Watamu Baada Ya Kazi Limited & another v Guido Burton t/a Garoda Resort Watamu & 2 others (Judicial Review Application 9 of 2022) [2023] KEELC 18552 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18552 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

JUDICIAL REVIEW APPLICATION 9 OF 2022

MAO ODENY, J

JULY 6, 2023

IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDERS OF CERTIORI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT, LAW REFORM ACT, JUDICATURE ACT, THE CONSTITUTION OF KENYA AND ALL OTHER LAWS

AND

IN THE MATTER OF EX-PARTE CONTEMPT ORDER GIVEN ON 27.9.2022 IN MALINDI CMC LAND CASE NO. 24/2022

BETWEEN

WATAMU BAADA YA KAZI LIMITED ..... 1ST APPLICANT

SHAMSIA PEEVERS ..... 2ND APPLICANT

AND

GUIDO BURTON T/A GARODA RESORT WATAMU ..... 1ST RESPONDENT

MOHAMMED HUSSEIN ..... 2ND RESPONDENT

ABUKHADIJA OBO ..... 3RD RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion dated 24th October 2022 by the Applicant seeking the following orders: -

    1. That orders of declaration that the Respondent's ex-parte order or decision by the Respondent (Honourable E.K Usui) issued on 3rd October 2022 in Malindi, CMC Land Case no 24/2022 is *ultra vires* jurisdiction of the court, unlawful, illegal, unreasonable, biased, violates natural

justice, the rule of law, the right to fair administrative action, fair hearing, section 5 of the *Judicature Act*, Section 4 and 5 of the *Fair Administrative Action Act* and Articles 25(b), 27 (1) and (2), 47, and 50 (1) and (2) of the *Constitution* of Kenya.

2. That orders of certiorari to call, remove, deliver up to this Honourable court and quash the ex-parte order by the Respondent issued on 3rd October 2022 (Honourable E.K Usui) in Malindi, CMC Land Case no 24/2022 directing that summons be and are hereby issued against the 1st Applicant's director one Shamsia Peevers to attend Court to show cause why she should not be committed to civil jail for a term not exceeding 6 months for disobeying and or breaching an order of the said subordinate court order given on 22/06/2022.

3. That orders or prohibition to restrain the Respondent (Honourable E.K Usui) executing or enforcing the *ex-parte* order issued on 3rd October 2022 together with any consequential contempt proceedings arising therefrom or any such contempt proceedings premised upon the subordinate court order given on 22/06/2022 in Malindi, CMC Land Case no 24/2022.

4. That this Honourable Court do grant any such other or further relief that it may deem fit to grant.

5. That the costs of this application be provided for.

2. The Applicant relied on the Supporting Affidavit sworn on 25th October 2022 by the 2nd Applicant, a copy of statutory statement and verifying affidavit both dated 4th October 2022.

3. Briefly, the genesis of this matter is an order to maintain *status quo* issued by the Honourable Chief Magistrate E.K Usui on 22nd June 2022 in Malindi CMC Land Case no 24 of 2022. The dispute was between the 1st Applicant and the Respondents herein. On 28th September 2022, the Respondents then served the Applicants with an application dated 21st September 2022 seeking orders to cite the 2nd Applicant, who is also a director of the 1st Applicant, in contempt of the orders issued on 22nd June 2022.

4. On 3rd October 2022, the Applicants were served with an ex-parte order issued on the same date which indicated that the Respondents' application be heard on 5th October 2022 and summons be issued against the 2nd Applicant to show cause why she should not be committed to civil jail for a term not exceeding 6 months. The order prompted the filing of this application by the applicant. Applicants to file the present application.

5. According to the Applicants, the Honourable Chief Magistrate acted without jurisdiction on the grounds that statutes reserve exclusive jurisdiction to this court to punish for contempt. That the orders violate the rules of natural justice by condemning the 2nd Applicant unheard thus limiting her right to fair hearing.

6. The 1st Respondent opposed the application *vide* a Replying Affidavit dated 30th November 2022 where he deponed that the application was legally defective and an abuse of the court process. It was his evidence that they filed the application for contempt since the Applicants continued to construct a perimeter wall on the suit premises despite the court order to maintain status quo. He added that the present proceedings were premature and that the Applicants ought to have filed an appeal or review of the subordinate court's orders.

Applicant's Submissions

7. Quoting Article 159 of the *Constitution* of Kenya, counsel submitted that the impugned orders did not serve the interest of justice as they contradicted the pleadings on record as the Respondents had

averred at the lower court that they had no interest over the Applicants' dealings on the suit premises and therefore, the subordinate court's orders served a different purpose contrary to the principles of administration of justice.

8. Counsel relied on the case of *Republic v Vice Chancellor Jomo Kenyatta University of Agriculture and Technology* [2008] eKLR on Judicial Review remedies and further submitted that by issuing orders that contradicted pleadings, and without giving the Applicants an opportunity to be heard, the Honourable Magistrate acted in violation of Article 25 and 47 of the *Constitution* of Kenya.

9. Counsel relied on the cases of *Robert Mutiso Lelli and Cabin Crew Investments Limited v NLC and 3 others* [2017] eKLR; and *Sceneries Limited v National Land Commission* [2017] eKLR and urged the court to allow the application as prayed.

10. The Respondents did not file any submissions to this application.

Analysis and Determination

11. The Court of Appeal in *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR set out the scope for granting orders of judicial review as follows: -

> "...That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition of [sic] certiorari. These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury's Law Of England, 4th Edition, vol 1 at pg37 paragraph 128. ...
>
> Only an order of Certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

12. It was the Applicants case that the Honorable Magistrate had no jurisdiction to entertain an application for contempt as the same is only a reserve of this court. This argument is flawed as the *Magistrates' Courts Act*, 2015 which came into force on 2nd January 2016 now gives the Magistrates' Courts unlimited jurisdiction to punish for contempt. Section 10 of the said Act specifically provides: -

    (1) Subject to the provisions of any other law, the Court shall have power to punish for contempt.

    (2) A person who, in the face of the Court-

        a. Assaults, threatens, intimidates, or insults a magistrate, court administrator, judicial officer, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court;

        b. Interrupts or obstructs the proceedings of the Court; or

        c. Without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence

(3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.

13. A plain reading of the above provisions leaves no doubt that the Honorable Chief Magistrate acted well within her jurisdiction to entertain the application ex-parte at the first instance. I understand the Applicants' argument to mean that the 2nd Applicant was condemned unheard as the application for contempt is yet to be heard inter-partes.

14. The impugned orders served upon the Applicants stated that the 2nd Applicant was to attend court on the scheduled hearing date to give reasons why she should not be punished for contempt. The issues raise in this application by the Applicants should have been raised at the hearing of the Respondents' application in the lower court.

15. It is also trite that judicial review is only concerned with the process of making a decision as opposed to the merits thereof. The Court of Appeal in *Municipal Council of Mombasa v Republic, Umoja Consultants Ltd*, Nairobi Civil Appeal no 185 of 2007[2002] eKLR held that :-

> " The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review".

16. Looking at the application at a glance you will definitely note that this application is not a judicial review application as it is complaining about the merits of the Chief Magistrates' decision and not the process of arriving at the decision.

17. Having failed to demonstrate to this Court that the Learned Chief Magistrate acted in excess of her jurisdiction and contrary to the rules of natural justice and fair administration of justice, I find that the application lacks merit and is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF JULY 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order no 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.