



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF
AT ELDORET
JUDICIAL REVIEW APPLICATION NO. 7 OF 2020
IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW FOR
ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF AN APPEAL TO THE MINISTER'S CASE NO.124 OF 2019

AND

IN THE MATTR OF LAND ADJUDICATION ACT CAP 281 LAWS OF KENYA

BETWEEN

RUPUBLIC

VERSUS

SUB COUNTY COMMISSIONER BARINGO NORTH.....1ST RESPONDENT

THE ATTORNEY GENERAL KENYA 2ND RESPONDENT

THE CABINET SECRETARY MINISTRY OF LANDS AND PHYSICAL PLANING..... 3RD RESPONDENT

ZEPHANIAH C. RONGUNO.....INTERESTED PARTY

FRANCIS KIMOSOP..... EX PARTE APPLICANT

RULING

This is the ruling is in respect of a Notice of Motion dated 9th December 2020 by the ex parte applicant and preliminary objection by the 1st 2nd and 3rd respondents on the ground that the application is defective and cannot be granted in judicial review proceedings. The applicant sought for the following orders in the application:

- a. Spent.
- b. The status quo in the suit property plot No. 2763 — Kapkoiwo Adjudication Section be maintained that the interested parties herein be stopped from utilizing the land in whatever manner pending hearing and determination of this suit.
- c. Temporary orders do issue in terms of prayer of above pending hearing and determination of this application inter partes.
- d. Costs of the application be provided for.

Counsel agreed to canvas the application together with the preliminary objection by way of written submissions.

1ST 2ND & 3RD RESPONDENTS' SUBMISSIONS

Counsel for the 1st, 2nd and 3rd respondents submitted that the issue for determination in the preliminary objection is whether the orders sought by the Ex parte applicant can be granted in judicial review proceedings.

Ms. Jepkemei Counsel for the respondents relied on the case of **Republic v County Government of Kajiado & 2 others Ex-Parte Leah Wanjiru Mburu** where the court held that:

“In the present objection, the main question before the court is whether an application for a temporary injunction can be made in an application for judicial review orders. This is an issue which does not require the ascertainment of any facts or exercise of any judicial discretion, as it is one that can only be determined by the application of the relevant legal provisions. The preliminary objection therefore raises a pure point of law.

As to whether the said preliminary objection has merit, I accept the Respondent’s submissions and it has been held in various judicial decisions that judicial review proceedings are *sui generis* proceedings exclusively brought under Order 53 of the Civil Procedure Rules, and that the other provisions of the Civil Procedure Act and Rules are inapplicable. The Court of Appeal in *Commissioner of Lands v Kunste Hotel Limited KLR (E&L) 1 249* stated as follows in this regard at page 256 that a court in judicial review proceedings it is exercising neither a civil or criminal jurisdiction. Also see the decision in *R vs Communication Commission of Kenya & Another, (2001) 1 E.A 199*. In *Wellamondi vs The Chairman, Electoral Commission of Kenya, (2002)1 KLR 286, Ringera J.* (as he then was) explained the legal position to be as follows:

“I agree that Judicial Review Proceedings under Order 53 of the Civil Procedure Rules are a special procedure. The provisions of the order are invoked whenever orders of certiorari, mandamus, or prohibition are sought. That may be so in either civil or criminal proceedings. So in the exercise of its power under the order, the court is exercising neither a civil nor a criminal jurisdiction in the strict sense of the word. It is exercising a jurisdiction *sui generis*. It follows therefore that it is incompetent to invoke the provisions of section 3A and order 1 rule 8 of the Civil Procedure rules. It is equally incompetent to invoke section 42.”

The 2nd Interested Party cannot therefore for the foregoing reasons competently bring the Notice of Motion dated 11th November 2013 in the judicial review proceedings herein, as he relies on the substantive provisions of sections 3, 3A, and 63(e) of the Civil Procedure Act, and Order 40 of the Civil Procedure Rules for the orders sought.”

Counsel therefore urged the court to find that the applicant cannot competently bring the Notice of Motion as he relies on the Judicature Act, the Civil Procedure Act and the Civil Procedure Rules which do not apply in Judicial Review proceedings and dismiss the application and uphold the objection.

The Interested party also filed submissions and urged the court to uphold the preliminary objection as the court cannot deal with the current application in judicial review proceedings.

EX PARTE APPLICANT'S SUBMISSIONS

Counsel submitted that the court has wide discretion to grant any other orders to preserve property including grants of stay and orders of status quo and relied on the case of *Lucy Bosire v Kehancha Divisional Land Disputes Tribunal & 2 others (2013) eKLR* where the court applied Article 159(2) of the constitution to serve substantive justice.

The ex-parte applicant also relied on the case of **Republic vs General Manager, Moi International Airport & another exparte Jared Odhiambo & Another (2014) eKLR** where the court emphasized the need to place Order 53 rule 3 of the Civil Procedure Rules in consistency with Article 159 that justice should be administered without due regard to procedural technicalities and therefore grant the preservation order.

ANALYSIS AND DETERMINATION

The court must deal with the preliminary objection before delving into the application. If the preliminary objection is upheld, then the same determines the application.

The issue to be determined is whether the court can grant the orders sought vide judicial review proceedings. Courts have held in various judicial decisions that a court in judicial review proceedings exercises *sui generis* jurisdiction exclusively brought under Order 53 of the Civil Procedure Rules and other provisions of the Civil Procedure Act and Rules remain inapplicable.

This position was affirmed by court in **Republic v County Government of Kajiado & 2 others Ex-Parte Leah Wanjiru Mburu and Republic v Commissioner of Cooperatives Ex Parte Kirinyaga Tea Growers [1999] 1 EA 245**.

In **Republic v Kahindi Nyafula ex parte Kilifi South East Farmers' Cooperative, High Court, Malindi, Jud. Rev. 3 of 2013 (2014) eKLR**, the court pronounced itself as follows:

“Judicial Review proceedings under Order 53 of the Civil Procedure Rules are a special procedure. A party, other than invoking the provisions of Order 53 cannot invoke the provisions of the civil Procedure Act and the Rules made thereunder.”

In exercising this special jurisdiction, the court is not concerned with reviewing the merits of a decision which is the subject of an application but rather the review of the process by which the decision was arrived at as was held in the case of **Republic v MRK & 3 others [2020] eKLR**.

In the case of **R v Attorney General & 4 Others ex parte Diamond Hashim Lalji and Ahmed Lalji (2014)** the court observed that:

“Judicial review applications do not deal with merits of a case but only with the process. In other words, judicial review only determines whether the decision maker had 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.”

Similarly, injunctive reliefs cannot be granted in judicial review proceedings as was held in the Court of Appeal case of **Cortec Mining Kenya Ltd vs Cabinet Secretary Attorney General and 8 Others, (2015) eKLR**, The court noted that:

“It is plain to see that in judicial review; the Court is concerned with public law remedies. An injunction is a private law remedy, and it can also serve as a public law remedy. However, in the context of judicial review, it is not available either in the High Court or in this Court on appeal under the Law Reform Act.”

The court also stated the above position in the case of **Republic v Cabinet Secretary Lands & another; Orwa Group Ranch Representatives (Interested party) Ex-Parte Patrick Pkiach & 6 others [2019] eKLR**, where the court affirmed that granting of an injunction in judicial review proceedings is tantamount to importing other provisions of the Civil Procedure Rules into Judicial Review proceedings commenced under Order 53.

The ex-parte applicant further invited the court to take into account the provisions of Article 159 of the Constitution in order to serve substantive justice without due regard to procedural technicalities. However, in the case of **Emfil Limited v. The Registrar of Titles Mombasa & 2 Ors (2014) eKLR** and which was cited with approval in **Republic v County Government of Mombasa Exparte Outdoor Advertising Association of Kenya [2018] eKLR** where the court stated:

“Judicial Review proceedings, are proceedings of a sui generis nature subject to its own peculiar rules. While we appreciate Article 159 of the Constitution and the need to apply substantive justice, that article provides no justification for a court to ignore a specific procedure provided by law and deliberately chosen by a litigant, nor does it allow a court to bend backwards to accommodate persons who have deliberately failed to protect or assert their interest.”

Although Article 159 enjoins the court to administer substantial justice without undue regard to procedural technicalities, the said article does not allow parties to totally ignore the rules of procedure that guide the court in administration of justice.

Having considered the preliminary objection and the submissions in support and in opposition, I find that the same has merit and is upheld with the result that the notice of motion is struck out with costs.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF MARCH, 2021

M. A. ODENY

JUDGE