



Gitau v Chairman, Murang'a Kandara Land Board & another (Judicial Review Miscellaneous Application E001 of 2021) [2022] KEELC 2939 (KLR) (17 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2939 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E001 OF 2021
LN GACHERU, J
MAY 17, 2022**

BETWEEN

HANNAH WANJIRU GITAU APPLICANT

AND

CHAIRMAN, MURANG'A KANDARA LAND BOARD 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. By a Notice of Motion Application dated 22nd July 2021, the Exparte Applicant herein Hannah Wanjiru Gitau, sought for the following Judicial Review Orders; -
 - (1) That the Applicant herein be granted leave to apply for;-
 - (2) An order of Certiorari to quash the Order to defer the decision of the Land Control Board, Kandara Murang'a to issue consent to transfer the land known as LOC.4/ Nguthuru/414, Muranga, measuring 4.53 HA, till the Applicant serves the Board with Letters of Administration and or grant of Letters of Administration pending the hearing and determination of the cause of High Court.
 - (3) An Order Of Mandamus do issue directing the Land Control Board Kandara, Muranga do issue consent to transfer the land known as LOC.4/Nguthuru/414, from the Donor (Gitau Kinguri – Deceased) to the Donee (Hannah Wanjiru Gitau) herein unconditionally.
 - (4) That this Honourable Court do give direction concerning the leave herein to be granted pending the hearing and determination of the Judicial Review.
2. The Judicial Review is based upon the following grounds: -



- (1) That the Respondents have deferred the Application for Land Control Board, on the grounds that the Consent requires Grant of Letters of Administration to the deceased's estate.
 - (2) That the deceased had issued completion documents to the Donee in contemplation of his death, hence the Applicant does not require Grant of Letters of Administration under the Succession Act, Chapter 160 of the Laws of Kenya.
 - (3) That there are no pending cases or claim on the said land.
 - (4) That the Applicant is very old (81 years) and ill and unless the transfer is done, any eventuality will cause the gift to lapse.
3. The Application is also supported by the Verifying Affidavit of Hannah Wanjiru Gitau, who averred that she intended to apply for Judicial Review, since the Land Control Board refused to grant her consent on the ground that she had not taken out Letters of Administration. That the land in question was a gift in contemplation of death and as envisaged under the Law of Succession, she did not require Letters of Administration.
 4. Further that her Advocate has advised her that the suit land is not subject of succession, since the Donor had already exercised his statutory duties and therefore the land should be transferred to her. Further that the Applicant is 81 years old, sick and that the gift will be invalidated in the event she is incapacitated, die and that will cause untold suffering to those who would be her beneficiaries. She urged the Court to order the Chairman of the Land Control Board - Kandara to issue the consent.
 5. In her statement, the Exparte Applicant reiterated the contents of the Verifying Affidavit and further averred that she is 81 years, old, sick and the gift will stand invalidated in the event that she is incapacitated and unable to carry on. Further that the delay was due to the caution which was on the suit land and which has long been removed by her Advocate.
 6. The Judicial Review is opposed by the Respondents herein through the Grounds of Opposition filed on 2nd February 2022, by Benson Njagi, Senior State Counsel.
 7. Among the grounds of opposition are that the Exparte Applicant has filed the substantive Notice of Motion Application together with the Chamber Summons without leave of the Court contrary to the Provisions of Order 53 of the Civil Procedure Rules.
 8. Further that the Applicant's Application violates Section 9 (2) of *Fair Administrative Action Act* No. 4 of 2015, as she has not exhausted all the available remedies before resorting to Judicial Review. Section 11 of the Land Control Board Act provides that an Appeal can be made to the Provincial Land Appeal Control Board where the Land Control Board refused to grant consent in respect to a controlled transaction.
 9. That the Applicant's Application seeks an order of Certiorari which is an order meant to quash a Decree, Order or Decision by an Administrative body. This prayer is misplaced as there was no order made by the 1st Respondent against the Applicant, and if there was, the Applicant has not adduced the same as required.
 10. That the Judicial Review herein is Resjudicata as the same orders had been sought in ELC No.39 of 2020, which application had sought the same prayers as the Judicial Review herein and the said Application was dismissed by the Court.
 11. Therefore, the instant Judicial Review herein dated 22nd July 2021, is bad in law, is an abuse of the Court process and it ought to be dismissed with costs to the Respondents.



12. The Exparte Applicant filed Supplementary Affidavit dated 14th January 2022, and averred that the Ruling referred to by the Respondents dated 30th June 2021 in Misc. Application No.4 of 2021, was struck out and thus the substance of the case was not covered by the said Ruling and therefore the instant Application is not Resjudicata. The said Application was attached to the Supplementary Affidavit.
13. This Judicial Review was canvassed by way of Written Submissions. The Exparte Applicant through the Law Firm of Muhatia Pala & Associates Advocates (MPA), filed the Written Submissions on behalf of the Applicant and submitted that there are five issues for determination.
14. The first issue was whether it was wrong to file the Application contemporaneously. It was the Applicant's submissions that no law was cited that bars an Applicant from filing the Application contemporaneously. Section 4 of the Fair Administrative Actions Act and Article 159 of the Constitution were cited. Further the Applicant cited Sections 3A, 1A and 1B of the Civil Procedure Act that outlaw technicalities.
15. On whether the Application offends Section 9(2) of the Fair Administrative Action Act No.4 of 2015, it was submitted that Subsection (1) of the said Section allows a Party to invoke the original jurisdiction of the Court in the matter of Judicial Review pursuant to Article 22(3) of the Constitution. That Section 4 of the Fair Administrative Actions Act states that the Court may in exceptional circumstances and on application by the Applicant exempt a person from the obligation to exhaust any remedy, if the Court considers such exemption to be in the interest of justice. It was further submitted that the exception circumstances of this case is that the Donee is elderly and sickly and any delay may complicate the issue.
16. On whether there was a decision to warrant the current action, it was submitted that the Land Control Board did not issue a formal decision but instead just indicated the word "deferred" on the face of the Application. That there was therefore no decision and it was technically fatal to appeal at the Provincial level.
17. Further that Sections 8 and 16 of the Land Control Act were not adhered to and no formal decision was communicated to the Applicant to warrant an appeal. Hence the avenue available due to the urgency was directly to Court.
18. On whether the matter is Resjudicata, it was submitted that the case referred to by the Respondents was neither allowed nor denied, but the same was struck out. Further that the Court did not hear the substance of the case and it did not make a decision on the same. The Applicant relied on the case of Trade Bank Ltd VS LZ Engineering Construction Ltd & Another (2000)eKLR.
19. On whether the Application is bad in law, the Applicant relied on the case of Registered Trustees of Anglican Church of Kenya Mbeere Diocese VS The Rev. David Waweru Njoroge C.A No.108 of 2002, where the Court allowed the transaction to be laid completed where a Party had executed all the transfer documents and died before the land had been transferred to the Donee.
20. The Applicant urged the Court to allow the Judicial Review Application and finds that the Exparte Applicant is deserving of the Orders sought and that the Land Control Board should be compelled to issue consent to the Exparte Applicant to enable her transfer the land.
21. The Respondents through Benson Njagi, Advocate a Senior State Counsel filed their submissions on 20th February 2022, and pointed out four issues for determination.
22. The first issue was whether the Applicant had violated the mandatory provisions for Judicial Review provided for under Order 53 of the Civil Procedure Rules. It was submitted that Order 53 Rule 1



provides that “No Application for an Order of Mandamus, Prohibition or Certiorari shall be made unless leave therefore has been granted in accordance with the Rule”.

23. It was their submissions that the Applicant herein filed Chamber Summons Application dated 22nd July 2021, together with the Substantive Notice of Motion Application on the same date, before being granted leave by the Court. That this violated Order 53 of the Civil Procedure Rules. That though the Applicant cited Article 159 of the Constitution and Sections 3A, 1A and 1B of the *Civil Procedure Act*, the said omission cannot be referred to as a technicality. The Application was therefore made without the pre-requisite leave in terms of Order 53 Rule 1 of the Civil Procedure Rules. They relied on the case of *Raila VS IEBC & 2 others (2013) eKLR*, where the Court held that “Article 159(d) of the Constitution was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from Court of Law”
24. It was their further submissions that failure to comply with the procedures should be deemed as an abuse of the Court process.
25. On whether the Judicial Review Application offends Section 9(2) of the Fair Administration Actions Act No. 4 of 2015, which provides that:

“The Court shall not review an administrative action or decision under this Act unless the mechanism including Internal Mechanism for appeal or review and all remedies available under any other written law are first exhausted.”
26. It was submitted if the Land Control Board refused to grant consent, then the remedy was to appeal to Provincial Land Control Appeals Board, as provided by Section 11 of *Land Control Act*.
27. That the Applicant did not seek the above remedy, but proceeded to file this Judicial Review Application. The Respondents relied on various authorities among them the decision of the Court of Appeal in the case of *Republic VS the Rent Restriction Tribunal and Z.N. Shah & S.M. Shah Exparte MM Butt, Appeal No. 47 of 1980*) where the Court held that;

“if there is an equally convenient beneficial and effective remedy available, a Court will generally decline to exercise its discretion in favour of an Application for a Prerogative Order”.
28. That the Applicant has clearly not exhausted the available remedy under Section 11 of the *Land Control Act*, which is equally convenient, beneficial and effective and thus the application herein is misconceived and fatally defective.
29. On whether the Applicant has established sufficient grounds for seeking an order of Certiorari, it was submitted that an Order of Certiorari is meant to quash a Decree, Order or decision by an administrative body. The Court must satisfy itself that the decision sought to be challenged exists and that the content of the decision need to be verified to decide whether the decision satisfies the grounds for Judicial Review. They relied on the case of *Republic vs Mwangi S. Kimenyi Exparte, Kenya Institute of Public Policy and Research Analysis (KIPPPRA) (2013)eKLR*, where the Court of Appeal held that:

The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into Court a decision to be quashed. We hold that the learned Judge erred and it was not appropriate to issue the Judicial Review Orders in this matter”.
30. It was further submitted that failure to attach the decision sought to be quashed, the Applicant sought to have the Court invalidate a decision, the substance of which cannot be ascertained.



31. On whether the Judicial Review Application is Resjudicata, it was submitted that the judgment in ELC No.39 of 2020, vide an application dated 23rd September 2020, was dismissed on merit. That in the said Application, the Applicant had sought the same Orders that are being sought in the present Judicial Review Application and thus this suit is Resjudicata. Therefore, the instant Application is an abuse of the Court Process as it offends Section 7 of the *Civil Procedure Act* by seeking a determination on matters that has already been determined in a previous suit by a competent Court.
32. The Respondents urged the Court to dismiss the instant Judicial Review Application, with costs to the Respondents as the same is fatally defective and an abuse of the Court process.
33. The Court has considered the pleadings herein, the annexures thereto, the Written Submissions and the cited authorities. The Court will take into account the description of Judicial Review as was held in the case of Municipal Council of Mombasa VS Republic & Umoja Consultants Ltd;-Civil Appeal No.185 of 2009, where the Court held:-

Judicial Review is concerned with the decision making process. Not with the merits of the decision itself, the Court would concern itself with such issues as to whether the decision maker had the jurisdiction, whether the person affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters the Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision”

34. Further the Court will also be guided in the decision of the Court of Appeal in the case of Kenya National Examination Council Vs Republic Ex Parte Geoffrey Gathenju Njoroge & Others; Civil Appeal No.266 of 1996 eKLR, where the Court held:

Only an Order of certiorari can quash a decision already made and an Order of certiorari will issue if the decision is without jurisdiction or is in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons. In the present Appeal, the Respondents did not apply for an order of certiorari and that is all the Court wants to say on that aspect of the matter.

Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice, the High Court would be obliged to prohibit Court from acting contrary to rules of natural justice.....”

35. The Applicant herein has sought for an order of Certiorari to quash the decision of Land Control Board at Kandara, to defer its decision until Letters of Administration are obtained and also an order of Mandamus to direct the said Land Control Board to issue the said consent to transfer.
36. Though the matter herein is under *Fair Administrative Action Act* No. 4 of 2015, the Application is brought under Order 53 Rule 1 the Civil Procedure Rules.
37. Under Order 53 Rule 1 above cited, it is apparent that before an Application for prerogative orders such as Mandamus, Prohibition or Certiorari are sought, the Applicant must seek leave of the Court.
38. The Respondents have submitted that the Applicant violated the Mandatory provisions of Law on Judicial Review for failure to obtain leave of the Court first before filing the substantive Judicial Review Application. Indeed, it is very clear from the Applicant’s Notice of Motion Application dated 2nd July, 2021, she sought for Leave to apply for the Orders of Certiorari and Mandamus. The Application herein is for leave to seek the Judicial Review.



39. However, the Applicant combined the Application for leave and the substantive prayers for Judicial leave. In that way, the Applicant violated the clear provisions of Law on Application for Judicial Review. The Respondents submitted that failure to comply with the requisite procedure is indeed an abuse of the Court Process and thus this Application should be dismissed. The Applicant on her part relied on Sections 3A, 1A & 1B of the Civil Procedure Act which outlaw procedural technicalities.
40. However, Order 53 Rule 1 obligates an Applicant to seek leave before instituting Judicial Review Procedure. The Applicant has not obtained such leave and the substantive Judicial Review prayers sought are thus premature.
41. This Court is guided by the findings of the Supreme Court in the decision of Raila Odinga vs Independent Electoral Boundaries & 3 Others (2013)eKLR, where it expressed itself as follows; --
-our attention has repeatedly been drawn to the Provisions of Article 159(2) (d) of the Constitution which obliges a Court of Law to administer Justice without undue regard to procedural technicalities..... The article simply means that a Court of Law should not pay undue attention to procedural requirements at the expensive of substantive justice. It was never meant to outset the obligation of litigant to comply with Procedural Imperatives as they seek justice from Court of Law.”
42. The Applicant herein failed to comply with the procedural imperatives and is thus violated of the Law on Judicial Review.
43. Even if the Court was to find that the Applicant was right in filing an Application for leave together with substantive prayers, did she offends Section 9(2) of the Fair Administrative Action Act No. 4 of 2015?
44. The above Section is very clear that no Court shall review an administrative action on decision under this Act unless all the internal Mechanism for Review, Appeal and other remedies have been exhausted.
45. It is evident that before an Applicant files a Judicial Review proceedings in Court, he (she) should ensure that there is exhaustion of Administrative Remedies. Judicial Review is available when all the available administrative remedies proceedings fail to produce a satisfactory resolution. This doctrine was upheld in the case of speakers of National Assembly vs Karume where the Court held;
- where there is a clear procedure for redress, any particular grievance prescribed by the Constitution on the Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any Law must be strictly adhered to since there are good reasons for such special procedures”.
46. The Applicant has alleged that the Land Control Board has refused to grant consent to finalize the transfer of the suit property to herself.
47. However, it is very clear that Section 11 of the Land Control Act provides the Mechanism of Appeal to the Provincial Land Control Appeals Board, in the event a party is aggrieved by the decision of the Land Control Board. The Applicant herein did not Appeal to the Provincial Appeals Board, but decided to file several Judicial proceedings in this Court. The Applicant submitted that she opted to file this Judicial Review because the issue of deferment raised a weighty legal question deserving the Courts intervention. However, there is no evidence that the Land Control Board did “defer” the said decision of grant of consent until the Letters of Administration are obtained.



48. Section 9(4) of Fair Administration Action Act provides that;

the Court may in exceptional circumstances as on Application of the Applicant exempt such a person from the obligation to exhaust any remedy, if the Court considers such exemption to be in the interest of justice”.

49. The Applicant herein has not demonstrated the exceptional circumstances that existed and also did not apply to Court to be exempted. This Court is persuaded by the decision of the Court in the case of Republic vs Zacharia Kahuthu & another (Sued as Trustees and on Behalf of and as Officials of the Kenya Evangelical Lutheran Church); Johanness Kutuk Ole Meliyio & 2 others (Interested Parties) Ex parte Benjamin Kamala & another [2020] eKLR, Where the Court held;

First, there is a requirement that on Application, the Court may grant an exemption. My reading of the Law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a Court for reviews, unless exempted from doing so by way of a successful application under Section 9(4) of the Fair Administrative Act. The person seeking exemption must first satisfy the Court that there are exceptional circumstances and that it is in the interest of justice that the exemption be given”.

50. With due respect, the Applicant herein did not meet the criteria stated in Section 9(4) of Fair Administrative Action Act and this Court cannot hold with certainty that the Applicant could not exhaust the available mechanism for remedies under the Land Control Act, due to any exceptional circumstances.

51. Even if this Court was to find that special circumstances existed to warrant the Applicant file the Judicial Review Application, is this Judicial Review the application merited?

52. The Applicant has sought for quashing of the decision of Land Control Board, and compelling the said Board to issue her with the said consent. The Court needed to satisfy itself of the decision that was made and thereafter make a finding on whether the said Land Control Board violated the Applicant’s right and thus the need for this Court to quash the said decision. The impugned decision was not attached to this Application and the same cannot be ascertained: As was held in the case of Republic Vs Mwangi S Kimenyi (Supra), the decision to be quashed must be ascertained and determined to be in existence. Court do not issue orders in vain. The Applicant submitted that the Board did not issue a formal decision, but indicated the word deferred.

53. However, the Court finds it very difficult to believe that the word “deffered” on the face of the Application was from the Land Control Board and that the alleged Application was deffered because of want of Letters of Administration. This was also the finding of the Court in its Ruling of 30th June, 2021 where the Court in Para 14 held;

Even if I was inclined to determine the Application under Fair Administrative Action, the Applicant failed to present the impugned decision of Kandara Land Control Board to this Court that she sought to be quashed and/or reviewed by the Court”.

54. Equally, the Court finds that the said decision is not attached and the Court cannot quash a speculative decision.

55. On whether this Judicial Review Application is Resjudicata, it is evident that the Applicant had filed a Misc. Application Notice 4 of 2021, where in she had sought similar Orders to this Judicial Review. The said Application was struck out. The Court in Misc. Application No. 4 of 2021, made a finding that the Orders that were to be reviewed was not attached, and that indeed was a substantive finding.



Further, the Court held that no evidence was adduced to support the said Application. The said holding was on the merit of the Misc Application. Thus, this Court finds that the instant Judicial Review Application is Resjudicata and offends the provisions of Section 7 of the Civil Procedure Act. The Court is guided by the decision of the Court of Appeal in the case of “The IEBC Vs Maina Kiai & 5 Others. Civil Appeal No. 105 of 2017 eKLR, where the Court held;

The rule or doctrine of Resjudicata serves the salutary aim of bringing finality to litigation and affords parties closure.....”

56. Having now carefully analysed all the issues as above, this Court finds and holds that the instant Judicial Review Application is not merited and the same is dismissed entirely with no Orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 17TH DAY OF MAY, 2022.

L. GACHERU

JUDGE

In the presence of:-

Alex - Court Assistant

Mr. Muhatia Pala for the Applicant

N/A for the 1st and 2nd Respondents

L. GACHERU

JUDGE

