



Republic & 18 others v Attorney General of Kenya & 6 others; Mbaluto & 2 others (Interested Parties); Maithia & 17 others (Exparte) (Judicial Review Application E008 of 2020) [2022] KEELC 2485 (KLR) (4 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2485 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
JUDICIAL REVIEW APPLICATION E008 OF 2020**

A NYUKURI, J

MAY 4, 2022

IN THE MATTER OF ARTICLES 64 AS READ TOGETHER WITH ARTICLE 20, 21, 22, 23, 43, 47 & 50 OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF ARTICLE 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR), ARTICLE 11 OF THE INTERNATIONAL CONVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR), ARTICLE 17 OF THE INTERNATIONAL COVENANT ON POLITICAL AND CIVIL RIGHTS AND ARTICLE 18 OF THE AFRICAN CHARTER OF HUMAN AND PEOPLE RIGHTS (ACHPR) AS APPLIED IN KENYA UNDER ARTICLES 2(5) & (6) OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES 2013, RULE 3,4,5,9 AND 10 AND IN THE MATTER OF S.8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA AND IN THE MATTER OF SECTION 7&8 OF THE FAIR ADMINISTRATIVE ACTIONS ACT 2015 AND JR.NO. 008 OF 2020 – JUDGMENT¹ IN THE MATTER OF THE CONSTITUTION AND THE RIGHTS OF OWNERSHIP TO PROPERTY AS ENSHRINED IN THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC & 18 OTHERS APPLICANT

AND

ATTORNEY GENERAL OF KENYA 1ST RESPONDENT

COUNTY COMMISSIONER MACHAKOS COUNTY 2ND RESPONDENT

COUNTY COMMANDER MACHAKOS COUNTY 3RD RESPONDENT

COUNTY CRIMINAL INVESTIGATION OFFICER MACHAKOS

COUNTY 4TH RESPONDENT

OFFICER COMMANDING ATHI RIVER POLICE STATION 5TH RESPONDENT



INSPECTOR GENERAL OF POLICE 6TH RESPONDENT
NATIONAL LAND COMMISSION 7TH RESPONDENT

AND

TOM MBALUTO INTERESTED PARTY
TITUS MUSYOKI NGUTI INTERESTED PARTY
LA-NYAVU GARDENS LIMITED INTERESTED PARTY

AND

NZUKI MAITHIA EXPARTE
NICHOLAS MULI EXPARTE
SHADRACK MUTUNGA (SUING AS OFFICIALS OF KITHIANI SELF HELP
GROUP) EXPARTE
JACINTA MWENDE MULEI EXPARTE
JOEL MWEMA (SUING AS OFFICIALS OF MATEI RANGING
SOCIETY) EXPARTE
MICHAEL KANYENZE EXPARTE
SAMUEL MAITHIA EXPARTE
WILLIAM MUTHUI JOHN EXPARTE
DENNIS WAMBUA NZAUI (SUING AS OFFICIALS OF GREENLAND SELF
HELP GROUP) EXPARTE
BERNARD MASINGI MALUKI EXPARTE
JOSHUA MUTETI KILONZO EXPARTE
JOHN MUMO KIMUYU(SUING AS OFFICIALS OF JISIMAMIE SELF HELP
GROUP) EXPARTE
GEOFFREY K. MATHEKA EXPARTE
HENRY KAMANDE EXPARTE
MUTUA MUINDE(SUING AS THE OFFICIALS OF MAVIANI SELF HELP
GROUP) EXPARTE
JONES KISULA EXPARTE
EVERLINE MUSA EXPARTE
ALI MUHATHI SUFI (SUING AS THE OFFICIALS OF KATANI SELF HELP
GROUP) EXPARTE



JUDGMENT

Introduction

1. Vide a Notice of Motion dated 12th January 2021 and brought under Order 53 Rule 1 and 3 of the Civil Procedure Rules, pursuant to leave granted on 22nd December 2020, the Applicants sought for the following Judicial Review orders;
 - a. That an order of mandamus be issued prohibiting and restraining the respondents from evicting, demolishing houses, arresting the applicant without lawful cause, destroying their properties, threatening with unlawful arrest, unlawfully interfering with them, removing them, wasting, alienating, meddling in, dealing with and or in any manner howsoever and whatsoever interfering with the applicant use and enjoyment of land parcel LR/12610/2, 12610/3, 12610/4 and LR No. 12610/5 and or any further subdivisions thereto.
 - b. That the court do grant any or further relief that this honourable court deem fit and just to order in the circumstances.
 - c. That the cost of this application be provided for.
2. On 4th January 2021, upon application, the Applicants were granted leave to amend their chamber summons, the statement of facts and the orders granted all dated 22nd December 2020 to correct the description of parcel LR No. 1210/4 to read 12610/4.
3. The three Interested Parties, namely; Tom Mbaluto, Titus Musyoki Nguti and La- Nyavu Gardens Limited sought to be joined to this suit, and were so joined by the court as Interested Parties, and subsequently responded to the application herein. None of the Respondents filed response to the application, despite being duly served.
4. The application is premised on the following facts; that the 1st, 2nd and 3rd Exparte Applicants are chairman, secretary and treasurer (which titles shall hereinafter be referred as office bearers) of Kithiani Self Help Group and residents of LR No. 12610/3 and bring this suit on behalf of their members; that the 4th, 5th and 6th Exparte Applicants are office bearers of Matei Ranching Society, who have sued on behalf of their members; that the 7th, 8th and 9th Exparte Applicants are office bearers of Greenland Self Help Group and residents of LR No. 12610/4 and have sued on behalf of their members; that the 10th, 11th, and 12th Exparte Applicants are office bearers of Jisimamie Self Help Group and have brought this suit on behalf of their members; that the 13th, 14th, and 15th Exparte Applicants are office bearers of Maviani Self Help Group and residents of LR No. 12610/3 and have filed suit on behalf of their members and that the 16th, 17th, and 18th Exparte Applicants are office bearers of Katani Community Self Help Group and residents of LR No. 12610/2/3/4/5 and have filed suit on behalf of their members. The properties mentioned above are hereinafter referred to as the suit properties.
5. Further, the Exparte Applicants averred that the suit properties were previously occupied by white settlers and upon their exit, many people from the local Kamba community including the Exparte Applicants, occupied the said properties and their occupation is well known to the government; that the Respondents have threatened to evict the Exparte Applicants unlawfully; that in early 2020, the Respondents descended on the suit properties thereby demolishing the Exparte Applicants' homes and inflicting injuries on them; that the Respondents have ordered the Exparte Applicants to move out of LR Nos. 12610/2, 3, 4 and 5, (hereinafter referred to as the suit properties), where the Exparte Applicants have resided for over 60 years having constructed permanent homes, schools, churches and



other amenities; that the eviction is unlawful as the same has not been sanctioned by a court of law; that the Respondents are usurping the powers of the court, with blatant abuse of their powers; that the Exparte Applicants legitimate expectation, and right to natural justice has been violated.

6. In response, Tom Mbaluto, the 1st Interested Party swore a replying affidavit dated 13th April 2021 on his own behalf and on behalf of the 2nd Interested Party and averred that the dispute is between the Exparte Applicants who are squatters on one hand and the Interested parties and others are land owners of the suit properties, while the Respondents have only been caught in between by virtue of being law enforcement agencies; that the Respondents' role is to keep law and order and protect the Interested Parties from having their proprietary interests violated by the Exparte Applicants; that the 1st and 2nd Interested Parties acquired and are now title holders of parcel Nos. LR. Nos. 13667 and 13666 respectively which are subdivisions of LR No. 12610/2; that the Exparte Applicants' claim of adverse possession has not been affirmed or adjudged by any court of law; that suit No. Machakos ELC No. 462 of 2017 was filed by the 16th to 18th Exparte Applicants on behalf of Katani Self Help Group for adverse possession was dismissed by this court on 7th October 2020; that therefore the Exparte Applicants are guilty of material non-disclosure; that therefore any entry, or occupation of the Exparte Applicants on the suit land is unlawful as the Exparte Applicants have not established a legal right which has been violated as they are merely trespassers; that if the orders sought are granted, the 1st and 2nd Interested Parties stand to suffer great prejudice as their proprietary rights under Article 40 of the Constitution will be violated.
7. The 3rd Interested Party through Haron Gekonge Nyakundi swore the replying affidavit dated 6th September 2021 where he stated that the 3rd Interested Party is the registered proprietor of LR No. 12610/4 and therefore the Exparte Applicants have failed to disclose material facts to this court and failed to disclose the numerous court cases concerning the suit properties; that upon invasion and trespass of parcel LR No. 12610/4, Machakos HCCC NO. 337 of 2021 La Nyavu Ltd v Wilson Munguti Mbithi Alias Kavuti & 2 others was filed by the 3rd Interested Party and a decree issued in their favour to the effect that they were the rightful, legal and registered proprietor of parcel LR No. 12610/4 measuring 231.4 HA., a permanent injunction against the defendants was granted and the 5th Respondent (OCPD Athi River) ordered to ensure compliance; that the said decree has not been set aside; that the Interested Party has a right to evict the Exparte Applicants; that the 16th and 17th Exparte Applicants together with others filed Machakos Elc No. 462 Of 2017 Jones Mavuti Kisyula & Others V Haron Gekonge Nyakundi, which suit was dismissed; that this suit is a mischievous way of the Exparte Applicants to obtain proprietary rights in the suit property; that the said property is in possession of the 3rd Interested Party though the Exparte Applicants have been trying to invade and conduct quarrying activities on the same; that the Exparte Applicants unlawfully acquired EIA licence for Machine Cutting Quarry on the 3rd Interested Party's land.
8. The application was canvassed by way of written submissions. On record are the Exparte Applicants' submissions filed on 7th October 2021, the 1st and 2nd Interested Parties' submissions and the 3rd Interested Party's submissions filed on 16th September 2021.

Submissions

9. Counsel for the Exparte Applicant submitted that the Respondents have not responded to the application hence failing to explain the reasons for evicting the applicants. Counsel argued that the remedy for Judicial Review is not concerned with the merits but rather the decision making process. Counsel argued further that the Exparte Applicants were entitled to fair treatment. Counsel further submitted that the police had not explained which order they were enforcing against the Exparte Applicants.



10. Counsel also contended that the Interested Parties did not state whether they had orders against the Exparte Applicants which were being enforced by the police. That as there was no court order directing the police to evict the Exparte Applicants, the police whose mandate is criminal justice were acting in civil disputes which was outside their mandate.
11. Counsel for the 1st and 2nd Interested Parties submitted that the Exparte Applicants are squatters and have no evidence of any right to the suit property under Article 40 of *the Constitution*. Counsel relied on the case of *Joseph Letunya & 21 Others v Attorney General & 5 Others* [2014] eKLR, for the proposition that to get constitutional protection of the right to property, the applicants must demonstrate the nature of their proprietary right.
12. It was further argued for the 1st and 2nd Respondents that even the attempt by the 16th to 18th Exparte Applicants to obtain the suit property by adverse possession vide Machakos ELC No. 462 of 2017, was unsuccessful when the same was dismissed on 7th October 2020, while the 1st and 2nd Interested Parties have demonstrated by certificates of title that they are registered proprietors of part of the suit properties. Counsel relied on the cases of *Amir Suleiman v Biraj Brabmbhatt & Another* [2005] eKLR and *Auto Garage v Motokov (No. 3)* [1971] E.A 514, and further contended that in the absence of a legal right on the part of the applicants, there is no cause of action against the Interested Parties hence the court has no jurisdiction to grant any relief.
13. Counsel also submitted that the Exparte Applicants' claim was founded on an illegality of criminal trespass, as they admitted squatting on the Interested Parties' land without any justification. Counsel placed reliance on the cases of *North Western Salt Company v Electrolytic Alkali Company Ltd* (1914) AC 461 and *Attorney General v Law Society of Kenya & Another* [2017] eKLR for the proposition no court should aid a man whose cause of action is premised on an illegality.
14. On whether the orders sought are tenable, counsel contended that the Notice of Motion sought for Mandamus to prohibit the Respondents from inter alia evicting the Exparte Applicants from the suit properties. Counsel submitted that orders of Mandamus, being positive orders are for compelling public bodies to do their duty, while the Exparte Applicants sought to restrain the Respondents from doing their duty. To buttress that argument, counsel referred the court to the cases of *Republic v Kenya Forest Service Ex-Parte Joseph Kakore Ole Mpoie & 5 Others* [2010] eKLR and *Kenya National Examination Council v Republic Exparte Geoffrey Njoroge & Others* Civil Appeal No. 266 of 1996. Citing *B v Attorney General*, (2004) 1 KLR 431. It was counsel's position that court orders are not made in vain.
15. On whether the Exparte Applicants were entitled to the orders sought, counsel argued that the Exparte Applicants were guilty of non-disclosure of material facts having failed to disclose that there had been Machakos ELC No. 462 of 2017 which was dismissed.

Analysis and Determination

16. I have considered the application, the statement of facts, the affidavits in support, the responses thereto and the rival submissions by the parties. The issue that arise for determination is whether the Exparte Applicants are entitled to the orders sought.
17. For an applicant to succeed in a Judicial Review application, they must demonstrate that the decision complained of, is illegal, irrational and or tainted with procedural impropriety. In the Ugandan case of *Pastoli v Kabale District Local Government Canal & Others* (2008) 2 E.A 300, the court stated as follows;



In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is, tainted with illegality, irrationality, and procedural impropriety.

Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are- instances of illegality...

Irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural Impropriety, is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non- observance of the rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision- it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

18. In the case of *Republic v Kenya National Examinations Council Ex- Parte Gathenji & Others* (1997) eKLR, the Court of Appeal explained the principles for grant of an order of Mandamus in the following terms;

.....what is the scope and efficacy of an order of Mandamus? Once again we turn to Halsbury's Law Of England^{4th} Edition Volume 1 at page 111 from Paragraph 89. That learned treatise says;

“The order of Mandamus is of a most extensive remedial nature, and is, in a form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

...the order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a Mandamus cannot require it to be done at once. Where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a Mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of Mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed...

19. It is therefore clear that an order of Mandamus will only issue where the Applicant has a legal right, their right has been violated and the only effective remedy for such breach is an order compelling a public officer or body to do that which they ought to do.
20. In the application before court, the Exparte Applicants have sought for “an order of Mandamus prohibiting and restraining the Respondents from evicting, demolishing houses, arresting the applicant without lawful course (sic), destroying their properties, threatening with unlawful arrest, unlawfully interfering with them, removing them wasting, alienating, meddling in, dealing with and or in any manner howsoever and whatsoever interfering with the Applicants' use and enjoyment of land parcel LR/12610/2, 12610/3, 12610/4 and 12610/5 and or any further subdivisions thereto.”



21. The Exparte Applicants' prayer herein for an order of Mandamus must fail for four reasons. To begin with, I must point out that an order of Mandamus is meant to compel a public officer to do that which they ought to do and therefore it is contradictory and defeatist for the Exparte Applicants herein to seek for an order of Mandamus for prohibiting and restraining the Respondents from doing something. As I understand it, an order of Mandamus cannot compel the restraining of an action by a public officer. In other words, it is a positive order compelling a public body to do what they ought to do, and not a negative order to restrain the doing of something. Thus, this court cannot issue an order of Mandamus for purposes of restraining the Respondents from doing certain acts, as that would not constitute an order in the nature of Mandamus.
22. Secondly, for an order of Mandamus to issue, the applicant must show that they have a legal right which entitles them to seek to compel the doing of certain acts constituting public duty. In the instant case, the Exparte Applicants have not demonstrated any legal right to the suit properties as they allege to be squatters thereon. Their claim is that they reside on the suit properties and have not shown ownership of the same, neither have they justified the occupation of the same. While they allege to be entitled thereto by the doctrine of adverse possession, no competent court has declared such entitlement and the assertion and evidence that their suit for adverse possession being Machakos ELC No. 462 of 2017 was dismissed has not been controverted or denied. All that the Exparte Applicants are saying is that there is no court order for their eviction, but they do not deny the Interested Parties' legal right to the suit properties. It is therefore clear that they have no legal right upon which they can seek to restrain the police from enforcing law and order.
23. On the other hand, the Interested Parties have demonstrated that the suit properties belong to them by virtue of being the registered proprietors thereof. The 3rd Interested Party has produced a decree in Machakos hccc No. 337 of 2011 passed against the Applicants showing that they are the rightful owners of LR No. 12610/4, that there is an order of eviction and permanent injunction against the Applicants and that the 5th Respondent herein is tasked with ensuring compliance with the said decree.
24. Thirdly, the order sought and granted in respect of the application for leave dated 22nd December 2020, was to seek for orders of certiorari to quash the decision of the Respondent made on 18th December 2020 ordering the applicants to move out of the suit properties and orders of prohibition restraining the Respondents from inter alia evicting the applicants. There was no leave obtained to seek for orders of Mandamus. To my mind, an applicant cannot be granted substantive orders in whose respect, he did not obtain leave. Therefore, the prayer for Mandamus having been made under Order 53 of the Civil Procedure Rules which require grant of leave before the substantive prayer is made, cannot be granted, for want of leave.
25. Fourthly, the Applicants filed this application in regard to five properties and deliberately failed to avail the search certificates of the suit properties where they sought not to be evicted from. They also failed to join the registered proprietors of the suit properties and failed to disclose that they had litigated over the suit properties with the registered owners thereof. This non-disclosure of material facts is mischievous, a deliberate attempt to mislead this court, an abuse of the court process and a fraudulent use of the court process for purposes of sanitizing an illegal occupation of private property. This court will not sanction or aid an illegality.
26. Consequently, I am not satisfied that the Exparte Applicants have demonstrated any illegality in the Respondents actions. They have also not demonstrated any legal right over the suit properties capable of being protected by this court. It is therefore my considered view that the Exparte Applicants are not entitled to the orders sought.



27. The upshot is that the application dated 12th January 2021 lacks merit and the same is dismissed with costs to the Interested Parties.

28. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 4TH DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

No appearance for the Exparte Applicants

No appearance for the Respondents

No appearance for the Interested Parties

Ms Josephine Misigo – Court Assistant

