**Water Front Holdings Limited v Registrar of Titles Mombasa & another; Kandie (Interested Party) (Judicial Review 13 of 2021) [2022] KEELC 13694 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13694 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**JUDICIAL REVIEW 13 OF 2021**

**NA MATHEKA, J**

**OCTOBER 25, 2022**

**BETWEEN**

**WATER FRONT HOLDINGS LIMITED ............................................ APPLICANT**

**AND**

**REGISTRAR OF TITLES MOMBASA ........................................ 1ST RESPONDENT**

**JOHN LEMISO OLE LEKAKENY ............................................... 2ND RESPONDENT**

**AND**

**DAVID KIPKURUI KANDIE ................................................. INTERESTED PARTY**

**RULING**

1. The application is dated February 9, 2022 and is brought under Article 159 of *the Constitution* of Kenya, 2010, Sections IA, 1B, 3A, 63(e) and 65 1 b of the *Civil Procedure Act* Order 45 of the *Civil Procedure Rules* and *Environment and Land Court Act* seeking the following orders;
    1. That this application be heard on priority basis
    2. That the Court be pleased to place this matter for directions together with ELC No. 126 of 201 9 (Mombasa) on February 15, 2022 when this similar matter is coming up for directions.
    3. That the Court be pleased to review, set aside and or vary its orders given *ex parte* on December 28, 2021 hereof.
    4. That the Court be pleased to issue further and necessary orders for the best interest of justice hereof.
    5. That the costs be in the cause hereof.

2. It is based on the grounds that this Application is urgent for the interest of justice and to prevent abuse of the Court process. Order 45 Rule I of the *Civil Procedure Rules* allows the Applicant who has been aggrieved by an order to apply before this Honourable Court to review the same. The Respondent obtained the said orders through concealment of material facts and misleading this Honourable Court. The Applicant secured the orders herein after failing to secure temporary orders in ELC No. 126 of 2019 (Mombasa). The Respondent is guilty of shopping for forums to grant it orders. This is tantamount to abuse of court process and this Honourable Court is entitled to frown against its actions hereof. The Applicant failed to disclose to this Honourable Court that there was a pending Appeal in which it is a party and that the Applicant was the first beneficiary of the suit premises. This court has no jurisdiction to reopen and make orders in favour of the Respondent on matters that are pending before the Court of Appeal involving the parties and suit premises hereof. The impugned orders given on December 28, 2021 were issued in vain because the Land Registrar, Mombasa had already transferred and issued a Certificate of Lease in favour of the Applicant on December 8, 2021 in compliance with the Court orders and decree arising from the judgment of Hon. Justice Yano in ELC No. 126 of 2019 (Mombasa). It is trite law that courts should not issue orders in vain or issued orders that are impractical for compliance or grant orders to undo what has already taken place. The Respondents impugned orders are otiose and overtaken by events. The Respondent was all along aware of the disputes between the parties in Court. It was therefore imperative to disclose to this Honourabie Court all the material facts thereof. The Applicant is adversely affected by the said orders and stands to suffer great prejudice. The suit premises belong to the Applicant who has already been issued with a Certificate of Lease hereof. The Applicant has defended the interested Party's Application for stay in the Court of Appeal: COA Misc Applic No. E094 of 2021 (Mombasa). This matter is scheduled for a ruling on March 18, 2022. There are no interim orders thereat. The Respondent's Appeal against the Interested Party is pending at the Court of Appeal. The Respondent did not enjoin the Applicant though it was aware of his proprietary rights thereof.

3. The Respondent had lost a suit in favour of the Interested Party and later the Applicant succeeded in ELC 126 of 2019 (Mombasa) against the Interested Party for failure to pay the agreed purchase price. Justice must come to an end. The Applicant is entitled to enjoy the fruits of the Court judgment. The Application for Stay in ELC 126 of 2019 was dismissed by Hon. Lady Justice Matheka on December 7, 2021 paving the way for the Registrar of Titles to transfer and issue the Certificate of Lease dated December 8, 2021 in favour of the Applicant. The Respondent has no legal rights to the suit premises. The Applicant has both possession and the title to the suit premises. Unless this matter is urgently heard and determined, the Applicant will continue to suffer irreparable loss and damage. He seeks to have the said application dismissed. The interested Party did not file any response and orally concurred with the 2nd Respondent's submissions.

4. The Respondent/*Ex parte* Applicant in this matter in their grounds of opposition stated that the Court of law enjoys inherent jurisdiction at all times to make such orders to ensure that the end of Justice is realized and the process of the court is not abused. The 2nd Respondent herein filed Mombasa ELC No. 126 of 2019 without including the *Ex-parte* Applicant while the 2nd Respondent then who had full knowledge of the pending Appeal No. 88 of 2019 (Mombasa) whose suit property is the same as the said Suit property in Mombasa ELC No. 126 of 2019. That immediately the *Ex-parte* Applicant became aware of the action, which was well calculated scheme by the 2nd Respondent to steal a match, the ex-parte Applicant moved the Court for Stay of Execution to prevent the 2nd Respondent from misleading this Honourable Court. The *Ex-parte* Applicant further raises the following issues that despite the fact that the 2nd Respondent was fully aware of the pending Appeal No. 88 of 2019 (Mombasa) in which he is a party, he still proceeded to file ELC No. 126 of 2019(Mombasa). The

2nd Respondent failed to include the *Ex-parte* Applicant in the said suit knowing very well he was the Respondent in ELC Case No.22 of 2012 in which he was a witness. As a witness in ELC Case No. 22 of 2012 the 2nd Respondent herein renounced his interest in the suit property and had confirmed before court he had sold the suit property to the Interested Party. Despite this fact the 2nd Respondent filed a different suit against the same Interested party claiming that he was the rightful owner this shows clear abuse of the court process.

5. The 2nd Respondent was aware of the dispute between the parties in court however proceeded to obtain a third title of the same suit from the 1st Respondent while executing decree arising from Judgement of Hon. Justice Yano ELC No. 126 of 2019. In fairness the 2nd Respondent should have waited for the determination of Appeal No. 88 of 2019 (Mombasa) that was filed by *Ex-parte* Applicant against the interested party to conclude then proceed filing a case against the Interested party herein.

6. This court has considered the application and the submissions therein. On the issue that this judicial review seeks to review orders of a superior court and this court has no jurisdiction to do so, indeed the *Ex parte* applicant confirms that decree in question arises from Judgement of Hon. Justice Yano ELC No. 126 of 2019 and that there is an Appeal No. 88 of 2019 (Mombasa) on the same. The Applicant states that the *Ex parte* Applicant failed to disclose to this Honourable Court that there was a pending Appeal in which it is a party and that the Applicant was the first beneficiary of the suit premises. That this court has no jurisdiction to reopen and make orders in favour of the Respondent on matters that are pending before the Court of Appeal involving the parties and suit premises hereof.

7. The issue to be determined is whether or not the court has jurisdiction to hear and determine this application of judicial review, the court held in the *locus classicus* decision in Kenya on jurisdiction in the celebrated case of *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR where the late Justice Nyarangi of the Court of Appeal held as follows: -

> " I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

8. Further in the case of *Sir Ali Salim vs Shariff Mohammed Sharray* [1938] KLR the court held that;

> " If a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however certain and technically correct, are mere nullities and not only voidable, they are void and have no effect either as estoppel or otherwise and may not only be set aside at any time by the court in which they are rendered but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver or their part cannot make up for the lack of jurisdiction."

9. Article 162 (2)b of *the Constitution* gives the court the mandate and Section 13 of the *Environment and Land Court* stipulates the jurisdiction of the court is to hear and determine disputes relating to the environment, use, occupation and title to land. The court is further empowered to make any order or grant any relief as the Court deems fit and just, which may include interim and permanent preservation orders. This position was also adopted by the court in *Gerick Kenya Limited v National Environment Management Authority* [2015] eKLR. A court cannot give itself jurisdiction that it does not possess.

In the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 others* [2012] eKLR where the Supreme Court expressed itself as follows;

> " A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law ..."

10. Similarly, in the case of *Republic v National Land Commission & another Ex parte Cecilia Chepkoech Leting & 2 others* [2018] eKLR it was held that it would be improper for the court to grant itself jurisdiction on the basis of convenience.

11. This court has jurisdiction to hear and determine judicial review applications as stipulated under section 13 of the *Environment and Land Court*. Having found that the court has jurisdiction to hear and determine judicial review applications in respect to use and occupation of land, the next issue is whether the application falls within the ambit of judicial review. To answer this question, it is important to look at the meaning and purpose of judicial review.

12. The purpose of judicial review was enunciated in the case of *Municipal Council of Mombasa vs Republic Umoja Consultants Ltd*, Nairobi Civil Appeal No.185 of 2007(2002) eKLR, where the Court of Appeal held that;

> " 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 make 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 they take into account irrelevant matters. These are the kind of questions 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 - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review".

13. It is trite law that a court exercising judicial review jurisdiction is only concerned with the procedural propriety of a decision and not the merits. The court cannot be invited in a judicial review proceeding to act as an appellate court to reverse the decision of the 1st Respondent.

14. This position was adopted by the court in *Associated Provincial Picture Houses, Ltd. vs Wednesbury Corporation* [1947] 2 All E.R 680. As a result, it is only in exceptional circumstances that the court can consider merits of a decision. These exceptional circumstances were enumerated by the learned Mumbi Ngugi J in *Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited* [2013] eKLR, while citing the *Associated Provincial Picture Houses Ltd. vs Wednesbury Corporation* (*supra*) namely:

> " where the administrative body has acted outside its jurisdiction, has taken into account matters it ought not to have taken into account, or failed to take into account matters it ought to have taken into account; or that it has made a decision that is 'so unreasonable that no reasonable authority could ever come to it."

14. The remedy of judicial review is 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 as was held by

Mumbi Ngugi J in the case of *Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited* (*supra*),

> " That the purpose 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."

15. It was incumbent upon the Applicant to demonstrate that the decision-making organ, in this case, the 1st Respondent acted ultra vires in making the impugned decision. The *Ex parte* Applicant seeks orders to stop the Land Registrar from executing the court judgement in ELC No. 126 of 2019. In the case of *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another* [2014] eKLR, the court held that;

> " 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."

16. Similarly, in the case of *Commissioner of Lands v Kunste Hotel Limited* [1997] eK.L.R (E & L) 1 at page 249, the Court of Appeal stated that;

> " But it must be remembered that Judicial Review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected".

17. In *Halsbury's Laws of England* 4th Edition Volume 2 Page 508 where it is stated that;

> " *Certiorari* is a discretionary remedy which the Court may refuse to grant even when the requisite grounds for its grant exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The judicial discretion of the Court being a judicial one, must be exercised on the basis of evidence and sound legal principles".

18. This Court is therefore guided by the above principles and other binding precedents and the relevant laws in determining the matter at hand. The Judicial Review process is concerned with the decision making process and not with the merits of the decision itself. Further, that a Court hearing an application for Judicial Review should not sit as an appellate Court and such orders will not be granted as a matter of course but are a discretion of the Court which must consider if such orders are most efficacious in the circumstances of each case.

19. In the case of *Republic vs Inland Revenue Commissioner Ex Parte Opman International* 1986 1ALL E.R 328, the Court held that the fact that there is an alternative procedure available to address a

particular grievance does not mean one cannot apply for the remedy of Judicial Review. The Court stated that;

> " Judicial Review is however the procedure of last resort and is a residual procedure which is available in those cases where the alternative procedure does not satisfactorily achieve a just resolution of the applicant's claim"

20. In the case of *Speaker of National Assembly v Karume* C.A Civil Application No. 92 of 1992 (2008 1 K.L.R 426), the Court of Appeal stated that where there is a clear procedure to address a particular grievance, it should be followed. Looking at the circumstances of this case, this Judicial Review application is really an appeal against the decision of the Judge made in ELC No. 126 of 2019 In an application such as this, the Court should be concerned with the decision making process and not the merits of that decision. Further, it is my view that Judicial Review remedies being sought herein are not the most efficacious in the circumstances. It is submitted that already there is Appeal No. 88 of 2019 pending. In my view, that appeal should be the most efficacious way of addressing the *Ex parte* applicant's grievance which in my view questions the merits of the decision of the Judge Yano in ELC No. 126 of 2019. It is not a proper exercise of Judicial Review process to litigate over this application when there is a pending case at the Court an Appeal against the same decision. In this case, the Judicial Review application is really an appeal over the decision of a superior Court of which this court lacks jurisdiction to entertain.

21. Lastly, Judicial Review orders are granted at the discretion of the Court. Courts therefore have the discretion to refuse to grant such orders even where a foundation has been laid for the same although such discretion must be used sparingly. In the case of *Bluesea Shopping Mall Limited vs City Council of Nairobi & Others* C.A Civil Appeal No. 129 of 2013 (Nairobi), the Court of Appeal said the following on the issue of discretion in Judicial Review applications:

22. In administrative law matters, Courts have discretion to withhold a remedy of Judicial Review even where a substantive foundation has been laid because administrative law remedies are inherently discretionary. But Courts are slow to deny the remedy. The discretion to refuse to grant Judicial Review orders where they are merited must be very sparingly exercised".

23. In the circumstances of this case, taking into account the fact that the orders sought in this Judicial Review application appear to question the merits of the decision made by the superior Court, that this matter has been the subject of previous litigation both in this Court and the Court of Appeal and that there is also Appeal No. 19 of 2012 pending in Court over the same decision, I find I have no jurisdiction to entertain this application. The up-shot of the above is that the applicants' judicial review is wrongly filed before this court as the court lacks jurisdiction and is struck out with costs to the 2nd Respondent.

24. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF OCTOBER 2022.**

**N.A. MATHEKA**

**JUDGE**