



Republic v Attorney General & another (Environment and Land Judicial Review Case E014 of 2021) [2022] KEELC 12659 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12659 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E014 OF 2021
EO OBAGA, J
SEPTEMBER 22, 2022
IN THE MATTER OF UNLAWFUL ENFORCEMENT OF A JUDGMENT
AND DECREE THAT HAVE LAPSED AND CONTRARY TO
SECTION 4(1) AND (4) OF THE LIMITATION OF ACTIONS ACT**

BETWEEN

REPUBLIC APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

KIPTANUI AYABEI 2ND RESPONDENT

JUDGMENT

1. By a notice of motion dated November 15, 2021 the ex-parte applicant sought the following orders:-
 1. An order of *Certiorari* do issue to bring to this court for purposes of quashing the order of the Eldama Ravine Senior Residents Magistrate granted on October 19, 2021 requiring the Applicant to pay to the deceased decree holder the sum of Kshs 721,672/= within 14 days from October 19, 2021 or be condemned to civil jail. The decree holder, Richard Sangoro Amsala died in 2017.
 2. An order of prohibition against the Senior Resident Magistrate, Eldama Ravine barring that court from condemning the applicant to civil jail in enforcement of an unlawful award.
 3. The costs of this application be provided for.
2. The ex-parte applicant is the registered owner of LR. No Lembus/Kibias/149 which is about 20 acres. In the 1980's Richard Sangoro Amsala (Deceased) purchased 10 acres from the ex-parte applicant. The ex-parte applicant however did not transfer the 10 acres to the deceased.



3. The deceased complained before a panel of elders who ordered that the ex-parte applicant do compensate the deceased by giving him Kshs 500,000/= being the value of the 10 acres in addition to Kshs 50,000/= being developments which the deceased had carried out on the 10 acres. The award was given on 8th May, 2009.
4. The award of the panel of elders was adopted as a judgment of the court in Eldama Ravine Resident Magistrates court land case No. 3 of 2009 on July 30, 2009. The process of execution of the decree thereafter commenced. At some stage the parties entered into negotiations which however did not materialize.
5. Before the process of execution could be completed the deceased died in the year 2020. Three ladies namely Leonida Akheoni, Mariamu Amsala and Leah Amusala came in as personal representatives of the deceased and proceeded with execution of the decree.
6. On October 19, 2021, the Senior Resident Magistrate Eldama Ravine decreed that the ex-parte applicant pays the decree holder Kshs 721,672/= within 14 days from October 19, 2021 or be committed to civil jail. This is what prompted the ex-parte applicant to seek leave to commence judicial Review proceedings which leave was granted on November 2, 2021. This is the leave pursuant to which the ex-parte applicant filed the present notice of motion.
7. The ex-parte applicant contends that the execution of the decree has been done after the expiry of 12 years and that the award should have been enforced before expiry of 6 years. The ex-parte applicant further contends that there was no grant of letters of administration in respect of the estate of the deceased and that the suit abated and therefore there is no basis upon which execution can be carried out.
8. The ex-parte applicants application was opposed by the respondent based on grounds of opposition dated April 12, 2022. The respondent contends that the ex-parte applicant's application is bad in law and an abuse of the process of the court and that this court lacks jurisdiction to entertain the application or grant orders sought. The respondent further contends that the ex-parte applicant is guilty of non-joinder as the Estate of the deceased has not been joined in these proceedings.
9. The respondent further argues that the application herein does not qualify to be brought as a Judicial Review application and that the ex-parte applicant should have preferred an appeal against the decision of the trial Magistrates instead of the present application. The respondent states that the current application is appeal disguised as a judicial Review as the same dwells on the merits of the decision of the trial magistrate.
10. The parties were directed to file written submissions. The ex-parte applicant filed his submissions on May 5, 2022. The respondent filed his submissions on July 8, 2022. I have carefully considered the ex-parte applicant's application as well as the opposition to the same by the respondent. I have also considered the submissions by the parties. There are two issues which emerge for determination. The first is whether this court has jurisdiction to deal with the ex-parte applicant's application. The second is whether the ex-parte applicant has met the threshold for grant of orders of Certiorari and prohibition.
11. On the first issue, the respondent argues that this court has no power to supervise subordinate courts; that the power of the court to supervise subordinate courts was taken away through amendments to the Environment and Land Court which were effected in the year 2012. The respondent argues that it is only the High Court which has supervisory jurisdiction over subordinate courts pursuant to article 165(6) of *the Constitution*.



12. What is before this court is an application seeking prerogative orders and not an application for review of the decision of this court under its supervisory role. Section 13 (7) of the [Environment and Land Court Act](#) states as follows:-

“In exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including...

- (a) interim or permanent preservation orders including injunctions;
- (b) prerogative orders;
- (c) award of damages;
- (d) compensation;
- (e) specific performance;
- (g) restitution;
- (h) declaration; or
- (i) costs.”

13. It is clear that when exercising its jurisdiction, the Environment and Land Court has powers to grant any order or relief including prerogative orders as shown in section 13(7) (b) of the [Environment and Land Court Act](#). I therefore find that this court has jurisdiction to entertain the present application.

14. On the second issue there are numerous decisions from the Court of Appeal and other Superior Courts which define the scope of judicial Review. To begin with Judicial Review is a discretionary remedy which is rarely available where there is an alternative remedy by way of appeal. In [R v Chief Constable of Maerseyside Police Exp Calveley](#) (ibid), Sir John Donaldson MR stated as follows:-

“Judicial review is “very rarely” available when there is an alternative remedy by way of appeal (at 433 and 261 -262); and may LJ said that “the normal rule” in cases such as this is that an applicant for judicial review should first exhaust whatever other rights he has by way of appeal (at 435 and 263).

15. In [Republic v Public Procurement Administration Review Board & 2 others Ex-parte Sanitam Services \(EA\) Limited](#) (2013) eKLR Mumbi Njugi J (as she then was) stated as follows:-

“Judicial Review proceedings is that remedy of judicial review 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. The purposes of the remedies availed to a party under the judicial review regime is to ensure that the individual is given fair treatment by the authority to which he has been subjected. The purpose is not to substitute the opinion of the court for that of the administrative body in which is vested statutory authority to determine the matter in question.”

16. The [Seventh Day Adventist Church Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another](#) Judicial Review case No. 112 of 2011, the Court stated as follows:-

“Where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute



the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”

17. In *Municipal council of Mombasa v Republic & Umoja Consultants Ltd* Civil Appeal No. 85 of 2001, the Court of Appeal stated as follows:-

“Judicial review proceedings, is concerned itself with the decision making process, not with the merits of the decision itself; the court would concern itself with such issues as to 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 court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

18. It is in light of the above decided cases that I will examine whether the ex-parte applicant has met the threshold for grant of prerogative orders sought. A look at the issues raised by the ex-parte applicant shows that the Ex-parte Applicant is seeking a determination on merits of the case which was before the lower court. These issues should have been raised through appeal and not by way of Judicial Review.

19. The ex-parte applicant’s counsel has in her submissions stated that the ex-parte applicant is not in court to challenge the verdict of the Resident magistrate or the panel of elders. She argues that she is before court to trigger the Supervisory role of this court to ensure that not only is justice done but also seen to be done. In support of this reliance is placed on the case of *Chase International Investment Corporation and another v Laxman Keshra & 3 others* (1978) eKLR where Madam J A stated as follows:-

“If the circumstances are such as to raise an equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed. As I have said, all three ingredients are satisfied in this case. Lord Mansfield said (in *Moses v Macferian*) “obliged by the ties of natural justice and equity to refund the money”. anything else would be against conscience. The recovery is based upon an obligation imposed by law which, to use an expression I have employed previously, justice demands, therefore the law requires, to be done. It is a rule of reason. As Lord Atkin said in *united Australia Ltd v Barclays Bank Ltd* (1941) AC 1, 29:

When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course of the judge is to pass through them undeterred.”

20. One cannot seek to invoke the doctrine of equity in a Judicial Review application. It is either the remedy is available or not. The doctrines of equity cannot be invoked. This is a matter in which the ex-parte applicant should have moved the court by way of appeal. Even then, the appeal would have had no chance of success. The deceased died in 2020. The decree was extracted soon after the award given on May 8, 2009 was adopted as judgment of the court on July 30, 2009. What is being executed is a decree which emanated from the adoption of the award on July 30, 2009.

21. The proceedings annexed to the ex-parte applicant’s application though incomplete show that the process of execution had been put in place as far back as 2015. On February 23, 2017 Counsel for one of the parties is on record stating that the matter was before court No. 1 for Notice to show cause. It is therefore clear that the process of execution had been started before the expiry of 12 years. What was



pronounced on October 19, 2021 was a continuation of a process which was started soon after July 30, 2009. It cannot therefore be argued that execution was commenced on October 19, 2021.

22. Order 24 Rules 3, 4 and 7 of the Civil Procedure Rules deals with abatement of case. Order 24 Rule 10 of the Civil procedure Rules states as follows:-

“Nothing in rules 3,4 and 7 shall apply to proceedings in execution of a decree or order.”

23. It is therefore clear that a suit cannot abate at execution stage where a decree holder is deceased. There is no need to substitute for purposes of execution. Any person related to a deceased decree holder where proceedings had reached execution stage before the demise of the decree holder can proceed with execution without necessarily seeking to be substituted as was in this case.

24. It is therefore clear from the above analysis that the ex-parte applicant’s application is devoid of merit. The same is dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 22ND DAY OF SEPTEMBER, 2022.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Omwenyo for subject.

Court Assistant –Albert

E. O. OBAGA

JUDGE

22ND SEPTEMBER, 2022

