



Republic v Attorney General & another; Kathenge & 3 others (Interested Parties); Kamusina (Exparte Applicant) (Environment and Land Judicial Review Case E002 of 2022) [2023] KEELC 16236 (KLR) (14 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16236 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2022**

LG KIMANI, J

MARCH 14, 2023

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR AN ORDER OF CERTIORARI, PROHIBITION AND MANDAMUS AND IN THE MATTER OF CIVIL SUIT NUMBER 67 OF 2019 IN THE CHIEF MAGISTRATE’S COURT AT KITUI CONSENT ORDER RECORDED ON 2ND DECEMBER 2021 AND ISSUED ON 9.12.2022 AND IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA AND ORDERS OF THE CIVIL PROCEDURE RULES 2010 AND IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015 SECTIONS 7,8,9,10,11 AND 12 IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

BETWEEN

REPUBLIC APPLICANT

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

THE HONOURABLE CHIEF MAGISTRATE KITUI LAW COURTS 2ND RESPONDENT

AND

STANLEY MBOLE KATHENGE INTERESTED PARTY

AGNES SYONGAA KAMUSINA INTERESTED PARTY

NZOMO KAMUSINA INTERESTED PARTY

STEPHEN WAMBUA MUSYA INTERESTED PARTY

AND

MUSYOKA KAMUSINA EXPARTE APPLICANT



JUDGMENT

1. The *ex parte* applicant filed the notice of motion dated February 28, 2022 seeking for the following orders:
 - a. An order of mandamus directed to stop the 2nd respondent, 1st interested party, agents, employees from proceeding in executing, implementing the consent orders recorded on December 2, 2021 and issued on December 9, 2021 in Civil Case No 67 of 2019 transferring, effecting registration restraining the *Ex parte* Applicant in respect of Plot Parcel No 15 Mosa registered with the County Government of Kitui.
 - b. An order of prohibition directed against the respondents from enforcing the decree orders arising from consent order dated December 2, 2021 and issued on December 9, 2021 in Civil Case No 67 of 2019 made by the 2nd respondent.
 - c. An order of certiorari to remove and/or bring to this honourable court and to quash proceedings of the 2nd respondent in Civil Case No 67 of 2019 in respect to the Consent Order recorded on December 2, 2021 and issued on December 9, 2021 between Stanley Mbole Kathenge versus Agnes Syongaa Kamusina, Nzomo Kamusina, Stephen Wambua Musya, Thangu Kamusina & Musembi Musya.
 - d. That the cost of this application is awarded to the *ex parte* applicant.
2. The application is supported by a statement of facts, verifying affidavit, supplementary affidavit and written submissions. The respondents have filed grounds of objection while the 1st and 2nd interested parties filed separate replying affidavits and written submissions.

Brief background

3. A brief background to the case is that the 1st interested party filed Chief Magistrates Civil Case No 67 of 2019 against the 2nd, 3rd, 4th and 5th Interested Parties and another party for recovery of Kshs 972, 000 a debt arising out of the sale to him of plot number 15 Mosa market within Kitui County. From the court proceedings the *ex parte* applicant was not a party to the said suit. judgment was entered against the defendants in the said suit and execution proceedings commenced.
4. That the execution proceedings were compromised by way of an order by consent recorded on December 2, 2021 and issued on December 9, 2021. It is necessary to set out the said consent order in full;
 1. That the defendants don't dispute that the Plaintiff purchased plot number 15 within Mosa market belonging to Musya Mutua (deceased) at a sum of Kenya Shillings Nine Hundred Thousand (Kshs 900,000/-) on May 20, 2019.
 2. That since the said date the plot has never been transferred to the Plaintiff neither has been able to access the said plot the subject of this suit.
 3. That an order do and is hereby issued to the defendants to hand over the said plot with immediate effect beginning the December 2, 2021.
 4. That the 1st defendant be and is hereby allowed to file for letters of administration in order to transfer ownership of plot No 15 Mosa Market to the plaintiff.



5. That this decision has been reached since there are other parcels of land that have to be distributed to the other legal beneficiaries.
 6. That an order do and is hereby issued to the area chief Kitungute Location to issue a letter to the beneficiaries to enable them file a succession cause.
 7. That an order do and is hereby issued to the defendant to allow the plaintiff access the said plot the subject matter of this suit.
 8. That an order do and hereby issued to refrain one Musyoka Musya from interfering with the said plot the subject of this suit in any way or denying the plaintiff access to the said plot subject of this suit.
 9. That an order do and is hereby issued directing one Musyoka Musya to remove all the restraints denying the Plaintiff access to the said plot the subject of this suit.
 10. That this consent has been executed voluntarily without any undue influence and as such should be adopted as an order of this Honorable court.
5. Arising from the above consent order, the *ex parte* filed the notice of motion herein dated February 28, 2022 seeking orders of mandamus, certiorari and prohibition. The *ex parte* applicant had previously filed an application before the Chief Magistrates Court by way of Notice of Motion dated December 8, 2021 seeking orders to be joined as a party in the said suit, stay of execution of the consent orders and setting aside of the said consent orders and the said application is pending hearing and final determination having been stayed by an order of this court.
 6. There also exists a Succession Cause No 89 of 2019 (in the matter of the estate of Musya Mutua (deceased)) in which the *ex parte* Applicant is the Administrator and a Certificate for Confirmation of grant was issued on November 16, 2020 awarding the suit plot to him in whole. The 2nd Interested Party filed an application in the succession cause dated December 16, 2021 which seeks to preserve the estate and to prevent the *ex parte* applicant from disposing of properties of the estate. The applicant further seeks revocation and/or rectification of the grant issued to the *ex parte* applicant.
 7. The *Ex parte* Applicant claims that the suit property Land Parcel No 15 Mosa Market in Kitui is his property as an administrator of the Estate of the late Musya Mutua (Deceased). That he was not a party to the sale of the suit property to the 1st interested party by the 2nd to 5th interested parties and was not made a party to the suit and consent order entered before the 2nd Respondent.
 8. The *ex parte* applicant claims that he was not given an opportunity to be heard in contravention of rules of natural justice. He further states that the 1st Respondent illegally and unprocedurally turned the suit before him from a debt recovery claim to a suit under the Environment and land court and ordered his property to be transferred. He states that the process that led to the decision of the 2nd Respondent was flawed, tainted by illegality and that he was denied his legal right to be heard despite him being the administrator in succession cause 89 of 2019.
 9. According to the *ex parte* applicant, the 2nd respondent overstepped his mandate by holding that the plot No 5 Mosa Market herein was subject to litigation and in directing that the same be transferred to the 1st Interested Party.

Ex-parte applicant's written submissions

10. Counsel for the *Ex parte* Applicant reiterated the contents of his statement of facts and verifying affidavit as summarized above and submitted that the case emanates from Chief Magistrate's ELC No



67 of 2019 which was between the 1st interested party against the 2nd, 3rd, 4th and 5th interested party with the subject matter being Land Parcel Plot No 15 Mosa Market. He stated that the plot was in his hands yet he was not cited as a party to the suit thus denying him an opportunity to be heard.

11. Further, he submits that the Civil Case 67 of 2019 changed to ELC 67 of 2019 without any reason being advanced by the 2nd Respondent, which action the ex-parte applicant claims is tainted with illegality, irrationality and procedural impropriety. He also contends that the suit before the 2nd Respondent was for the refund of Ksh.972, 000 and not for the transfer of the property No 15 Mosa Market as was finally agreed upon by the Court and that the change was calculated to deprive the applicant of his interest in Plot.
12. The *Ex parte* Applicant submits that the 2nd Respondent acted in excess of powers and was in breach of natural justice. Counsel relied on the authorities of: Judicial Review No 43 of 2018 [*Republic v Fire Arms Licensing Board Attorney General*](#) (High Court of Kenya at Nairobi), Miscellaneous No 3 of 2021 [*Republic v Parliamentary Service Commission*](#) and [*Kenya National Examination Council vs Republic*](#) Civil Appeal 266 of 1996.
13. It is the ex parte applicant's submission that the courts are bound to render decisions according to the principles of the [*Constitution*](#) and that Judicial review is a relief provided for in Article 23(3), Section 8 of the [*Law Reform Act*](#) and Section 13(7) of the [*Environment and Land Court Act*](#) 2011. He also relied on Section 7 of the [*Fair Administrative Action Act 2015*](#). He also urged the court to find that there was an error in making of the decision and that the 2nd Respondent Court was in blatant disregard of the law when it condemned the ex-parte applicant unheard.

The respondent's case

14. The Respondents filed Grounds of Opposition dated March 23, 2022 opposing the Judicial Review Application on grounds:
 1. That the application herein is unmerited, misconceived, vexatious, bad in law and therefore an abuse of the processes of the court.
 2. That the application herein is intended to curtail the statutory functions and powers of the 2nd Respondent herein.
 3. That the *Ex parte* Applicant in essence, seeks That this Honourable Court directs a Public Officer to exercise or not to exercise his/her statutory discretion in a particular manner hence usurp the said officer's authority.
 4. That the Application as presented offends the provisions of Article 160(1) of [*the Constitution of Kenya, 2010*](#) and Section 6 of the [*Judicature Act*](#) Cap 8 Laws of Kenya.
 5. That the Applicant has not shown how the said order by the Honourable Chief Magistrate at Kitui Law Courts has been tainted by illegality and procedural impropriety.
 6. That in the circumstances and based on the foregoing reasons, the Notice of Motion Application dated February 28, 2022 is therefore devoid of any merit and the orders sought should not be granted.
 7. That the Applicant has not demonstrated sufficient cause for grounds upon which the court can grant the orders sought.
 8. The application is an abuse of the court process.



The respondents' written submissions

15. State Counsel for the Respondent submitted on whether the decision from the 2nd Respondent was irrational, illegal and tainted with procedural impropriety and stated that the decision was based on the facts presented to the 2nd Respondent by the parties since we are in an adversarial system. Their submission therefore is that the Applicant alleging that he was not given an opportunity to participate in Civil suit 67 of 2019 is not the 2nd Respondent's fault and that if the Applicant wanted to participate in the suit he could have done so through an application.
16. The Respondent's case is that the 2nd Respondent had the requisite jurisdiction to deal with the case before the court; he did not overstep his mandate and was only exercising his judicial authority.
17. The Respondent submitted that there was no procedural impropriety and he relied on the case of *Council of Civil Service Union v Minister for Civil Service* stating that the impugned decision was made after the due process of conducting a suit was followed and that the parties were afforded an opportunity to participate as stipulated by the law.
18. It is therefore their submission that the ex-parte applicant has not shown how the 2nd Respondent acted ultra vires, in excess or without jurisdiction and how the decision has been marred with irreparability, impropriety and irregularity.
19. State counsel submitted that the grounds within which the application is premised are on contested facts which are not amenable to a judicial review application. They relied on the case of *Republic vs Judicial Service Commission Ex parte Pareno* (2007) 1KLR where the court held that a judicial review court cannot assume appellate jurisdiction. It is their submission that the suit raises issues on the merits of the decisions of the respondents on which an appellate court can deal with. They relied on the case of *Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd* Civil Appeal No 185 of 2001.

The 1st Interested Parties' Case

20. The 1st Interested Party filed a Replying Affidavit in response to the Judicial Review Application. He stated that the suit in the lower court involved the 2nd, 3rd, 4th and 5th Interested Parties who were defendants as well as one Musembi Musya, the elder brother to the Ex-parte Applicant whose omission as an Interested Party he states was intentional since he was a party to all the proceedings that led to the filing of this Application.
21. He stated that the consent order was recorded by the parties without any undue influence and that the *Ex parte* Applicant has challenged the consent order in the Lower Court and the same is pending hearing. According to the 1st Interested Party, the Ex- parte Applicant fooled all the family members and appointed himself as sole administrator to all the estate of the deceased using his finances as evidenced by the Certificate of Confirmation of Grant dated July 28, 2020 despite his mother, who is the 1st wife to the deceased being alive.
22. The 1st Interested Party also contends that all the family members were involved in the sale of Plot No 15 Mosa Market and did so without any undue influence. Further, that at the time of consenting to have him occupy the suit property, the 2nd, 3rd, 4th, 5th interested parties and Musembi Musya did not know that the *Ex parte* Applicant had appointed himself as the sole administrator to all the properties of the deceased contrary to the *Law of Succession Act* and Probate and Administration Rules.



23. It is the 1st Interested Party's averment that he is the legal and/or beneficial owner of the suit property Plot No 15 Mosa Market and that he has been granted occupation and possession by the 2nd Interested Party.
24. Apart from the *Ex parte* Applicant filing an application to set aside the court order in the lower court the 1st interested party states that there is a Summons for Revocation/Rectification of Grant by the 2nd Interested Party challenging the *Ex parte* Applicant's grant that is pending in Chief Magistrate's Succession Cause No 89 of 2019.

The 1st Interested Party's written submissions

25. Counsel for the 1st Interested Party submitted that judicial review is concerned with the decision-making process rather than the merits of the decision and that this application offends this rule. They relied on the decision in *Municipal Council of Mombasa vs Republic and Another* (2002) eKLR. Counsel relied on the holding in the case of *Bellevue Development Company Ltd v Francis Gikonyo & 3 others* (2020) eKLR where the court was of the view that one should appeal or seek a review instead of suing a Judge or judicial officer for rendering an unfavorable decision. The 1st interested party therefore submits that the *Ex parte* Applicant's Notice of Motion Application is bad in law, incompetent, devoid of any merit and does not disclose any reasonable cause of action and the same dismissed with costs.

2nd interested party's case

26. Agnes Syongaa Kamusina, the 2nd Respondent deposed that she is the widow of Kamusina Mutua whose estate is the subject of these proceedings. She listed all the properties in the estate and all the family members comprised of two households, where the other wife's name is Mulekye Kamusina (deceased), the mother of the *Ex parte* Applicant herein.
27. According to the 2nd Interested Party, the members of the two households mutually and unanimously agreed to dispose of the commercial plot 15 Mosa Market in order to have sufficient funds for filing of a succession cause. They entered into an agreement of sale with the 1st Interested Party, Stanley Mbole Kathonge at a purchase price of Ksh 900,000.00 They were later sued by him for failure to have the ownership of the plot transferred to him. She also stated that the ex-parte applicant has filed an application for joinder to the suit pending before the Chief Magistrates Court suit No 67 of 2019.
28. The 2nd Interested Party deposed that she later came to learn that the ex parte applicant had instituted Succession cause 89 of 2019 and she filed summons for revocation of grant. She stated that the *ex parte* applicant ought not to institute the proceedings herein while the proceedings in the subordinate court are still pending and stated that this application ought to be dismissed with costs.

Analysis and determination

29. I have considered the Notice of Motion herein and all the supporting documents. I have also considered all the pleadings filed in opposition and submissions filed by all Counsel and the legal authorities cited. I opine that the issue that arises for determination is whether the Ex-parte Applicant is entitled to the judicial review orders sought.
30. From perusing the proceedings before the 2nd Respondent in Chief Magistrate's Court at Kitui Civil suit Number 67 of 2019, the 1st interested party filed the said suit for recovery of Kshs 972,000 from the 2nd, 3rd, 4th and 5th interested parties jointly with another by the name of Musembi Musya. The defendants in that suit did not enter appearance and judgement in default of appearance was entered on November 26, 2019. Execution of the decree commenced and the Judgement/debtors were committed



to civil jail for failure to pay the decretal sum, costs and interest. Negotiations took place between the parties and finally the impugned consent order was entered into on December 2, 2021. The specific terms of the consent have been set out above and the parties agreed inter alia that the Defendants to hand over the said plot with immediate effect beginning the December 2, 2021 and he be given access, the Defendant were allowed to file for letters of Administration in order to transfer ownership of plot No 15 Mosa Market to the Plaintiff. Further, an order was issued refraining one Musyoka Musya (*ex parte* applicant herein) from interfering with the said plot and directed him t to remove all the restraints denying the Plaintiff access to the said plot the subject of this suit.

31. It is noted that the *ex parte* applicant does not object to the suit as initially filed for recovery of money. He objects to the consent orders issued as part of the process of execution of the decree and the specific orders issued.

32. Section 30 of the [Civil Procedure Act](#) provides for execution of decrees and the Court by which decree may be executed and states;

“A decree may be executed either by the court which passed it or by the court to which it is sent for execution.”

33. The Chief Magistrates Court is the one that passed the decree in CMCC No 67 of 2019 and the said court has the power to issue orders in execution of the same. Section 34 of the [Civil Procedure Act](#) provides for situations where issues arise out of orders made during the process of execution of a decree and states;

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

34. Further Order 22 Rule 51 to 54 of the [Civil Procedure Rules](#) provide for the procedure to be followed where there is objection to attachment and states;

(1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.

2. Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.

3. Such notice of objection and application shall be served within seven days from the date of filing on all the parties.

52. Stay of execution [Order 22, rule 52.]



Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.

53. Raising of attachment [Order 22, rule 53.]

Should the attaching creditor in pursuance of a notice issued under rule 52 either fail to reply to the court and the objector within the period prescribed by the notice or intimate in writing to the court and the objector within the period prescribed by such notice that he does not propose to proceed with the execution of the attachment of the whole or of a portion of the property subject to the attachment, the court shall make an order raising the attachment as to the whole or a portion of the property subject to the attachment in accordance with the intimation received from the attaching creditor and shall make such order as to costs as it shall deem fit.

54. Notice of intention to proceed [Order 22, rule 54.]

If the attaching creditor proposes to proceed with the attachment pursuant to rule 52, the intimation shall be accompanied by a replying affidavit and the court shall proceed to hear the application expeditiously.

35. From the foregoing provisions of the [Civil Procedure Act](#), in particular Section 30 and 34 and the Rules 51, 52, 53 & 54 of the [Civil Procedure Rules](#) the court that has power to deal with all issues relating to execution of a decree is the court that passed the said decree and the procedure to be followed has been provided for. Indeed, the *Ex parte* applicant did file an application dated December 8, 2021 challenging the process of execution and the orders made and the same is pending hearing and final determination. It is not clear why the ex parte applicant failed to pursue the said application to conclusion and instead filed the present application while the one before the Chief Magistrates was still pending. In my view it was mischievous and borders on abuse of the process of the court to have filed the present application before the application pending before the Chief Magistrates court was heard and determined.

36. It is further noted that an application dated December 16, 2021 was filed by the 2nd interested party, Agnes Syonaa Kamusina in succession cause number 89 of 2019, In the Matter of the estate of Musya Mutua seeking inter alia revocation and/or rectification of the grant issued to the ex parte applicant Musyoka Kamusina. In my view this is another process that is provided under the [Law of Succession Act](#) cap 160 which must be followed to exhaustion in order that the rights of the parties hereto are determined before they can come to this court for judicial review. The ex-parte applicant contends that joinder to CMCC 67 of 2019 at this stage of execution is of no consequence. However, the doctrine of exhaustion of remedies has been considered in Kenyan courts and found to be sound. It was most felicitously stated by the Court of Appeal in [Speaker of the National Assembly v James Njenga Karume](#) [1992] eKLR where it was explained in the following words: -

“Where there is a clear procedure for redress of any particular grievance prescribed by [the Constitution](#) or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”



37. Further the *Fair Administrative Actions Act* No 4 of 2015 provides as follows at Section 9(2), (3) and (4) in relation to exhaustion of alternative remedies:

“(2). The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

38. From the foregoing, the Ex-parte Applicant has the option of pursuing the application to set aside the impugned order and further to have the dispute over the plot determined in the succession cause among other available options. The court of appeal in the case of *Market Plaza Limited v Commissioner for Lands & 3 others* [2019] eKLR held as follows:

“We agree with the learned Judge that orders for judicial review ought to be sought as a last resort and only where there are exceptional circumstances. This Court, in setting out the criteria for determining such exceptional circumstances in *Republic v National Environmental Management Authority* [2011] eKLR held:-

“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in, the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.....We find that the circumstances of this case were not exceptional such as to render a finding that judicial review was the most efficacious remedy. The real issue for determination by the Superior court was whether the registrar had acted ultra vires by invalidating the appellant’s title via Gazette Notice. As to the orders sought, that was entirely up to the court’s discretion to determine as to whether or not they will be granted.”

39. Further, the Court of Appeal in *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* [2015] eKLR, stated that:

It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The ex



parte applicants argue that this accords with Article 159 of the constitution which commands courts to encourage alternative means of dispute resolution.”

40. In this particular case the suit subject matter of these proceedings is before Chief Magistrates Court and even though that is not a mechanism outside the court system, in my view the exhaustion theory is applicable and it is imperative for parties to exhaust the available mechanism before resorting to this court for orders of judicial review.
41. I therefore find that the Notice of Motion dated December 28, 2021 lacks merit and the same is hereby dismissed with costs to the Respondents and interested parties.

DATED, SIGNED AND DELIVERED AT KITUI THIS 14TH DAY OF MARCH, 2023.

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

In the presence of:

C/A Musyoki

K. Musyoki together with A. Mwendwa for the 1st interested party

K. Musyoki for 2nd, 3rd and 4th interested parties

Kariuki for Mbaluka for ex parte applicant

