



**Republic v Senior Resident Magistrate, Kilifi Law Courts & 2
others; Karisa & another (Exparte Applicants) (Judicial Review
E005 of 2023) [2024] KEHC 3802 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3802 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
JUDICIAL REVIEW E005 OF 2023
M THANDE, J
APRIL 19, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**SENIOR RESIDENT MAGISTRATE, KILIFI LAW COURTS . 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
STEPHEN CHARO KAZUNGU 3RD RESPONDENT**

AND

**PETER TUMAINI KARISA EXPARTE APPLICANT
CERVINO ELECTRONICS LIMITED EXPARTE APPLICANT**

JUDGMENT

1. Before this Court for determination is the Application dated 22.9.23 in which the Ex Parte Applicants seek an order of certiorari to remove to this Court and quash the decision, directive and orders of the 1st Respondent made on 21.8.23 in Kilifi Miscellaneous Case No. E071 of 2023 Stephen Charo Kazungu v Peter Tumaini Karisa.
2. The Ex Parte Applicants’ case is that on 18.9.23, the 1st Ex Parte Applicant was served with an application dated 21.8.23 and an order of even date in which mandatory orders were given without according the Ex Parte Applicants an opportunity to be heard. It was further averred that the order in question indicated that inter partes hearing would be on 12.9.23, yet the same was served 6 days after. It is the Ex Parte Applicants’ further averment that the 1st Respondent abused its powers by unfairly by granting draconian orders affecting the 2nd Respondent’s business.



3. The Ex Parte Applicants further stated that the 3rd Respondent was employed as the company technician of the 2nd Ex Parte Applicant, while the 1st Ex Parte Applicant was appointed as a manager. Corrado Severi (Corrado) financed the business by investing the sum of Kshs. 3,000,000/=. The shop is fully stocked but was shut down after the 3rd Respondent squandered the company's money, including Kshs. 250,000/= from the 1st Ex Parte Applicant and took away a generator. He now seeks to have the shop reopened to wipe it out.
4. In his affidavit sworn on 16.10.23, the 3rd Respondent denied the allegations of the Ex Parte Applicants. He averred that he is a shareholder of the 2nd Ex Parte Applicant and that he, Corrado and the 1st Ex Parte Applicant are directors thereof. He met Corrado when he purchased several generators from his business, Watamu Maintenance, which dealt in maintenance of generators, solar panels and other electronics. In March 2023, Corrado approached him to form a company and they formed the 2nd Ex Parte Applicant. He contributed Kshs. 1,000,000/= while Corrado contributed Kshs. 2,000,000/=. The 1st Ex Parte Applicant contributed nothing and was only appointed trustee of Corrado who lived outside Kenya. He contended that the 1st Ex Parte Applicant arbitrarily closed the business premises and denied him entry into the same resulting in the business suffering loss of loyal customers.
5. It is the 3rd Respondent's case that the 1st Ex Parte Applicant had time to put in a response to the application as the same was given another date 26.9.23, but instead opted to move to the High Court. The present Application is intended to delay the hearing of the application in the lower court, in violation of Article 159(2)(d) of *the Constitution*. According to the 3rd Respondent, the orders complained of are not within the purview of judicial review as they were made by the 1st Respondent in exercise of its judicial function conferred by law and not administrative in nature. He urged the Court to dismiss the orders made on 21.9.23 and dismiss the Application herein with costs.
6. The 1st Ex Parte Applicant filed a supplementary affidavit sworn on 26.10.23 in which he stated that he has known Corrado for more than a decade and that it was he who introduced him to the 3rd Respondent. He denied that the 3rd Respondent made any contribution towards the 2nd Ex Parte Applicant as alleged. Further that the court in Kilifi issued exparte orders that were final in nature upon presentation of the plaint thereby prejudicing the 2nd Ex Parte Applicant which had no opportunity to defend itself. It was additionally stated that the court is an administrative body and the impugned orders are within the purview of judicial review.
7. Parties filed their respective written submissions which I have duly considered. The only issue for determination is whether the orders issued on 21.8.23 in the Kilifi court should be quashed.
8. The Court is keenly aware that in the matter before it, the relief sought is in the nature of judicial review. In such a case, the Court exercises a special jurisdiction in which it is only concerned with the decision making process and not the merits of the decision under review. In this regard, the holding in the case of Nation Media Group Limited v Cradle - The Children's Foundation Suing Through Geoffrey Maganya (Civil Appeal 149 of 2013) [2016] KECA 839 (KLR) (22 January 2016) (Judgment), is instructive. The Court of Appeal had this to say concerning this Court's special jurisdiction of judicial review:

In judicial review, the High Court has special jurisdiction to issue orders of mandamus, prohibition and certiorari as the remedies against acts or omissions by public entities. See *Biren Amritlal Shah & Another v Republic & 3 Others* (2013) eKLR. It is not concerned with reviewing the merits or otherwise, of a decision by a public entity, in respect of which the application for judicial review is made, but the decision making process itself. It is important to note in every case, that the purpose of judicial review is to determine whether



the applicant was accorded fair treatment by the concerned public body, and that it is not within the remit of the court to substitute its own opinion with that of the public entity charged by law to decide the matter in question. See *R v Judicial Service Commission - Misc. Civil Application No 1025 of 2003*.

9. The Exparte Applicants' complaint is that the lower court issued final orders without giving them an opportunity to be heard, thereby violating its right to fair administrative action.
10. Article 47 of *the Constitution* guarantees to every person the right to fair administrative action as follows:
 - (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.
11. Parliament did enact the FAAA to give effect to the right to fair administrative action as guaranteed under Article 47(1). Section 2 of the Fair Administrative Actions Act defines an administrative action to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. An administrator is defined as a person who takes an administrative action or who makes an administrative decision. An administrator thus includes a court of law.
12. The Court of Appeal in the case of *Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR* considered the import of Article 47 of *the Constitution* and stated:

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.
13. The impugned orders as made on 21.8.23 are reproduced hereunder:
 1. That a temporary be and is hereby issued restraining the Respondent, his agents, servants, and/or employees from closing down and /or any other way interfering with the business premises of the Applicant pending the hearing and determination of this Application.
 2. That a mandatory injunction be and is hereby issued compelling the Respondent to open the business premise of the Applicant.



3. That the OCS of the area of jurisdiction be and is hereby ordered to supervise the opening of the said business premises and ensure law and order is maintained.
4. That the service be dispenses with for inter party (sic) hearing on 12/9/2023.
14. It is noted that these orders were issued in chambers by the learned Magistrate. Clearly these orders were issued ex parte and without giving the Ex parte Applicants an opportunity to be heard. This brings into sharp focus, the principles of natural justice specifically audi alteram partem, which literally means 'hear the other side'.
15. Halsbury's Laws of England, 5th Edn. Vol. 61 page 545 at para 640 states:

The audi alteram partem rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet.
16. The issuance by the 1st Respondent of the orders against the Ex parte Applicants condemned them unheard, thereby offending all notions of justice. I am guided in this regard by the decision in the case of Mbaki & Others v. Macharia & Another [2005] 2 EA 206, at page 210, where the Court of Appeal stated as follows:

The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.

The Court went on to say:

In Pashito Holdings & another V Ndungu & 2 others KLR (E&L)1 295 it was held that "The rule of audi alteram partem, which literally means 'hear the other side', is a rule of natural justice. It is an indispensable requirement of justice that the party who has to make a decision shall hear both sides, giving each an opportunity of hearing what is urged against him.
17. The rights of a party cannot be taken away without giving such party an opportunity to defend those rights. Useful guidance is found in the decision in Cozens v North Devon Hospital Management Committee and Another (1966) 2 All E. A. 799 where Salmon L.J, had this to say:

I start from the point that the general rule of the law is that the courts will not make orders in legal proceedings affecting a party's rights without giving that party an opportunity of being heard ... To my mind very clear words would be required to take away fundamental rights which are ordinarily accorded by the law and indeed by natural justice.
18. The legal imperative of hearing a person who is likely to be adversely affected by a decision before the decision is made cannot be overemphasized. In the case of J M K v M W M & another [2015] eKLR, the Court of Appeal observed:

The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.
19. In the performance of their judicial function, all courts are required to observe the principles of natural justice. Any decision made by a court will be unjust and unfair if the court deprives itself of the views



of any party who will be affected in one way or another by the decision. (See *Msagha vs. Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 [2006] 2 KLR 553*).

20. The resoluteness of our courts in upholding the principles of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made in ordinary litigation, cannot be disaffirmed. Courts must thus caution themselves that any decision made in violation of these principles however “right” the decision may be, must be declared to be no decision.
21. Other than the orders being made in violation of the *Exparte Applicants’* right to be heard, order 2 of the impugned orders is mandatory in nature and was issued at the interlocutory stage. It is well settled that mandatory orders may not be issued at the interlocutory stage unless there is a demonstrable existence of exceptional and special circumstances.
22. In the case of *Nation Media Group & 2 others v John Harun Mwau [2014] eKLR*, the Court of Appeal had this to say about interlocutory mandatory injunction:

It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of and special circumstances. See *KENYA BREWERIES LIMITED vs. WASHINGTON OKEYO*, Civil Application No. 332 of 2000.

The learned Judges went on to state:

A different and higher standard than that in prohibitory injunctions is required before an interlocutory mandatory injunction is granted. Besides, existence of exceptional and special circumstances must be demonstrated as we have stated, a temporary mandatory injunction can only be granted in exceptional and in the clearest of cases.

23. In the present case, while issuing the *exparte* interlocutory mandatory injunction, the learned Magistrate did not specifically set out the exceptional, special or indeed any circumstances taken into consideration to warrant the grant of the impugned orders.
24. The broad grounds on which the Court exercises its judicial review jurisdiction was stated in the case of *Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300* 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 or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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 a 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 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.



25. The impugned orders having been made in excess of jurisdiction and in violation of the rules of natural justice are tainted with illegality, irrationality and procedural impropriety. As such, they cannot stand.
26. In *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR, the Court of Appeal stated:

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.

27. In the end and in view of my analysis and conclusion herein above, it is my finding that the Exparte Applicants have established grounds for the Court to grant the orders sought. Accordingly, I make the following orders:
 1. An order of certiorari be and is hereby issued to remove to this Court the order made on 21.8.23 by the Senior Resident Magistrate, Kilifi Law Courts and the same is hereby quashed.
 2. The Ex Parte Applicants shall have costs of this suit which shall be borne by the 1st and 2nd Respondents.

SIGNED DATED AND DELIVERED IN MALINDI THIS 19TH DAY OF APRIL 2024.

M. THANDE

JUDGE

