear and determine disputes arising from private lands between citizens hence the Board had no jurisdiction to deliberate over the matter.

Determinations

5. I have considered the instant application, the Statement and verifying affidavit filed herein as well as the submissions of counsel.

6. The Applicant’s application in my view is based on two grounds.

7. The first ground is that the action of the Board violated the rules of natural justice in that the applicant was never afforded an opportunity to be heard before the challenged decision was made. The second ground is that the said decision was ultra vires the powers of the Board.

8. The requirement for leave was explained by a three judge bench comprising **Bosire, Mboghli-Msagha & Oduk, 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.**

9. **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”.

10. 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.

11. 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...”

12. 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.”

13. 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.

14. In this case the two grounds relied upon by the applicant if true may well justify the grants of the order of judicial review. Accordingly, I am satisfied that the applicant has established *prima facie* grounds for the grant of the leave sought. Leave is accordingly granted to the applicant to commence judicial review application in terms of prayers 2 and 3 of the said Chamber Summons and the substantive Motion therefor is to be filed and served within 7 days.

15. However the mere fact that the application discloses a *prima facie* case does not automatically warrant the grant of stay of proceedings in question. The Court, despite a finding that the applicant has established a *prima facie* case must proceed to address its mind on whether or not to direct that the leave so granted ought to operate as a stay of the proceedings in question and that determination is no doubt an exercise of judicial discretion and hence like any other judicial discretion must be exercised judicially and not capriciously or whimsically.

16. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since in that case there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted. See George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.

17. **Maraga, J** (as he then was) in Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006 was of the view that:

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the *ex parte* applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”
[Emphasis mine].

18. In this case, it was submitted by **Miss Karumba**, learned counsel for the applicant that pursuant to the impugned decision amending the records in question, the new allottee has taken possession of the suit property on the ground. In such circumstances, the effect of granting the stay sought herein would be not only to overturn the challenged decision but also to dispossess the said party of the suit property. In my view that is not what a direction in the nature of a stay is all about.

19. In the premises I decline to direct that the grant of leave herein shall operate as a stay as sought in prayer 4 of the said Summons.

20. The costs of this application shall be in the cause.

Dated at Nairobi this 23rd day of September, 2015

G V ODUNGA

JUDGE

Delivered in the absence of the parties

Cc Patricia