



**Musyoka v Chief Magistrate, Machakos Law Courts & another;
Kung'u (Interested Party) (Environment and Land Judicial Review
Case E003 of 2023) [2024] KEELC 4431 (KLR) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4431 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E003 OF 2023
CA OCHIENG, J
JUNE 3, 2024**

BETWEEN

RICHARD MULWA MUSYOKA APPLICANT

AND

THE CHIEF MAGISTRATE, MACHAKOS LAW COURTS 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

AND

FAITH MELI KUNG'U INTERESTED PARTY

RULING

1. What is before Court for determination is the Applicant's Chamber Summons Application dated the 11th October, 2023 where he seeks the following Orders:-
 - a. That this Honourable Court be pleased to grant leave to the ex parte applicant herein to bring in/file a substantive Notice of Motion for the superior orders of judicial review in the nature of prohibition and certiorari directed upon the 1st Respondent her - in prohibiting the said Respondent from taking any further proceedings in his case No. ELC 1142 of 2013 AND the said Respondent be directed to bring forth before this court his case file No. ELC 1142 of 2013 for purposes of having all orders and proceedings made therein quashed.
 - b. That such leave as may issues do operate as a stay of all the proceedings in the aforesaid case.
 - c. That costs be provided for.
2. The Application is premised on the Statement of Facts and Affidavit. He explains that the Interested Party instituted Machakos CMCCC No. 1142 of 2013 Faith Meli Kungu v Richard Mulwa Musyoka



- wherein he appointed the firm of messrs J.M. Mutinda & Company Advocates to act for him. He avers that, before the matter was heard, the proprietor of messrs J. M. Mutinda & Company Advocates died. Further, when he visited the said offices, the wife of the deceased advised him that a new firm in collaboration with the Law Society of Kenya was in the process of being assigned his brief.
3. He claims a Mr. J. M. Tamata came on record to represent him but he did not know him. Further, that on 27th October, 2014, another law firm of R. M. Matata & Company Advocates had come on record for him but only met the proprietor on 20th September, 2023. He contends that, upon visiting the firm of messrs R. M. Matata & Company Advocates, Mr. Matata denied having his file. Further, there are allegations of service upon his advocates, as per the Affidavits of Service in the court file, but the said Advocates deny service. He reiterates that, at one point the trial court found itself lacking jurisdiction and dismissed the suit and he is not sure how the same was reinstated. He insists that the proceedings and all orders issued in the lower court were a sham and obtained by way of a fraud.
 4. The Interested Party opposed the instant Application and filed a Replying Affidavit where she confirms instituting the lower court case against the Ex parte Applicant. She avers that the Ex parte Applicant was duly served and appointed an advocate who entered appearance and filed a defence on his behalf. She highlights the proceedings in the lower court and how the suit had been dismissed for want of prosecution but later reinstated, after she had filed an Application dated the 29th March, 2023, which was unopposed. She states that the lower court suit was set down for hearing on 18th July, 2023, on which date, the Ex parte Applicant attended court and informed it that he intended to file an important Application and he was granted leave to do so.
 5. She contends that on 20th September, 2023, the Ex parte Applicant was granted an opportunity to defend the suit but he refused to testify and this culminated in his case being closed. She reiterates that the instant Application is made in bad faith. Further, the Ex parte Applicant has not advanced tangible reasons why he seeks leave to file Judicial Review and why the lower court proceedings should be quashed. She reaffirms that the instant Application is an afterthought and aimed at ensuring that the primary suit is not heard to conclusion.
 6. The Ex parte Applicant filed a Further Affidavit without leave of court wherein he reiterated his averments.
 7. The Application was canvassed by way of written submissions.

Analysis and Determination

8. I have considered the Chamber Summons Application dated the 11th October, 2023 including the respective Affidavits, Statement, Annexures and the only issue for determination is whether the ex parte Applicant is entitled to leave to commence Judicial Review proceedings in the nature of prohibition and certiorari directed upon the 1st Respondent to quash any further proceedings in Machakos ELC 1142 of 2013 and leave so granted, to operate as a stay of the proceedings.
9. On commencement of Judicial Review, order 53 rule 1 of the [Civil Procedure Rules](#) stipulates inter alia: -
 - “(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 as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and



description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

- (3) The judge may, in granting leave, 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.
- (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.”

10. In the current scenario, the Ex parte Applicant seeks leave to commence Judicial Review in the nature of prohibition and certiorari directed upon the 1st Respondent, prohibiting her from taking any further proceedings in his case being Machakos CM ELC No. 1142 of 2013. Further, that the 1st Respondent be directed to bring forth before this court, the said court file, for purposes of having all orders and proceedings made therein quashed.

11. On Judicial Review, Lord Diplock in the case of *Council for Civil Service Unions v Minister for Civil Service* [1985] AC 374, at 401D set the standards of Judicial Review and stated that:-

“Judicial Review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’ ...By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’...it applies to a decision which is so outrageous in its 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...I have described the third head as ‘procedural impropriety’ rather than 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.”

12. Further, in the case of the *Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo* [2015] eKLR, it was held that:-

“It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine 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.”

13. See also the case of Nairobi Civil Appeal 185 of 2001 *Municipal Council of Mombasa v Republic* (2002) eKLR.



14. It is trite that Judicial Review challenges the administrative action of a person in position of authority. Further, it seeks to demonstrate that the actions of the person in authority was ultra vires, irrational, improper and violated the rules of Natural Justice. From the averments in the respective Affidavits including documents presented, I note the Interested Party had instituted Machakos CMCCC No. 1142 of 2013 Faith Meli Kungu v Richard Mulwa Musyoka against the Ex parte Applicant.
15. Further, the Ex parte Applicant hired an advocate who entered appearance and filed a Defence on his behalf. He participated in part of the proceedings but declined to participate in the Defence case. The Ex parte Applicant claims he never hired the advocates acting for him, the court did not have jurisdiction to handle the lower court matter and he did not understand how the said lower court matter had been reinstated, after having been dismissed for want of prosecution. However, since he was participating in the proceedings, he does not indicate why he did not file a Notice to Act in person if he did not want his advocates.
16. Based on the facts as presented including associating myself with the decisions cited above, I find that the Ex parte Applicant has not demonstrated how the 1st Respondent acted irrationally and ultra vires her powers, culminating in his seeking to quash all the lower court proceedings. In my view, the issues raised by the Ex parte Applicant especially the proceedings in the lower court, service of court documents, legal representation and reinstatement of a suit are governed by the [*Civil Procedure Rules*](#) and do not fall within the ambit of Judicial Review. I opine that the 1st Respondent cannot be blamed, for undertaking her mandate as espoused in the Magistrate's Courts' Act, while dealing with the aforementioned matter. To my mind, if the Ex parte Applicant was aggrieved with any decision of the trial Magistrate, he had a recourse to Appeal or apply for review of the impugned decision.
17. In the foregoing, I find that the Ex parte Applicant is hence not entitled to leave as sought. In the circumstances, I find the Notice of Motion Application dated the 11th October, 2023 unmerited and will dismiss it, but make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 3RD DAY OF JUNE, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Kuria holding brief for Mumo for Respondent

Ms. Mbilo for Interested Party

Court Assistant – Simon/Ashley

