



Republic v Resident Magistrate Honourable L G Ruhu Mwingi Law Courts & 2 others; Officer Commanding Police Station , Mwingi Police Station & another (Interested Parties); Kalungu (Exparte) (Environment and Land Miscellaneous Application E006 of 2022) [2022] KEELC 3942 (KLR) (25 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3942 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2022

LG KIMANI, J

JULY 25, 2022

IN THE MATTER OF ARTICLE 165(6) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF MISCELLANEOUS APPLICATION NO.5 OF 2022 AT CHIEF MAGISTRATE’S COURT AT MWINGI LAW COURTS- MWINGI SAND HARVESTING CO-OPERATIVE SOCIETY LTD-VS-PETER KALUNGU

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, AND PROHIBITION AGAINST THE ORDERS OF RESIDENT MAGISTRATE-MWINGI SAND HARVESTING CO - OPERATIVE CO-OPERATIVE SOCIETY LTD-VS PETER KALUNGU

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE ORDERS OF RESIDENT MAGISTRATE-MWINGI HONOURABLE I.G RUHU DATED 16TH JUNE 2022, OFFICER COMMANDING MWINGI POLICE STATION AND MWINGI SAND HARVESTING CO-OPERATIVE SOCIETY LTD.

BETWEEN

REPUBLIC APPLICANT

AND

RESIDENT MAGISTRATE HONOURABLE L G RUHU MWINGI LAW COURTS 1ST RESPONDENT

MWINGI SAND HARVESTING CO-OPERATIVE SOCIETY LTD 2ND RESPONDENT



ATTORNEY GENERAL 3RD RESPONDENT

AND

OFFICER COMMANDING POLICE STATION , MWINGI POLICE
STATION INTERESTED PARTY

SAND TRANSPORTERS AND ENVIRONMENTAL CONSERVATION
GROUP INTERESTED PARTY

AND

PETER KALUNGU EXPARTE

RULING

1. Before this court is a chamber summons application dated June 21, 2022 brought pursuant to article 165 (6) as read with (7) of the Constitution of Kenya, s 8 of the Law Reform Act section 7 of the Fair Administrative Action Act, s 3(10) of the Judicature Act, order 53 rule 1 (1), (2), (3) and 4 of the Civil Procedure Rules seeking the following orders:
 1. That leave be granted to apply for orders of *certiorari* to call for and remove to the High Court the proceedings, records and orders of the Resident Magistrate-Mwingi Law Courts dated June 16, 2022 issued by Honourable IG Ruhu to quash and set aside for being null and void.
 2. That leave be granted to the applicant for orders of prohibition against the Resident Magistrate-Mwingi Law Courts, the Officer Commanding Station-Mwingi Police Station and Mwingi Sand Harvesting Co-operative Society Ltd. from implementing and/or enforcing the orders issued by the Resident Magistrate-Mwingi Law Courts Honourable LG Ruhu dated June 16, 2022.
 3. That the leave granted herein in prayers 1 and 2 do operate as a stay of the implementation and enforcement of the orders of Resident Magistrate-Mwingi Law Courts, Honourable LG Ruhu dated June 16, 2022 until the full determination of the substantive notice of motion, or as he honourable court may direct in the wider interests of justice.
2. The application herein is in the 1st instance an *ex parte* application under order 53 rule 1 of the Civil Procedure Rules. The same was filed under certificate of urgency and was placed before the judge in chambers on June 22, 2022 when the court noted that the application relates to ongoing proceedings before the Resident Magistrates Court in Mwingi. The court declined to certify the application urgent but directed that the same be served for inter partes hearing on June 30, 2022.
3. Upon service the 2nd respondent filed a replying affidavit sworn by one Harrison Salim Kasee on June 28, 2022. The 1st interested party also attended court for the inter partes hearing.
4. The grounds upon which the application is premised are that the ex-parte applicant is a member of the second interested party who has the permit or authority of the County Government to desilt, harvest and transport sand within Mwingi areas among other regions in the County.
5. The *ex parte* applicant states that he was summoned by the Officer Commanding Police Division (OCPD) Mwingi and was confronted with an order from Mwingi Law Courts. He claims that he was not aware of the suit but that he later obtained copies of the court documents in Chief Magistrates Court at Mwingi Miscellaneous Application No 5 of 2022 between Mwingi Sand Harvestors Co-



- Operative Society Ltd (suing through the Chairman) Harrison Salim Kasees versus Pater Kalungu. He states that was never served with court documents in order to defend himself.
6. According to the *ex parte* applicant, the 2nd respondent where he is a member has permits or authority or licence to desilt, sand harvesting and transport sand from various parts of Mwingi. There is rivalry between the activities of the 2nd respondent and the 2nd interested party in relation to sand harvesting and collection of levies. The *ex parte* applicant claims that sand harvesting as a natural resource is a devolved function, therefore the mandate of the County Government.
 7. The *ex parte* applicant contends that the 1st respondent acted ultra vires his jurisdiction since the said officer is not gazetted to hear and determine disputes relating to Environment and land under the ELC Act. He further claims that the 1st respondent acted in violation of the rules of natural justice, the rule of law and due process as he was not notified of the court proceedings before the orders were made .
 8. Counsel for the applicant stated there was no substantive suit filed in the court at Mwingi that would have formed the basis for the 1st respondent to make the impugned court order. That the impugned order emanated from a miscellaneous application which had no supporting suit. Counsel for the *ex parte* applicant further stated that the subject matter of the suit is an environmental matter which cannot be dealt with by the civil court. His contention is that the magistrate should not have entertained the application.
 9. In response thereto, Harrison Salim Kasee, the Chairman of the 2nd respondent told the court that they had served the *ex parte* applicant with all court documents filed in the court at Mwingi.
 10. The 2nd respondent stated that the 2nd respondent had no concern with the *ex parte* applicant and/or the 2nd interested party and that they only prayed that they may be allowed to collect SACCO levies. He claimed that the 2nd respondent has all the mandate to collect SACCO levies as enshrined by the County Government, they have carried out impact assessment and have reports.
 11. The 1st interested party was present in court and he stated that he did not object to the application since he was just doing his job.

Analysis and Determination

12. The provision for the *ex parte* applicant's application is found in order 53(1) of the [Civil Procedure Rules, 2010](#) which provides that:

“Applications for *mandamus*, prohibition and *certiorari* to be made only with leave.

 - (1) No application for an order of *mandamus*, prohibition or *certiorari* shall be made unless leave therefor has been granted in accordance with this rule.
 - (2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”
13. Nyamweya, J in the case of [Republic v Registrar of Companies & another ex parte Prakla East Africa Limited; Prakla Bobrtecknic GMBH \(Interested Party\)](#) [2021] eKLR so aptly broke down the reasons



for grant or refusal of an application for leave and stay pending the substantive judicial review application.

“I have considered the arguments made by the parties herein, and the applicable law for leave to commence judicial review proceedings, namely order 53 rule 1 of the Civil Procedure Rules. The main reason for the leave as explained by Waki, J (as he then was), in *Republic v County Council of Kwale & another Ex Parte Kondo & 57 others*, Mombasa HCMCA No 384 of 1996, is to ensure that an applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration.

While in most cases it is self-evident that the matter should proceed to judicial review, there are a number of preliminary factors that a court considers and addresses at the leave stage. These factors have been enumerated in *Judicial Review: Principles and Procedure* by Jonathan Auburn et al at paragraph 26.05 as follows:

1. whether the enactment, action, decision, or failure to act that is being challenged is amenable to judicial review;
2. whether the claimant has capacity to bring a claim for judicial review;
3. whether the claimant has a sufficient interest to bring a claim for judicial review;
4. whether the particular challenge brought by the claimant is one that may be brought by the judicial review procedure, and whether it is appropriate to bring it by that procedure;
5. whether the claim is otherwise an abuse of process;
6. whether all or some of the grounds of challenge relied upon by the claimant are sufficiently meritorious to justify the grant of permission;
7. whether the claim has been brought promptly;
8. whether there are any discretionary grounds that justify the refusal of permission in the exercise of the court’s discretion.”

14. In my view this application is amenable to judicial review because it is an administrative relief against public bodies or officers and the 1st respondent, being a judicial officer constitutes a public officer and his decisions are amenable to judicial review. Further it has been shown that the applicant has capacity to bring the claim for judicial review since orders have been issued by the 1st respondent against him, Further that he has a sufficient interest in the subject matter of review. I do find that the criteria set out in the above case of *Republic v Registrar of Companies & another ex parte Prakla East Africa Limited; Prakla Bohrtecknic GMBH (supra)* have been met.

15. Order 53(2) of the *Civil Procedure Rules, 2010* judicial review orders can be issued to quash an order or decree of the court. The rule provides that:

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to



appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”.

16. The application herein has also been brought promptly without unreasonable delay since the impugned order was issued on the June 16, 2022 and this application was filed on the June 22, 2022.
17. Without going into the arguments of the parties since that will be decided at the hearing and determination of the substantive Notice of motion application, the circumstance under which leave may be granted were considered in the case of *Lempaa Suyianka & 5 others v Nelson Andayi Havi & 14 others; Caucus of LSK Branch Chairpersons (Interested Party)* [2021] eKLR the court confirmed that the leave stage of the judicial review proceedings is not to determine whether or not the applicant’s case will succeed but whether is arguable. The court stated thus:-

“Lord Diplock as explained put this way:

“Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.”

18. From the foregoing I find that the application dated June 21, 2022 has merit and the same is allowed in the following terms:-
 1. That leave be and is hereby granted to the applicant to apply for orders of *certiorari* to call for and remove to the this court the proceedings, records and orders of the Resident Magistrate-Mwingi Law Courts dated June 16, 2022 issued by Honourable IG Ruhu to quash and set aside for being null and void.
 2. That leave be granted and is hereby granted to the applicant to apply for orders of prohibition against the Resident Magistrate-Mwingi Law Courts, the officer Commanding Station-Mwingi Police Station and Mwingi Sand Harvesting Co-operative Society Ltd from implementing and/or enforcing the orders issued by the Resident Magistrate-Mwingi Law Courts Honourable LG Ruhu dated June 16, 2022.
 3. Leave granted in prayers 1 and 2 above shall operate as a stay of the implementation and enforcement of the orders of Resident Magistrate-Mwingi Law Courts, Honourable LG Ruhu dated June 16, 2022 until the full determination of the substantive notice of motion.
 4. The substantive notice of motion to be filed within 21 days from the date of this order.

DELIVERED, DATED AND SIGNED AT KITUI THIS 25TH DAY OF JULY 2022

HON LG KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court in the presence of-

C. Nzioka/Musyoki Court Assistant.

Kilonzi Advocate for the *ex parte* applicant.

Harrison Kisea a representative of the 2nd respondent present.

No attendance by the 1st respondent and the interested parties.

