



**Republic v Kenya Wildlife Service & 3 others; Ngare, Chairman of  
Marina Beach Management Unit & 4 others (Exparte) (Judicial Review  
Application 4 of 2021) [2022] KEELC 3576 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3576 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
JUDICIAL REVIEW APPLICATION 4 OF 2021**

**LL NAIKUNI, J**

**MAY 12, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**KENYA WILDLIFE SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**KENYA FISHERIES SERVICE ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MOMBASA FISHERIES DEPARTMENT .... 3<sup>RD</sup>  
RESPONDENT**

**OCS BAMBURI POLICE STATION ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**KAHINDI RANDU NGARE, CHAIRMAN OF MARINA BEACH  
MANAGEMENT UNIT ..... EXPARTE**

**SAID KHAMIS SAID, CHAIRMAN OF NYALI BEACH MANAGEMENT  
UNIT ..... EXPARTE**

**SHEHA KHAMIS ..... EXPARTE**

**HASSAN ALI MAGENDO ..... EXPARTE**

**JUMA NYAWJE (SUING ON BEHALF OF OTHER 100 MEMBERS) .... EXPARTE**



## JUDGMENT

### I. Introduction

1. The ex parte applicants filed the judicial review chamber summons application dated May 28, 2021 seeking leave to file for certain prerogative orders against the respondents. On being granted leave, they filed substantive notice of motion application dated June 8, 2021.

It was brought under the provision of section 1,A, 1B, 3 and 3A of the Civil Procedure Act, cap 21, order 53 of the Civil Procedure Rules, 2010, sections 8 and 9 of the Law Reform Act cap 26 and articles 40, 47 and 48 of the Constitution of Kenya.

### II. The Ex Parte Applicant's Case

2. He sought for the following orders:-
  - a. That the *ex parte* application be granted judicial review orders of certiorari removing to this court and quashing the decision of the respondents, their servants, agents or representative from blocking the applicants from caring on with fishing activities and to release their fishing apparatus seized.
  - b. That the costs be to the *ex parte* applicant.
3. The notice of motion application dated June 8, 2021 is premised on the grounds, testimony and averments of the 22 paragraphed supporting affidavit of Kahindi Randu Ngare and the three (3) annexures marked as “KRN – 3” annexed hereto. He deposed that ex parte applicants were registered fishermen operating within Mombasa and members of Marina Beach Management Unit and Nyali Beach Management Unit. He stated that their members included fishermen, boats and canoes owners and their organization was registered under the Kenya Fisheries and the County Government of Mombasa. He stated that they had been in operation for many years and earned their living by carrying out fishing activities within the Indian Ocean.
4. He averred that on September 27, 2020, the 1<sup>st</sup> respondent seized and unlawfully detained the fishing apparatus that include piece of fishing nets, pieces of ropes canoes and anchors all belong to the applicants. The applicants claim the actions of commission and omission by the 1<sup>st</sup> respondents were unfair, irregular, unprocedurally unlawful and unjust. It had caused them mental anguish and untoward suffering as they risked losing their livelihood if the respondents were not restrained from seizing and/or blocking them from carrying on with their fishing activities at the Marina beach and Nyali beach management units.
5. The *ex parte* applicants further claim that they were neither given an opportunity to be heard prior to the said acts nor were they given any notice of the respondent's intention to carry out the aforesaid acts. The applicants claimed that the respondents infringed on their constitutional rights and denied them a chance to acquire their daily income when they blocked them from carrying out of fishing activities. They termed the actions by the respondents being *ultra vires*, unfair, irregular, un - procedural, unlawful, unjust, unreasonable, irrational and a breach of the principles and the rules of natural justice and within the wednesbury principal. The Applicant argued that acts by the respondents' amounted to abuse of power, in bad faith and constitute errors of facts and law.



### III. The 3<sup>rd</sup> Respondents Case.

6. On November 30, 2021 the learned counsel for the 3<sup>rd</sup> respondent, Elizabeth Kuria, from the state law department filed a three (3) points grounds of opposition dated June 28, 2021 and on November 30, 2021. The grounds stated that the applicant contravened the provisions of order 1 rule 10 (2), order 2 rule 15 (1) (a) (b) (c) and (d) of the Civil Procedure Rules, 2010. The 3<sup>rd</sup> respondent argued that they are not a necessary party to the suit as no relief had been sought against them. They claimed that the suit was frivolous, vexatious and an abuse of the court process. They claimed the suit was brought by the applicants who did not seek leave of court as required by order 1 rule 8 of the Civil Procedure Act, cap 21 to bring a suit in a representative capacity.

### IV. Submissions

7. On October 4, 2021 while all the parties were present in court, they were directed to have the said application filed by the *ex parte* applicant be disposed off by way of written submissions. Pursuant to that, all the parties obliged and a judgement date was secured accordingly.

#### A. The Ex Parte Written Submissions.

8. On November 8, 2021, the learned counsel for the *ex parte* applicants, the law firm of Messrs J K Mwarandu & Company Advocates filed their written submissions. Additionally, on December 3, 2021, they filed further submissions. Mr Kahindi advocate holding brief for Mr Mwarandu advocates, while submitting reiterated and reproduced the same the facts word by word as raised in the averments of the supporting affidavit of Kahindi Randu Ngare. He submitted that the court ought to restrain the respondents from blocking the applicants from carrying out fishing activities at Marna Beach and Nyali Beach.
9. From the further filed submissions, the learned counsel argued that the judicial review suit was not *res judicata* since the suits referred to by the respondents and which indeed had been instituted before the lower court being civil suits CMCC No 131 of 2020 being “Kahindi Randu & others v KWS and No 141 of 2020 Said Khamis Said & others v KWS” had since been withdrawn and a notice of withdrawal annexed thereto.

#### B. The 1<sup>st</sup> Respondent’s Written Submission

10. On November 29, 2021, the learned counsel for the 1<sup>st</sup> respondent, the law firm of Messrs Doreen Mutung’a Advocate filed their written submissions dated November 18, 2021. M/s Owindi the learned counsel strongly submitted that the judicial review application was an afterthought, fatally defective and an abuse of the court process and court ought to dismiss it with costs. The learned counsel argued that in CMCC E131 of 2020 the applicants were seeking injunctive orders to restrain the 1<sup>st</sup> respondent from harassing and seizing their goods, an application which was dismissed and the substantive suit stood over generally for non - attendance by the applicants. The applicants then filed CMCC E141 of 2020 seeking similar orders and it too was stood over generally. The learned counsel submitted that the judicial review was doctrine *res judicata* to the two matters that were before the Chief Magistrate and as such should be dismissed with costs. To buttress her case she cited the cases of Prof Christopher Mwangi Gakuu v Kenya National Highways Authority & 5 Others (2013) eKLR and Republic v City Council of Nairobi & 2 Others (2014) eKLR, JRA 433 of 2021.
11. On the substance of the judicial review, the learn counsel submitted that the applicants were not entitled on the ground that they entered into a national park contrary to the provision of section 1 (a) of the Wildlife Conservation and Management Act 2012. Besides, they were fishing in a national



park contrary to section 102 (1) (f) (g) (h) of the same Act. The learned counsel established that the 1<sup>st</sup> respondent found the applicants fishing at night inside the park and the same was reported to Bamburi Police Station. The learned counsel argued that the actions of the 1<sup>st</sup> respondent of seizing the fishing apparatus of the applicants was in no way unreasonable or an infringement to the rights of the applicants as they were fishing inside the Mombasa Marine Park. The learned counsel submitted that the 1<sup>st</sup> respondent was within their jurisdiction and within their mandate of conserving national parks and wildlife conservation areas. The learned counsel argued that the social economic rights of the applicants were not absolute and were subject to limitation.

### C. The 3<sup>rd</sup> Respondent's Written Submission

12. On January 27, 2022, the learned counsel for the 3<sup>rd</sup> respondent, M/s Elizabeth Kuria, from the state law department filed their written submissions. M/s Kuria the learned counsel submitted that the 3<sup>rd</sup> respondent was improperly before court and court should order that they be removed from the suit as provided by order 1 rule 10 (2) of the Civil Procedure Rules, 2010. She heavily relied and cited The Code of Civil Procedure by Mulla on this aspect where they were wrongfully joined in this matter.
13. In addition, the learned counsel argued that in the judicial review application, the applicants did not raise any particulars to prove a cause of action against the 3<sup>rd</sup> respondent. The 3<sup>rd</sup> respondent did not play any part in the events leading to the judicial review and was therefore not a necessary party, and there can be no order that can be enforced against him. The learned counsel urged court to find that the 3<sup>rd</sup> respondent was not a necessary or a proper party to the judicial review and they ought to be struck out of the suit with costs to the 3<sup>rd</sup> respondent.

### V. Analysis and Determination

14. I have carefully considered the application by the *ex parte* applicant, the responses thereto, together with the written submissions by all the parties herein, the authorities cited as well as the provisions of the Constitution, the law applicable and precedents.
15. In order to arrive at an informed, just and fair decision, there are two -questions for determination before me. These are:-
  - a. Whether the notice of motion application dated June 8, 2021 fulfills the fundamental threshold of granting the prerogative orders of judicial review as founded under the provisions of the law.
  - b. Whether the parties herein are entitled to the orders sought.
  - c. Who will bear the costs of the *ex parte* application.

#### **Issue No a) Whether the Notice of Motion Application Dated June 8, 2021 Fulfills The Fundamental Threshold Of Granting The Prerogative Orders Of Judicial Review As Founded Under The Provisions Of The Law.**

16. The brief facts of the case are that, the applicants states that the 1<sup>st</sup> respondent, on September 27, 2020 Kenya Wildlife Service seized their fishing apparatus and blocked them from carrying on with their fishing activities. They now seek an order of certiorari to quash the decision of the respondents from blocking their fishing activities and to release their fishing apparatus. On the other hand, the 1<sup>st</sup> respondent in their replying affidavit sworn by Hassan Poda and their submissions, admit to inside the Mombasa Marine Park, which is a wildlife conservation area.



17. In our legal parlance and jurisprudence, judicial review is founded under the provisions of order 53 rules 1 to 7 of the [Civil Procedures Rules 2010](#) where the prerogative orders are issued. Primarily, the provisions of sections 8 and 9 of the [Law Reform Act](#) cap 26 of the Laws of Kenya where the provisions of order 53 of the [Civil Procedure Rules 2010](#) was borrowed from the case of *Farmers Bus Services v Transport Licensing Appeals Tribunal* (1975) E A 523. And upon the promulgation of [the Constitution](#) of Kenya in 2010 article 47 of the [Constitution](#) of Kenya introduced the provisions of fair administration of justice and later on the legislation of the [Fair Administration of Action Act](#) of 2012 which is the statutory framework governing judicial review and the administrative law in Kenya currently.
18. The legal efficacy and scope of the statutory order of *mandamus*, prohibition and certiorari are remedies granted by High Court to persons inferred by the exercise of administrative of judicial powers. These prerogative orders are only available against public bodies. Their origins lie in the expansion of common law in England and the jurisdiction of the Court of King Bench to acquire superintendence over the observance of law by officials. These orders are predicated upon the fact that without law, society cannot function with fundamental values such as social order, social justice and personal freedom. Today public authorities determine an overwhelming extent how much of these values are enjoyed. Their decision affect vast numbers of people collectively and individually ipso facto unlawfully decision, must be available to judicial scrutiny hence judicial review. The social need for how and the protection of legality is violated when a public official exceeds his/her authority or does not use his/her power in the prescribed manner.
19. The prerogative writs of *certiorari* derives from the latin word *certiorari* which means to be certified, informed, appraised or shown. Both in its embryonic days and today, the order, initially and prerogative writ was inferior courts and required the proceedings of that to be transferred to the High Court and examined for validity. It meant the decision would be quashed. From the provisions of order 53 of the [Civil Procedure Rules](#) the applicant ought to move court within a period of six (6) months from the time the order, decree, judgment, conviction or other proceeding was made. The order of prohibition issues where there are assumption of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction. The order of *mandamus* is derived from the latin word *mandare* meaning to command. It is issued in cases where there is a duty of a public or a quasi-public nature or a duty imposed by statute, it compels the fulfillment of a duty where there is a lethargy on the part of a body or officer concerned.
20. In a nutshell judicial review is the means by which High Court judges scrutinize public law functions intervening as a matter of discretion to quash, prevent, require and/or classify not because they disagree with the judgment but so as to right a recognizable public law wrong. This public law wrong could be unlawfulness, wednesbury unreasonableness or irrationality, unfair hearing, ultra vires bad faith, unfairness, made or arrived at out of excess powers (*ultra vires*) biasness, capriciousness or un judicially.
21. In an application for judicial review the applicant must be a person with a sufficient interest – *locus standi* and who commences proceedings promptly. To support this legal concept on judicial review, I have made indepth references to several literature review and court decisions – [Pharmaceutical manufacturers Association of South Africa in re- exparte president of Republic of South Africa](#) - 2000 S A 674 CC at 33 [Republic v Speaker of the Senate and Another Ex parte Afrison Export Import Limited](#) 2018 eKLR [Republic v Stanley Mambo Amuti](#) (2018) eKLR.; the [Kenya National Examination Council v Republic \(Ex - Parte - Geoffrey Gathenji & Another](#) Nairobi Civil Appeal No 266 of 1996.



In the instant case, the *ex parte* applicant has sought only the writ prerogative orders – *certiorari*.

22. As stated above, this court has powers under sections 8 and 9 of the [Law Reform Act](#), cap 26 of the Laws of Kenya to issue prerogative *writ* of *certiorari*, which brings into this court to quash a decision which is *ultra vires*. A *writ* of prohibition intended to forbid or prevent an action by a public officer from taking place is granted alongside *certiorari*, since it's a similar remedy but more prospective than retrospective. While *certiorari* looks at the past, prohibition looks at the future. The provision of section 8 of the [Law Reform Act](#), also provides for a *writ* of prohibition which primarily prohibits a tribunals, judicial bodies or subordinate courts from doing or taking an action in excess of its jurisdiction.

In the book of [Administrative Law](#), Sir W Wade and C Forsyth, page 605 noted that:-

“I can see no difference in principle between *certiorari* and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on *certiorari*. I think that prohibition will lie to restrain it from so exceeding its jurisdiction.

Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but *ultra vires*. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. *Certiorari* and prohibition frequently go hand in hand, as where *certiorari* is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself.”

23. Under the provision of order 53 rule 7 of [Civil Procedure Rules](#), which provides:-
1. 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.
  2. Where an order of *certiorari* is made in any such case as aforesaid, the order shall direct that the proceedings shall be quashed forthwith on their removal into the High Court.
24. This provision, requires that any party seeking an order of *certiorari* must annex to his application a copy of the order or decision he seeks to challenge or if does not, he must give to court a satisfactory reason for that failure. Order 53 rule 7 is a precondition to seeking an order of *certiorari* and failure to comply renders the entire application incompetent since the court is not in a position to determine whether there in fact existed an order capable of being quashed. The rationale behind it is to enable court satisfy itself of the existence of the orders or decision their contents and whether the application was filed in time.

#### **Issue b). Whether The Parties Herein Are Entitled To The Orders Sought.**

25. Under this sub heading, it must be remembered that the provision of order 53 rule 2, of the [Civil Procedure Rules, 2010](#) sets out the time for applying for *certiorari*, which is limited to six (6) months of the time when the decision was made. In the instant case, the six (6) months begun running from the date of the proceedings that is the judgement, order, decree, conviction or any other proceedings. Evidently, the applicants failed to annex to their application the ostensible and/or alleged decision made by the 1<sup>st</sup> respondents that they sought to bring into this court to quash. This failure denies court the



chance to examine that decision to make a determination as to whether it complies with the provision of order 53 rule 2 of the Civil Procedure Rules, 2010 on the six (6) month limitation. In Republic v Land Dispute Tribunal Court Central Division & another ex parte Nzoma (2006) 1 KLR Nyamu J held the following in relation to the provision of order 53 rule 2, “The rule applied only to the formal orders set out therein and did not apply generally and in addition, the exclusion did not apply where there was a lack of jurisdiction and the court should be able to reach out and attack nullities arising out of lack of jurisdiction of the targeted decision making bodies. The application must, however, be made within reasonable time and the delay explained in the cases outside the rule. Hardship and prejudice to other parties were major factors in these cases and in the exercise of any judicial discretion.”

26. The decision being challenged is not known. In other words, the reasoning, nature under which the decision was made and its maker remains unclear. In Republic v County Assembly of Nakuru & 2 others Ex parte Samuel Waitbuku Njane & 21 others (2017) eKLR, the court held that, “In order to establish a *prima facie* case the *ex parte* applicant must show that the decision he is challenging was made in contravention of one of the grounds upon which judicial review order of certiorari may issue, and must also show that the application has been made within six months from the date when the challenged decision was made. The failure to annex the decision to be challenged in this case is fatal as it remains uncertain whether there actually exists a decision which can be called into court for purposes of quashing.”

In the given circumstances, the *ex parte* applicant are not entitled to the orders sought as they have failed to fulfil a basic requirement inherent or demanded for all such cases while an applicant is seeking for prerogative orders of the *writ of certiorari*.

Suffice it to say, from this proceedings, I have taken judicial notice that there exists no breach the doctrine of *res judicata* and offending the provisions of section 7 of the Civil Procedure Act cap 21 of the Laws of Kenya as all the other previously filed suits before the lower court at Mombasa and elsewhere being CMCC No 131 of 2020 & CMCC No E141 of 2020. This was following the withdrawal of all the suits by the *ex parte* applicants *vide* filed notices of withdrawal dated May 19, 2021 and filed on June 11, 2021 respectively.

Finally, as things stand now, it is just fair that all the goods and machineries belonging to the *ex parte* applicants that were detained and seized by the Kenya Wildlife Services - the 1<sup>st</sup> respondent herein should be released to them forthwith so that they may utilize them and continue earning with their livelihood in a proper manner.

### **Issue No C) Who Will Bear The Costs Of The Ex Parte Application.**

27. It is now trite law that the issue of costs is purely discretionary by courts. By the provision under section 27 of the Civil Procedure Act, cap 21 costs follow the events. The events are the results and/or outcome of the total and/or circumstances of the case.

In the instant case, the *ex parte* applicant has not been able to sustain their case due to the detailed analysed reasoning adduced herein. Taking that the respondents have succeeded in the matter, it follows that they be awarded the costs of the *ex parte* application to be borne by the *ex parte* applicant.

### **VI. Conclusion and Disposition**

28. Ultimately, and based on the thorough and detailed analysis of the facts and legal provisions herein, I find and make the following orders:-
- a. That the substantive application for the judicial review seeking the prerogative orders of certiorari to remove into this court for purpose of being quashed the decision of the 1<sup>st</sup>



respondent to halt and seize the fishing activities and apparatus belonging to the applicant is fatally defective for failing to annex the decision being challenged.

- b. That the *ex parte* application dated June 8, 2021 be and is hereby dismissed for lack of merit.
- c. That an order directed to the Kenya Wildlife Services – the 1<sup>st</sup> respondent forthwith release all the machineries, goods and/or fishing apparatus including pieces of fishing nest, pieces of ropes, canoes, anchors and any other material belonging to the *ex parte* applicants and which were detained or being detained to be released to them within the next seven (7) days from the date of this judgement and a proper inventory maintained.
- d. That an order be and is hereby made that the *ex parte* applicant has not breached the doctrine of *res judicata* and offending the provisions of section 7 of the *Civil Procedure Act* cap 21 of the Laws of Kenya as all the other previously filed suits before the lower court at Mombasa and elsewhere being CMCC No 131 of 2020 & CMCC No E141 of 2020 were all withdrawn *vide* filed notices of withdrawal dated May 19, 2021 and filed on June 11, 2021 respectively.
- e. That the costs to be awarded to the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

29. It is ordered accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 12<sup>TH</sup> DAY OF MAY 2022.**

**HON. JUSTICE L. L. NAIKUNI (JUDGE)**

**ENVIRONMENT AND LAND COURT**

**MOMBASA.**

**In the presence of:-**

Mr. Wilson Rabongo – Court Assistant.

Mr. Kahindi holding brief for Mr. Mwarandu Advocate for the Ex – parte Applicant.

Mr. Leon Kalisto Advocate for the 1<sup>st</sup> Respondent (KWS).

Non appearance for the 2<sup>nd</sup> Respondent.

Non Appearance for the 3<sup>rd</sup> Respondent.

