Rashid v Kasyi & 2 others (Environment & Land Petition E021 of 2024) [2025] KEELC 3216 (KLR) (8 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3216 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND PETITION E021 OF 2024

SM KIBUNJA, J

APRIL 8, 2025

BETWEEN

ALI ABUBAKAR RASHID ..... PETITIONER

AND

FRANCIS MUNUVE KASYI ..... 1ST RESPONDENT

KHANSAM APARTMENTS & MANAGEMENT COMPANY LIMITED ..... 2ND RESPONDENT

COUNTY GOVERNMENT OF MOMBASA ..... 3RD RESPONDENT

RULING

[Notices of Motion dated 16th September 2024 by Petitioner, 15th October 2024 by the 1st and 2nd Respondents and 16th October 2024 by 2nd Respondent]

1. The first application dated 16th September 2024 was filed by the petitioner and seeks for the following prayers:

   a. "Spent.

   b. Spent.

   c. [Repeat of (b) above].

   d. This Honourable Court do issue an order of certiorari to review the process upon which the approval for development permission number P/2024/00371 by the 3rd Respondent was issued.

   e. This Honourable Court do issue an order of prohibition against the 1st, 2nd and 3rd Respondents either in their own capacity or through agents, from the continued

implementation of the development process on the suit property, plot number Mombasablock XXVI/351 pending the hearing and determination of this petition.

f. [Repeat of (e) above.]

g. This Honourable Court do issue an order of certiorari to review and quash the unprocedural and illegal process upon which an approval for development permission was issued by the 3rd respondent and quash the /revoke the said approval number P/2024/00371.

h. Costs of this application be provided for."

The application is premised on the fourteen (14) grounds on its face and supported by the affidavit sworn by Ali Abubakar Rashid, petitioner, on 16th September 2024, inter alia deposing he is the owner of Mombasa Block XXV1/949, Kizingo, while the 1st respondent is the owner of the Mombasa Block XXV1/ 351, suit property, whereas the 2nd respondent is the developer who on 13th June 2024 applied for development permission for a proposed residential development of 21 floors thereon that was approved by the 3rd defendant on 6th September 2024; that his property, Mombasa Block XXVI/949, is in the same neighbourhood with the suit property; that the 2nd respondent's development is a high risk project, whose approval was unprocedurally obtained, as there was no public participation or consultations with neighbours prior to granting of the development permission; that no ESIA study was conducted to list effects and mitigations therefrom before approval was granted, and there was no prior approval from NEMA was obtained for the project, and the project has not been registered with National Construction Authority; that the zoning requirement of the area provide for a single dwelling and no change of user to a multiple dwelling has been obtained; that the development will impact adversely on clean and healthy environment of the area if the application is not granted and the 1st and 2nd respondent continues with the development.

2. The application is opposed by the 3rd respondent through the replying affidavit of Paul Manyala, director planning, sworn on 7th February 2025 inter alia deposing that the 3rd respondent has among its functions the responsibility of planning and control of developments; that development permissions are issued under the *Physical and Land Use Planning Act* 2019, PLUPA, and is usually granted with conditions; that section 57 provides for revocation of a development permission where the applicant contravened any provision of the Act or condition imposed on the permission; that the 2nd respondent was granted a development permission but it was revoked on 9th October 2024 due to breach of the conditions imposed; that the 2nd respondent did not adequately carry out public participation; that the permission having been revoked by the 3rd respondent, the position that remains is that the 2nd respondent does not possess a development permission; that if the 2nd respondent were to continue with the development, sanctions would follow.

3. The second application is the dated 15th October 2024 and is filed through Ms. J. M. Makau & Company Advocates for the 1st & 2nd respondents, seeking for the petition against the 1st respondent to be struck out as he is deceased. The application is based on four grounds on its face and supported by the affidavit of John Muneeni Makau, advocate, sworn on 15th October 2024, inter alia deposing that the 1st respondent died on 7th September 2021, as confirmed by the certificate of death number 1142939 issued on 16th September 2021 that is attached, and the petition against him is nullity ab initio.

4. In opposition to the application, the Petitioner filed eight (8) grounds of opposition and six (6) grounds on the preliminary objection both dated 10th February 2024 stating inter alia that Mr. Makau counsel lacks locus to swear affidavit as he is no longer on record for the 1st respondent and has not disclosed who instructed him if the 1st respondent is deceased; that Mr. Makau's supporting affidavit offends

Order 19 Rule 3, as it is defective and oppressive; that the application was a nullity at inception, incompetent and incurably defective and should be struck out.

5. The third application also filed through Ms. J. M. Makau & Company Advocates for the 2nd respondent is dated 16th October 2024, and seeks for orders that:

    1. "Spent.

    2. That the Honourable court be pleased to order that the petitioner's notice of motion application dated the 16th December 2024 filed under Certificate of Urgency be issued with a near date other than the 12th February, 2025.

    3. That the 1st Respondent is deceased and therefore not available to be served with the Petition, being in the neighbourhood, the petitioner knew or ought to have known this fact.

    4. That the petitioner has not acted in good faith since he obtained the ex parte stay orders and has through deceit tried to enlarge time for the hearing and determination of this application whilst occasioning financial losses to the 2nd respondent.

    5. That the petitioner be ordered to give security of costs as shall be deemed by the court from the 2nd respondent's pleadings and more specifically the Bill of Quantities by Kiara & Costs Associates Limited which states the total loss per month as Kshs.6,066,000 plus Kshs.46,900,000 bring refund of the money already paid by clients as off-plan deposits.

    6. That costs of the application be granted for."

    The application is based on the seven grounds on its face and supported by the affidavit of Sammy Kamuio Mukuri, director, sworn on the 16th October 2024, in which he inter alia deposed that though the petitioner came to court on 16th September 2024 and obtained interim orders, he failed to serve the court papers within the time directed for inter parties hearing on 30th September 2024; that due to the non-service, the exparte stay orders were on 30th September 2024 extended to 12th February 2025; that petitioner was not truthful in claiming he had not traced the 2nd respondent while he could have easily obtained its address from the 3rd respondent and for suing the 1st respondent while knowing he had passed on in 2021; that the 2nd respondent got to know about this petition through the 3rd respondent when it stopped the ground breaking ceremony to commence development of 8th October 2024 as the petitioner had not served it; that as the development was funded by the would be buyers of the units therein, the 2nd respondent continues to incur costs on account of work stoppage; that the 2nd respondent has filed a cross-petition, and as the petitioner is unlikely to satisfy its decree if successful, he should provide security for costs, and a nearer date should be fixed for the petitioner's application.

6. The application is opposed by the petitioner through the six grounds of opposition dated 10th February 2024, stating inter alia that deposit of security is an impediment to access to justice under Article 48 of *the Constitution*; that the respondent has not proved that he will be unable to pay costs if he fails in this petition; that his right to access justice should not be impeded through the pursuit for an order for security for costs.

7. That so as to expedite the determination of the pending interlocutory applications, the court on the 11th November 2024 and 12th February 2025 directed the applications to be canvassed together through submissions to be filed and exchanged within the time specified thereof. The learned counsel for the petitioner filed their submissions dated the 11th February 2025, while the 1st respondent filed theirs dated 16th January 2025 and supplementary submissions dated 24th February 2025. The counsel for the 2nd respondent filed theirs dated 24th January 2025 and supplementary submissions dated the 4th March

2025. The learned counsel for the 3rd respondent informed the court on the 12th February 2025 that they are not filing submissions. The court has carefully considered all the submissions filed as detailed above.

8. The main issues for the determination by the court in the three applications are as follows:

   a. Whether the petitioner has met the threshold for an order of certiorari in respect of development permission number/2024/00371 to issue at this interlocutory stage.

   b. Whether the petitioner has met the threshold for prohibition order against the respondents in respect of construction on the suit property to issue as prayed.

   c. Whether the application for striking out of the 1st respondent from the petition is properly before the court.

   d. Whether the 2nd respondent has made a reasonable case for the petitioner to give security for costs and if so how much.

   e. Who pays the costs in each of the applications?

9. The court has carefully considered the grounds on the three applications, affidavit evidence, grounds of oppositions, preliminary objection, submissions by the learned counsels, superior courts decisions cited thereon and has come to the following determinations:

   a. It is important to start my analysis and determination with the motion dated 15th October 2024, to strike out the 1st respondent from the petition for the reason that he had died by the time the petition was filed. Striking out of pleadings/suits is provided under Order 2 Rule 15 of the Civil Procedure Rules. The reasons for striking out pleadings/suits are mostly because it would prejudice, embarrass or delay the fair trial of the action or it would otherwise an abuse of the process of the court. In this instance, the main reason given is that the 1st respondent is deceased. In the case of Viktar Maina Ngunjiri & 4 Others versus Attorney General & 6 Others, High Court at Nairobi, Civil Suit No. 21 of 2016 (2018) eKLR the court reviewed various authorities including the Indian case of C. Muttu vs. Bharath Match Works AIR 1964 Kant 293 and observed that;

      > " If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person."

      In yet another Indian Case of Pratap Chand Mehta versus Chrisna Devi Meuta AIR 1988 Delhi 267 the court citing another decision observed as follows;

      > " .....if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a

dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment."

Without belabouring the issue, it matters not which party brings the evidence about the death of a party in a suit to the court, so long as it is formally brought by one of the parties and or their counsel or a friend of the court.

b. The striking out application dated 15th October 2024 was filed through Ms. J. M. Makau & Company Advocates for the 1st & 2nd respondents. The said counsel had entered appearance for the 1st & 2nd respondents through the memorandum of appearance dated the 15th October 2024, that has not been challenged. The counsel was therefore the counsel for the two parties when the striking out application dated 15th October 2024 and the 2nd respondent's application dated 16th October 2024 for security of costs were filed. The claim by the petitioner that John Muneeni Makau, the deponent in the striking out application was not the counsel in conduct of the petition on behalf of the 1st respondent is therefore without merit, considering he was in conduct of the matter until the notice of change of advocate dated 6th November 2024, through which Ms. Apollo Muinde & Partners came on record for 1st respondent was filed. Prayer (3) on the 2nd respondent's application dated 16th October 2024 seeks for an order that petitioner knew that the 1st respondent had died as was not available to be served with the petition. It is therefore appropriate for that prayer to be decided together with the striking out application dated 15th October 2024 as they are related. The fact is that the evidence of death of the 1st respondent as evinced by the certificate of death attached to the supporting affidavit to the application dated 15th October 2024 has not been disputed through any deposition by the petitioner or any other party and the court takes it as a proven fact. Flowing from the decisions in the above superior courts cases, the petitioner's claim against the 1st respondent, who had died years before the petition was drawn and filed is null, and void ab initio. The striking out application dated the 15th October 2024 and prayer (3) in the 2nd respondent's application dated 16th October 2024, therefore has merit and the petition against the 1st respondent is hereby struck out.

c. The next question that arises out of the petitioner's response to the striking out application is who then instructed the advocate on record for the 1st respondent, who had died years before the petition was filed? This applies to both the initial counsel, Ms. J.M Makau & Company Advocates, and the subsequent counsel, Ms. Apollo Muinde & Partners Advocates. Neither, of the two counsel who were on record for the 1st respondent initially and now, has attempted to provide an insight or answer to that question, and for that reason, no costs are awarded in the application for striking out the petition against the 1st Respondent.

d. Going back to the petitioner's application dated 16th September 2024, I start by pointing out that prayer (a) for certifying the application urgent is already spent, and prayers (c) & (f) are a repeat of prayers (b) & (e) respectively. This leaves the court with prayers (d) and (g) which are both for certiorari orders that are differently phrased and prayer (h) on costs. On prayer (f) which is for a prohibition order against commencement of construction activities on the suit property and prayers (d) and (g) for a certiorari order to quash the development permission, the petitioner has raised objection both in his replies and submissions on the process used by

the 2nd respondent to seek for the two judicial review remedies. In the case of Republic versus Judicial Service Commission Ex-Parte Pareno [2004] KEHC 2684 (KLR) the court held that:

> " What then is the scope of judicial review?
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> The Supreme Court Practice 1997 Vol 53/1-14/6 states:
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> > "The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision – making process itself.
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> It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question."

The Supreme Court commentary also makes the position even clearer by stating in the same paragraph cited above that:

> " The Court will not, however, on a judicial review application act as a "court of appeal" from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the Court is to see that lawful authority is not abused by unfair treatment. If the Court were to attempt itself the task entrusted to that authority by the law the Court would, under the guise of preventing the abuse of power be guilty itself of usurping power. Lord Bringtman in Chief Constable of North Wales Police v Evans [1982] I WLR 1155 p 1173"

In view of the mention of the "Wednesbury principle" it is appropriate to set it out:

> " Decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision." See Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223 per Lord Green M R."

My understanding of the law relating proceedings seeking for judicial review reliefs, and this position is supported by superior courts decisions including the one above, is that such orders can only be granted after full hearing of suit or application and not at the interlocutory stage.

e. In the case of Olive Mwihaki Mugenda & another versus Okiya Omtata Okoiti & 4 others [2016] KECA 663 (KLR) the Court of Appeal cited Deoray -v- State of Maharashtra & Others 6th April 2004 where it was stated:

> " Situations emerge where the granting of an interim relief would be tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would be tantamount to dismissal of the main petition itself; for, by the time the main matter comes up for hearing there would

be nothing left to be allowed as relief to the Petitioner though all the findings may be in his favour. In such cases, the availability of a very strong prima facie case ...the court may grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases."

f. This goes further to cement the position that judicial review reliefs, are orders issued where merited at the conclusion of the proceedings. There is however an exception where in exceptional circumstances they can be sought and issued at the interlocutory stage pending the hearing and determination of the main claim. The way prayers (d) and (g) for certiorari are drafted or phrased is in finality terms, and are not for pending the hearing and determination of the petition. They cannot therefore, be issued at this stage. On prayers (e) and (f) for prohibition, they are properly phrased as they are meant to be in force pending the hearing and determination of the petition. While the petitioner may have had reasonable basis as the 2nd respondent had a development approval permission number P/2024/00371 issued by the 3rd respondent, by the time the application and petition were filed, that position has since changed as the approval was subsequently revoked vide the 3rd respondent's letter dated 9th October 2024, addressed to the 2nd respondent, that is annexed to the 3rd respondent's replying affidavit, sworn by Paul Manyala. That revoked development approval permission appear to have been the main basis or foundation upon which the instant application was predicated upon and with its revocation, the petitioner's application crumbles. The instant application was filed before the said revocation, and there no challenge before the court over that decision of the 3rd respondent to revoke the development approval permission it had granted the 2nd respondent.

g. The third application was by the 2nd respondent primarily seeking at prayer (2) for the petitioner's application to be given an earlier hearing date; prayer (3) for order that petitioner knew by the time he filed this claim that the 1st respondent was dead; prayer (4) for an order that petitioner has not acted in good faith and has occasioned 2nd respondent financial losses; and prayer (5) for petitioner to be ordered to provide security for costs. It is obvious prayer (2) has since been overtaken by events, while prayer (3) has already been decided as in (b) above, and the petition against 1st respondent has been struck out. This leaves prayers (4) and (5) and in view of the finding in (f) above that the petitioner's application has no merit as the development approval permission granted by the 3rd respondent to the 2nd respondent has since been revoked, then the two prayers are also otiose. Indeed, both the petitioner and the 2nd respondent, who has filed a cross-petition, may need to rethink the contents of their claims and how it is affected by the revocation of the development approval before taking further steps towards prosecuting them.

h. On the issue of costs on the petitioner's and 2nd respondent's applications dated the 16th September 2024 and 16th October 2024 respectively, I am of the view that it will be fair and just for the costs to abide the outcome of the petition and cross-petition.

1. From the foregoing conclusions, the court finds and orders as follows on the three applications:

   a. The 1st & 2nd respondents' striking out application dated 15th October 2024, and prayer (3) of the 2nd respondent's application dated 16th October 2024 are allowed and the petitioner's claim against the 1st respondent is hereby struck out with no orders as to costs.

   b. The Petitioner's application dated 16th September 2024 is without merit and is struck out.

c. The 2nd respondent's application dated 16th October 2024, with exemption of prayer (3) which has been allowed, is hereby struck out.

d. That the costs in respect of the applications dated 16th September 2024 and 16th October 2024 to abide the outcome of the petition and cross-petition respectively.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 8TH DAY OF APRIL 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Petitioner : M/S Orenge for Kombe

Respondents : Mr. Makau for 2nd Respondent holding brief for Muinde for 1st Respondent. Mr. Tajbhai for 3rd Respondent

Shitemi – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.