



**IN THE MATTER OF AN APPLICATION BY ELISHA NKAMANI M'MWARI FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF THE LOCAL GOVERNMENT ACT, (CAP.265)**

**(LOCAL GOVERNMENT ELECTION RULES)**

**AND**

**IN THE MATER OF ELECTION IN MWANGATHIA WARD-CENTRAL IMENTI**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**VERSUS**

**1. THE CLERK COUNTY COUNCIL OF MERU**

**2.THE INTERIM INDEPENDENTCOMMISSION.....INTERESTED PARTY**

**R U L I N G**

The applicant Elisha Nkamani M’Mwari being aggrieved by orders of this court dated 14<sup>th</sup> December, 2011 seeks that the said orders be reviewed and be set aside, vacated and/or substituted with an order allowing the notice of motion dated 7<sup>th</sup> July, 2008 with costs. That the costs of the application be borne by the respondents and the interested party at any event.

The application is brought pursuant to Section 80 of the Civil Procedure Act and Order 45 Rule 1, 2, 3(2) and 6 and Order 51 Rule 1 of Civil Procedure Rules(Cap.21) Laws of Kenya.

The application is based on the grounds stated on the face of the application. The application is supported by annexed affidavit sworn by Elisha Nkamani M’Mwari dated 23<sup>rd</sup> January, 2012 and annexures attached thereto. The applicant also filed written submissions supported by authorities.

According to the applicant there is a fundamental mistake and error apparent on the face of the record in the ruling necessitating a review of the court’s ruling and and the finding that the Chamber Summons and Notice of Motion filed by the exparte applicant was fatally defective and the striking out of both were arrived at a mistaken fact and erroneous conclusion.

The application was opposed. The 1<sup>st</sup>respondent filed grounds of opposition dated 14<sup>th</sup> March, 2012. The 2<sup>nd</sup> respondent filed grounds of opposition dated 8<sup>th</sup> March, 2012 and attached a list of authorities. The

interested party swore a replying affidavit dated 1<sup>st</sup> February, 2012. The respondents filed written submissions supported by authorities. The main and common thread in the grounds of opposition are:-

- 1. That Section 8(3) of the Law Reform Act prohibits a return or a review of a judgment in a judicial review matter and that the only remedy available to a dissatisfied party is an appeal pursuant to the provisions of Section 8(5) of the Law Reform Act.**
- 2. That Order 53 of the Civil Procedure Rules, a self-contained regime, is a creation of Section 9 of the Law Reform Act and Order 45 and 51 of Civil Procedure Rules do not apply to Judicial Review proceedings.**
- 3. That there is no fundamental error apparent on the face of the record in the ruling, findings and orders of the court given on 14<sup>th</sup> December, 2011.**
- 4. That there was no mistaken fact and erroneous conclusion that there was no verifying affidavit filed by the ex-parte applicant to verify the statement of facts in accordance with Order 53 Rule(I) of the Civil Procedure Rules in view of the court's finding at page 14 of the ruling sought to be reviewed.**
- 5. That the court having rendered its ruling on 14<sup>th</sup> December, 2011 the court becomes functus officio.**
- 6. That the Judicial Review Procedure under Order 53 of Civil Procedure Rules and the Law Reform Act is a complete legal regime. It is neither civil nor criminal. It is a special jurisdiction and the provisions cited on the face of the motion before court are not applicable in a judicial review proceedings hence the application before court is incompetent and its fate lies in it being dismissed or struck out.**
- 7. That the application was dismissed on the ground of being fatally defective but not dismissed on any grounds relating to the affidavits.**

Prior to the hearing of the application, Counsel for the parties to the application agreed that the application be determined by way of written submissions in support of their client's opposing positions. The written submissions were duly filed. This court further heard oral submissions made by Mr. K'Opere Advocate for the exparte applicant, Mr. Mwanzia for 1<sup>st</sup> respondent, Mr. C. Otieno Advocate h/b for Mr. Arusei Advocate for 2<sup>nd</sup> respondent and Miss Wamucii Advocate for the interested party. This court has carefully considered the written submissions with list of authorities. It has also read the pleadings filed by the parties herein in support of their respective opposing positions.

The issue for determination is whether this court has jurisdiction to vary, review or set aside its own orders in a judicial review application and further whether Civil Procedure Rules outside Order 53 of Civil Procedure Rules are applicable in Judicial Review application. Lastly whether the only remedy available to an aggrieved party on any decision arising out of a Judicial Review application is by way of an appeal to Court of Appeal.

The respondents' contention is that this court is being asked to review its orders in Judicial Review yet the court has no jurisdiction to do so.

The Judicial Review Jurisdiction is donated by Section 8 and 9 of the Law Reform Act(Cap.26) Laws of Kenya and Order 53 of the Civil Procedure Rule. Under the above Act and Order 53 of Civil Procedure Rules there is no provision for review of Judicial Review Orders. Section 8(3) of the Law Reform Act prohibits any application for review in an application for review of a ruling or judgment in a Judicial Review matter. The only remedy available to an aggrieved party is an appeal to the Court of Appeal pursuant to Section 8(5) of the Law Reform Act.

Section 8(1), (3) and (5) provides as follows:-

**8. (1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.**

(2).....

**(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.**

(4).....

**(5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.**

In the instant case, this court delivered its final ruling on 14<sup>th</sup> December, 2011 hence it became functus officio and cannot reconsider its decision as orders made under Section 8(3) of the Law Reform Act are final. The applicant in seeking this court to review its orders is tantamount to asking court to sit on appeal of its Orders yet in Judicial Review an appeal can only be in Court of Appeal.

In the case of **LEPAPA OLE KISOTU V NTULELE GROUP RANCH, DISTRICT COMMISSIONER NAROK, NAIROBI HIGH COURT MISC.APPLICATION NO. 690 OF 1997** court held that in Judicial Review there is no return, review or stay of court's orders of its final orders but there is a right of Appeal under S.8(5) of the Law Reform Act.

Further in the case of **CHARLES SHIKANGA & OTHERS –V-BETTING CONTROL LICENSING BOARD HC.MISC.APPLICATION NO.1023 OF 2005** the court dismissed an application where it was asked to review or set aside its final orders in Judicial Review.

Similarly in case of **KURIA MBAE –V-THE LAND ADJUDICATION OFFICER CHUKA HC.MISC.APPLICATION NO.257/1987Mbito**and Mango,JJ held that one is only entitled to an appeal to Court of Appeal from the decision of the High Court in Judicial Review applications.

I therefore do agree with the respondents' contention that in Judicial Review there is no return, review or varying of the court's orders but there is only a right of appeal to the aggrieved party under S.8(5) of the Law Reform Act. In the present application this court is being asked in other words to sit on appeal of its own decision. This I find is not available in law or in Judicial Review. This court having made its decision on 14<sup>th</sup> December, 2011 it became functus officio and cannot reconsider its decision.

The present application was brought under Section 80 of Civil Procedure Act, Order 45 Rule 1, 2, 3(2) and 6 of Civil Procedure Rules. The Civil Procedure Rules do not apply to Judicial Review except Order 53 of Civil Procedure Rules. Section 8(1) of the Law Reform Act, quoted herein above, totally outs the application of any other procedure. In the case of **COMMISSIONER OF LANDS –VS-KUNSTE HOTEL LTD C.A. 234 OF 1995** Court of Appeal at Nakuru held:-

***“When the High Court exercising jurisdiction under Order LIII of the Civil Procedure Rules, it is neither civil nor criminal but a special jurisdiction donated by Section 8 and 9 of the Law Reforms Act. The provisions that applies to the Civil proceedings are not available in the Judicial Review proceedings.”***

In view of the above-mentioned decision of Court of Appeal it is clear that Judicial Review is a special jurisdiction and Civil Procedure Act and Civil Procedure Rules do not apply. The applicant therefore could not invoke the court's jurisdiction under the provisions stated herein above.

In the instant application, the applicant seeks the review of this court's decision and at the same time has lodged a notice of Appeal dated 30<sup>th</sup> December, 2011 and served it on 5<sup>th</sup> January, 2012. The right of review given by Section 80 of Civil Procedure Act and Section 45 of the Civil Procedure Rules requires

the court to consider review application where an appeal lies but where no appeal was filed. In this case ex-parte applicant has a right of appeal as of right from Judicial orders and has already filed a Notice of Appeal and served the same. It is a trite law that a party who has filed a Notice of Appeal cannot apply for a review.

I therefore agree with the respondents' Counsel contention that by virtue of the applicant having filed and served a Notice of Appeal this court lacks jurisdiction to entertain the present ex-parte applicant's application.

In view of my finding herein above, I find the application dated 23<sup>rd</sup> January, 2012 to be without merits and the same is dismissed with costs to the respondents and the interested party.

**DATED, SIGNED AND DELIVERED AT MERU THIS 27<sup>th</sup> DAY OF SEPTEMBER, 2012.**

**J. A. MAKAU**  
**JUDGE**

**DELIVERED IN OPEN COURT IN PRESENCE OF:**

- 1. Miss Kiome for Mr. K'Opere Advocate for the exparte applicant**
- 2. Mr. Mwirigi h/b for Mr. Arithi Advocate for the 1<sup>st</sup> respondent**
- 3. Mr. C. Otieno Advocate H/B Arusei for 2<sup>nd</sup> respondent**
- 4. Miss Wamucii Advocate for interested party(absent)**

**J. A. MAKAU**  
**JUDGE**