



**Amarnath v Commission on Administrative Justice (Office of the  
Ombudsman) & 2 others (Environment and Land Judicial Review Case  
2A of 2022) [2022] KEELC 12650 (KLR) (26 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12650 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 2A OF 2022  
NA MATHEKA, J  
SEPTEMBER 26, 2022**

**BETWEEN**

**AMARNATH ENTREPRISES LIMITED ..... APPELLANT**

**AND**

**COMMISSION ON ADMINISTRATIVE JUSTICE (OFFICE OF THE  
OMBUDSMAN) ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MOMBASA ..... 2<sup>ND</sup> RESPONDENT**

**MOHAMED ALHADI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The application is dated 28<sup>th</sup> February 2022 and is brought under Order 53. Rule 1, 2 and 3 of the [Civil Procedure Rules](#) 2010 Section 1A, IB and 3A of the [Civil Procedure Act](#), Cap 21 seeking the following orders;
  1. That an order of certiorari be issued to quash the decision made on 30<sup>th</sup> November 2021 by the 1<sup>st</sup> Respondent herein whereby the 1<sup>st</sup> Respondent directed the 2<sup>nd</sup> Respondent to within 30 days of the said date to demolish the Applicant’s Business Premises standing on Mombasa/ Block XVIII/556 which premises were referred to in derogatory terms as “structures”
  2. That an Order of prohibition be issued to prohibit the Respondents from interfering with the Applicants quiet possession and enjoyment of the Land Parcel No. Mombasa/ BlockXVIII/556.
  3. That the grant of leave to apply for the Judicial Review Orders sought herein do operate as a stay against the Respondents their agents and servants from implementing the said decision of the 1<sup>st</sup> Respondent.



4. That the costs of this application be provided for.
2. It is based of the grounds that the 1<sup>st</sup> Respondent made an irregular, unlawful, unreasonable and illegal so-called determination on the 30<sup>th</sup> November 2021 to the effect that the Applicant's Business Premises Standing on Land Parcel No. Mombasa/ Block XVIII/556 be demolished by the 2<sup>nd</sup> Respondent within 30 days from the date of the said irregular, unlawful, unreasonable and illegal determination. That the said decision and determination of the 1<sup>st</sup> Respondent was unlawful and illegal in that it contravened Section 30(c) of the *Commission on Administrative Justice Act* No. 23 of 2011 and was therefore ultra vires the powers of the 1<sup>st</sup> Respondent in that there are still pending before this Honourable Court ELC Nos 223 of 2012 and ELC No. 103 of 2013 on the same subject matter. That the Applicant who is so adversely affected by the said unlawful decision and determination of the 1<sup>st</sup> Respondent was deliberately left out of the inquiry and proceedings before the 1<sup>st</sup> Respondent nor was the said determination served on or otherwise communicated to the Applicant herein contrary to Section 36 of the *Commission on Administrative Justice Act* and contrary to the Rules of Natural Justice and contrary to the Audi alterum partem Rule. That the so-called decision and or determination of the 1<sup>st</sup> Respondent was a travesty of justice, a one sided exercise carried out at the behest and instigation and direction of the 3<sup>rd</sup> Respondent who is a disgruntled neighbour of the Applicant and who has filed a multiplicity of suits on the subject, all of which have been dismissed, and is the main witness in the ELC Case No. 223 of 2012 and ELC Case No. 103 of 2013 still pending before this Honourable Court. That the 3<sup>rd</sup> Respondent, having failed to acquire the land Mombasa/Block XVIII/556 has resorted to referring to it as a road reserve service lane or access road and in this particular instance enlisted the support and service of the 1<sup>st</sup> Respondent in his schemes to have the Applicant herein evicted so that he takes over the parcel of land Mombasa/Block XVIII/556. That all the 3<sup>rd</sup> Respondents are aware of the fact that the said ELC Case No. 223 of 2012 and ELC Case No. 103 of 2013 are still pending before this Honourable Court and are therefore in contempt of Court, and not entitled to any audience from this Honourable Court unless and until they purge their contempt and ought to be cited accordingly. That in all the circumstances herein leave to commence Judicial Review proceedings ought to apply as a stay of the unlawful, unreasonable, unfair irregular, illegal and unjust determination of the 1<sup>st</sup> Respondent made on the 30<sup>th</sup> November 2021 so that this action is not rendered nugatory.
3. The 1<sup>st</sup> Respondent submitted that the Commission's determination was made legally as the same was done in accordance with the laws that the Commission draws its mandate and powers from. These laws include *the Constitution*, the *Commission on Administrative Justice Act*, 2011 and the *Commission on Administrative Regulations*, 2013.
4. The 3<sup>rd</sup> Respondent admits that there are various other pending cases involving the subject suit land but some of the court files have gone missing. That due to this stale mate the 3<sup>rd</sup> Respondent approached the Commission on Administrative Justice who after investigations made their finding which is the subject matter of these proceedings. That the Ex parte Applicant lacks locus standi to appear and act in this matter.
5. This court has considered the application and the submissions and authorities cited therein and the issues before court for determination are;
  - a. Whether the ex parte applicant has locus standi to bring the Judicial review application.
  - b. Whether the decision of the 1<sup>st</sup> respondent was ultra vires to its powers.
  - c. Whether the ex parte applicant ought to be granted the judicial review orders sought.



**a. Whether the ex parte applicant has locus standi to bring the Judicial review application.**

6. The 3<sup>rd</sup> Respondent in his replying affidavit filed on 9<sup>th</sup> May 2022 has argued that the judicial review application is bad in law and an abuse of the court process as the Applicant lacks locus standi to file and appear in the suit. The 3<sup>rd</sup> Respondent has maintained that the Exparte Applicant is not the owner of the suit property Mombasa/Block/XVIII/556 and that the donor of the Power of Attorney Sharif Ali Shekue and the Attorney Amaranth Gupta are both deceased. In the Ex parte Applicant's verifying affidavit filed on 18<sup>th</sup> January 2022, the Exparte Applicant claimed to be in occupation of the suit property after gaining beneficial interest, by virtue of an irrevocable special power of attorney held by Vaibhav Amar Nath on behalf of the applicant donated by the registered owner. The Exparte Applicant attached and marked as VA1, a special power of attorney dated 13<sup>th</sup> July 2005 and registered on 17<sup>th</sup> August 2005, that establish Mr. Shariff Ali Shekue appointed Amarnath Gupta to possess the suit property for a consideration of Kshs 1.6 million. Further the Exparte Applicant has attached the suit property's Certificate of Lease dated 23<sup>rd</sup> July 1997 to demonstrate that Shariff Ali Shekue is the registered owner. It is clear that the Exparte Applicant is not the registered owner of the suit property, the suit property was never transferred as stated in the Special Power of Attorney.
7. The 3<sup>rd</sup> Respondent's case on locus standi of the Exparte Applicant is based on the above set of facts, that the Exparte Applicant is not the registered proprietor of the suit property and is therefore has no legal interest to bring the judicial review application before court. However, the question of locus standi in judicial review is well settled. The Exparte Applicant need not show a personal and direct interest in the matter. It is sufficient for the ex parte applicant to demonstrate that there exists a threatened breach or contravention of law, which requires the intervention of the Court and that the application is made in good faith. In the case of *Mureithi & 2 Others (For Mbari ya Murabimi Clan) vs Attorney General & 5 Others* Nairobi HCMCA No. 158 OF 2005 (2006) 1 KLR 443 Judge Nyamu (as he then was) held as follows,
- “judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law...
- Under the English Order 53 now replaced in that county since 1977 and which applies to us by virtue of the *Law Reform Act* Cap 26 the test of locus is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. Thus in the case of *Arsenal Football Club v Ende* (1979) AC 1 the statutory phrase “person aggrieved” was treated as a question of fact – “grievances are not to be measured in pounds and pence”.

**b. Whether the decision of the 1<sup>st</sup> Respondent was ultra vires to its powers.**

9. Judicial review is about the decision making process, not the decision itself. The role of Court in Judicial Review is supervisory, the court reviews the decision to determine whether that decision or



action is invalid. Judicial Review stems from the supervisory jurisdiction of the Court, where the Court supervises the exercise of power by the holder to ensure that, that power is exercised in a lawful manner. In the case of *Evans Kidero vs Speaker of Nairobi City County Assembly & another* (2015) eKLR, the Court stated that;

“Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasbam Lalji* (2014)eKLR

“Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...

The grant of the orders or certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.”

10. The Ex parte Applicant, Amarthan Enterprise Limited sought to have the decision made by the 1<sup>st</sup> Respondent pursuant to Inquiry File No. CAJ/MSA/CG/MSA/068/45/2016 Mohamed M. Alhadi vs County Commissioner of Mombasa, quashed vide an Order of Certiorari for being irregular, unlawful, unreasonable and illegal. On the ground that said decision contravened Section 30 (c) of the *Commission on Administrative Justice Act* No. 23 of 2011 and was therefore ultra vires, as there are pending suits before court on the suit property i.e. ELC NO. 223 OF 2012 and ELC 103 OF 2013. Further, the Exparte Applicant claimed though they were affected by the said decision, they were neither given an opportunity to be heard nor were they served with the said decision, in contravention with Section 36 of the *Commission on Administrative Justice Act* No. 23 of 2011.
11. The decision which is subject of this judicial review was made by Washington Sati, the Vice Chairperson of the 2<sup>nd</sup> Respondent on 30<sup>th</sup> November 2011. The 1<sup>st</sup> respondent carried out the inquiry pursuant to its functions provided under Section 8 of the *Commission on Administrative Justice Act* 2011. Section 8 (a) and (b) provides inter alia the functions of the Commission are to,

“investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice; investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector’ respectively”
12. The Commission proceeded to hear and make a determination on the 3<sup>rd</sup> Respondent complaint that was made on 9<sup>th</sup> April 2016. The 3<sup>rd</sup> Respondent sought the intervention of the 1<sup>st</sup> Respondent to have the access road which was illegally registered as Plot No. 556/XVIII/MI opened to enable him access his parcel of land being Plot No. 413/XVIII/MI, on the following grounds;
  - a. That in 2008, the former mayor of Mombasa Mr. Sharif Ali Shekue sold a road reserve along Duruma Road in Mwembe Tayari within Mombasa county to one Armarnath Enterprise Limited.



- b. That Armanath Enterprise limited constructed a commercial building on the said road reserve hence blocking access to the complainant's parcel of land being Plot No. 413/XVIII/MI.
  - c. That vide its letter dated 18<sup>th</sup> September 2015, the National Land Commission had ordered Armanath Enterprise Limited to open up and vacate the access road within two weeks from the date thereof failure to which eviction shall be done.
  - d. That to date, the road was yet to be opened and the complainant continues to suffer.
13. After analysing the issues and evidence before it, the Commission found that the suit property is a designated road reserve and that the structures therein are illegal. The Commission proceeded to exercise its powers under Article 59 (2)(j) of *the Constitution* and Section 8 (g) of the *Commission on Administrative Justice Act* 2011 and directed the County Government of Mombasa to:
- i. Proceed to cancel the business permit of Amaranth Enterprises limited and desist from collecting any rates therefrom forthwith.
  - ii. Demolish all the illegal structures standing on plot No. 556/XVIII/MI to unblock the road access within thirty (30) days from the date of this determination.
14. From the nature of the complaint made before the Commission by the 3<sup>rd</sup> Respondent, the determination made and orders issued by the Commission, it is clear to this Court that the Commission acted ultra vires and usurped the jurisdiction of this Court as stated in Section 13 of the *ELC Act* that;
1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
  2. In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
    - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
    - (b) relating to compulsory acquisition of land;
    - (c) relating to land administration and management;
    - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
    - (e) any other dispute relating to environment and land
15. The Commission exceeded its jurisdiction by purporting to hear and determine a dispute on whether or not the suit property is a road reserve and proceeding to order the 2<sup>nd</sup> Respondent to demolish the structures therein. A reading of Article 59 (2)(j) of *the Constitution* and Section 8 (g) of the *Commission on Administrative Justice Act* 2011, which the Commission relied upon when issuing orders, does not presuppose that the Commission would have jurisdiction to hear and determine a dispute relating to land. By dint of Article 162(2) (b) of *the Constitution*, and Section 13 of the *ELC Act*, it is the Environment and Land Court that has competent jurisdiction to hear and determine a dispute relating to occupation and title to land.



16. This court would with no doubt determine whether the suit property is a road reserve, and would have the powers to order for revocation of the certificate of title to the suit property if found irregularly acquired and for the demolition of the structures thereon found to be illegal. Therefore, the commission acted illegally and without jurisdiction hence usurping the powers of this Court in determining that the suit property is a designated road reserve and ordering for the demolition of the structures thereon.

**c. Whether the ex parte applicant ought to be granted the judicial review orders sought.**

17. I find that the 1<sup>st</sup> Respondent, as a quasi-judicial body acted beyond and outside its jurisdiction and mandate as provided for by Section 8 and 26 of the Commission of Administrative Justice. The determination made and orders issued by the Commission on 30<sup>th</sup> November 2021 are illegal and ultra vires. The Ex parte Applicant has sought the order of certiorari to quash the decision of the 1<sup>st</sup> Respondent. In making this determination the court is guided by the Court of Appeal in *Kenya National Examination Council vs Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR, where it was held that;

“Only an order of Certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

18. On the second prayer, the Ex parte Applicant seeks an order of prohibition to prohibit the Respondents from interfering with their quiet possession and enjoyment of the suit property. The Court of Appeal in *Kenya National Examination Council vs Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others* (supra), dealt with the nature of the order of prohibition and held that,

“That is why it is said prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision”.

19. Therefore, the remedy of prohibition is not available to the Ex parte Applicant, since it will not have an impact on a decision already made. An order of prohibition as rightfully put by the Court of Appeal in the *Kenya National Examination Council* case, is an order of this Court directed to a quasi-judicial body like the 1<sup>st</sup> Respondent to discontinue proceedings that are in excess of its jurisdiction; it is not meant to correct a decision already made. In particular, the Court held that,

“The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.”

20. From the above analysis the court grants the following orders;

1. That an order of certiorari be issued to quash the decision made on 30<sup>th</sup> November 2021 by the 1<sup>st</sup> Respondent herein whereby the 1<sup>st</sup> Respondent directed the 2<sup>nd</sup> Respondent to within



30 days of the said date to demolish the Applicant's Business Premises standing on Mombasa/  
Block XVIII/556.

2. The costs of this application to the Exparte Applicant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**N.A. MATHEKA**

**JUDGE**

