REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 12 OF 2014

ISAAC NDUNGU MUCHEMI……...EX PARTE APPLICANT

VERSUS

SENIOR RESIDENT MAGISTRATE

NAIVASHA LAW COURTS……..1ST RESPONDENT

THE HIGH COURT, NAKURU LAW COURTS…….....2ND RESPONDENT

AND

FRANCISCO NATTA, NATTA SARONIO and F. SOLE

(Sued as the personal representative of Marula Estate)…….INTERESTED PARTY

RULING

By the notice of motion dated 20/3/2014, the applicant seeks the following prayers:-

1. **THAT the applicant herein be granted leave to institute an application for orders of prohibition of the ruling on 22nd October, 2009 or adopting the ruling of the High Court as judgment emanating from a prior judgment from the Naivasha Senior Resident Magistrate relating to that building built on L.R. 11367 – I.R. 20093;**
2. **THAT leave so granted to apply for orders of prohibition and certiorari do apply as a stay of execution arising out of Nakuru High Court Civil Appeal No. 111 of 1995 and also the implementation of the decision and judgment of Naivasha Senior Resident Magistrate on 8th December, 1995;**
3. **THAT the subject herein be granted leave to institute an application for an order of certiorari against the Naivasha Senior Resident Magistrate and the Nakuru High Court for orders that this honourable court be pleased to bring before it and quash proceedings and the decision made by the Naivasha Senior Resident Magistrate and the Nakuru High Court made on 8th December 1995 and 22nd October 2009 respectively relating to that building built on L.R. 11367 – I.R. 20093.**

The application is supported by grounds found in the body of the application, a supporting affidavit of the applicant and a statement of facts.

The applicant is seeking the leave of the court to allow him commence judicial review proceedings so that he can apply for orders of certiorari to quash the decision of Senior Resident Magistrate, Naivasha made on 8/12/1995 and High Court decision made on 22/10/2009. In the Naivasha case, the Interested Party, Marula Estate Ltd had sued Margaret Nduma & 29 Others who included the plaintiff, seeking eviction from their land. The court granted the order, and the applicant then filed CA 111/1995 against Marula Estate. I have read the decision of J Maraga dated 22/10/2009 in which the applicant had sought review of J Kimaru's order dismissing his application for injunction. In that ruling Justice Maraga set out the history of the applicant's grievances from page 2, 2nd paragraph to page 3. He declined to grant the prayers and one of the reasons was that J Kimaru had found that the appeal had been dismissed and therefore he could not grant a temporary injunction; that the Magistrate's Court at Naivasha was correct in evicting the applicant from the Interested Party's land because he no longer worked as a teacher at Marula Primary School.

The applicant's complaint seems to be that he was wrongly removed from the Interested Parties' land. He had been a teacher at Marula Primary School. A dispute arose between the applicant and Teachers Service Commission (TSC). He had a shop on Marula Estate. He alleges that he was evicted from the shop before the case between him and Teachers Service Commission had been determined; that the Interested Parties were in contempt of court orders and he wants the proceedings before the magistrate's court quashed because the court did nothing against the Interested Parties whom he calls imposters. Likewise, the High Court did nothing to stop the Interested Parties from using forged documents or defrauding the applicant; that the Interested Parties were in contempt of court orders and had forged court orders.

The application was opposed. The firm of Kagucia Advocates, filed grounds of opposition to the effect that the application is res judicata; that the court has no jurisdiction under **Order 53** of the **Civil Procedure Rules,** to adjudicate on grievances determined in NKU HCA 111/1995 (**Isaac Ndungu Muchemi v Marula Estate Ltd**); that the applicant is a vexatious litigant and if granted leave, should be asked to provide security; that this court is *'functus officio'* because the issues now raised were determined in previous proceedings; that the applicant is guilty of laches, indolence and inordinate delay and litigation must come to an end and lastly, that the application is an abuse of the court process.

Ms Lubia who appeared for the Interested Parties set out a brief history of the dispute that has existed between the parties that gives rise to this application. I have already alluded to the said history earlier in this ruling which was captured in J Maraga's ruling.

Ms Khatambi, counsel for the respondent did not file any papers but associated herself with submissions of the Interested Party and added that an order of certiorari can only issue if the application is made within 6 months of the making of the decision.

I have considered the pleadings and submissions by all parties. Judicial Review proceedings are a mechanism by which the State checks the excesses of its officers or public bodies. An aggrieved party moves the court for leave to commence the proceedings and in doing so, has to demonstrate that he has an arguable case or prima facie case. If the aggrieved party establishes that he has an arguable case, leave is granted and the State takes over as the applicant. In this instance, the onus is upon the applicant to demonstrate that he has an arguable case whereby after the notice of motion is heard the orders may be granted.

It seems the applicant wants to challenge his eviction from the Interested Parties land where he is said to have been running a shop business. In his affidavit, he claims that it was his property which he bought. However, he has not attempted to prove ownership of the said land.

As pointed out by Ms Khatambi, for the respondent, an application for an order of certiorari must be made within 6 months of the making of the decision. **Order 53 Rule 2** reads:-

> **"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decision, conviction or other proceeding for purposes of being quashed, unless the**

application for leave is made not later than 6 months after the date of the proceeding…."

The impugned decisions were made in 1995 and 2009 respectively. No explanation has been given why this application was not brought 19 years ago or 5 years ago. Even if the applicant had an arguable case, he is guilty of laches and has been indolent and would not be availed the orders sought.

Whether the orders sought can issue as against the decision in HCC 111/2009: An order of certiorari lies from the High Court to quash the decision of an inferior court or a tribunal which is made in excess of jurisdiction, without jurisdiction or in breach of rules of natural justice. The decision of J Maraga is from a court of concurrent jurisdiction and therefore the order would not lie. That also applies to an order of prohibition. It lies to prohibit the making of a decision or continuing in proceedings by an inferior tribunal or body and cannot lie against the High Court.

Ms Lubia told the court that the applicant appealed against the eviction order in HCC 111/95. The application for stay was to be heard on 31/1/96 but the applicant did not appear nor did his advocates and the temporary stay order was vacated and he was evicted on 31/1/96. The appeal came up for hearing in 2000; applicant's counsel applied for adjournment, it was declined and both applicant and counsel walked out and the court dismissed the appeal; That the applicant filed a new to appeal out of time but the application was dismissed and it is then another application was filed to set aside the dismissal order and another application was made in 2008 but was dismissed. The above history clearly shows that the applicant has continually dragged the Interested Parties to the courts but his applications have been dismissed. Clearly, he is a vexatious litigant and he is declared as such. This court is functus officio as respects his claims to the shop at Marula Estate. If he had any grievance he should have moved to the Court of Appeal.

The upshot is that the application is unmerited. The applicant has not demonstrated that he has any arguable case and the application is hereby dismissed. Each party to bear its own costs.

DATED and DELIVERED this 27the day of June, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

The applicant – in person

Ms Lubia for the 1st, 2nd and 3rd Interested Parties

Kennedy – Court Assistant