



**Republic v Resident Magistrate - Kisii Law Courts; Oteke & another (Exparte Applicants); Onkoba t/a Betico Auctioneers & another (Interested Parties) (Judicial Review Application 2 of 2022) [2023] KEHC 4091 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4091 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
JUDICIAL REVIEW APPLICATION 2 OF 2022**

**PN GICHOHI, J**

**MAY 4, 2023**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
IN THE NATURE OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION OF KENYA**

**2010**

**AND**

**IN THE MATTER OF LAW REFORM ACT (CAP 26 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF THE RESIDENT MAGISTRATE’S COURT AT KISII**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**RESIDENT MAGISTRATE - KISII LAW COURTS ..... RESPONDENT**

**AND**

**DAVID ODHIAMBO OTEKE ..... EXPARTE APPLICANT**

**MERCY MORANGI MACHWARA ..... EXPARTE APPLICANT**

**AND**

**BERNARD ONKOBA T/A BETICO AUCTIONEERS ..... INTERESTED PARTY**

**WILFRED NYANGWONO OSORO ..... INTERESTED PARTY**



## JUDGMENT

1. Pursuant to the leave granted on July 29, 2022 to commence judicial review proceedings, the ex-parte applicants filed a Notice of Motion dated August 5, 2022 seeking the following orders: -
  - a. That this court be pleased to issue an order of Certiorari to remove unto the High Court and quash the proceedings and orders of the Resident Magistrate at Kisii given on 3/6/2022 directing the OCS Kisii Central Police Station or OCS Nyanchwa Police Station or any other police station in the Republic of Kenya to escort BETICO Auctioneers, the 1<sup>st</sup> interested party or its agents in repossessing motor vehicle registration no KBX 698Z Ashok Leyland or from anywhere where the motor vehicle might be operating or kept, in any case do arrest anybody obstructing the lawful execution;
  - b. All necessary and appropriate relief be granted and/or directions to be given by this court;
  - c. Costs in the substantive application be provided for.
2. In support of the application is the statement of facts and the affidavit of David Odhiambo Oteke (1<sup>st</sup> ex-parte applicant). The ex-parte applicant deponed that the 1<sup>st</sup> interested party filed an application dated June 3, 2022. The said application was placed before the Resident Magistrate (Respondent) who issued substantive orders on the same day and at the ex-parte stage; that though the said orders were never served upon the ex-parte applicants, the 1<sup>st</sup> interested party executed them and impounded motor vehicle registration number KBX 698Z Ashok Leyland (suit motor vehicle) without proclamation. He depones that the said orders given on June 3, 2022 were final in nature and yet he was not afforded an opportunity to be heard.
3. It was further deponed that the ex-parte applicants' counsel filed an application seeking stay of the orders issued on 33<sup>rd</sup> June 2022 but the application was dismissed on grounds that the Respondent was functus officio.
4. It is deponed that on January 13, 2016, the 2<sup>nd</sup> ex - parte applicant entered into a sale agreement for the suit motor vehicle with one Wilfred Nyangwono Osore and 1<sup>st</sup> ex-pate Applicant's wife and paid a consideration of Kshs 1,000,000/= and the remaining balance of Kshs 2,500,000/= was paid directly to the NIC Bank as agreed.
5. The 1<sup>st</sup> ex-parte applicant stated that there was no decree against the ex-parte applicants capable of being executed; that there exists no chattels instruments between himself or the 2<sup>nd</sup> ex-parte applicant which the interested parties could exercise their statutory power of sale; that there was no basis upon which the Respondent could make the orders sought by the 1<sup>st</sup> interested party taking into account the 2<sup>nd</sup> interested party did not have the capacity to instruct the 1<sup>st</sup> interested party; that the orders given by the Respondent were against the principle of natural justice as the ex-parte applicants were not given any opportunity to be heard.
6. The 1<sup>st</sup> interested party filed a replying affidavit sworn and dated August 22, 2022 in opposition of that application. He admitted to filing the application dated June 3, 2022 on the instructions of Mageto & Co Advocates to repossess the suit motor vehicle; that the application and the orders were duly served upon the 1<sup>st</sup> ex-parte applicant; that the proclamations done using the orders issued by the Respondent



- are proper and do not need to be restricted; that if the orders sought are granted, it will contravene the Provisions of Article 159 (2) and (6) of the *Constitution*; that the 1<sup>st</sup> ex-parte applicant is not stating the true facts of this case and intends to hoodwink this court; that the application is defective and it should be dismissed with costs.
7. The 2<sup>nd</sup> interested party also opposed the application and swore an affidavit dated August 22, 2022. He deponed that he has never been paid any amount as was agreed and that necessitated the 1<sup>st</sup> interested party to file the application; that the suit motor vehicle was almost being bounded by the auctioneers but he assisted the 1<sup>st</sup> ex-parte applicant to take a loan from Mukulima Youth Group which he was the 1<sup>st</sup> ex-parte applicant's guarantor but the 1<sup>st</sup> ex-parte applicant failed to pay and this necessitated him to pay the loan; that there exists a chattel instrument between him and the 1<sup>st</sup> ex-parte applicant since he has not been paid the monies; that he had and still has the capacity to instruct the 1<sup>st</sup> interested party to repossess the suit motor vehicle; that if the 1<sup>st</sup> ex-parte applicant was prejudiced, he would not have participated in the miscellaneous application which he is now seeking to review. The 2<sup>nd</sup> interested party asked the court to dismiss the application with costs.
  8. The application was canvassed by way of written submissions. The applicants filed their submissions dated February 26, 2023 and submitted on three issues.
    1. Whether the Respondent violated the rules of natural justice to the detriment of the applicant in making the orders of June 3, 2022.
    2. Whether the respondent acted illegally, irrationally or unreasonably in granting the said orders.
    3. Whether the applicants are entitled to the reliefs sought.
  9. On the 1<sup>st</sup> issue, it was submitted that the respondent issued the ex - parte orders without giving the applicants time to respond to the monetary claims made by the 1<sup>st</sup> interested party which orders adversely affected the ex -parte applicants; that the ex-parte applicants' suit motor vehicle was attached even without ascertaining whether or not the amount due was payable or not. It was submitted that the respondent breached the rules of natural justice by making the ex-parte orders which were final in nature.
  10. On the 2<sup>nd</sup> issue, it was submitted that the Respondent acted arbitrarily and irrationally in allowing prayer No 2 and the orders were also made without hearing the ex-parte applicants.
  11. On the 3<sup>rd</sup> issue, it was submitted that the ex - parte applicants have demonstrated that the Respondent acted arbitrarily and irrationally and this court should allow the application and issue an order of Certiorari quashing the ex-parte orders issued on June 3, 2022.
  12. In their written submissions dated 1<sup>st</sup> February 023, the interested parties submitted that the ex-parte applicants are entitled to the orders sought as the orders of June 3, 2022 were issued by a court of competent jurisdiction and they cannot be quashed; that if the ex - parte applicants are aggrieved, they should have appealed against the court's decision. They urged the court to be persuaded by the decision made in the case of *Municipal Council of Mombasa vs Republic and Umoja Consultants Ltd* Nairobi Civil Appeal No 185 of 2007 (2002) eKLR where the court stated that in judicial review, the court would be concerned with the procedure leading to the making of the decision.
  13. They also rely on the Ugandan case of *Pastoli vs Kabale District Local Government Canal & Others* (2008) 2 EA 300 where the court discussed what an applicant has to show in a Judicial Review Application that is, illegality, irrationality and procedural impropriety. They urged this court to find



that the ex -parte applicants are not deserving of the orders sought and dismiss the application with costs.

### **Determination**

14. The Respondent did not file any responses though served. After considering the Notice of Motion, responses and the rival submissions by parties, the bone of contention by the ex-parte applicants is that they were not given an opportunity to be heard in the application dated June 3, 2022 where the Respondent proceeded to make order that were final in nature contrary to the rules of natural justice. If the Court finds that they were denied a chance to be heard as they claim, then the issue for determination then is whether the ex-parte applicants are deserving of the orders sought by way of a judicial review or whether they ought to have filed an appeal if aggrieved by the orders made on June 3, 2022.
15. The purpose of a judicial review was set out by the Court of Appeal in *Municipal Council of Mombasa (supra)* thus:

“Judicial review is concerned with the decision-making process, not with merits of the decision itself...The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at “Did those who made the decision have the power, i.e. the jurisdiction to make it” “Were the persons affected by the decision heard before it was made” In making the decision, did the decision-maker take into account relevant matters or did he take into account irrelevant matters” These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether there was or there was not sufficient evidence to support the decision - and that, as we have said, is not the province of judicial review.”
16. It is therefore not the concern of this court to establish the merits and demerits of a case when called upon to exercise its judicial review powers as doing so would be tantamount to sitting as an appellate court rather than a review court. This Court is concerned with the decision-making process, that is, whether the persons who were affected by the decision were given an opportunity to be heard and if the decision maker took into account relevant or irrelevant matters before making its decision.
17. A look at the original record of lower court file that is Chief Magistrates Court Misc Civil Application No E037 of 2022 clearly reveals that the Application dated June 3, 2022 was said to have been brought under Order 15 Rule 1 & Order 22 Rule 1 (b) of the [Civil Procedure Rules 2010](#), Section 3, 3 A and Section 63 E of the [Civil Procedure Act](#) and Article 159 of the [Constitution of Kenya 2010](#). The Applicant was seeking orders that:
  1. This application be certified urgent.
  2. This court does issue an order directing the OCS Kisii Central Police Station /and or OCS Nyanchwa Police Station or any other Police Station in the Republic of Kenya to escort BETICO Auctioneers or his agents in repossessing motor vehicle registration number KBX 698Z Ashok Leland from David Odhiambo Oteke /Mercyline Morangi Machwara or from anywhere where the motor vehicle might be operating or kept, in any case do arrest anybody obstructing the lawful execution.



3. The costs of the application be in the cause."
18. The court record shows that the application filed under certificate of urgency was placed before the learned Magistrate in chambers and dealt with in absence of the parties and he held:

"Upon reading the N/M dated 03/6/2022 and supporting affidavit Bernard Onkoba sworn on June 3, 2022, I am satisfied that the matter is urgent and I certify it as such.

I grant prayer No 2 of the of the N/M dated 03/6/2022. The Application. The application be served and appear before the court on 08/6/2022."
19. Having granted the orders which were final and ex-parte, it is not clear why the learned magistrate directed that the application be served and ordered an appearance on June 8, 2022. Though the trial magistrate had jurisdiction to deal with the application, the process was plainly irrational. If the learned magistrate intended that the Respondents therein be served with the application and appear before him, then that would have been the order after certifying the application urgent. In this case, granting the substantive order meant there was no further cause. There was no point of directing an appearance by the parties after issuance of that order.
20. He denied the Respondents therein a chance to be heard and that is contrary to the rules of natural justice. That is what the ex-parte applicants have demonstrated before this court and this is not an issue for appeal but judicial review.
21. In the circumstances, this court allows the application in the following terms;
  1. An order of Certiorari be and is hereby issued quashing the proceedings of the Resident Magistrate at Kisii in Misc. Application No 37 of 2022 Benard Onkoba T/A Betico Auctioneers vs David Odhiambo Ateka & Another and the orders given on June 3, 2022 directing the OCS Kisii Central Police Station or OCS Nyanchwa Police Station or any other police station in the Republic of Kenya to escort BETICO Auctioneers, the 1<sup>st</sup> Interested Party or its agents in repossessing motor vehicle registration no KBX 698Z Ashok Leyland or from anywhere where the motor vehicle might be operating or kept, in any case do arrest anybody obstructing the lawful execution.
  2. Due to the circumstances herein, each party bears his own cost in this application.

**DATED, DELIVERED AND SIGNED AT KISII THIS 4TH DAY OF MAY 2023.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of;**

N/A for the Ex-Parte Applicants

N/A for the Respondent

N/A for the Interested Parties

Kevin Court Assistant

