



Tom Ojienda & Associates v National Land Commission (Judicial Review Cause E145 of 2021) [2023] KEHC 22582 (KLR) (Judicial Review) (21 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22582 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW CAUSE E145 OF 2021
JM CHIGITI, J
SEPTEMBER 21, 2023**

BETWEEN

PROF. TOM OJIENDA & ASSOCIATES APPLICANT

AND

NATIONAL LAND COMMISSION RESPONDENT

RULING

1. The application dated September 30, 2021 seeks for orders:
 - a. That this honourable court be pleased to certify this matter urgent and the same be heard *ex parte* in the first instance.
 - b. That leave be granted to the applicant to file an application for judicial review seeking an order to *mandamus* compelling the 1st respondent and 2nd respondent, to pay to the *ex parte* applicant forthwith and without delay, the decretal sum delineated hereunder together with the accrued interest until payment in full, that is to say;
 - i. Amount awarded.
 - ii. Interest at 12% p.a from November 11, 2019 to September 6, 2021 amounting to Total... Kshs 1,005,633.00/= . Kshs 225,506.63/= . Kshs 1,228,139.63.
 - c. That the costs of this application be borne by the respondents.
2. The application is predicated upon the statement of facts and verifying affidavit of Prof Tom Ojienda, SC.



Brief Background:

3. The matter emanates from a judgement in petition No 402 of 2014, National Land Commission v Cabinet Secretary, Ministry of Lands Housing and Urban Development & another in which the applicant represented the respondent and a bill of costs dated June 15, 2017 was taxed at Kshs 1,005,633/= in a ruling dated January 18, 2018.
4. The applicant thereafter secured a certificate of taxation dated October 24, 2019 of Kshs 1,005,633/=.
5. Due to the lack of payment by the respondent, the applicant, in anth November 2019, sought that the court be pleased to enter judgement for the applicant against the respondent for the sum of Kshs 1,005,633/=.
6. That on January 25, 2021, judgement was entered in favour of theth October, 2019 and the applicant extracted a decree dated January 25, 2021.
7. As on September 6, 2021 the amount owed was Kshs 225,506.63/= as set out in the certificate of order which was served upon the respondents on September 8, 2021 together with several reminders.
8. The respondents have refused to settle the claim.

Analysis And Determination:

9. This court has to determine whether the applicant has made out a case for the grant of leave to institute judicial review proceedings. The leave stage is used to identify and filter out, at an early stage, claims which may be trivial or without merit.
10. Order 53 rule 1 of the *Civil Procedure Rules* provides that no application for judicial review orders should be made unless leave of the court was sought and granted.
11. It is also trite that in an application for leave, the court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. In *Uwe Meixner & another v Attorney General* [2005] eKLR, it was held that the leave of court is a prerequisite to making a substantive application for judicial review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case. Thus, the first step in the judicial review procedure involves the mandatory "leave stage." At this stage an application for leave to bring judicial review proceedings must first be made.
12. The reason for the leave was explained by Waki J (as he then was), in *Republic v County Council of Kwale & another Ex Parte Kondo & 57 others*, Mombasa HCMCA No 384 of 1996 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. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the



court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judiciously".

13. Judgement was entered in petition No 402 of 2014, *National Land Commission v Cabinet Secretary, Ministry of Lands Housing and Urban Development & another*.
14. A bill of costs was taxed at Kshs 1,005,633/= on January 18, 2018.
15. The applicant secured a certificate of taxation dated October 24, 2019 of Kshs 1,005,633/-.
16. On January 25, 2021, judgement was entered in favour of theth January, 2021. Applicant for the payment of Kshs 1,005,633/= and it has a decree dated 25
17. The applicant extracted a certificate of order.
18. In HCJR Case No E087 of 2021, *AAR Insurance v Public Procurement Administrative Review Board, Secretary IEBC and Zamara Risk and Insurance brokers Limited Interested Parties* (unreported), Ngaah J aptly summed up the rationale for the requirement for leave where he stated;

"I must reiterate that that judicial review remedies are discretionary and it is partly for this reason that a judicial review court has been clothed with the discretion to interrogate, at a preliminary level, the intended application for prerogative orders. It is at that stage that, in exercise of its discretion, the review court will weigh between 'the legitimate requirement of public authorities that they should be free to perform their proper functions on behalf of the public and the corresponding requirement that they should have due regard for the legitimate rights and interests of the individual and groups of individuals. (Emphasis added)' If upon examination of the material before it, the court is persuaded that a case has been made out that on further interrogation the legitimate rights and interests of the individual or group of individuals may have been abrogated, it will intervene and exercise its discretion in favour of grant of leave to institute a substantive motion for judicial review reliefs. It follows that the application for leave is not a mere procedural technicality that can be dispensed with at the whims of either the court or an applicant. It is a material stage in the application of judicial review orders at which the discretion of this honourable court is called into question and which, for this very reason, cannot be taken away without an express provision of the law in that regard."

Disposition:

19. I am satisfied that the applicant has made out a *prima facie* case to warrant the grant of leave to initiate judicial review proceedings as sought.

Order:

20. The application dated September 30, 2021 is hereby allowed.
21. The applicant shall file and serve the substantive motion within 14 days of today's date.
22. The respondents shall file and serve their respective responses to the application within 14 days of service.
23. The applicant shall thereafter file and serve its submissions within 7 days.



24. The respondents shall file and serve their submissions within 7 days of service.
25. The submissions shall be limited to 6 pages each.
26. The matter shall be mentioned on November 22, 2023 to report compliance and for further directions on the judgment.

DATED, SIGNED AND DELIVERED THIS 21ST DAY OF SEPTEMBER 2023.

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J. CHIGITI (SC)

JUDGE

