



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO. 195 OF 2013

IN THE MATTER OF APPLICATION BY DANIEL MACHARIA KURIA ERWINS OKELLO TOM AND HENRY GEORGE MWANGI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORERS CERTIORARI, MANDAMUS AND PROHIBITION.

IN THE MATTER OF THE LOCAL GOVERNMENT ACT, CAP 265 OF THE LAWS OF KENYA

BETWEEN

DANIEL MACHARIA KURIA

ERWINS OKELLO TOM

HENRY GEORGE MWANGIAPPLICANTS

(T/A FLUSH POINT CARE GROUP)

VERSUS

THE CITY COUNCIL OF NAIROBIRESPONDENT

AND

PETER MWAURA.....1ST INTERESTED PARTY

PIUS ONYANGO.....2ND INTERESTED PARTY

JOHN KAMAU.....3RD INTERESTED PARTY

FLORENCE ACHIENG.....4TH INTERESTED PARTY

RULING

1. By a Chamber Summons dated 25th March 2013, the applicants herein **Daniel Macharia Kuria, Erwins Okello Tom** and **Henry George Mwangi** all Trading as **Flush Point Care Group**, seek the following orders:
1. **THAT the Applicant herein be certified urgent and service of the same be dispensed with in the first instance.**

2. **THAT leave be granted to the Applicant to institute Judicial Review proceedings against the Respondent herein for an Order of certiorari to quash the decision of the respondent to revoke the applicants management agreement and licence to carry out the business of the public toilet at Gikomba CNN Market.**
3. **THAT leave be granted to the Applicant to institute Judicial Review proceedings against the Respondent herein for an order of mandamus to remove all the locks and gadget placed hindering the Applicant access to the public toilet at Gikomba market placed under his management.**
4. **THAT leave be granted to the Applicant institute judicial review proceedings against the Respondent from signing any management agreement or issuing any licences to any other person other than the Applicant to operate the public toilet at Gikomba Market.**
5. **THAT leave do operate as stay of the decision of the Respondent to terminate the management agreement and revoke the licence of the Applicant to operate a public toilet at Gikomba Market.**
6. **THAT the costs of this application be costs in the court.**

2. On 24th September 2013 the Court ordered pursuant to the provisions of Order 53 rule 1(4) of the ***Civil Procedure Rules***, that the parties put in submissions.

3. According to the applicants, on 1st January 2010 they were invited to sign a management agreement with the City Council of Nairobi following a successful bid they had lodged for the management of a public toilet at Gikomba CNN Market which agreement they did sign and commenced charging members of the public a fee for use of the toilet. Pursuant thereto they have always paid the monthly management fees of Kshs. 3,000 to the City Council of Nairobi which payments are up to date and have made numerous improvement to the toilet and invested heavily in the same since the said allocation and assignment by the Director of Environment of the City Council of Nairobi. In spite of the foregoing, it is the applicants' case that despite our constant pleas the illegal occupants are still operating the toilets illegally hence the necessity for the court to issue orders to quash any decision by the Respondent to repossess the toilet, to prohibit the respondent from issuing letters to the interested party or any other party for the toilet and to restrain the Respondent from interfering with the applicant's management of the toilet.
4. In opposition to the application, the Respondents filed the following grounds of opposition:

1. **The Honourable court has no jurisdiction to determine the issues raised herein in so far as same are issues concerning breach of contract which ought to be dealt with by the private law courts.**
2. **The applicants have not demonstrated that the respondent acted in excess of its mandate in terminating the said contract to warrant the exercise of this court's discretion to grant orders of judicial review.**
3. **The applicants have also not proved that the respondent acted contrary to the principle of natural justice or unreasonable in so far as no decision of the respondent being challenged has been exhibited herein or pleaded.**
4. **The application is fatally defective, misconceived and an abuse of the court process.**
5. **The application does not stand in law and hence ought to be dismissed with costs to the respondent in so far as the applicants have failed to demonstrate to court they have an arguable and prima facie case with a probability of success.**

5. Despite directions that the parties file written submissions, only the Respondent complied. According to the Respondent, the applicant has not satisfied the conditions necessary for the grant of leave sought. It is further submitted that the application is defective, incompetent and an abuse of the Court's process. According to the respondent the applicants have failed and/or neglected to exhibit the purported respondent's decision being challenged and reliance is placed on **Republic vs. The District Co-operative Officer Meru ex parte Simon G. Ithira & Others High Court**

Miscellaneous Application No. 990 of 1995. It is further contended that as the issue revolves around a civil dispute, the same ought to be dealt with in a civil court hence this Court lacks the jurisdiction to entertain the application as it has not been alleged that the respondent acted without jurisdiction, or took into account matters it ought not to have taken into account or that it has acted unreasonably in the whole transaction. It is further submitted that according to the management agreement, its lifespan was from 1st January 2010 to 31st December 2010 which period has since expired and there is no evidence of its renewal hence the application is an abuse of the court process.

6. I have considered the foregoing. Order 53 rule 7(1) of the *Civil Procedure Rules* provides:

In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

7. What the rule requires is that a copy the decision which is being challenged be lodged verified by an affidavit before the hearing of the motion. In this case even the motion itself has not yet been filed as leave to do so is the subject of this ruling. The objection is therefore premature in my view. This was the position of **Tanui, J** in **Republic vs. Land Disputes Tribunal Siaya District Ex Parte Allan Mwalo Wambani Kisumu HCMisc Application No. 45 of 2003** where he held that Order 53 rule 7(1) of the *Civil Procedure Rules* envisages that before the hearing of an application for judicial review which seeks an Order of Certiorari, the applicant shall have lodged with the registrar a copy of the document sought to be quashed, verified by an affidavit and therefore where the hearing date is yet to be fixed the issue of lodgement of the document has not arisen. I therefore hold that the objection is unmerited.
8. The requirement for leave was explained by a three judge bench comprising **Bosire, Mboghli-Msagha & Oguk, 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:

“The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power...the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter... It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person’s legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant’s legal rights or interests were affected. The applicant’s complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant’s interests without regard to the matter of his complaint. If he 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... In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a *prima facie* case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a *prima facie* case. For that, he should have been granted leave to apply for the orders sought.”

12. In **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199**, the Court of Appeal was of the view 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.
13. 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.... Like the Biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. One can safely state that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of *Donoghue vs. Stephenson* in the last century. 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.”

14. 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. The Court is under a duty to filter the application at that stage of leave 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. Public bodies ought to proceed with their statutory duties without being uncertain as to whether their actions will be overturned in the future and the public ought to be assured that the actions taken by the public bodies will not be overturned. Unless this assurance is given, public affairs are unlikely to be conducted in a manner that guarantees to the public confidence in the administration of its affairs. Therefore leave may only be granted 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.

15. In this case, the only issue is that there is an illegal group running the toilets which were allocated to the applicants. The verifying affidavit which ought to contain the facts does not show the circumstances under which the interested parties took over the management of the said toilets. It similarly does not state the circumstances under which the Respondent is held liable. It is the verifying affidavit and not the statement which ought to contain the facts relied upon by the applicant in judicial review proceedings. In *Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000*, the Court of Appeal held:

“We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the *Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7*: ‘The application for leave “By a statement” – The facts relied on should be stated in the affidavit (see *R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281*). “The statement” should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.’”

16. It follows that in the absence of the facts in the verifying affidavit which would constitute grounds for judicial review, what remains is simply a claim for breach of contract and such a claim is not the kind of a dispute which can be dealt with in judicial review proceedings but ought to be determined in ordinary civil courts.

17. I am accordingly not satisfied that the applicants have established a *prima facie* case to warrant

the grant of the leave sought herein.
18. In the result Chamber Summons dated 25th March 2013 is dismissed but with no order as to costs.

Dated at Nairobi this 28th day of November 2013

G V ODUNGA

JUDGE

Delivered in the absence of the parties