



Republic v National Land Commission & 5 others; Nyamu (Exparte) (Judicial Review Application 19 of 2021) [2022] KEELC 14969 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14969 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
JUDICIAL REVIEW APPLICATION 19 OF 2021**

A NYUKURI, J

NOVEMBER 24, 2022

**IN THE MATTER OF: AN APPLICATION BY NELSON MUTHAMA
NYAMU FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS IN THE NATURE OF MANDAMUS AND PROHIBITION**

AND

**IN THE MATTER OF THE LAND REGISTRATION ACT 2012, NATIONAL
LAND COMMISSION ACT 2011, LAND ACT, 2012 LAWS OF KENYA
AND ARTICLES 40, 64 & 165 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF MACHAKOS TOWN/BLOCK 1/41 (PLOT NO. 909/534)

AND

**IN THE MATTER OF ORDER 53 CIVIL PROCEDURE RULES
2010 AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

COUNTY EXECUTIVE COMMITTEE, LANDS, MACHAKOS

COUNTY 2ND RESPONDENT

MACHAKOS COUNTY GOVERNMENT 3RD RESPONDENT

THE MINISTRY OF LANDS 4TH RESPONDENT

THE CHIEF LAND REGISTRAR 5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 6TH RESPONDENT



AND

NELSON MUTHAMA NYAMU EXPARTE

RULING

Introduction

1. Before court is an *ex parte* chamber summons dated October 19, 2021, brought under order 53 rules (1) and (2) of the *Civil Procedure Rules*, where the *ex parte* applicant sought the following orders;
 - a. Spent.
 - b. That leave be granted to the *ex parte* applicant to apply for an order of *mandamus* directed to the 2nd respondent herein to issue PPA 2 form and a letter of no objection to the *ex parte* applicant herein over the parcel of land known as Machakos Town/block 1/41 measuring approximately 0.4338Ha to enable him renew and/or extend the lease and in the alternative to compel the 1st respondent, 4th respondent and the 5th respondent to renew and/or extend the lease with or without the letter of no objection and PPA 2 form from the 2nd respondent.
 - c. That leave be granted to the *ex parte* applicant to apply for an order of prohibition directed to the respondent herein and all parties claiming under them or any other person from allocating the property to any other person or in any other manner developing the said property and/or interfering with the *ex parte* applicant's quiet and peaceful possession, use and ownership of the said parcel of land known as Machakos Town/block1/41 measuring approximately 0.4338Ha.
 - d. That the grant of leave so granted do operate as stay of execution barring respondents herein and all parties claiming under them or any other person from allocating the property to any other person or in any other manner developing the said property and/or interfering with the *ex parte* applicant's quiet and peaceful possession, use and ownership of the said parcel of land known as Machakos Town/block1/41 measuring approximately 0.4338Ha.
 - e. Costs and incidental to this application be provided for.
 - f. Such further or other reliefs as the honourable court may deem just and expedient to grant.
2. The application is anchored on the statutory statement, as well as the verifying affidavit by the applicant; both dated October 19, 2021. The applicant's case is that he is the direct beneficiary of all that parcel of land known as Machakos Town/block 1/41 measuring approximately 0.4388Ha, (hereinafter referred to as "the suit property") and that he is one of the administrators of the estate of Elijah Nyamu (deceased) who was the registered owner of the suit property *vide* letters of administration dated December 10, 2004.
3. That the suit property was a leasehold from the 3rd respondent -formerly county council of Masaku and that one Elijah Nyamu (now deceased) renewed the terms of the lease for a period of 33 years with effect from January 1, 1968 and that the term of the lease was set to expire on August 1, 2014. That upon expiry of the same, the *ex parte* applicant sought to renew the lease for a further term of 99 years.
4. That there was no objection of the renewal by the 3rd and 4th respondents. That however, despite several demands by the applicant, the 1st and 2nd respondents have refused to exercise their mandate to enable



- the renewal and/or extension of the lease. That the applicant herein is worried that his property stands the risk of being diminished leading to substantial loss if the application is not allowed.
5. Further that the search revealed that a court order was registered on April 4, 2019 against the suit title. The applicant therefore complained that the Land Registrar had refused to provide copies of the said court order without any justification and that he needs the said order to enable him file the relevant applications in court to lift the same, which actions have frustrated the enjoyment of his right to property.
 6. The application is opposed. Evelyne Kavuu Mutie filed a replying affidavit dated November 26, 2021 on behalf of the 2nd and 3rd respondents. She stated that she was currently the County Executive Committee member (CEC member) of the 2nd respondent in charge of matters relating to land. She averred that in 2014, she was recruited by the County Government of Machakos as a Deputy Subcounty Administrator under the Department of Decentralised units, Urban Areas and Municipalities and the mandate of that department was county administration, waste management and public participation. According to her, that department did not have mandate to deal with matters relating to land as that was within the mandate of the Department of Land, Energy, Environment and Natural resources.
 7. She stated also that having seen the letter dated May 13, 2014, there was no position known as the town administrator, and therefore that the letter presented by the applicant is fraudulent and that her department had no legal powers to give a “no objection” on renewal of leases.
 8. She averred that there was an elaborate procedure for renewal of leases that had to be followed through express permission by the National Land Commission under the [Land Act](#) and [Land \(Extension and Renewal of Leases\) Rules 2017](#) and as such the court cannot be invited to usurp the powers of other constitutional and statutory offices by directing them to act in a manner that violates the law.
 9. She stated that there is no entity by the name county executive committee Machakos county named as the 2nd respondent. She averred that the *ex parte* applicant is not the lessee of the suit property and cannot purport to have filed the suit in his personal capacity and further, that a certificate of grant cannot grant proprietary rights in an expired lease; she further averred that it would appear that the *ex parte* applicant sought approvals from National Government for land belonging to county government of Machakos which is unprocedural and this court lacks jurisdiction.
 10. Her position was that before a lease is extended, the applicant must satisfy the requirement by demonstrating that the lease complied with conditions of existing lease, paid all land rates and rents promptly, that the renewal is beneficial to the economy of the county and country, that the renewal is in public interest and that the application is made through the right procedure and in compliance with the law. Further, that once she decides to extend the lease, she communicates to the National Land Commission for implementation. She pointed out that the *ex parte* applicant had never made an application to the National Land Commission, which she should respond to.
 11. According to her, an application for extension of lease must substantially be in form LA23, and that the applicant has not exhibited that form to prove she applied for extension of lease. It was her position that if the applicant was aggrieved, he ought to have first filed an appeal before the independent appeals committee of the National Land Commission, and if still aggrieved with the committee’s decision, he can then appeal to this court.
 12. She contended that the doctrine of exhaustion ousted this court’s jurisdiction



13. The 2nd & 3rd respondents further filed two replying affidavits both dated November 29, 2021, and sworn by Machakos county officials namely Patrick Wambua Manthi & Patrick Kingole Malombe. Mr Wambua averred that in September 2014 he was appointed as the Machakos Town sub- county administrator and that therefore during the period when the letter dated May 7, 2015, was said to have been written, he was in office. He denied authoring the said letter or authorizing another person to write the letter. And that at that time there was no office called town manager reporting to him. He therefore maintained that the letter dated May 7, 2015, was a forgery as at no particular time were land matters in Machakos placed under the department of decentralized units, urban areas and municipalities.
14. He reiterated that the mandate to extend the lease lay in the County Executive Committee Member for land, Energy, Environment and natural resources and that at the time the letter dated May 7, 2015, was written he was not serving under the department of lands and therefore had no mandate to issue such a letter.
15. Mr King'ole averred that he was the Chief Administrative Officer, department of Agriculture in Machakos county. He stated that in May 2014 he was the substantive Machakos town sub-county administrator and in September he was transferred to the department of agriculture upon handing over the office to Mr Patrick Wambua Manthi. He also denied authoring or authorizing anyone to author the letter dated May 13, 2014. He stated that at that time there was no office known as the town administrator and he denied having been a town administrator for Machakos town. He insisted that the signature on the letter was not his and that the same was a forgery. His position was that documents relied upon by the applicant were the applicant's creation.
16. The application was canvassed by way of written submissions. On record are the submissions of the exparte applicant dated January 24, 2022, the 2nd and 3rd respondents' submissions dated January 2, 2022 and the 4th, 5th and 6th respondents' submissions dated January 13, 2022.

Ex parte Applicant's Submissions

17. Counsel for the *ex parte* applicant relied on order 53 rule 1 of the [Civil Procedure Rules 2010](#) and submitted that at the leave application stage, the court does not delve into the matters of fact that can only be determined at the interpartes hearing of the substantive motion. Counsel argued that at this stage, the court needs to only peruse the pleadings and consider whether the exparte applicant has made out a case with chances of success. Counsel was of the view that the allegation that the applicant's documents were forged are matters that can only be determined at the interpartes hearing of the substantive motion. Reliance was placed on the case of [Republic v Registrar of Trade Marks Ex Parte United Millers Limited; Kaab Investments Limited \(Interested Party\)](#) [2021]eKLR where it was held that the purpose for leave application is to establish if there is a *prima facie* case and if the case is fit for consideration.
18. Counsel also submitted that the exparte applicant had established a *prima facie* case, fit for further consideration. Counsel relied on the cases of [James Opiyo Wandayi v Kenya National Assembly & 2 others](#) [2016] eKLR and [Republic v Cabinet Secretary, Ministry of Labour and Social Protection & 3 others Ex Parte Samson Ongechi Nyaanga](#) [2019] eKLR for the proposition that judicial review is important to curb the excesses of public officers and therefore the need for a party seeking judicial review to be given an opportunity to ventilate their claim. It was further argued for the exparte applicant that where property is involved, it is necessary that leave so granted operates as stay.



2nd and 3rd Respondent's Submissions

19. Counsel for the 2nd and 3rd respondents submitted that there was an elaborate procedure for renewal of leases that must be followed by lessees of land vested in County Governments under section 13 (2) of the [Land Act](#) and the [Land \(Extension and Renewal of Leases\) Rules 2017](#).
20. Counsel submitted that a lessee is required to apply to the National Land Commission and copy the CEC member for Lands, expressing their intention to have the lease extended, in form LA 22. Counsel argued that the *ex parte* applicant had not annexed such an application to his application for leave. Counsel contended that the CEC member for lands can only act on the application received from the National Land Commission, and therefore has no application to respond to.
21. On the issue of the doctrine of exhaustion, counsel submitted that the said doctrine ousts the jurisdiction of the court from determining disputes reserved for other bodies. It was argued for the respondents that the issues raised by the *ex parte* applicant are about change of user and extension of lease. According to counsel those issues ought to have been filed at the Independent Appeals Committee and the County Physical and Land Use Planning liaison Committee. Reliance was placed on rule 7 of the [Land \(Extension and renewal of leases\) Rules 2017](#).
22. Further, counsel submitted that as regards change of user, the *ex parte* applicant ought to have filed an appeal to the county physical and land use planning liaison committee established via gazette notice dated November 27, 2020, before moving to court. Counsel also argued that section 61 as read with section 58 of the [Physical and Land Use Planning Act](#) provides that this court is an appellate court whose decision is final. In that regard, counsel contended therefore that this court lacks original jurisdiction to hear and determine this matter. In that respect, reliance was placed on the case of [Erik Sunde & Another v City Council of Nairobi & 3 others](#) [2016] eKLR for the proposition that where an applicant is challenging the validity of development approval, they must first file their grievance before the liaison committee
23. In addition, counsel relied on section 9 (2) of the [Fair Administrative Action Act](#) to argue that the court is prohibited from entertaining these proceedings until the *ex parte* applicant has exhausted the other established mechanisms. Counsel also contended that the lesee did not take possession or carry out developments on the suit property although those were some of the conditions the lesee was expected to comply with. Counsel argued that, that was the reason the applicant was unwilling to follow the right procedure in seeking renewal of the lease. Reliance was placed on the case of [Diana Ketbi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 others](#) [2013] e KLR.
24. In conclusion counsel observed that grant of leave is not automatic, as the application is meant to exclude frivolous and vexatious applications just like the instant application.

4th, 5th and 6th Respondents Submissions

25. Counsel for the 4th, 5th and 6th respondents submitted that at the stage of leave application, the court ought only to take a cursory look at the evidence before it and make a decision whether the applicant's case is meritorious to justify grant of leave; and that the purpose of leave to apply for judicial review orders 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. In that regard, counsel referred to the case of [Republic v County Council of Kwale & another; ex parte Kondo & 57 others](#), Mombasa HCMCA No 384 of 1996.



26. It was further submitted for the 4th, 5th and 6th respondents that the ex parte applicant was undeserving of the orders sought as he had not exhausted alternative remedies. Reliance was placed on the case of *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] e KLR for the proposition that where a dispute resolution exists outside courts, the same ought to be exhausted before approaching the court. Counsel argued that although there are exceptions to the exhaustion doctrine, the applicant must demonstrate exceptional circumstances as provided for under section 9 (4) of the *Fair Administrative Action Act*. Counsel relied on the case of *R v National Environmental Management Authority* (2011) e KLR for the proposition that to determine whether exceptional circumstances exist, the court must ask what was the real issue and whether the statutory appeal was suitable to determine such question. According to counsel, no exceptional circumstances exists in the circumstances of this case to warrant by passing the alternative remedies and that no application was made and or allowed to exempt the applicant from seeking the alternative remedies.
27. Counsel took the position that there is an alternative remedy to the applicant under section 9 (2) of the *Fair Administrative Action Act*, hence this court has no jurisdiction. Counsel also argued that section 78 of the *Physical and Land Use Planning Act* provides that a person aggrieved with the decision of the County Planning Authority concerning the County physical and Land use development plan or matters connected thereto, may within sixty days appeal to the County Physical and Land Use Planning Liaison Committee. Counsel therefore argued that the ex parte applicant had not exhausted the said remedies.
28. On whether leave should operate as stay, counsel submitted that the same is not granted as a matter of course, but it can only be granted where it is necessary. Counsel was of the view that the said order is discretionary and that the discretion must be exercised judiciously. Reliance was placed on the case of *Jared Benson Kangwana v Attorney General* Nairobi HCCC No 446 of 1995, which the court has noted.

Analysis and Determination

29. I have carefully considered the application, statutory statement and verifying affidavit, replying affidavits and submissions. The issues that fall for determination are as follows;
- a. Whether the applicant has made out a *prima facie* case fit for further consideration at the inter partes hearing.
 - b. Whether the applicant deserves orders of stay.
30. Order 53 rules 1 and 2 of the *Civil Procedure Rules* grants this court the power to grant leave to an applicant to seek orders of judicial review, and provides as follows;
1. No application for an order of *mandamus*, prohibition or *certiorari* shall be made unless leave therefore has been granted in accordance with this rule.
 2. An application for such leave shall be made ex parte to a judge in chambers and shall be accompanied by –
 - a. A statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and
 - b. Affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.



3. The judge may, where leave denotes stay, impose such terms as to costs and as to giving security as he thinks fit including cash deposits, bank guarantee or insurance bond from a reputable institution.
 4. The grant of leave under this rule to apply for an order of prohibition or an order of *certiorari* shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: provided that where the circumstances so require, the judge may direct that the application be served for hearing interpartes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.
31. The purpose for grant of leave is to filter out frivolous applications that are unworthy of further interrogation. Therefore, the responsibility of the court in considering an application for leave to apply for judicial review orders, is to eliminate frivolous applications and ensure that only *prima facie* cases proceed to the substantive hearing. Therefore, at this stage the applicant must satisfy the court that he has an arguable case fit for further consideration. In the case of *Republic v County Council of Kwale & another Ex parte Kondo & 57 others*, Mombasa HCMCA No 384 of 1996, the court restated this position as follows;
- The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busybodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.
32. The issue that this court must determine at this stage is whether the applicant has made out a *prima facie* case that ought to be interrogated further. I note that the respondents have faulted the authenticity of documents relied upon by the *ex parte* applicant to argue that the application is not merited. In that regard, my considered view is that the question as to whether the documents relied upon by the applicant are forged or not is an issue touching on the merit of the substantive matter and in my view, those arguments are best left for interrogation at the interpartes hearing of the substantive motion. At this stage, the court ought to consider at a *prima facie* level, whether the facts disclose a *prima facie* case fit for further attention. At this point, the court need not make any conclusive pronouncements on the facts.
33. In the instant application, the applicant states that he applied for extension of lease and that the 2nd respondent failed to issue forms PP2 to the 1st respondent. He argues that the respondents have acted unreasonably, irrationally and in bad faith. While the respondents have argued that the applicant failed to comply with the process of extension and or renewal of leases as set out in the *Land (Extension and renewal of leases) Rules 2017*, I must point out that the applicant alleges to have applied for extension of lease in 2014, which is three years before the enactment of the said rules. It is a general principle of law that laws do not apply retrospectively unless the retrospective application is specifically provided for within that specific law. (See *Samuel Kamau Macharia & another v Kenya Commercial Bank & another* [2012] eKLR) as the *Land (Extension and renewal of leases) Rules 2017* came into effect in 2017, I therefore find and hold that the same could not be applicable in the circumstances of this case.



34. Besides, the respondents' argument faulting jurisdiction of this court to hear and determine this application, based on the doctrine of exhaustion, arose from their reliance on rule 7 of the [Land \(Extension and renewal of leases\) Rules 2017](#). The said rule provides that a lessee aggrieved with the decision not to renew or extend a lease, ought to appeal to the NLC, and NLC shall establish an ad hoc Independent Appeals Committee to determine the matter. Subsequent appeal from the latter, lies to this court. Having already found that the said rules were not in force at the material time, I find that the respondents' objection to this court's jurisdiction anchored on the doctrine of exhaustion cannot succeed.
35. The law in place in 2014, at the time of the alleged application for extension of lease by the *ex parte* applicant herein, was section 13 (1) and (1a) of the [Land Act](#) No 6 of 2012. The same provides as follows;
1. Before the expiry of the leasehold tenure, the commission shall-
 - a. Within five years, notify the lessee, by registered mail, of the date of expiry of the lease and inform the lessee of his or her pre-emptive right to allocation of the land upon application, provided that such lessee is a Kenyan citizen and that the land is not required by the national or county government for public purposes; and
 - b. If within one year the lessee shall not have responded to the notification, publish the notification in one newspaper of nationwide circulation.

(1a) where a lease is not granted after an application under subsection (1), the commission shall give the lessee the reasons for not granting the lease in writing.
36. As the *ex parte* applicant has demonstrated that his application to the respondents for extension of lease ought to have been considered, it is my finding that he has met the threshold of a *prima facie* case fit for consideration at the interpartes hearing of the substantive motion.
37. On the issue of whether leave should operate as stay, I note that the applicant stated that he is apprehensive that the suit property may be allocated to other persons, which may expose him to the risk of being deprived the same. The respondents did not rebut the possibility of allocation of the suit property to third parties. In my considered view, the applicant's apprehension is justified and therefore he is deserving of an order of stay as sought.
38. I therefore find the application dated October 19, 2021, as merited and allow the same as follows;
- a. That leave be and is hereby granted to the *ex parte* applicant to apply for an order of *mandamus* directed to the 2nd respondent herein to issue PPA 2 form and a letter of no objection to the *ex parte* applicant herein over the parcel of land known as Machakos Town/block 1/41 measuring approximately 0.4338Ha to enable him renew and/or extend the lease and in the alternative to compel the 1st respondent, 4th respondent and the 5th respondent to renew and/or extend the lease with or without the letter of no objection and PPA 2 form from the 2nd respondent.
 - b. That leave be and is hereby granted to the *ex parte* applicant to apply for an order of prohibition directed to the respondents herein and all parties claiming under them or any other person from allocating the property to any other person or in any other manner developing the said property and/or interfering with the *ex parte* applicant's quiet and peaceful possession, use and ownership of the said parcel of land known as Machakos Town/block1/41 measuring approximately 0.4338Ha.



- c. That the grant of leave to apply for judicial review orders above shall operate as stay of execution barring the respondents herein and all parties claiming under them or any other person from allocating the property to any other person or in any other manner developing the said property and/or interfering with the *ex parte* applicant's quiet and peaceful possession, use and ownership of the said parcel of land known as Machakos Town/block1/41 measuring approximately 0.4338Ha, until the determination of the substantive motion.
- d. The *ex parte* applicant is directed to file and serve the substantive motion in 21 days of the date of this ruling.
- e. Costs of this application shall abide the determination of the substantive motion.

39. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24TH DAY OF NOVEMBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

No appearance for the *Ex parte* Applicant.

No appearance for the Respondents.

Josephine Misigo – Court Assistant.

