REPUBLIC OF KENYA

In The High Court Of Kenya At Kerugoya

JUDICIAL REVIEW APPLICATION NO. 9 OF 2014

POLYCARP WATHUTA KANYUGO

MICHAEL KABUGA NJIKARI ……APPLICANTS

SAMUEL WANJOHI

VERSUS

THE COUNTY GOVERNMENT OF KIRINYAGA…..RESPONDENT

RULING

1. By a Notice of Motion dated 4th March 2014 and filed in this court on even date under a certificate of urgency, the four applicants who were described as the ***Republic, Polycarp Wathutha Kanyugo, Michael Kabuga Njikari and Samuel Wanjohi*** sought among other prayers leave to apply for the Judicial Review remedies of mandamus, prohition and certiorari against the respondent ***The County Government of Kerugoya*** and that leave if granted, operates as stay until the application was determined .

2. Even before the court acted on the application, the applicants through their learned counsel ***Mr Muguku*** instructed by V.E. Muguku Muriu & Company Advocates purported to amend the application by filing two subsequent applications the first one being the amended notice of motion dated 5th March 2014 and what was described as an "Amended, Amended chamber summons application filed on 11th March 2014.

It is not disputed that the two subsequent applications were filed without leave of the court and that the application filed on 11th March 2014 sought to introduce fourty four(44) other applicants who were not party to the original notice of motion.

3. It is important to note at this juncture that though the notice of motion dated 4th March2014 as its title suggests was supposed to be heard exparte, as expected of all applications seeking leave to institute Judicial Review proceedings, the applicants' counsel on his own volition decided to serve the application on the Respondent. The Respondent then appointed learned counsel ***M/S Wanjiru Wambugu*** to act for it in this matter and opposed the multiple applications filed by the applicants through a replying affidavit sworn by ***Peter K. Gachathi***, the County Secretary on 20th March 2014 and a preliminary objection

dated 11th March 2014.

4. On 25th March 2014, the parties appeared before me for directions and by consent of the parties, the court regularized the Respondent's position by ordering that the applicant's application seeking leave to institute judicial review proceedings be heard interparties. It also transpired during that session that the Applicants had yet again filed two further affidavits without leave of the court. The court however on application by Mr Muguku exercised its discretion by ordering that the further affidavits be deemed to have been properly filed and that they be admitted as part of the court record.

5. By consent of the parties, the applications were canvassed by way of written submissions. And in the Respondent's submissions filed on 12th May 2014, the Respondent took up an issue it had raised in paragraphs 5,6,7 of the replying affidavit attacking the competence of the applications filed on the 5th and 11th March 2014 respectively purporting to amend the notice of motion filed on 4th March 2014.

As this objection was contested by the applicants who maintained that the amended applications were properly on record, I think it would be prudent to deal with the Respondent's objection at this preliminary stage in order to determine whether the applications filed by the applicants were properly before the court and whether all of them merits this court's consideration.

6. According to the Respondent, the applications filed on 5th and 11th March were incompetent as they amended the initial application dated 4th March 2014 without leave of the court contrary to the provisions of ***Order 53 Rule 4(2)*** of the ***Civil Procedure Rules*** which requires an applicant to seek leave of the court before amending its pleadings.

The applicants on their part argued that all the applications before the court were competent and properly on record. ***Mr Muguku*** contended that the applications had been filed Exparte and could thus be validly amended without leave of the court; that in any case on 12th March 2014, the applicant orally applied in court for leave to amend the initial application which leave was granted thereby regularizing the subsequent applications.

This claim was denied by the Respondent who averred that the court on 25th March 2014 only regularized the further affidavits excluding the subsequent applications which remained irregularly on record.

7. Having considered the above submissions, I am inclined to agree with the position taken by the Respondent. I have perused the court record particularly the proceedings of 12th and 25th March 2014 and the same does not bear any indication that the irregularity of filing the two subsequent applications purporting to amend the original notice of motion without leave of the court had been regularized by the court.

The record shows that on 12th March 2014, the parties appeared before the Deputy Registrar who only advised that a mention notice would be issued upon further directions by the court. Again on 25th March 2014, the parties appeared before me for directions and upon application by ***Mr Muguku***, the court excused the filing of two further affidavits by the applicants without leave of the court by deeming them as properly filed and served.

8. The court specifically indicated that it was only the further affidavits which had been admitted as part of the court record because on this date, no attempt was made to regularize the filing of the applications dated 5th and 12th march respectively without leave of the court. And this is despite the fact that the two applications sought to introduce substantial amendments which would have fundamentally changed the nature and character of the initial application dated 4th March 2014. The submission by the applicants that the filing of the two applications had been regularized by the court is therefore false and misleading.

9. If the Applicants felt that the application dated 4th March 2014 was so wanting in both form and substance, my view is that they should have withdrawn the same to pave way for them to file a fresh

application. Even without looking at the substance or merits of the amended applications, to the extent that they had been filed without leave of the court, I find that they were improperly on record and they ought to be struck out. In light of the foregoing, I hereby strike out the applications dated 5th and 12th March 2014 respectively.

The result of this it that the only valid application left on record for determination of the court is the initial notice of motion dated 4th March 2014 which I now turn to consider. But before doing so, I wish to point out that as the parties had filed their written submissions when the applications I have just struck out were on the court record albeit irregulary, I will disregard the affidavits and submission made by the parties in support of the two applications and will confine myself to only those pleadings and submissions which are relevant to the application dated 4th March 2014.

10. Having said that, I now wish to consider the application dated 4th March 2014. In this application, the applicants sought the following prayers (reproduced verbatim);

a. ***That leave be granted to the applicants to apply for an order of Mandamus, prohibition and certiorari against the Respondent herein and the leave operates as a stay until the determination of the application.***

b. ***That the Respondent be prohibited from arbitrary increasing rents in its estate known as Kamukunji, Congo, Biafra and***

forty rentals where the applicants and other tenants reside.

c. ***That the Respondent do amend and repeal the Kirinyaga County Government Finance Act 2013 Section 51 Rental houses in Congo Estate, Biafra Estate, Kamukunji Estate and Forty Rental Estate accord reasonable increase of rent to avoid reasonable increase of rent.***

The application is supported by the verifying affidavit and further affidavits sworn by Polycarp Wathuta on 4th, 19th and 24th March 2014 respectively. It is also supported by the statutory statement of facts dated 4th March2014.

THE APPLICANT'S CASE

11. The Applicant's case as can be discerned from the pleadings and written submissions filed on their behalf by their counsel is that they were among others tenants in houses situated at Kamukunji, Biafra, Congo and Forty Rental estates in Kerugoya town.

The houses were prior to the promulgation of the Constitution of Kenya 2010 owned by the Kerugoya/Kutus Municipal council and the Kirinyaga County Council but with the introduction of devolution in the new Constitution as a system of governance in Kenya, when County Governments started their operations, the houses were automatically taken over by the county Government of Kirinyaga, the Respondent herein.

According to the applicants, prior to the taking over of the houses by the Respondent, they had executed tenancy agreements with the Kerugoya/Kutus Municipal and Kirinyaga County Council and had lived in the houses for many years paying the rents agreed upon in their respective tenancy agreements. The rents ranged from Kshs 800 to kshs 2000 depending on the estate and size of the house.

12. After taking over the houses, the Respondent through the County Assembly introduced the Kirinyaga County Finance Bill 2013 which at **Section 51** proposed to increase the applicant's rents with a margin of 300 %.

It is the Applicants case that several consultative meetings were held between the residents of Kirinyaga County including the Applicants, several county officials including the member of the

Kirinyaga County Assembly representing Kerugoya ward and the County Governor in which certain resolutions were passed. Among the resolutions passed was that the Finance Bill be suspended and it be subjected to further deliberations by all stake holders before it was enacted into law.

However, according to the applicants, the County Finance Bill was enacted into law becoming the Kirinyaga County Finance Act 2013 (the Finance Act) without taking into consideration the views of the Applicants and other residents of Kirinyaga County.

13. It was the Applicants further contention that the rental increase was arbitrary and that the passing of the Finance Act 2013 contravened ***Articles 10(2),174(c),184(c),176(b) and Article 199(1)*** of the ***Constitution*** as well as ***Section 15,87,88*** and ***89 o***f the ***County Government Act No. 17 of 2012*** in that it was passed without adequate consultations with the affected tenants and this violated the Constitutional values of good governance , transparency and accountability as well as the principle of public participation and involvement in the passing of legislation guaranteed under ***Article 196(1***) of the ***Constitution.***

For the foregoing reasons, Mr Muguku urged the court to determine under ***Article 165(b)*** whether Section ***51*** of the Kirinyaga County Finance Act 2013 was inconsistent with the Constitution. He urged the court to find that the application was meritorious and that is should be allowed with costs.

THE RESPONDENT'S CASE.

14. In opposing the application, the Respondent filed a preliminary objection dated 11th March 2014, a replying and further affidavit sworn by Peter K.Gacathi the Respondent's County Secretary on 1st April 2014. It is the Respondent's case that the applicant's application was incompetent and was without merit.

In the replying and further affidavits, the deponent made a two pronged attack on the form of the applicant's application. The first ground of attack was that the application was defective in that it was presented as a notice of motion offending ***Order 53 Rule 1(2)*** of the ***Civil Procedure Rules*** (the ***Rules***) which provides that applications for leave to commence Judicial Review proceedings should be made through a chamber summons.

Secondly, that the Republic and the aggrieved parties have been named as Applicants in an application for Judicial Review.

15. On the merits of the application, the gist of the Respondent's case was that besides the prayer seeking leave to institute judicial review proceedings being vague and ambiguous, the orders sought in the application were incapable of being granted.

The Respondent contended that the application offended the principle of separation of powers between the three arms of Government in so far as it sought orders to direct the Respondent to amend or repeal a piece of legislation; that the court cannot order amendment or repeal of legislation as this was the preserve of the legislative body in this case the County Assembly.

16. ***M/S Wanjiru,*** learned counsel for the Respondent further submitted that the court only had jurisdiction to determine the constitutionality or otherwise of legislation under ***Article 165(3)*** of the ***Constitution*** and that the court cannot also be called upon to adjudicate on what was the appropriate rent or what percentage of rental increment the Respondent could levy on the Applicants.

Lastly, the Respondent denied the applicant's assertion that the Kirinyaga County Government Finance Act had been enacted without the involvement of members of the public.

The Respondent contended that there was full public participation in the passing of the Finance Act 2013 as required by the Constitution.

DETERMINATION

17. Before delving into the merits of the Applicant's case, I wish to quickly dispose of the preliminary issues raised by the Respondent with respect to the form of the instant application. The Respondent was of the view that the application was defective since it was made through a notice of motion instead of a chamber summons as prescribed under ***Order 53 Rule 1(2)*** of the ***Rules;*** and that the Republic had wrongly been named as an Applicant.

Under ***Order 53 Rule 1***, it is clear that no application for judicial review should be made unless leave of the court was sought and granted. ***Order 53 Rule 1(2)*** provides that;

> ***"An application for such leave as aforesaid shall be made Exparte 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 affidavits verifying the facts relied on".***

18. From the foregoing provision, there is no doubt that the Respondent was right in its submission that the correct application to file when seeking permission to commence judicial review proceedings is a chamber summons and not a notice of motion like the one filed by the Applicants herein. I also agree with the Respondent that the Republic should not have been named as an Applicant in this initial stage of the proceedings. At the stage of seeking leave, only the aggrieved party or parties should appear as Applicants. It is only after leave is granted that the actual judicial review proceedings should be instituted in the name of the Republic as the Applicant while the aggrieved party becomes the Exparte Applicant –**See** ***Farmers Bus Service & others Vs Transport Licensing Appeal Tribunal (1959)EA 779.***

The rationale for this format was espoused in **Mohammed Ahmed Vs Republic (1957) EA 525** and also in **Jotham Mulati Welamondi Vs The Electoral Commission of Kenya (2002) I KLR 486.**

Learned counsel for the Applicants in urging the court to dismiss the Respondent's objection submitted that the anomalies cited amounted to procedural technicalities which should be disregarded under ***Article 159 (2) (d)*** of the ***Constitution.***

19. On my part, I find that presenting the application for leave in a Notice of motion as opposed to a chamber summons and including the Republic as an Applicant are irregularities of form which have nothing to do with the substance of the application and as such, I agree with ***Mr Muguku*** that these are procedural technicalities which this court in the exercise of its discretion can disregard ***under Article 159(2) (d)*** of the ***Constitution*** which enjoins courts to administer substantive justice . I therefore find that the irregularities cited by the Respondent do not render the application incurably defective. I accordingly find no merit in the Respondent's objections are hereby overruled.

20. Having disposed of the preliminary issues raised by the Respondent, I now wish to turn to the merits of the application. And this being principally an application seeking leave to commence judicial review proceedings, it is important to examine the purpose and the principles which guide the court in the exercise of its discretion in deciding whether or not to grant the leave sought. This discretion, as in all other cases must be exercised judiciously depending on the circumstances of each case.

21. It is now settled that the requirement that leave must be sought and obtained before making an application for judicial review is designed to protect the court process from abuse by mischievous litigants who may want to waste precious judicial time by filing frivolous applications which have no chance of success.

I agree with Waki J (as he then was) when he stated in ***Republic Vs County Council of Kwale & Another Exparte Kondo & 57 others Mombasa HCM CA NO. 384 of 1996*** that :

> ***" 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"

22. The rationale for this requirement was also expounded by **Odunga J** in ***Lady Justice Joyce Khaminwa Vs Judicial Service Commission & another (2014)e KLR*** when he expressed himself as follows;

''The rationale for the requirement that leave be sought and obtained is 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. However, 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. Leave stage is therefore 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 paralyzed for months because of pending court action which might turn out to be unmeritorious".

See also the Court of Appeal decision in ***Mirugi Kariuki Vs Attorney General (1990-1994)EA 156 (1992) KLR 8 and in Republic Vs Communications Commission of Kenya & 2 others Exparte East Africa Television Network Ltd (2001) KLR 82,(2001) 1EA 199.***

23. The golden thread running through the aforesaid authorities among others is that leave to commence judicial review proceedings is not granted as a matter of course or as a mere formality. Though at the leave stage the applicant is not expected to go into the depth of the intended application for judicial review , the applicant must satisfy the court that he or she has a prima facie arguable case which merits further investigation by the court. The question that then arises is whether the Applicants have met the threshold for the grant of leave as sought in their application.

24. The prayer for leave is contained in prayer 1 of the application which has been reproduced earlier in this ruling.This prayer, as observed by the Respondent is too general and vague as it fails to disclose to what end the judicial review remedies of certiorari , mandamus and prohibition would be applied in the event that the leave sought is granted.

Judicial review is a challenge on administrative action or decision. It invokes the supervisory jurisdiction of the High Court donated by ***Sections 8*** and ***9*** of the ***Law Reform Act*** and ***Article 165 (6)*** of the ***Constitution*** which makes it clear that the said jurisdiction is to be exercised over decisions of subordinate courts, any person , body or authority which exercises a Judicial or quasi –judicial function but not over a superior court .

In Halisbury's laws of England 4th Edition at page 91 , the learned author opines that Judicial review is the process by which the High Court exercises its supervisory Jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons, who carry out quasi-judicial functions or who are charged with the performance of public acts and duties .

25. The three main judicial review remedies of certiorari, mandamus and prohibition are designed to achieve different purposes in furtherance of the course of justice.

The remedy of certiorari is meant to quash illegal administrative decisions, while the remedy of

mandamus is aimed at compelling the performance of a statutory or public duty which a public body or officer has failed to perform without legal justification.

On the other hand, the order of prohibition is meant to stop or prevent the making of contemplated illegal decisions or actions or their implementation.

26. I have taken the trouble to briefly expound on the scope of judicial review and the nature and purpose of its remedies to make the point that it is important for an applicant to sufficiently disclose what decision is sought to be quashed by an order of certiorari or what contemplated decision or action is sought to be prohibited by an order of prohibition or what duty the Respondent is supposed to be compelled to perform by an order of mandamus in the event that leave is granted to institute Judicial Review proceedings .

It is only on the basis of such information that a court can be able to ascertain whether or not the applicant has made out a prima facie arguable case which warrants to proceed to the substantive stage.

In this case, for unexplained reasons, no such information was provided in prayer 1. The court was not told which decision was supposed to be quashed by an order of certiorari, or what the Respondent was supposed to be compelled to do or what was to be prohibited.

27. Be that as it may , a look at prayer 2 and 3 leaves one wondering whether they were meant to espouse the basis of seeking leave to file proceedings for orders of prohibition or mandamus or whether they were meant to be distinct and separate prayers.

If they were meant to be independent prayers , then in my opinion, they are misconceived and misplaced since such prayers are substantive and should not be made in an application for leave. Such prayers can only be appropriately made in the substantive motion once leave is granted.

28. From those prayers however and from the corpus of the application, it is clear that the Applicants main grievance is that rents in the houses they occupy were arbitrary and exorbitantly increased by the Respondent despite their protestations. The rent increment was effected through the passing of the Kirinyaga County Government Finance Act 2013 by the Kirinyaga county Assembly , the legislative organ of the Respondent.

Under ***Article 175*** of the ***Constitution***, County Governments are allowed to have reliable sources of revenue to enable them govern and deliver services to their people effectively and under ***Article 185(2), " A county Assembly may make any laws that are necessary for or incidental to the performance of the functions and exercise of the powers of the County Government under the fourth Schedule"***

29. From the foregoing, it is clear that by increasing rent through the medium of legislation, the Respondent through its County Assembly was not exercising its administrative functions nor was it acting in a quasi - judicial capacity. I have no doubt in my mind that in passing the Finance Act, the Kirinyaga County Assembly acted in the exercise of its legislative function as mandated by the Constitution and this took the matter of the rent increments complained about by the Applicants outside the purview of Judicial Review as shown above.

30. Even if it was to be assumed for the sake of argument that the Respondent's decision of increasing rents in the houses leased to the Applicant's among others was an administrative decision, I am still of the firm view that the remedy of judicial review would still not be available to the Applicants. As can be seen from the depositions in the affidavits sworn on behalf of the Applicants, the Applicants were not actually opposed to the rental increments per se but they were aggrieved by the rate at which the increments were done which in their view amounted to a 300% increment which was too high.

In light of the foregoing, it would then appear that the Applicants were mainly questioning the merits of the Respondent's decision. However, it is trite law that judicial review is concerned not with the merits

of the decision in question but with the decision making process – ***see Municipal Council of Mombasa Vs Republic & another (2002) e KLR ;The Commissioners of Lands Vs Kuntse Hotel Limited Civil Appeal No. 234 of 1995.***

31. Another major complaint made by the Applicants was that the principles of inclusiveness and public participation which are enshrined in our Constitution and the County Government Act were never adhered to before the Finance Act was enacted. In my opinion, this was the crux of the Applicant's case. This must be what informed the invitation to the court by ***Mr Muguku*** in his written submissions filed on 25th April 2014 to invoke its jurisdiction under ***Article 165(3) (d)*** of the ***Constitution*** to determine whether or not Section 51 of the Finance Act 2013 was consistent with the Constitution.

Without making any finding whether the principle of public participation was observed by the Respondent, it is my view that the determination ***Mr Muguku*** invited the court to make cannot be made within a judicial review application leave alone in an application seeking leave to institute such proceedings.

I am persuaded to find that the applicants chose the wrong forum to ventilate their grievances. Instead of seeking to commence judicial review proceedings, the Applicants should have filed a Constitutional Petition.

32. I believe I have said enough to show that the Applicants have failed to demonstrate that they have a prima facie arguable case that merits the grant of leave to institute judicial review proceedings against the Respondent.

For the foregoing reasons, I am satisfied that the application dated 4th March 2014 is not merited and it is consequently dismissed.

33. On costs, since this was supposed to be an exparte application but the applicants chose to involve the Respondent in its prosecution by serving it with the application, it is only fair and just that the Respondent be awarded the costs of the application . It is so ordered.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 15TH DAY OF AUGUST 2014.

In the presence:

Mr Makori holding brief for Mr Muguku for the Applicants

Mr Igati Mwai holding brief for M/S Wanjiru Wambugu for the Respondent

Mwangi Court Clerk.