



REPUBLIC OF KENYA



**KENYA LAW**  
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**Shish Vendors & 3 others v Officer Commanding Police Station – Kwale & another;  
Postal Corporation of Ken & another (Interested Parties) (Environment & Land  
Miscellaneous Case E001 of 2024) [2024] KEELC 1192 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1192 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND MISCELLANEOUS CASE E001 OF 2024**

**AE DENA, J**

**MARCH 6, 2024**

**IN THE MATTER OF AN APPLICATION FOR  
ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OR ORDERS ISSUED ON THE 14 TH  
SEPTEMBER 2023 IN KWALE CHIEF MAGISTRATES COURT LANDS CASE NUMBER 77  
OF 2019 BETWEEN SHISH VENDORS LTD AND POSTAL CORPORATION OF KENYA**

**AND**

**IN THE MATTER OF CONSTRUCTIVE EVICTION**

**BETWEEN**

**SHISH VENDORS ..... 1<sup>ST</sup> EXPARTE APPLICANT**

**NGOME MRIZIKI KUHUMBULA T/A KWALE LAND**

**TECHNICIAN ..... 2<sup>ND</sup> EXPARTE APPLICANT**

**FATUMA RASHID KURUMA T/A KWALE GRAPHICS .... 3<sup>RD</sup> EXPARTE  
APPLICANT**

**4. AM IBRAHIM T/A HILL INVESTMENTS ..... 4<sup>TH</sup> EXPARTE APPLICANT**

**AND**

**THE OFFICER COMMANDING POLICE STATION –**

**KWALE ..... 1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**



**AND**

**POSTAL CORPORATION OF KENYA ..... INTERESTED PARTY  
CHIEF MAGISTRATES COURT KWALE LAW COURTS . INTERESTED PARTY**

**RULING**

**The Application**

1. This ruling is the subject of the application dated 5/01/24. The application was filed during the December 2023 vacation and was certified urgent by my brother justice E. Makori who further directed the application be heard interparte before me. In the Chamber Summons the Applicant seeks the following prayers; -
  1. Spent
  2. Thatleave be granted to the Ex-Parte Applicants to apply for an Order Certiorari to bring into the High Court for purposes of quashing the 1<sup>st</sup> Respondent decision to physically barricade the Ex-Parte Applicants leased business premises situated on building developed upon property known as LR. No. 5007/47 Kwale in purported enforcement of Order issued on the 14<sup>th</sup> September 2023 in Kwale Chief Magistrates Court Land Case Number 77 of 2019 between *Shish Vendors Limited versus Postal Corporation of Kenya*.
  3. Thatleave be granted to the Ex-Parte Applicant to apply for an order of prohibition against the 1<sup>st</sup> Respondent from barricading the Ex-Parte Applicants leased business premises situated on building developed upon property known as LR. No. 5007/47 Kwale in purported enforcement of Order issued on the 14<sup>th</sup> September 2023 in Kwale Chief Magistrates Court Land Case Number 77 of 2019 between *Shish Vendors Limited versus Postal Corporation of Kenya*.
  4. Thatthe grant of leave do operate as a stay of the Order dated 14<sup>th</sup> September 2023 issued in Kwale Chief Magistrates Court Land Case Number 77 of 2019 between *Shish Vendors Limited versus Postal Corporation of Kenya* or any action barricading or impeding the Ex-Parte Applicants access into their respective business premises situated within the building developed upon property known as LR. No. 5007/47 Kwale.
  5. Thatcosts be provided for.
2. The application is premised on the grounds enumerated on its face and supported by the Affidavit of Suleiman Jobez Osman the Applicants authorized Managing Director. It is deponed that the Applicant leased from the 1<sup>st</sup> Interested Party LR. No. 5007/47 Kwale (leased property) as per the lease dated 17/10/2017 and developed a commercial building thereon. They retained the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Applicants as tenants including the exparte Applicant (herein Shish Vendors). It is stated that there is been a dispute on the lease pitting Shish Vendors and the 1<sup>st</sup> Interested Party Postal Corporation of Kenya being Kwale Chief Magistrates Court Land Case Number 77 of 2019. A copy of the lease, pictures of the premises and the pleadings were annexed.
3. It is further stated that an interim order was issued exparte in the above proceedings and was challenged interparty and was awaiting the courts determination. That pursuant to the said order on 15/09/23 and which was not an eviction order the 1<sup>st</sup> Respondent went into the premises and chased away patrons



and customers and welded the doors shut. It is further stated that the 1<sup>st</sup> Respondent action renders the proceedings in the magistrate's court to which they have submitted themselves for determination. The 1<sup>st</sup> Respondents actions to barricade the business are not backed by the court orders and are termed extra judicial , excessive, ultra vires and tantamount to a constructive eviction well before the court makes an independent determination of the issues before it. That despite lodging complaints to every relevant administrative office who the applicant felt should have intervened, there was no reprieve thus these proceedings.

### **Responses to the application**

4. The office of the Attorney General came on record on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 19/01/24 and filed grounds of opposition to the Chamber Summons dated 5/01/24 in the following terms; -
  1. The Applicant seeks to appeal the decision of the Chief Magistrates Court without conferring an appeal under the *Civil Procedure Act*.
  2. That the Applicant has redress to seek interpretation of the order of the court by the Chief Magistrate Court but seeks to litigate the same order through a judicial review application.
  3. That the Chamber Summons application is sub-judice since the Chief Magistrate Court is currently seized of an interlocutory application of the inter partes stage in CMCC Land Case Number 77 of 2019 that resulted in the order dated 14<sup>th</sup> September 2023.
  4. That based on the foregoing the chamber summons application is abuse of the court process.
  5. It is prayed that the Chamber summons for leave is denied and dismissed with costs.
  6. The OCS Kwale Police station Chief Inspector Ngata, responded vide a replying affidavit sworn on 30/01/24 and filed on 5/02/24. It is deponed that the application does not disclose a prima facie case to institute judicial review proceedings. That he was under the order of the court to ensure compliance of the court order prescribed under courts seal and which orders were for the preservation of the suit property pending a determination of the ownership dispute. That if there is any ambiguity of the court order and its implementation. It is deponed that the actions of the OCS are in total compliance with the orders of the court and it is in the public interest to protect officers in execution of lawful court orders from costs.
  7. The rest of the parties did not enter appearance despite service.

### **Submissions**

8. The application was argued orally on 13/02/2024 by Mr. Michiri for the Applicants and Mr. Penda Senior State Counsel.

### **Ex-parte Applicants Submissions**

9. Referring to the grounds on the face of the application and depositions in the supporting affidavit to the Chambers Summons herein it was submitted that the closure of the premises went beyond the orders of the Chief Magistrates. It was the unreasonableness of the action of the OCS that is in issue. Counsel referred the court to Misc. Civil Application 443 of 2017 *Samuel Muweru and others vs NLC & others* (2020) eKLR where it was held an administrator ought to be reasonable in the administration; the Court of Appeal in Civil Appeal no. 46 of 2012 *Suchein Investment Ltd Vs Ministry of National*



*Heritage and Culture* –on application of the *Fair Administrative Act* 2015 when quashing a decision of an administration body.

### **1<sup>st</sup> & 2<sup>nd</sup> Respondent Submissions**

10. Referring to the grounds of opposition dated 30/01/2024 and Chief Inspector Ngata’s replying affidavit it was submitted the basis of the application is that the OCS Kwale has gone beyond the orders of the court. A prima facie case must be established by a simple look of the pleadings and not to go into the merits. The orders of the Chief Magistrate required the exact actions or actions that are somehow similar with those undertaken by the OCS Kwale. That the suit property is subject to a dispute between Postal Corporation and it being a business premises for the business to continue would be against the orders. There is no clear prima facie case where there is laid down procedure in a legal or administrative forum that should be followed first. This court’s jurisdiction has invoked when it is clear there’s a pending suit and the order of the court is awaiting another ruling and which hasn’t been exhausted since the lower court has not been invoked for a review of its order. It has not been moved to interpret its orders. That relief is sought for stay of the orders of the Chief Magistrate and the court as being implored to overturn the decision without an appeal before it. Reliance was placed on the holding in *Speaker of National Assembly vs Nyanga Kerome* 19/1992 KCEA 42 KLR on the need for exhaustion of available routes/procedure.
11. It is contended that the prayer for leave to operate as stay is subjudice as it was clear in the Applicants supporting affidavit that there’s a pending ruling.
12. In a brief rejoinder Mr. Muchiri submitted that the supervisory jurisdiction of this court is not ousted by the existence of a pending suit. The remedy sought isn’t available before the subordinate court. That the action of OCS gave rise to malicious damage. The Chief Magistrate order didn’t direct winding of the property. The 1<sup>st</sup> Respondent was duty bound to report back to the Chief Magistrate if it found the Applicant was out of order and not to damage property.

### **Analysis and Determination**

13. The Chamber summons is brought under the provisions of Order 53 Rule 1, 2 and 3 of the *Civil Procedure Rules* which stipulates that;-
  1. No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor 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 deposit, bank guarantee or insurance bond from a reputable institution. [L.N. 22/2020, r. 26.]
  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 inter



partes 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.

14. It is important to note that the application before the court is for leave to file proceedings for the intended orders of certiorari and prohibition. The other limb of the application was for leave to operate as a stay. This is what the court will apply itself on. But first things first why the requirement for leave? This was aptly stated in the case of *Republic v Retirement Benefits Appeals Tribunal & 2 others; Alice Anyona Mumo & 168 others (Ex parte)* (Judicial Review E157 of 2021) [2023] KEHC 766 (KLR) (Judicial Review) (9 February 2023) (Ruling) Neutral citation: [2023] KEHC 766 (KLR) where Njoki Ndungu Judge of the Supreme Court stated; -
  25. The requirement to seek leave is provided for under Order 53 Rule 1 of the Civil Procedure Rules 2010, which stipulates that an Applicant must seek leave to institute judicial review proceedings.
  26. The purpose of this is so as to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the Applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration; to prevent the time of the court being wasted by busy bodies 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 were actually pending even though misconceived.
  27. These reasons for leave were discussed at length in the case of *Republic v County Council of Kwale & amp; Another Ex Parte Kondo & 57 Others*, Mombasa HCMCA No. 384 of 1996.
  28. Leave as was held by the Learned Judge in *R v County Council of Kwale Ex Parte Kondo and 57 Others* (supra) may only be granted if on the material available, the court is of the view that, without going into the matter in depth, the Applicant has an arguable case for the grant of the relief sought.
15. Arising from the dictum of Njoki Ndungu judge of the Supreme Court above is whether the Applicant has an arguable matter. In the present matter the Applicants are seeking to have the 1<sup>st</sup> Respondent decision to physically barricade the business premises herein quashed. It is not in dispute that the said action were pursuant to the enforcement of an order issued on 14/9/2023 which I have read. The Applicants have clearly stated in their supporting affidavit that they do not have a problem with said order. However their contention is in the manner in which it was enforced that is the barricading of the premises. The court has seen the photos of the same. It is the Applicant's case that the order did not direct such barricading and the said action was ultravires.
16. It is clear that this is a matter of interpretation of the orders of 14/9/23. It is now trite that judicial review is about the decision making process. Clearly the root and genesis of the actions of the OCS are the orders issued on 14/9/2023. I say so because the only decision available is the decision as contained in the order. It is this order that requires focus as to its implementation yet the Applicant have no problem with it. The immediate remedy that was available in my view was for the Applicant to move the same court for an interpretation of the said order. Is it being said it was opaque? In addition it is not also in dispute that the application giving rise to the orders herein was heard inter partes before the Chief Magistrate Court where both parties made their submissions which were attached. The matter was awaiting a ruling.



17. Is this then a matter for judicial review? The answer is in the negative. It is clear that this is a matter that is squarely on interpretation of the court order dated 14/9/23. The question whether the 1<sup>st</sup> Respondent acted ultra vires best lies in the said interpretation. For the foregoing reasons I also don't think there is an arguable case for the consideration of this court to warrant the issue of the leave to file the substantive Notice of Motion.
18. Having made the above finding I do not see the necessity to delve into the issue of whether leave should operate as a stay.
19. The upshot of the foregoing is that the Chamber Summons application dated 5/01/24 is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

It is so ordered.

**RULING DATED, AND DELIVERED THIS 6<sup>TH</sup> DAY OF MARCH 2024.**

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**A.E DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

Mr. Muchiri for the Applicants

No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

No appearance for the Interested parties

Mr. Disii – Court Assistant

