Republic v Deputy County Police Commander Bungoma County & 6 others; Nganyi (Exparte Applicant); Independent Police Oversight Authority (Interested Party) (Judicial Review E001 of 2021) [2022] KEELC 4891 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4891 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

JUDICIAL REVIEW E001 OF 2021

BN OLAO, J

SEPTEMBER 22, 2022

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, ARTICLE 23 (3) THEREOF IN THE MATTER OF PUBLIC SERVICE COMMISSION, HUMAN RESOURCE POLICIES AND PROCEDURES MANUAL FOR THE PUBLIC SERVICE, MAY 2016.

IN THE MATTER OF STATE DEPARTMENT FOR HOUSING AND URBAN DEVELOPMENT IN THE MATTER OF JUDICIAL REVIEW

ORDERS

BETWEEN

REPUBLIC .... APPLICANT

AND

DEPUTY COUNTY POLICE COMMANDER BUNGOMA COUNTY .... 1ST RESPONDENT

COUNTY COMMISIONER BUNGOMA COUNTY .... 2ND RESPONDENT

COUNTY DIRECTOR OF HOUSING, BUNGOMA COUNTY .... 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE .... 4TH RESPONDENT

MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT .... 5TH RESPONDENT

ATTORNEY GENERAL .... 6TH RESPONDENT

CHIEF MAGISTRATE COURT AT BUNGOMA .... 7TH RESPONDENT

AND

HEZEKIAH OCHAMI NGANYI .... EXPARTE APPLICANT

AND

INDEPENDENT POLICE OVERSIGHT AUTHORITY ..... INTERESTED PARTY

JUDGMENT

1 Having been granted leave by Ombwayo J on November 22, 2021 via Bungoma Elc Miscellaneous Application No E016 of 2021, Hezekiah Ochami Nganyi (the Applicant) filed this Judicial Review Application on December 28, 2021. He has impleaded and seeks the following orders against: -

1. The Deputy County Police Commander Bungoma
2. The County Commissioner Bungoma
3. The County Director Of Housing Bungoma.
4. The Inspector General Of Police
5. The Ministry of Interior and Cordination of National Government
6. The Attorney Generaland
7. The Chief Magistrates Court Bungoma(the 1st to 7th Respondents respectively): -

    1: An order of *Certiorari* be and is hereby granted calling into this Court and quashing the decision of the Respondents to allocate House BGM/HOU/MG/11 to the Deputy County Police Commander Bungoma Countyat detriment of the Applicant.

    2: That an order of *mandamus* do hereby issue questioning by what authority the Respondents jointly acted illegally and in total disregard of the law purported to evict the Applicant from occupation of House BGM/HOU/MG/11 when the same was duly and properly allocated to him and as such was not available for re – allocation to any other person whatsoever.

    3: That an order of Prohibition be and is hereby issued prohibiting the Respondents either by themselves or acting through their servants/agents from interfering with, continuing to interfere with or in any other way purporting to evict, bar, threaten or by whatever means continuing to occupy house number BGM/HOU/MG/11 and hand over vacant possession thereof to the Applicant.

    4: A finding that decisions made by the Respondents regarding house number BGM/HOU/MG/11 including the ruling by the Chief Magistrate's Courtat Bungomaon the October 26, 2021 in CMCC No 524 of 2018 is without merit, sheer abuse of office, high – handedness, subversion of justice, oppressive and the learned Magistrate acted beyond his powers and jurisdiction.

    5: Restitution of the house number BGM/HOU/MG/11 and property as at October 25, 2021 as per the inventory attached herewith.

    6: A Declaration that the 1st, 2nd, 3rd and 7th Respondents are unfit to hold Public Office for subversion of justice and/or abuse of office.

    7: Compensation for mental anguish, embarrassment, invasion of privacy and destruction of property as may be verified by the Court.

8: Costs be provided for.

2. The Judicial Review application is based on the grounds set out therein and is also supported by the Applicant's affidavit dated December 28, 2021 with annextures HON 1 – HON 9.

3. It is the Applicant's case that house number BGM/HOU/MG/11 was duly and properly allocated to him since January 2004 and it was not therefore available for inspection and re – allocation to any other person. That the said house is a pool house and is not an institutional house for the Ministry of Interior and Coordination of National Government as misconstrued by the Respondents. That he is currently on secondment from the National Government to Vihiga but the County Director of Housing has abdicated his responsibilities by double allocating the house yet according to the Human Resource Policies and Procedures Manual for the Public Service issued in May 2016, a civil servant is an employee of the Public Service Commission and the County Government. That it is only Institutional Houses that are restricted for allocation at duty stations since they are reserved for allocation to officers providing essential services such as Police, Immigration etc. That the Government intended to sell non – Institutional houses such as the house subject of this application and which the Applicant has occupied for over 10 years. That house number BGM/HOU/MG/11 being a pool house and as long as the Applicant is a civil servant paying rent, he is eligible to occupy it as he has been paying rent recovered at source as shown in his pay – slip. The code of regulations prohibits his eviction therefrom yet the Respondents acting in bad faith and with high handedness have illegally interfered with his quiet occupation of house number BGM/HOU/MG/11. The Applicant is therefore paying rent for the Deputy County Police Commanderwho infact earns a higher house allowance and should be occupying an Institutional house and not a pool house.

4. That the Respondents filed an application dated September 1, 2021 seeking to review orders issued on December 3, 2018 which were over – taken by events on December 11, 2018. That despite necessary materials being placed before him, the learned Magistrate proceeded to render a ruling that has greatly prejudiced the Applicant causing him insurmountable loss in terms of property destroyed and/or lost in the cause of alleged eviction by the Respondents. The Respondents were openly biased against the Applicant, acted against the law by throwing out the Applicant's goods within minutes of the ruling delivered by the 7th Respondent so as to prevent him from accessing the house.

5. Annexed to the application are the following documents: -

   1. Letter dated September 9, 2015 by the County Director of Housing Bungoma addressed to the Ministry of Lands, Housing and Urban Development confirming that the Applicant was allocated house no BGM/HOU/MG/11 – Annexture Hon – 1.
   2. Human Resource Policies and Procedures Manual for the Public Service 2016 – HON – 2.
   3. Code of Regulations – 2006 – HON – 3.
   4. This is a repeat of (2) above.
   5. Applicant's pay slip for November 2021 – HON 5.
   6. This is a repeat of (3) above.
   7. Application by the Attorney Generaldated September 1, 2021 and filed in Bungoma Chief Magistrate's Court Civil Case No 524 of 2018 Hezekiah Ochami Ngayi .v. County Director of Housing Bungoma County & 2 others – Hon 7.

8. Ruling delivered on 26th October 2021 in Bungoma Chief Magistrate's Cofurt Civil Case No 524 of 2018 in respect to the application by the Attorney General dated 1st September 2021 – Hon – 8.

9. Submissions by the Applicant dated October 2, 2021 in respect to the application by the Attorney General dated September 1, 2021 – Hon 9.

10. Inventory of items in house No BGM/HOU/MG/11 – Hon10.

6. In response to the Judicial Review application, the Hon Attorney Generalentered appearance on behalf of all the Respondents on March 3, 2022 and filed both a Notice of Preliminary Objection to the suit as well as a replying affidavit by Moses O. Owuor the County Director of Housing Bungoma dated March 1, 2022 with annextures M001 – M009.

7. In the Notice of Preliminary Objection, the Respondents raise the following: -

   1. The suit is unsustainable in law and an affront to the Judicial Immunity granted to Judicial Officers as per Section 6 of the *Judicature Act* and Article 160(5) of *the Constitution*.

   2. The impugned decision is a Judicial decision and not an Administrative decision hence not amenable to judicial review.

   3. That this is a civil dispute disguised as a Judicial Review application. The grounds raised therein require direct and/or oral evidence.

   4. That the 7th Respondent acted within his jurisdiction and cannot be faulted.

   5. That the Judicial Review application is fatally defective and incompetent for offending the mandatory provisions of Order 53 Rule 7(1) of the *Civil Procedure Rules* 2010 since the Applicant has not annexed the verified decision sought to be quashed.

   6. That the Applicant has failed to exhaust the statutory appellate mechanism.

   7. That the application is scandalous, fatally and incurably effective bad in law and an abuse of the Court process.

   8. That the supporting affidavit dated February 28, 2021 is fatally and incurably defective.

   The Respondents therefore urge the Court to dismiss the application with costs.

8. In his replying affidavit, Moses O. Owuordepones, *inter alia*, that the Applicant was allocated the house no BGM/HOU/MG/11 in Milimani Estate Bungoma in 2004 but his services were later transferred to Vihiga County. He retired in 2019.

9. Having been transferred to another station a notice was issued for his eviction from the said house on October 17, 2018 in line with Section L5 of the Government Code of Regulations following a meeting of the 3rd Respondent's Housing Allocation Committee held on November 29, 2018. The Applicant was therefore required to vacate the house for another deserving officer posted within Bungoma.

10. Before the Respondents could enforce the eviction notice, they were served with a Court order issued inBungoma Chief Magistrate's Court Civil Case No 524 of 2018 restraining them from evicting the Applicant. They obeyed the order. Meanwhile, the 3rd Respondent's Housing Allocation Committee has already evicted and made allocations to 25 officers from various Departments while 229 applicants are awaiting allocation of Government houses since 2014. That according to the Human Resources Policies and Procedure Manual 2016, an officer can only enjoy Government Quarters on 3 conditions: -

1. He/she is an employee of the Government.
2. The house in question is in his/her work station.**
3. He/she pays rent as determined by the Ministry responsible.

That as of now, the Respondents cannot ascertain whether the Applicant is in active service to enjoy Government housing in Bungoma since copies of his pay – slips have conflicting information with regard to his date of retirement, age and station.

11. That on September 1, 2021, the Respondents filed an application in Bungoma Chief Magistrate's Court Civil Case No 524 of 2018 Hezekiah Ochami Nganyi .v. County Director Housing Bungoma & 2 others seeking a review of Court's orders issued on 3rd December 2018 and allowing them access to the house no BGM/HOU/MG/11. By a ruling delivered in favour of the Respondents on 26th October 2021, the Court made the following orders: -

    1. The Applicant is not entitled to occupation of National Government house number BGM/HOU/MG/11.
    2. The orders granted on 3rd December 2018 and confirmed on August 27, 2019 plus all consequential orders are vacated.
    3. Hearing of the main suit on November 24, 2021.
    4. Costs of the application is awarded to the Applicant.

    Once the orders issued on December 3, 2018 and confirmed on August 27, 2019 were vacated, the Applicant had no *locus* to occupy the house number BGM/HOU/MG/11 which has been duly allocated to the 1st Respondent as per the mandate of the Respondents. The Respondents' actions are not discriminatory nor are they null and void or amount to a travesty of justice. The application should therefore be dismissed with costs.

12. The following documents are annexed to the replying affidavit: -

    1. Copies of the Applicant's pay slips – annextures MOO1A to MOO1D.
    2. Notice to vacate dated October 17, 2018 Government Code of Regulations – annextures MOO2 A to MOO2 B.
    3. Minutes of the Housing Allocation Committee meeting held on November 29, 2018 – MOO3.
    4. Minutes of the Housing Allocation Committee meeting held on September 4, 2018 and October 4, 2018 – MOO 4.
    5. Requests by Officers for allocation of houses dated 4th December 2018 – MOO – 5.
    6. Section D of the Public Service Commission Human Resource Policies and Procedures Manual for the Public Service – MOO – 6.
    7. Notice of Motion dated September 1, 2021 and filed by the Respondents in Bungoma Chief Magistrate's Court Civil Case No 524 of 2018 Hezekiah Ochami Nganyi .v. The County Director of Housing Bungoma & 2 others – MOO -7.
    8. Ruling delivered on October 26, 2021 in respect to the Respondent's Notice of Motion dated 1st September 2021 – MOO – 8.

9. Advice note dated October 27, 2021 on occupation of houses – MOO 9.

13. The application was with the consent of the parties canvassed by way of written submissions. These were filed both by the firm of Obura– Obwatinya & Company Advocates for the Applicant and by Mr Juma Collins State Counsel on behalf of the Attorney Generalrepresenting all the Respondents.

14. I have considered the application, the rival affidavits and annextures, the Preliminary Objection as well as the submissions by Counsel.

15. This being a Judicial Review application, I must remind myself that my role is to consider the process through which the decision complained of was arrived at. It is not an appeal against the decision itself. In the case of *Municipal Council of Mombasa.V. R & Umoja Consultants Ltd* C.A Civil Appelal No 185 of 2001 [2002 eKLR], the Court of Appeal identified the duty of a Court considering such an application and said: -

> " The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision – maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of question a Court hearing a matter by way of Judicial review is concerned with, and such Court is not entitled to act as a Court of Appeal over the decider; acting as an appeal Court over the decider would involve going into the merits of the decision itself as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of Judicial review."

In the case of *Council of Civil Service Unions.v.Minister for the Civil Service* 1985 A.C 374 Lord Diplockset out the grounds for Judicial review as: -

1. Illegality – which means that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.
2. Irrationality – which applies to a decision that is so outrageous in it's defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.
3. Procedural impropriety – failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.

   The application cites Order 53 Rule 2 of the *Civil Procedure Rules*, Sections 3 & 3A of the *Civil Procedure Act* and Article 23(3) of *the Constitution*. As the Respondents have raised a Preliminary Objection, it is important that I address the issues raised therein first.

16 Traditionally, the case of *Mukisa Biscuit Manufacturing Co Ltd.v. West End Distributors Ltd* 1969 E.A 696 has been the beacon as to what constitutes a proper Preliminary Objection. In that case, Newbold P stated that: -

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion."

LAW JA added in the same case that: -

> "So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a Preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the Court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."
>
> A Preliminary Objection must therefore raise pure points of law. Some of the issues raised in the Preliminary objection are not really pure points of law. I do not, for instance, consider issue No 3 on whether this application is a civil dispute disguised as a Judicial review application to be a pure point of law.

17. Issues No 1, 2 and 4 can be considered together as they suggest that a Judicial decision is not amenable to Judicial review since it is an affront to Judicial Officers' immunity protected by Article 160(5) of *the Constitution*. That Article provides that: -

> "A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a Judicial function."

The 7th Respondent herein is the Chief Magistrate Bungoma Court who delivered the ruling dated October 26, 2021 in Bungoma Chief Magistrate's Court Civil Case No 524 of 2018 and which the Applicant argues was issued out of jurisdiction and for which he seeks an order of *mandamus* which is normally an order of command directing an inferior tribunal to perform a particular duty. In urging this Court to find that the ruling dated October 26, 2021 is not amenable to Judicial review, Mr Juma Collins has submitted that in making that decision, the 7th Respondent was not acting as an Administrative body but rather as a Judicial officer and such a decision is not amenable to Judicial review. In support of that argument, Counsel has cited the decision of Mativo J (as he then was) delivered on November 21, 2019 in the case of *Rhoda Wanjiru Kibunja .v. Hon. R. O. Mbogo Resident Magistrate's Children Court Miliman & another* 2019 eKLR where the Judge said: -

> "The power of the Court to review an administrative action is extraordinary. It is exercised sparingly in exceptional circumstances where illegality, irrationality or procedural impropriety has been proved. This is the power the applicant is invoking in this case. However, as noted earlier, the impugned decision is a Judicial function which to me is not amenable to Judicial review but is appealable to the High Court." Emphasis mine.

As I have already stated above citing the case of *Municipal Council of Mombasa.V. R* (*supra*), Judicial review is concerned with the decision making process. And among the issues that the Court considers is whether the decision maker had the jurisdiction to make the decision complained about including whether the person complaining was heard – see *Council of Civil Service Unions*(*supra*). Clearly, in my mind, a decision made in the course of a Judicial function is amenable to Judicial review and I do not consider it to be an affront to Article 160(5) of *the Constitution*. The Applicant is not seeking this Court to issue any orders holding the 7th Respondent personally liable for any action such as paying any damages following the impugned ruling. All he is seeking, from my understanding of prayer No 2 of his application, is for this Court to find that the 7th Respondent acted illegally, in disregard of the law and to quash that ruling. Whether or not the Court will grant that order is a matter to be considered later. However, there is no doubt that an issue of illegality of a Court ruling can be canvassed in Judicial review applications. Indeed, the same Judge in a subsequent decision of *R .v. Chief Magistrate's Court*

Milimani Director of Public Prosecution & Others 2020 delivered on March 11, 2020 took the view, with which I agree, that a Judgment, ruling or order of a Magistrate is amenable to Judicial review because it affects the legal rights of a party.

18. Preliminary Objections No 1, 2, and 4 are therefore not well founded. They are dismissed.

19. Preliminary objection No 5 is to the effect that the application is fatally defective and incompetent for offending Order 53 Rule 7(1) of the *Civil Procedure Rules*. That provision states that: -

> "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." Emphasis mine.

It is clear from the application herein that it is founded on Order 53 Rule (2) of the *Civil Procedure Rules* as well as Article 23 (3) of *the Constitution*. That is clear from the face of the application filed on December 28, 2021. Following the promulgation of the 2010 Constitution, Courts have now taken the view that Judicial Review is one of the reliefs for violation of fundamental rights under Article 23 (3) (f) of *the Constitution* and therefore, they should always strive to interpret the law in such a manner that favours the enforcement of such a right. Judicial Review is now a Constitutional supervision of public authorities involving a challenge to the legal validity of decisions – see *R .v. Commissioner of Customs Services – Ex Parte Imperial Bank Ltd* 2015 eKLR.

20. Having said so, however, it must be obvious that a Court can only quash what is placed before it. In this case, the Applicant seeks the first prayer of an order of *certiorari* to call into this Court for "quashing the decision of the respondents to allocate House BGM/HOU/MG/11 to the Deputy County Police Commander Bungoma County at the detriment of the *Ex – parte*, Applicant as null and void." However, the said decision of the Respondents to allocate House BGM/HOU/MG/11 to the said Deputy County Police Commander Bungoma was not among the documents annexed to the application and neither was it filed subsequently. That was of course contrary to the provisions of Order 53 Rule 7(1) of the *Civil Procedure Rules* which requires that the said decision be lodged in Court so that it can understand what has to be quashed. That notwithstanding, the Respondents have not only confirmed the existence of that decision but have gone further and filed it as part of their documents. In the replying affidavit of Moses O. Owuordated March 1, 2022 and filed in opposition to this application, it is averred in paragraph 8 as follows: -

> 8: "That it is well within my knowledge that the Respondents housing allocation meeting held on November 29, 2018 as captured in Min 003/11/2018 – Agenda of the Dayand Min 004/11/2018 – Matters Arising it was resolved to evict the plaintiff on the 04.12.2018 (Attached hereto and marked MOO – 3 is a copy of Minutes of Housing Allocation Committee held on 29/11/2018)."

Indeed, I did not hear the Respondents complain that they were not aware about the decision that this Court is required to quash. The decision to allocate the house No BGM/HOU/MG/11 previously occupied by the Applicant to another officer is not disputed and is a matter of common knowledge. In my view therefore, the failure by the Applicant to file the decision sought to be quashed is, in the circumstances, of this case, a matter that is curable under the provisions of Article 159(2) (d) of *the Constitution*.

21. Preliminary Objection No 5 is hereby dismissed.

22. With regard to Preliminary Objection No 8, it is the Respondents' case that the supporting affidavit dated December 28, 2021 is fatally defective and cannot stand. The Court has not been informed in what respect the said affidavit is defective. And having looked at it myself, I do not detect any defect in it.

23. Preliminary Objection No 8 is similarly dismissed.

24. Preliminary objections No 6 and 7 can, in my view, be considered together. They raise the issues that this application is scandalous, fatally and incurably defective, bad in law for being in violation of the doctrine of exhaustion as well as being an abuse of the process of this Court.

25. Section 3A of the *Civil Procedure Act* which is among those provisions upon which the application is premised grants this Court the power to halt a suit which amounts to an abuse of it's process. It states: -

> 3A "Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." Emphasis mine.

> It is obvious that this Court must act and protect itself from any abuse of its processes. In *Satya Bhama Gandhi.v. DPP & others* 2018 eKLR, the Court citing the cases of *Public Drug Co.v. Breyerke Cream Co* 347 Pa, 346, 32A, 2a, 413, 415 as well as *Jadesimi .v. Okotie Eboh* 1986 1 NWLR (PT 16) 264 identified some of what constitutes an abuse of the process of the Court as:-

> 1. Instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
> 2. Instituting different actions between the same parties simultaneously in different Court even though on different grounds.
> 3. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
> 4. Where an application for adjournment is sought by a party to an action to bring another application to Court for leave to raise issue of fact already decided by Court below.
> 5. Where there is no *iota* of law supporting a Court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
> 6. Where a party has adopted the system of forum – shopping in the enforcement of a conceived right.
> 7. Where an appellant files an application at the trial Court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
> 8. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or Judicial process to the irritation or annoyance of an opponent.

In the same case, the Court cited with approval the Nigerian Case of *Agwusin.V. Ojichewhere* justice NIKI Tobi JSC observed that: -

> "...... abuse of Court process create a factual scenario where appellants are pursuing the same matter by two Court process. In other words, the appellants by the two Court process were involved in some gamble, a game of chance to get the best in the Judicial process."

Back home, in *Muchanga Investments Ltd.v. Safaris Unlimited(Africa) Ltd & Others* 2005 eKLR, the Court of Appeal affirmed the following definition of the term "abuse of Court process" as given in the case of *Beinos.v. Wiycley* 1973 SA 721 SCA) at page 734 F where it was held that: -

> "What does constitute an abuse of process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all – encompassing definition of the concept 'abuse of process.' It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of Court to facilitate the pursuit of the truth are used for purposes extraneous to that objective."

Sections 6 and 7 of the *Civil Procedure Act* which provides for the doctrines of *sub judice* and *res judicata* were obviously meant to curb such proceedings which are an abuse of the Court processes.

26. In the case of *Muchanga Investments Ltd.v. Safaris Unlimited (africa) Ltd& 2 others*(supra), the Court of Appeal also cited another Nigeria case being *Sarak.v. Kotoye* 1992 9 NWLR (9PT 264) 156 where Karibu Whytie J.SC identified as among the illustrations of abuse of the judicial process the following: -

    (a) "Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

    (b) "Instituting different actions between the same parties simultaneously in different Courts even though on different grounds."

27 It is not in dispute that even as the Applicant moved to this Court seeking orders in Judicial Review, he had already filed in Bungoma Chief Magistrate's Court Civil Suit No 524 of 2018 seeking various orders with regard to the house NO BGM/HOU/MG/11. He obtained conservatory orders maintaining the status quo with regard to the occupancy of the house on August 27, 2019. It is also clear from the ruling dated October 26, 2021 that by the time this application was filed, that suit was set for hearing on November 24, 2021 and there is nothing to suggest that it has been heard and determined. The plaint in the Subordinate Court has not been availed to this Court but what is clear from the ruling delivered on October 26, 2021 is that the Applicant obtained the injunctive relief in 2019 while the suit was filed in 2018 and is still pending. Therefore, 3 years after filing the suit in the Subordinate Court and which is still pending a determination, the Applicant moved to this Court litigating against the same parties over the same subject being house NO BGM/HOU/MG/11 the only difference being that in the Subordinate Court he was seeking orders against the 1st, 2nd and 6th Respondents while in this case he has added other parties. That is clearly an abuse of the process of this Court because the Applicant is pursuing remedies in respect to the same subject matter in different Courts at the same time. Indeed, he only moved to this Court on December 28, 2021 after the injunction orders which he had been enjoying since December 3, 2018 were vacated by the Magistrate vide the ruling delivered on October 26, 2021. The Applicant is engaging in a fishing expedition and abusing the processes of this Court. On that ground alone, this application must be dismissed.

28. With regard to the complaint that the Magistrate's ruling delivered on October 26, 2021 in Bungoma Chief Magistrate's Court Civil Case No 524 of 2018 *"is without merit, sheer abuse of office, high*

handedness, subversion of justice, oppressive and the learned Magistrate acted beyond his/her powers and jurisdiction," it is clear that in a Judicial Review application such as this one, the Court is not concerned about the merit of the decision or whether there was sufficient evidence to support it – *Municipal Council of Mombasa .v. R & Umoja Consultants Ltd* (supra). Judicial Review is concerned with the decision making process such as, was the Applicant heard, did the Court or Tribunal have the jurisdiction to make the decision and was it irrational or illegal. Nothing has been placed before this Court to suggest that the Magistrate who delivered the ruling dated October 26, 2021 had no jurisdiction to determine the dispute before him. In any event, it is the Applicant who moved to the Subordinate Court seeking a Judgment against there (3) of the defendants in this case with regard to the house No BGM/HOU/MG/11 which means that he has no doubt about the jurisdiction of that Court.

29. The record shows that Applicant's application dated September 1, 2021 and which culminated in the ruling delivered on October 26, 2021 was heard inter – parte. After considering the said application and the Respondents' replying affidavits, the Magistrate vacated the orders which he had earlier issued on December 3, 2018 injuncting the Respondents from interfering with the Applicant's use of the house NO BGM/HOU/MG/11. The Applicant was therefore heard before the said ruling was delivered. He cannot now use these Judicial Review proceedings to allege that the said ruling *"is without merit,"* is a *"sheer abuse of office"* is a *"subversion of justice oppressive"* and beyond the *"powers and jurisdiction"* of the Magistrate. Besides, even on the merit, the trial Magistrate was justified in vacating the injunction orders issued on December 3, 2018 because they had infact lapsed on December 4, 2019 as provided under Order 40 Rule 6 of the *Civil Procedure Rules* which requires a suit in respect of which such an order has been issued to be determined within a period of twelve (12) months from the date when the injunction was issued. What the Applicant ought to have done was to appeal against that ruling.

30. The Applicant also seeks an order restituting the house No BGM/HOU/MG/11 to him and compensation for the mental anguish, embarrassment invasion of privacy and destruction of property as may be verified by the Court. Those are remedies that can be sought in a civil suit not in an application such as this one.

31. The Applicant further seeks an order of prohibition prohibiting the Respondents either by themselves or acting through their agents and/or servants from interfering with his occupation of the house No BGM/HOU/MG/11 and hand over vacant possession thereof to him. It is clear that the Applicant is no longer in occupation of the house NoBGM/HOU/MG/11 and so there is nothing to prohibit. He has already been evicted therefrom. That remedy is no longer available to the Applicant. In *Kenya National Examination Council.v. R Ex – Parte Geoffrey Gathenji Njoroge* 1997 eKLR [C.A Civil AppealNo 226 of 1996]: the Court of Appeal said as follows with regard to this remedy: -

> "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 .... Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of it's jurisdiction or in contravention of the laws of the land."

The Judicial Review remedy of Prohibition looks to the future and since the action being complained of has already happened, it is not available to the Applicant in the circumstances of this case.

32. The Applicant has also sought an order of mandamus to "issue questioning by what authority the Respondents jointly acted illegally and in total disregard of the law purported to evict the *ex – parte* Applicant from occupation of house number BGM/HOU/MG/11 when the same was duly and properly allocated to him and as such, was not available for re – allocation to any other person whatsoever."Again, as was held in *Kenya National Examination Council .v. R refers To Ex – Parte Examination Council .v. R Exparte Geoffrey Gathenji Njoroge* (*supra*): -

> "An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of *mandamus* cannot quash what has already been done ………………"

The Applicant also seeks a declaration that the 1st, 2nd, 3rd and 7th Respondents are unfit to hold public office and have sub – verted the cause of justice and abused their offices. The 1st, 2nd, 3rd and 7th Respondents are Public officers and their removal from office is regulated under relevant statutory provisions. In the case of the 7th Respondent who is a Judicial Officer, those provisions would include the *Judicial Service Act* and the other relevant provisions and regulations. His removal from office cannot therefore be effected through this application.

33. Finally, Judicial review orders are issued at the discretion of the Court. They are not automatic. Therefore, where the Court finds that they are not the most efficacious in the circumstances of a case, they will not be granted – *R .V. Judicial Service Commission Ex – Parte Pareno* 2014 eKLR.

34. In the circumstances of this case, I have already found that this application is an abuse of the process of this Court. The Applicant has a pending suit in Bungoma Chief Magistrate's Court Civil CaseNo 524 of 2018 in which his eviction from the house NO BGM/HOU/MG/11 is being litigated. It was therefore improper for him to approach this Court seeking Judicial review remedies over the same subject matter. This application is therefore for dismissal on account of being an abuse of the process of this Court. And even on its merits, this application has not met the threshold for granting the orders sought. It is for dismissal.

35. On the issue of costs, although they follow the event, they are at the discretion of the Court. In the circumstances of this case, I direct that each party meet their own costs.

BOAZ N. OLAO.

J U D G E

22nd September 2022.

JUDGMENT DATED, DELIVERED AND SIGNED ON THIS 22ND DAY OF SEPTEMBER 2022 BY WAY OF ELECTRONIC MAIL AT BUNGOMA.

Right of Appeal explained.

BOAZ N. OLAO.

J U D G E

22nd September 2022.