



**Republic v Chief Magistrates Court at Nakuru & another; Faulu
Microfinance Bank Limited (Exparte Applicant) (Judicial Review
E022 of 2023) [2024] KEHC 4559 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4559 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
JUDICIAL REVIEW E022 OF 2023
SM MOHOCHI, J
MAY 2, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE CHIEF MAGISTRATES COURT AT NAKURU 1ST RESPONDENT

JOHNSON MUGAI MUNGAI T/A SUBUKIA HESHIMA

HARDWARE 2ND RESPONDENT

AND

FAULU MICROFINANCE BANK LIMITED EXPARTE APPLICANT

JUDGMENT

1. By way of a Notice of Motion dated 13th December, 2023 the Ex-Parte Applicant herein brought judicial proceedings herein by seeking the following orders: -
 - i. That this Honourable Court be pleased to issue an order of prohibition prohibiting and restraining the Respondents herein from entertaining and/or filling any further interlocutory application(s) by the Plaintiff now 2nd Respondent seeking for temporary injunction in the suit serialized as Nakuru CMCC No. 1152 of 2019 Johnson Muigai Mungai T/A Subukia Heshima Hardware vs Faulu Microfinance Bank Limited.
 - ii. That costs of this Application be provided for.
2. The Application is premised on thirty-four (34) grounds on its face and in summary: -



1. That it is the Defendant in the Lower Court matter Nakuru CMCC No. 1152 of 2019 Johnson Muigai Mungai T/A Subukia Heshima Hardware vs Faulu Microfinance Bank Limited instituted vide Plaint dated 12th August 2019.
2. That accompanying the Plaint was an application filed under certificate of urgency dated 6th November, 2019 seeking temporary injunction orders.
3. That the Application was heard ex-parte on 6th November, 2019 and an ex-parte order for temporary injunction granted with the inter partes hearing set for 13th November, 2019.
4. That the dispute is on the issue of exercising statutory power of sale by the Ex-Parte Applicant with respect to two properties known as Subukia/Subukia Block 6/361 and Subukia/Subukia Block 6/591 (nguba).
5. The ex-parte order issued on 6th November, 2019 restrained the Ex-Parte Applicant from exercising its statutory power of sale which had commenced since the Chargor the 2nd Respondent herein had defaulted in loan repayments.
6. On 13th November, 2019 neither party was present in Court and the matter was stood over generally with the file being taken back to the registry.
7. No step was taken till 24th February 2021 when the Ex-Parte Applicant attempted to exercise its statutory power of sale and upon issuing a notification for sale the 2nd Respondent moved to Court and filed an application on 24th February, 2021 seeking to reinstate the interim orders of Temporary injunction issued on 6th November, 2019. No interim orders were issued.
8. As no interim orders were issued, the 2nd Respondent filed another application for temporary injunction dated 26th March 2021 which the 2nd Respondent later withdrew and proceeded to canvass the Application dated 24th February 2021 by way of written submissions.
9. Vide Ruling dated 28th January, 2022, the application dated 24th February, 2021 was dismissed.
10. The 2nd Respondent preferred an Appeal against the Ruling of 28th January 2022 in Nakuru HCCA No. E16 of 2022 Johnson Muigai Mungai T/A Subukia Heshima Hardware vs Faulu Microfinance Bank Limited in the High Court and filed an Application dated 9th February, 2022 seeking a temporary injunction.
11. Whilst the Application dated 9th February, 2022 was pending, the 2nd Respondent filed yet another Application for temporary injunction dated 13th April 2022.
12. He managed to get ex-parte orders halting the exercise of statutory power of sale. The 2nd Respondent withdrew the Appeal in Nakuru HCCA No. E16 of 2022.
13. In Response to the application dated 13th April, 2022 the Ex-Parte Applicant filed a Notice of Preliminary Objection dated 26th April, 2022 raising as a preliminary issue that the Application was res judicata.
14. Vide a ruling dated 26th October, 2022 declined the Application dated 13th April, 2022.
15. On 29th November, 2022 the Respondent filed yet another Application seeking temporary injunction and he was again issued with ex-parte orders on 30th November, 2022.



16. In Response to the Application dated 29th November, 2022 the Ex-Parte Applicant filed a Notice of Preliminary Objection dated 13th December, 2022 again raising as a preliminary issue that the Application was res judicata.
 17. Vide a ruling dated 12th May, 2023 the Preliminary Objection dated 13th December, 2022 was allowed striking out the Application dated 29th November, 2022.
 18. That again the 2nd Respondent filed yet another Application seeking temporary injunction dated 11th July, 2023 and was again able to obtain ex-parte orders.
 19. That yet again the Ex-Parte Applicant filed a Notice of Preliminary Objection dated 18th July, 2023 and vide a Ruling of 8th November, 2023 the Court upheld the Preliminary Objection.
 20. That the Ex-Parte Applicant is apprehensive that another interlocutory application will be filed by the 2nd Respondent in the lower Court seeking a temporary injunction and the 1st Respondent will once again issue ex-parte orders and the suit shall be delayed for another year.
 21. That this Court has supervisory jurisdiction and it ought to intervene and stop the abuse of the Court process as the lower Court suit has been in Court for 6 years and time has been wasted entertaining interlocutory applications by the 2nd Respondent.
 22. That the Respondents are hell bent on not according the Ex-Parte Applicant a fair hearing since for the last six years it is yet to be paid its loan and has been estopped by the Honourable Court from exercising its statutory power of sale arising from the frivolous applications filed by the 2nd Respondent.
 23. That unless the Respondents are prohibited by the Court they shall continue with the cycle.
 24. It is in the interest of justice that that Respondents are compelled to honour their duty and further accord the Ex-Parte Applicant a fair hearing by not entertaining any further application seeking temporary injunction.
 25. The Ex-Parte Applicant is apprehensive that its right to fair hearing and fair administrative action shall continue being curtailed unless the instant application is heard on priority basis.
3. The application is further supported by the affidavit of Maureen Kahiro Counsel for the Ex-Parte Applicant wherein she restates the grounds in support of the application and adopted the disposition in the Verifying Affidavit in support of the application for leave to commence judicial review proceedings dated 29th November, 2023, the annexures thereto and the Statement of Facts dated 29th November, 2023.
 4. The Respondents were directed to file their response and the Application be canvassed by way of written submissions. Neither of the Respondents filed a response and neither party's submissions are on record.

Analysis and Determination

5. Having considered the Ex-Parte Applicant's pleadings without the benefit of a response by the Respondents this Court refines the following issues for determination;
 - i. Whether the 1st Respondent has exceeded its jurisdiction or contravened the due process and natural justice principles or transgression on a fundamental right or freedom?
 - ii. Whether Judicial review orders of prohibition can be made against the 2nd Respondent?



- iii. Whether the Ex-Parte Applicant is entitled to the relief sought?
6. The Judicial Review Order of prohibition as framed;

Order of prohibition prohibiting and restraining the Respondents herein from entertaining and/or filing any further interlocutory application(s) by the Plaintiff now 2nd Respondent seeking for temporary injunction in the suit serialized as Nakuru CMCC No. 1152 of 2019 Johnson Muigai Mungai T/A Subukia Heshima Hardware vs Faulu Microfinance Bank Limited.
7. In essence the Ex-parte Applicant seeks to deploy judicial review remedy against a private individual they are engaged in an active civil litigation to obtain an order of prohibition from filing any future interlocutory applications for injunctions.
8. I have keenly read the extensive forty-two (42) paragraph Affidavit of Maureen Kahiro in support dated 29th November 2023, and no adverse deposition has been made against the 1st Respondent, in fact whereas the 2nd Respondent has clearly engaged in multiple interlocutory Applications and obtained at least three interlocutory injunctions in Nakuru CMCC No. 1152 of 2019 the same has been procedural and there are instances where such Applications have been dismissed and the Ex-Parte Applicant's Preliminary objections sustained.
9. The applicable principles for grant of Judicial review orders in the nature of "Prohibition" was expounded by the Court of Appeal in Joram Mwenda Guantai vs The Chief Magistrate, [2007] 2 EA 170, as follows:

"It is trite that an Order of Prohibition 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 in 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... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate Court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the Court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the Court or to a subordinate Court and to prevent an abuse of the process of the Court."
10. The judicial review orders of Prohibition can be issued only against judicial and quasi-judicial authorities.
11. The judicial review orders of Prohibition cannot issue to forestall an anticipated future occurrence or action by a private individual.
12. While this Court finds the apparent extreme weaponization of litigation by the 2nd Respondent bordering on abuse of the process of the Court this Court equally finds that the ex-parte Applicant reserves his right to appeal where dissatisfied with any order or ruling and that the case by all intents and purpose is now a backlog case that ought to be heard and concluded on priority basis.



13. Judicial review orders of Prohibition can issue where the judicial body in this instance, the Chief Magistrates Court at Nakuru has exceeded its jurisdiction or contravened the due process and natural justice principles or transgression on a fundamental right or freedom.
14. This Court thus finds the Notice of Motion dated 13th December, 2023 to be without merit and the same is dismissed without any orders as to costs.
15. The 1st Respondent is directed to prioritize hearing and determination of Nakuru CMCC No. 1152 of 2019 Between the Ex-Parte Applicant and 2nd Respondent, within the next ninety (90) days from today.

It is So Ordered

SIGNED, DELIVERED AT NAKURU ON THIS 2ND DAY OF MAY, 2024

MOHOCHI S.M

JUDGE

