



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC JUDICIAL REVIEW NO. E013 OF 2021**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO**

**APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, ARTICLE 165(6)**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT, 2011**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015**

**BETWEEN**

**NUH ABDILLE HASSAN.....APPLICANT**

**VERSUS**

**PRINCIPAL MAGISTRATE’S COURT AT MILIMANI.....1<sup>ST</sup> RESPONDENT**

**O.C.S PANGANI POLICE STATION.....2<sup>ND</sup> RESPONDENT**

**AND**

**HALIMA MAHMOOD ALLI..... INTERESTED PARTY**

**RULING**

**Background:**

In her plaint dated 22<sup>nd</sup> December, 2017 filed in ELCC No. 775 of 2017 (hereinafter referred to only as “the ELC suit”), the interested party herein who was the plaintiff in that suit averred that she was at all material times the beneficial and equitable owner of all that parcel of land known as Plot No. 36/460/VII Eastleigh, Nairobi together with the developments thereon (hereinafter referred to only as “the suit property”). The interested party averred that the suit property was registered in the name of one, Hawa Hassan Mohamud, deceased in respect of whose estate she was the legal representative. The interested party averred that in January, 2016, the then sole defendant in that suit, Amal Plaza Limited (hereinafter referred to only as “Amal”) which owned a building adjacent to the suit property created an access through the said building to the suit property which access remained open until 20<sup>th</sup> December, 2017 when the same was blocked by Amal without any

justification. The interested party averred that the obstruction of the said access caused loss and damage to her tenants on the suit property.

The interested party sought judgment against Amal in the ELC suit for:

- (a) A permanent injunction to restrain Amal from blocking access to the suit property.
- (b) A mandatory injunction directed at Amal compelling it to restore access to the suit property to the condition it was prior to 20<sup>th</sup> December, 2017.
- (c) General damages.
- (d) Costs of the suit.

Together with the plaint, the interested party filed an application by way of Notice of Motion dated 22<sup>nd</sup> December, 2017 under certificate of urgency seeking a temporary injunction to restrain Amal from blocking her access to the suit property through Amal's property aforesaid pending the hearing of the suit. When the application came up for hearing on 22<sup>nd</sup> January, 2018, the court granted an interim injunction restraining Amal from blocking the interested party's tenants' access to the suit property pending the hearing of the application. Amal did not comply with the said order.

On 30<sup>th</sup> January, 2018, the interested party filed another application of the same date seeking an order that Amal's Managing Director, one, Jama Corshe be found in contempt of the order made on 22<sup>nd</sup> January, 2018 and be committed to civil jail for a period of six (6) months and/or be fined as appropriate. The interested party also sought an order for the Officer in charge of Pangani Police Station to ensure compliance with the said court order of 22<sup>nd</sup> January, 2018. The interested party's contempt application was opposed by Amal. On 19<sup>th</sup> February, 2018, the court fixed the said application for hearing on 18<sup>th</sup> April, 2018.

While the said application was pending hearing, the interested party brought another application by way of Notice of Motion dated 5<sup>th</sup> March, 2018 seeking the following orders;

1. **"This Application be certified as urgent and heard ex parte in the first instance.**
2. **Pending the hearing and determination of this application, a temporary injunction be issued against the Defendant(Amal) and the intended Defendants restraining them by themselves, their agents, servants or otherwise howsoever from selling the goodwill of, leasing, letting, licencing or in any manner whatsoever alienating the plaintiff's (interested party's) shops erected on the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.**
3. **Pending the hearing and determination of this application, a temporary injunction be issued against the Defendant(Amal) and the intended Defendants restraining them by themselves, their agents, servants or otherwise howsoever from interfering with the plaintiff's tenants occupying the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.**
4. **Pending the hearing and determination of this application, a mandatory injunctive order be made against the Defendant(Amal) and the intended Defendants by themselves, their agents, servants or otherwise howsoever compelling them to vacate the suit property to wit property known as L.R No. 36/460/VII situated at Eastleigh area in Nairobi.**
5. **Pending the hearing and determination of this application, an injunction be issued against the Defendant(Amal) and the intended Defendants by themselves, their agents, servants or otherwise howsoever restraining them from interfering with the Plaintiff's possession of suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.**
6. **Pending the hearing and determination of this Application, this Honourable Court, does in exercise of its supervisory jurisdiction, call for the record of the proceedings on Nairobi Chief Magistrate's Court Civil Case No. 800 of 2018 – Nuh Abdille Hassan vs. Halima Mohamood Ali and make such orders and give such directions as it may consider appropriate.**
7. **Pending the hearing and determination of this Application this Honourable Court does quash, lift, review or set aside the orders made in Nairobi Chief Magistrates Court Civil Case No. 800 of 2018 – Nuh Abdille Hassan vs. Halima Mohamood Ali issued on 15<sup>th</sup> February, 2018 by the Honourable G. A. Mmasi, (Mrs), Senior Principal Magistrate and/or the proceedings in their entirety.**
8. **Directions be given for the earliest date possible for the inter partes hearing of the Orders set out herein below, which ought to be argued together with the Application dated 17<sup>th</sup> December, 2017.**
9. **The Plaintiff (interested party) be granted leave to join, Center Star Limited, Nuh Abdille Hassan and Hussein Hassan Bood as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively.**
10. **The Plaintiff (interested party) be granted leave to amend its plaint filed herein dated 22<sup>nd</sup> December, 2017 to include the stated proposed Defendants, and to accordingly articulate its claim in the terms contained in the draft annexed hereto.**

11. The draft Amended Complaint annexed hereto be treated as the Plaintiff's Amended Complaint and that the same be deemed as having been duly filed and served after payment of the requisite fees.
12. Pending the hearing and determination of this suit, a temporary injunction be issued against the Defendant (Amal) and the intended Defendants restraining them by themselves, their agents, servants or otherwise howsoever from selling the goodwill of the, leasing, letting, licencing or in any manner whatsoever alienating the Plaintiff's shops erected on the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.
13. Pending the hearing and determination of this suit, a temporary injunction be issued against the Defendant (Amal) and the intended Defendants restraining them by themselves, their agents, servants or otherwise howsoever restraining them from interfering with the Plaintiff's tenants occupying the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.
14. Pending the hearing and determination of this suit, a mandatory injunctive order be made against the Defendant (Amal) and the intended Defendants by themselves, their agents, servants or otherwise however compelling them to vacate the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.
15. Pending the hearing and determination of this suit, an injunction be issued against the Defendant (Amal) and the intended Defendants by themselves, their agents, servants or otherwise howsoever restraining them from interfering with the Plaintiff's possession of suit property to wit property known as L. R. No. 36/460/VII situated in Eastleigh area in Nairobi.
16. This Honourable Court does in exercise of its supervisory jurisdiction, call for the record of the proceedings of Nairobi Chief Magistrate's Court Civil Case No. 800 of 2018 – Nuh Abdille Hassan vs. Halima Mohamood Ali and make such orders and give such directions as it may consider appropriate.
17. That this Honourable Court does quash, lift, review or set aside the orders made in Nairobi Chief Magistrate Court Civil Case No. 800 of 2018 – Nuh Abdille Hassan vs Halima Mohamood Ali issued on 15<sup>th</sup> of February, 2018 by the Honourable G. A. Mmasi, (Mrs) Senior Principal Magistrate and/or the proceedings in their entirety.
18. The costs of this Application be in the cause.”

The interested party's Notice of Motion application dated 5<sup>th</sup> March, 2018 was brought on the grounds set out on the face thereof and on the affidavit of the interested party sworn on 5<sup>th</sup> March, 2018. The application was brought on among other grounds that the then proposed 3<sup>rd</sup> defendant in the ELC suit, Nur Abdille Hassan (hereinafter referred to only as “the applicant”) had while the ELC suit was pending, filed a suit in the Chief Magistrates Court at Milimani Commercial Court Nairobi against the interested party namely, Milimani CMCC No. 800 of 2018 Nuh Abdille Hassan v. Halima Mohamood Ali (hereinafter referred to only as “the lower court suit”) and fraudulently obtained among others, an ex parte order for the eviction of the interested party from the suit property. The interested party averred that the order was issued without service of court process upon her and without jurisdiction. The interested party termed the lower court suit a conspiracy between Amal and the then proposed 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in the ELC suit to dispossess her of the suit property. The interested party averred further that the lower court suit aforesaid was filed to frustrate the contempt application that was pending in the ELC suit against Amal.

The interested party's application dated 5<sup>th</sup> March, 2018 that was filed under certificate of urgency in the ELC suit came up for hearing ex parte on 7<sup>th</sup> March, 2018 when the court certified the same as urgent and granted the following orders on an interim basis;

1. “Pending the hearing and determination of this application inter partes Milimani Commercial Court Chief Magistrate's Court Case No. 800 of 2018 Abdille Hassan v. Halima Mahamood Ali is stayed.
2. Pending the hearing and determination of this application inter parties the defendant herein, Amal Plaza Limited, the proposed defendants Centre Star Limited, Nur Abdille Hassan and Hussein Hassan Bood by themselves, their agents, servants or otherwise howsoever are restrained from selling the good will of the, leasing, letting, licensing or in any other manner whatsoever alienating the plaintiff's shops erected on L.R No. 36/460/VII situated in Eastleigh area Nairobi.
3. Pending the hearing and determination of this application, a mandatory injunction is issued compelling the defendant, Amal Plaza Limited, the proposed defendants, Centre Star limited, Nur Abdille Hassan and Hussein Bood jointly and/or severally, their servants, agents or howsoever to vacate the shops that were occupied by the plaintiff on L.R No. 36/460/VII prior to her forceful eviction on 23<sup>rd</sup> February, 2018.
4. Pending the hearing and determination of this application inter partes, the defendant, Amal Plaza Limited, the proposed defendants, Centre Star Limited, Nur Abdille Hassan and Hussein Hassan Bood, their agents, servants or otherwise howsoever are restrained from interfering with the plaintiff's and the plaintiff's tenants' occupation and possession of the shops erected on L.R No. 36/460/VII situated in Eastleigh area in Nairobi.”

Once again, the orders made on 7<sup>th</sup> March, 2018 which were extended on 14<sup>th</sup> March, 2018 were not obeyed. The disobedience of the said orders gave rise to another contempt application by the interested party that was filed on 19<sup>th</sup> March, 2018 by way of Notice of Motion of the same date. In the application, the interested party sought among others the following orders;

“That the officer in charge of Pangani Police Station does ensure compliance with the court orders that were made on 7/3/2018 and issued on 8/3/2018 and that Yusuf Ahmed Dahir and Jama Mohamed Issa who are the directors of the

**defendant, Yusuf Ibrahim, a director of Centre Star Limited, the proposed 2<sup>nd</sup> defendant, Nuh Abdille Hassan and Hussein Hassan Bood, the 3<sup>rd</sup> and 4<sup>th</sup> proposed defendants (the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> respondents) be committed to civil fail for a period of six (6) months and/or be fined accordingly for contempt of the court orders issued on 8<sup>th</sup> March, 2018.”**

On 19<sup>th</sup> April, 2018, the court in the ELC suit directed that the two contempt applications dated 30<sup>th</sup> January, 2018 and 19<sup>th</sup> March, 2018 be heard together. The two applications for contempt were heard and a ruling date reserved for 30<sup>th</sup> July, 2018. On 6<sup>th</sup> July, 2018, the Court of Appeal in Civil Application No. 82 of 2018 made an order staying the proceedings in the ELC suit pending the hearing of an appeal by the applicant herein against the orders that had been issued by this court on 7<sup>th</sup> March, 2018 and extended on 14<sup>th</sup> March, 2018 referred to above. On 6<sup>th</sup> December, 2019, the Court of Appeal in Civil Appeal No. 297 of 2018, set aside this court’s orders of 7<sup>th</sup> March, 2018 and 14<sup>th</sup> March, 2018. The Court of Appeal directed that this court hears the application dated 5<sup>th</sup> March, 2018 that was pending in the ELC suit. The effect of the said orders by the Court of Appeal was that the orders that had been made in the ELC suit staying Milimani Commercial Court Chief Magistrate’s Court Case No. 800 of 2018, Abdille Hassan v. Halima Mahamood Ali (the lower court suit) stood set a side. That meant that the dispute between the parties over the suit property remained active in two courts, that is before this court in ELC No. 775 of 2017(the ELC suit) and the lower court in Milimani Commercial Court Chief Magistrate’s Court Case No. 800 of 2018.

Following that decision made by the Court of Appeal on 6<sup>th</sup> December, 2019, this court heard the interested party’s application dated 5<sup>th</sup> March, 2018 in the ELC suit that was amended on 20<sup>th</sup> February, 2020. In the amended application dated 20<sup>th</sup> February, 2020, the interested party sought the following reliefs;

1. **“This Application be certified as urgent and heard ex parte in the first instance.**
2. **Pending the hearing and determination of this application, a temporary injunction be issued against the defendant and the intended defendants restraining them by themselves, their agents, servants or otherwise howsoever from selling the goodwill of the, leasing, letting, licencing or in any manner whatsoever alienating the plaintiff’s shops erected on the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.**
3. **Pending the hearing and determination of this application, a temporary injunction be issued against the defendant and the intended defendants restraining them by themselves, their agents, servants or otherwise howsoever from interfering with the plaintiff’s tenants occupying the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.**
4. **Pending the hearing and determination of this application, a mandatory injunctive order be made against the defendant and the intended defendants by themselves, their agents, servants or otherwise howsoever compelling them to vacate the suit property to wit property known as L.R No. 36/460/VII situated at Eastleigh area in Nairobi.**
5. **Pending the hearing and determination of this application, an injunction be issued against the defendant and the intended defendants by themselves, their agents, servants or otherwise howsoever restraining them from interfering with the plaintiff’s possession of suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.**
6. **Pending the hearing and determination of this application, this Honourable Court does in exercise of its supervisory jurisdiction, call for the record of the proceedings in Nairobi Chief Magistrate’s Court Civil Case No. 800 of 2018, Nuh Abdille Hassan v. Halima Mohamood Ali and make such orders and give such directions as it may consider appropriate.**
7. **Pending the hearing and determination of this application this Honourable Court does quash, lift, review or set aside the orders made in Nairobi Chief Magistrates Court Civil Case No. 800 of 2018, Nuh Abdille Hassan v. Halima Mohamood Ali issued on 15<sup>th</sup> February, 2018 by Honourable G. A. Mmasi, (Mrs), Senior Principal Magistrate and/or the proceedings in their entirety.**
8. **Directions be given for the earliest date possible for the inter partes hearing of the Orders set out herein below, which ought to be argued together with the application dated 17<sup>th</sup> December, 2017.**
9. **The plaintiff be granted leave to join, Center Star Limited, Nuh Abdille Hassan and Hussein Hassan Bood as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively.**
10. **The plaintiff be granted leave to amend its plaint filed herein dated 22<sup>nd</sup> December, 2017 to include the stated proposed defendants, and to accordingly articulate its claim in the terms contained in the draft annexed hereto.**
11. **The draft amended plaint annexed hereto be treated as the plaintiff’s amended plaint and that the same be deemed as having been duly filed and served after payment of the requisite fees.**
12. **Pending the hearing and determination of this suit, a temporary injunction be issued against the defendant and the intended defendants restraining them by themselves, their agents, servants or otherwise howsoever from selling the goodwill of the, leasing, letting, licencing or in any manner whatsoever alienating the plaintiff’s shops erected on the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.**
13. **Pending the hearing and determination of this suit, a temporary injunction be issued against the defendant and the intended defendants restraining them by themselves, their agents, servants or otherwise howsoever from interfering with the**

plaintiff's tenants occupying the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.

14. Pending the hearing and determination of this suit, a mandatory injunctive order be made against the defendant and the intended defendants by themselves, their agents, servants or otherwise however compelling them to vacate the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.

15. IN THE ALTERNATIVE to prayer No. 14 above, pending the hearing and determination of this suit, the proposed 3<sup>rd</sup> defendant, his servants, employees or agents be barred from collecting rents or goodwill in the suit property, to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi, and that these rental proceeds be deposited in a joint interest earning account held in the names of the advocates for the plaintiff and for the proposed 3<sup>rd</sup> defendant, Nuh Abdille Hassan.

16. The proposed 3<sup>rd</sup> defendant, Nuh Abdille Hassan be ordered to furnish up to date accounts of all rental proceeds and goodwill received from the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi, from the date when he came into possession of the suit property to date.

17. Pending the hearing and determination of this suit, an injunction be issued against the defendant and the intended defendants by themselves, their agents, servants or otherwise howsoever restraining them from interfering with the plaintiff's possession of suit property to wit property known as L. R. No. 36/460/VII situated in Eastleigh area in Nairobi.

18. This Honourable Court does in exercise of its supervisory jurisdiction and call for the record of the proceedings of Nairobi Chief Magistrate's Court Civil Case No. 800 of 2018, Nuh Abdille Hassan v. Halima Mohamood Ali and make such orders and give such directions as it may consider appropriate.

19. That this Honourable Court does quash, lift, review or set aside the orders made in Nairobi Chief Magistrate Court Civil Case No. 800 of 2018, Nuh Abdille Hassan v. Halima Mohamood Ali issued on 15<sup>th</sup> of February, 2018 by Honourable G. A. Mmasi, (Mrs) Senior Principal Magistrate and/or the proceedings in their entirety.

20. The costs of this Application be in the cause."

In a ruling delivered in that application on 28<sup>th</sup> January, 2021, the court made the following orders in the ELC suit;

1. "Center Star Limited, Nuh Abdille Hassan and Hussein Hassan Bood are added to this suit as 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively.

2. The plaintiff shall amend the plaint in terms of the draft amended plaint annexed to the plaintiff's affidavit sworn on 5<sup>th</sup> March, 2018 to effect the joinder.

3. Pending the hearing and determination of the suit, the 3<sup>rd</sup> defendant, Nuh Abdille Hassan shall pay to the plaintiff as and when it falls due the rent that was agreed upon by the parties in the Joint Venture Agreement dated 10<sup>th</sup> November, 2014 and the lease dated 1<sup>st</sup> January, 2015 in respect of L.R No. 36/460/VII (the suit property).

4. Pending the hearing and determination of the suit, the 3<sup>rd</sup> defendant, Nuh Abdille Hassan shall from 1<sup>st</sup> February, 2021 render to the plaintiff a true account on a quarterly basis of the monies collected or received from the suit property as rent and goodwill.

5. Pending the hearing and determination of the suit, the monies collected or received from the suit property as goodwill shall with effect from 1<sup>st</sup> February, 2021 be deposited in a joint bank account in a reputable bank in Nairobi in the names of the advocates on record for the plaintiff and the 3<sup>rd</sup> defendant, Nuh Abdille Hassan as and when the same is received by the 3<sup>rd</sup> defendant, Nuh Abdille Hassan.

6. The costs of the application shall be in the cause."

Following the said orders, the plaint in the ELC suit was amended and the applicant herein among others were joined in the suit as defendants. That suit that relates to the ownership and use of the suit property is pending hearing and determination before this court. In this court's ruling of 28<sup>th</sup> January, 2021 in the ELC suit aforesaid, the court stated as follows on the invitation by the interested party herein for the court to quash, lift, review or set aside the orders that had been made in the lower court suit on 13<sup>th</sup> February, 2018 and issued on 14<sup>th</sup> of February, 2018 by Honourable G. A. Mmasi, (Mrs) Senior Principal Magistrate and/or the proceedings in their entirety;

"With regard to the prayer for this court to exercise its supervisory jurisdiction over the lower court in respect of Milimani Chief Magistrate's Court Civil Suit No. 800 of 2018, I am of the view that it would not be appropriate for this court to intervene at this stage despite the serious reservations that the court has with regard to the orders that were issued in that suit by the lower court. Since the order that this court had made staying the lower court suit was set aside by the Court of Appeal, the plaintiff is at liberty to prosecute her application pending before the lower court for the setting aside of the orders of that court. It is clear from the evidence placed before this court by both parties that the lower court had no

**pecuniary jurisdiction to entertain the proposed 3<sup>rd</sup> defendant's suit. Let that court discharge its orders that had been made without jurisdiction. I do not wish to say more on that suit."**

Following the said ruling of 28<sup>th</sup> January, 2021 in the ELC suit, the interested party herein went to the lower court to prosecute her application dated 1<sup>st</sup> March, 2018 that was pending before that court. In the application, the interested party had sought the following substantive orders;

- "1. This court be pleased to set aside the orders issued on the 14<sup>th</sup> day of February, 2018 by the Honourable Court and all consequential orders, and to order the eviction of the plaintiff and his servants and/or agents from the suit premises.**
- 2. The Officer Commanding Police Station, Pangani be directed to provide enforcement of the above orders.**
- 3. The costs of the application be provided for."**

That application in the lower court was opposed by the applicant. In a ruling that was delivered on 21<sup>st</sup> June, 2021, the lower court, Hon. D.M.Kivuti P.M made the following orders on the application;

- "1. The court finds that it does not have pecuniary jurisdiction to entertain this matter.**
- 2. The suit is struck out with costs to the defendant.**
- 3. For the avoidance of doubt, the orders issued on 14<sup>th</sup> February, 2018 are discharged and set aside. Prayers (a), (b) and (c) are premised on the High Court finding which is essentially binding to this court.**
- 4. The consequential order is that the plaintiff shall be removed from the property known as G-Centre to restore parties to the position they were in before the impugned orders as prayed for in the application dated 1<sup>st</sup> March, 2018.**
- 5. That the Officer Commanding Police Station, Pangani to provide enforcement of order (d) above.**
- 6. Parties be at liberty to apply only for the purposes of restitution under section 91."**

The application before this court:

What is now before me is a Chamber Summons application dated 6<sup>th</sup> July, 2021 in which the applicant has sought the following substantive orders;

- a) Leave to apply for orders of Certiorari directed at the 1<sup>st</sup> Respondent quashing its decision made through its ruling delivered on 21<sup>st</sup> June, 2021 striking out Nairobi CMCC No. 800 of 2018, Nuh Abdille Hassan v Halima Mahmood Ali, setting aside the eviction orders issued on 13<sup>th</sup> February, 2018 in the said suit and ordering the applicant to vacate the property known as G-Plaza shopping mall erected on L.R No. 26/460/VII situated in Eastleigh, Nairobi County ("the suit property").**
- b) Leave to apply for an order of Prohibition prohibiting the 2<sup>nd</sup> respondent from evicting the applicant from the suit property.**
- c) Costs of the application.**

The application is supported by a verifying affidavit and a supplementary affidavit of the applicant dated 6<sup>th</sup> July, 2021 and 28<sup>th</sup> July, 2021 respectively, and a statement of facts dated 6<sup>th</sup> July, 2021. In summary, the application has been brought on the following grounds;

1. The order made on 21<sup>st</sup> June, 2021 by the 1<sup>st</sup> respondent in favour of the interested party in Milimani Commercial Court, CMCC No. 800 of 2018 ("the lower court suit") was made without and/or in excess of jurisdiction.
2. The said order contravened the orders made by this court on 28<sup>th</sup> January, 2021 in ELC No. 775 of 2017("the ELC suit") in which the court had declined to grant a prohibitory and mandatory injunctive reliefs that had been sought by the interested party in relation to the suit property.
3. The applicant was not heard before the said order was made in breach of the rules of natural justice.
4. The decision by the 1<sup>st</sup> respondent was irrational and tainted with illegality and procedural impropriety.
5. The decision of the 1<sup>st</sup> respondent was *ultravires* its powers.

6. The orders of the 1<sup>st</sup> respondent contradicted the orders made by this court in the ELC suit.

In his verifying affidavit, the applicant gave the history of the dispute between him and the interested party and the various suits and arbitral proceedings in which they had been involved. In paragraph 6 of the affidavit, the applicant stated that he paid a total of Kshs. 100,140,000/- towards the construction of the building on the suit property. The applicant averred further that when the interested party's application dated 1<sup>st</sup> March, 2018 came up before the lower court, the applicant was directed to file a replying affidavit in response to the same. The applicant averred that after filing the said affidavit, the lower court directed that it will peruse the application and the replying affidavit and will give appropriate directions in the matter. The applicant averred that following the said directions, the lower court delivered the impugned ruling on 21<sup>st</sup> June, 2021. The applicant reiterated that he was not heard on the application before the said ruling was made.

In his supplementary affidavit, the applicant reiterated that the lower court did not give him a hearing before making the orders complained of and that the said orders were made without and/or in excess of jurisdiction of the lower court. The applicant contended that once the lower court made a finding that it had no jurisdiction, it should have laid down its tools and should not have made any further order. In paragraph 47(vi) of the affidavit, the applicant stated that the agreed value of the suit property was over Kshs. 300,000,000/-

The application was opposed by the interested party through a replying affidavit sworn on 27<sup>th</sup> July, 2021 and a supplementary affidavit filed on 29<sup>th</sup> July, 2021. In the replying affidavit, the interested party averred that the suit property belonged to her deceased mother in respect of whose estate she was the administratrix. The interested party stated that she was in possession of the suit property until she was evicted therefrom through ex-parte declaratory and eviction orders that were made by the lower court on 13<sup>th</sup> February, 2018 in an interlocutory application by the applicant. The interested party stated that she was not served with the lower court application in which the said eviction orders were made.

The interested party stated that following her eviction, she filed an application dated 1<sup>st</sup> March, 2018 in the lower court seeking to set aside the said ex-parte eviction orders. The interested party averred that as at the time she was being evicted from the suit property she had already filed a suit that was pending before this court (the ELC suit) over the same subject matter. The interested party stated that she also invoked the supervisory jurisdiction of this court in the ELC suit and sought an order for the setting aside of the said ex-parte orders that had been issued by the lower court. The interested party stated that in a ruling delivered by this court in the ELC suit on 28<sup>th</sup> January, 2021, the court found that the lower court had no jurisdiction to entertain the applicant's suit before it and to make the eviction orders of 13<sup>th</sup> February, 2018. The court however declined to review those orders and directed that the interested party moves the lower court to discharge those orders that were made without jurisdiction.

The interested party averred that it was pursuant to the said orders made by this court in the ELC suit on 28<sup>th</sup> January, 2021 that she moved the lower court to set aside its said eviction orders of 13<sup>th</sup> February, 2018. The interested party averred that following that move on her part, the lower court granted the orders of 21<sup>st</sup> June, 2021 complained of by the applicant. The interested party averred that on 23<sup>rd</sup> June, 2021, the applicant filed an application in the lower court for the review of the said orders of 21<sup>st</sup> June, 2021 and that the court declined to entertain the application citing lack of jurisdiction. The interested party averred that the issue of jurisdiction of the lower court had already been determined in the ELC suit in a ruling delivered on 28<sup>th</sup> January, 2021 and that in his replying affidavit filed in the lower court in response to the interested party's application dated 1<sup>st</sup> March, 2018, the applicant did not object to the interested party's prayer to be reinstated on the suit property. The interested party averred that in his response to the said application, the applicant admitted that the lower court had no jurisdiction to entertain the suit that was before it. The interested party denied that upon making a finding that it had no jurisdiction, the court became *functus officio* and could not make any other or further order. The interested party contended that the applicant is not entitled to the leave sought herein for among others the following reasons;

1. The applicant is challenging the merit of the decision of the lower court which is not within the purview of judicial review.
2. The only legal avenue available to the applicant is an appeal and as such the applicant has not exhausted the alternative remedies available to him before coming for judicial review.
3. The ELC suit in which the issue of possession of the suit property has been raised for determination is still pending and as such the applicant should have brought the issues raised in the present application in the pending suit.
4. The order of prohibition sought against the 2<sup>nd</sup> respondent if granted would render the interested party incapable of enforcing any order granted in her favour with the help from Pangani Police Station.
5. This court having declined to exercise its supervisory jurisdiction over the lower court in respect of the orders it had granted on 13<sup>th</sup> February, 2018 cannot now exercise the same jurisdiction over the same court in respect of the orders made on 21<sup>st</sup> June, 2021.
6. The applicant has not established a prima facie case to warrant the grant of the leave sought.

The application was argued by way of written submissions. The applicant and the 1<sup>st</sup> interested party filed their submissions on 28<sup>th</sup> July, 2021. I have considered the grounds and facts relied upon by the applicant in support of the leave sought and for the same to operate as a stay. I have also considered the response to the application by the interested party. Finally, I have considered the written submissions by the advocates for both parties and the several authorities that were cited in support thereof. Three issues arise for determination in the application before court which I will consider together. First, whether the impugned decision of the 1<sup>st</sup> respondent is within the purview of judicial review, secondly, whether the applicant has made out a case for grant of the leave sought to institute judicial review application against the respondents and the interested party and finally, whether leave if granted should operate as a stay. The following is my view on the outlined issues.

In Njuguna v Minister for Agriculture [2000] 1 E.A 184, it was held that:

**“the test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case, that the reliefs might be granted on the hearing of the substantive application.”**

In Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others [1998] 1 KLR (E&L) the court set out the rationale for seeking leave to apply for judicial review as follows:

**“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.”**

In R. v IRC ex-parte Federation of Self- Employed (1982) AC 617 at page 643, Lord Diplock stated that:

**“The need for leave to start proceedings for remedies in public Law is not new. It applied previously to applications for prerogative orders though not to civil courts for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove uncertainty in which public offices and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review is actually pending even though misconceived.”**

The court’s power to grant leave is discretionary. In his book; Public Law in East Africa published by Law Africa, Ssekaana Musa has stated as follows at page 250:

**“Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues ex debito justitiae on proper grounds being shown. A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully.”**

I am in agreement with the interested party that the impugned decision of the 1<sup>st</sup> respondent is not within the purview of the judicial review jurisdiction of this court. In my view, the orders complained of by the applicant were made by the 1<sup>st</sup> respondent in exercise of its judicial function conferred by law. In making the impugned decision, the 1<sup>st</sup> respondent was not acting as an administrative body but as a judicial body. Its decision was therefore judicial rather than administrative. I am of the view that while this court has supervisory jurisdiction over the 1<sup>st</sup> respondent in respect of the matters falling under its jurisdiction, that power is not exercised in the same way as judicial review of administrative action. I am of the view that a decision of a lower court made in exercise of its judicial function is not amenable to judicial review as an administrative action under the Fair Administrative Action Act, 2015.

This is not the first time that the court is being called upon to review a judicial decision. Matavo J. in Rhoda Wanjiru Kibunja v R. O. Mbogo, Resident Magistrate, Children’s Court, Milimani & another [2019] eKLR stated as follows in a similar case:

**“43. The power of the court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where illegality, irrationality or procedural impropriety has been proved. This is the power the applicant is invoking in this case. However, as noted earlier, the impugned decision is a judicial function, which to me is not amenable to judicial review but is appealable to the High Court. In fact, the reasons cited by the applicant are grounds for appeal as opposed to grounds for judicial review. The applicant is on record stating that she did not appeal and that the time prescribed for filing an appeal has since lapsed, hence the reason she seeks to review the decision. The said reasoning is legally flawed, it offends the provisions of the law setting out time limits for filing appeals and seeks to open doors for a litigant to file an appeal disguised as a judicial review.”**

What was before the 1<sup>st</sup> respondent was an application by the interested party in which she sought various orders. The application was opposed by the applicant. The 1<sup>st</sup> respondent after considering the application and the response thereto made a considered ruling. The applicant has given several reasons why he thinks that the said ruling and the orders contained therein were irregular and erroneous. I am in agreement with the interested party that what the applicant is challenging is the merit of the impugned decision of the 1<sup>st</sup> respondent and that the applicant had alternative remedies for the said decision.

The Magistrate’s Court Act, 2015 and the Environment and Land Court Act, 2011 gives any person aggrieved with a decision of the Magistrate’s Court on matters relating to environment and land a right of appeal to this court. The applicant had a right to appeal to this court against the impugned decision. The applicant had a right also to apply to this court for a stay of execution of the said decision once he had lodged an appeal. Furthermore, since there was and still is a suit pending before this court (the ELC suit) between the parties over the same subject matter, the applicant could move the court in that suit to stay the execution of the said decision of the 1<sup>st</sup> respondent if he had valid grounds for such order.

The need to exhaust alternative remedies before judicial review is sought is now statutorily underpinned in the Fair Administrative Action Act, 2015 which the applicant has called into his aid in the present application. The Act was enacted to give effect to Article 47 of the Constitution of Kenya, 2010. Section 9(1) of the Fair Administrative Action Act, 2015 provides that:

**“Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is**

conferred pursuant to Articles 22(3) of the Constitution.”

Section 9(2) of the said Act provides that:

**“The High Court or subordinate court under subsection 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 other written law are first exhausted (emphasis mine).”**

Although the impugned decision is not an administrative action under the Fair Administrative Action Act, 2015, it is clear from the foregoing that where there are internal mechanisms such as review or appeal or where a written law provides for a remedy for an administrative action or decision, this court is barred from entertaining any application for judicial review of such action or decision unless it is satisfied that such remedies have been exhausted. The applicant has not satisfied me that he had exhausted the remedies that were available to him before approaching this court for leave to apply for judicial review of the 1<sup>st</sup> respondent’s decision in question. As I have stated earlier, if the applicant had filed an appeal, he had a right to apply for a stay of execution of the said decision of the 1<sup>st</sup> respondent. It cannot therefore be said that the appeal process would not have been the most appropriate or convenient remedy for him.

In Speaker of the National Assembly v Karume [1992] eKLR, the court stated that:

**“In our view there is considerable merit in the submission that 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. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”**

In Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others, [2015] eKLR the court 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...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”**

Due to the foregoing, it is my finding that the impugned decision is not amenable to judicial review the same having been made by the 1<sup>st</sup> respondent in exercise of its judicial function and there being in existence of a statutory remedy of appeal to this court against the same. The applicant is in the circumstances, not entitled to the leave sought.

Assuming that I am wrong on the need for the applicant to exhaust alternative remedies before applying for judicial review, can the application succeed on merit? This calls for the determination of the issue as to whether the applicant has established a prima facie case against the respondents and the interested party. It is not disputed that suit property is valued at over Kshs. 300,000,000/-. From the material before the court, the suit property is a shopping mall in the City of Nairobi comprising of a five storey building with abasement. The dispute over the ownership, use and occupation of the property was beyond the pecuniary jurisdiction of the lower court. This fact has not been contested in the ELC suit and in the present application. The fact that the lower court had no jurisdiction to entertain the lower court suit was also not contested in the lower court. It is also not disputed that this court had made a finding in its ruling of 28<sup>th</sup> January, 2021 in the ELC suit that the lower court had no jurisdiction to entertain the lower court suit and to grant the orders that it granted on 13<sup>th</sup> February, 2018.

The question then is what was the 1<sup>st</sup> respondent supposed to do with the lower court suit? In my view, once a court makes a finding that it has no jurisdiction to entertain a suit and that the suit was filed in a court without jurisdiction, it has power to terminate the proceedings by striking out the suit and discharging all the orders that had been made in the matter in the wrong belief that the court had jurisdiction. The 1<sup>st</sup> respondent was in the circumstances within its power to strike out the lower court suit. Once the suit was struck out, that brought to an end not only the suit but also all the orders that had been made in the matter in favour of the party who had brought the suit. The striking out of the lower court suit in effect automatically discharged the orders that had been made on 13<sup>th</sup> February, 2018 for the eviction of the interested party from the suit property with the assistance of the Officer Commanding Pangani Police Station. The applicant could not retain the benefit of those orders after they were discharged. The applicant was supposed to move to a court with jurisdiction for similar orders if they were still needed. In making an order that the interested party be restored to the suit property with the assistance of the Officer Commanding Pangani Police Station in the same manner that she was evicted, the 1<sup>st</sup> respondent was merely restoring the status quo prior to the orders of 13<sup>th</sup> February, 2018 that were made without jurisdiction. In Kamau Mucuha v The Ripples Ltd., C.A Civil Application No. Nai. 186 of 1992, Cockar, J.A stated that:

**“A party, as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act.....” .**

In Gusii Mwalimu Investment Co. Ltd & 2 others v Mwalimu Hotel Kisii Ltd. [1996]eKLR Shah J.A stated as follows:

**“.....it is fallacious for a person who forcibly and riotously enters premises to maintain that his occupation of these premises is the status quo which must be maintained. In this case if I were to allow the appeal, I would be giving my assent to occupation of the premises by a third party and assist the landlord to perpetuate what it did illegally. My equity conscience does not allow that.”**

Due to the foregoing, I find no error, illegality, irregularity or irrationality in the orders that were made by the 1<sup>st</sup> respondent on 21<sup>st</sup> June, 2021. The 1<sup>st</sup> respondent had jurisdiction to make the said orders.

On the applicant's allegation that he was not heard when the said decision was made and orders given, I am satisfied that the parties were given opportunity to present their cases and that the 1<sup>st</sup> respondent considered the cases for both parties before delivering the ruling of 21<sup>st</sup> June, 2021. An opportunity to be heard does not mean that the hearing must be either orally or by way of written submissions. In this case, the parties left the matter to the lower court to give appropriate directions and orders. There is no indication or suggestion that any of the parties requested for an opportunity to make oral or written submissions. Due to the foregoing, I am not satisfied that a prima facie case has been established to warrant the grant of the leave sought. The applicant's application therefore fails for having been brought prematurely before exhaustion of the alternative remedies and for not disclosing a prima facie case. In view of those findings, it is not necessary for me to consider whether or not leave if granted should operate as a stay.

For the foregoing reasons, the Chamber Summons application dated 6<sup>th</sup> July, 2021 is not for granting. The same is dismissed with costs to the interested party.

**DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2021**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Mugo h/b for Mrs.Wambugu for the Applicant

Mr. Menge for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mrs. Kamau for the Interested Party

Mr. E.Waweru-Court Assistant