



Republic v Chief Magistrates Court (Milimani) & another; Khaminwa (Exparte Applicant); Kenya Commercial Bank Limited (Interested Party) (Judicial Review Miscellaneous Application E174 of 2021) [2023] KEHC 17320 (KLR) (Judicial Review) (11 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17320 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E174 OF 2021**

JM CHIGITI, J

MAY 11, 2023

BETWEEN

REPUBLIC APPLICANT

AND

CHIEF MAGISTRATES COURT (MILIMANI) 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

JOHN M KHAMINWA EXPARTE APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED INTERESTED PARTY

JUDGMENT

Brief Background

1. The application before this Court is the *ex parte* Applicant’s Notice of Motion application dated November 18, 2021 brought under Order 53 Rules 3 and 4 of the [Civil Procedure Rules 2010](#) and Sections 8 and 9 of the [Law Reform Act](#).
2. The Notice of Motion seeks the following orders:
 - i. An order of *certiorari* to bring into this Court for purposes of quashing the 1st Respondent’s Warrant of Attachment of movable property in execution of Decree for Money and Warrant of Sale of Property in Execution of Decree for Money both October 19, 2021 issued in CMCC



No 9058 of 2018 (Milimani) Kenya Commercial Bank Ltd v. John M. Khaminiwa T/A Khaminwa & Khaminwa Advocates.

- ii. An order of Prohibition staying any further proceedings in CMCC No 9058 of 2018 (Milimani) Kenya Commercial Bank Ltd v. John M. Khaminiwa T/A Khaminwa & Khaminwa Advocates.
- iii. Costs.
3. The application is supported by the grounds in the Supporting Affidavit of Dr. John M. Khaminwa sworn on November 10, 2021 and the Statement of Facts dated November 10, 2021.
4. The *ex parte* Applicant's case is that pursuant to the Court's Judgment and Decree dated April 30, 2020 the Interested Party herein instructed M/s Bemac Auctioneers to proclaim property in the *ex parte* Applicant's offices.
5. The copies of the Warrant of Attachment and of Movable property in execution of Decree for Money and Warrant of Sale of Property in Execution of Decree for Money issued by the 1st Respondent is dated October 19, 2021. The Auctioneers are said to have also attached the *ex parte* Applicant's personal property.
6. The *ex parte* Applicant challenges the Warrants of Attachment as they refer to the Judgment date as April 30, 2021 yet the same was delivered on April 30, 2020.
7. The issuance of the Warrants according to the *ex parte* Applicant contravenes the provisions of Order 22 rule 18(1)(a) of the [Civil Procedure Rules, 2010](#) as the Warrants were issued before a Notice to show Cause was issued to the *ex parte* Applicant.
8. The Respondents in response to the application filed Grounds of Opposition dated February 8, 2022. The Respondents' raised 8 grounds as follows;
 - i. That the Application is premature, incompetent. misplaced an abuse of the court process.
 - ii. That the Application is fatally defective as it offends the mandatory provisions of Section 9 (2) of the [Fair Administrative Action Act](#) No 4 of 2015.
 - iii. That the Application as drafted is an Appeal disguised as a Judicial Review Application.
 - iv. That Application as drawn offends Article 160 (5) of the [Constitution](#) as read together with Section 6 of the [Judicature Act](#).
 - v. That the 1st Respondent acted within the premises of the Law.
 - vi. That judicial review cannot be used to curtail or stop statutorily bodies or public officers from lawful exercise of power within their statutorily mandates.
 - vii. That there are no orders sought against the Hon. Attorney-General and as such ought to be struck off the proceedings.
 - viii. That the Application is a misconception and ought to be dismissed with costs to the Respondents.
9. The Interested Party also filed a Replying Affidavit sworn by John Katiku who swears to be a Managing Partner at the firm of Musyoka Wambua & Katiku Advocates the firm on record for the Interested Party.



10. Similar to the Respondents' case the Interested Party contends that the *ex parte* Applicant's application is premature and that the *ex parte* Applicant has failed to first exhaust the remedies available to him under the law.
11. It is also the Interested Party's case that the decree subject of which the Warrants of Attachment are issued is dated June 11, 2021 while the Warrants are dated October 19, 2021 and therefore the same cannot be considered to have been issued one (1) year apart. According to the Interested Party it was under no obligation to serve a Notice to Show Cause as claimed.
12. The *ex parte* Applicant is said to have actively participated in the proceedings before the 1st Respondent and that the instant application is an attempt at denying the Interested Party the fruits of its litigation. It is contended that the *ex parte* Applicant has failed to demonstrate that the proceedings in CMCC 9058 of 2018 are tainted with illegality or irregularity so as to justify intervention of this honourable court.

Analysis and Determination

13. Having taken into account the application before this court, the grounds for it, the affidavit evidence, the responses and the knowledgeable submissions made by counsel, two issues crystallize for determination and these are;
 - i. Whether the *ex parte* Applicant is entitled to the judicial review orders sought.
 - ii. Whether the *ex parte* Applicant's application is merited.
14. The grounds upon which judicial review orders can be granted were explained in the case of [*Council of Civil Service Unions v Minister for the Civil Service*](#) (1985) A.C. 374,410; Lord Diplock spoke of these grounds as follows:

“My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review.

“The first ground I would call “illegality,” the second “irrationality” and the third “procedural impropriety.” That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of “proportionality” which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

“By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

“By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic



or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

"I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

15. The *ex parte* Applicant in his submissions dated July 18, 2022 urges that a Decree is made when the Court pronounces its determination. Further that in the instant case this was on April 30, 2020 and not when the document is signed. According to him the subsequent execution process based on the Warrants of Attachment was thus flawed as the provisions of Order 22 Rule 18 were not adhered to.
16. The *ex parte* Applicant also submits that the [Fair Administrative Action Act](#) is not the sole legislation that has the powers to allow for Judicial Review proceedings. Also, that the fact that there are other avenues available to the *ex parte* Applicant is not a barr to him commencing these proceedings. The case of [Shah Vershi Devshi & Co. Ltd v Transport Licensing Board](#) [1970] EA is cited in support of this argument.
17. The 2nd Respondent in its written submissions urges that the import of the doctrine of exhaustion of remedies with respect to judicial review is that judicial review should be considered as a remedy of last resort, that is, it is the final recourse only after dispensing with other legally available remedies and to buttress this argument the case of [Market Plaza Limited V Commissioner for Lands & 3 others](#) [2019] eKLR is cited. Further that the criteria for determining what constitutes an exceptional circumstance to warrant the grant of such prerogative orders was succinctly provided by the court in [Republic vs. National Environmental Management Authority](#) [2011] eKLR.
18. It is the 2nd Respondent's case that, an order of *certiorari* will issue when the impugned decision was marred with illegality such as being made or rendered without or in excess of the administrative body's jurisdiction.
19. The Interested Party in its written submissions argues that the prerogative orders of *certiorari* and prohibition are not applicable in this instance since the *ex parte* applicant has failed to prove before this honorable court as to why he is entitled to the said orders and further that his sole argument is that he was alarmed by the proclamations of the judgment which is vague and not enough reason to entitle him the judicial review remedies.
20. The [Civil Procedure Rules, 2010](#) under Order 22 Rule 18(1)(a) provides as follows;

"Notice to show cause against execution in certain cases [Order 22, rule 18]

1. Where an application for execution is made



- a. More than one year after the date of the decree.
- b.
- c.

[Emphasis my own]

21. The Court in the case of *Mini Bakeries (K) Ltd v George Ondieki Nyamanga* [2014] eKLR held;

“What I can discern from the above provisions is that a notice to show cause is issued where an application for execution is made more than one year after the date of the decree. In the instant case, the decree was issued on 1st February 2013 and the warrants of attachment were taken out on February 8, 2013 before the trial court issued the conditional stay on April 3, 2014. Then on May 30, 2014, the respondents proceeded to attach the appellant’s motor vehicle. Clearly, May 30, 2014 was more than a year since the decree was issued on 1st February 2014 and it was therefore necessary for the respondent to ask the court executing the decree to issue a notice to the appellant requiring it to show cause why the decree should not be executed against it. Having failed to so, the respondent was clearly in breach of Order 22 Rule 1 (a). The record does not show that the trial court made any other order after April 3, 2014 which would have negated the requirement for a notice to show cause to be issued to the appellant/applicant.”

22. Similarly, the Court in the case of *Santowels Limited v Stanbic Bank Kenya Ltd* [2020] eKLR held as follows;

“17. The applicant submits that the plaintiff/respondents failed to comply with Order 22 Rule 18 of the *Civil Procedure Rules* which provides:

“18.

(1) Where an application for execution is made:

- (a) More than one year after the date of the decree;
- (b) Against the legal representative of a party to the decree; or
- (c) For attachment of salary or allowance of any person under rule 43;

The Court excluding the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him

18. The Defendant/Applicant submits that the Respondent failed to take out a Notice to show cause as per the mandatory requirements of Order 22 rule 18.



19. The Respondent counters that Order 22 Rule 18 contains a proviso as follows:

"... provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the Decree and the application for execution if the Application is made within one year from the date of the court order against the party against whom the execution is applied for, made on any previous application for execution or in consequence of the application being made against the legal representative of the judgment debtor, if upon a previous application for execution for execution against the same person, the court has ordered execution to issue against him, provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment debtor having changed his employment since a previous order for attachment".

20. It is not in dispute that the decree herein was issued on May 17, 2018. Proclamation was done on November 15, 2019, eighteen (18) months or 1^{1/2} years after issuance of the decree. Therefore, on terms of Order 22 rule 18 it would appear that a Notice to Show Cause ought to have been issued by the Respondents."

23. The provisions of Order 22 Rule 18 (1)(a) are clear cut and do not require further interpretation. The Rule provides that a Notice to Show Cause is issued where an application for execution is made more than one (1) year after the date of the decree and as has been stated by the courts as seen in the above decisions the date referred as the date of the decree is the date of the issuance of the said decree.

24. In our instant case the in CMCC No 9056 of 2018 was issued on June 11, 2021 and the Warrant of Attachment of Sale is dated October 19, 2021 this is just well over four (4) months and as such there was no need for the issuance of a Notice to Show Cause to the *ex parte* Applicant.

25. The 1st Respondent was therefore well within its jurisdiction in issuing the said warrants. For this reason, I find that the *ex parte* Applicant has not merited the Judicial Review orders sought.

Order:

26. The *ex parte* applicant's application dated November 18, 2021 is hereby dismissed. I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY, 2023

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J. CHIGITI (SC)

JUDGE

