



Pevans East Africa Limited v SPM Mukurweini Law Courts (Judicial Review E010 of 2024) [2024] KEHC 13030 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13030 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
JUDICIAL REVIEW E010 OF 2024
MA ODERO, J
OCTOBER 25, 2024**

BETWEEN

PEVANS EAST AFRICA LIMITED APPLICANT

AND

SPM MUKURWEINI LAW COURTS RESPONDENT

JUDGMENT

1. Before this Court is the Notice of Motion Application dated 6th May 2024 by which the Ex Parte Applicant Pevans East Africa Ltd sought the following orders:-

- “(a) Spent
- (b) Than an order of Certiorari to call into the Honourable Court to quash the Ruling and the Orders of the Magistrates Court at Mukurweini dated the 4th April 2024 in Gladys Muthoni Wathanga vs Pevans East Africa Limited & another Civil Case No. 45 of 2017.
- (c) That an order of Certiorari to call into the Honourable Court to quash the orders/decision of the Magistrates Court at Mukurweini dated the 30th November 2022 in Gladys Muthoni Watanga vs Pevans East Africa Limited & Another Civil Case No. 45 of 2017.
- (d) An order of Prohibition prohibiting the Respondent herein from further entertaining the dismissed and abated suit in Gladys Muthoni Wathanga vs Pevans East Africa Limited & Another Civil Case No. 45 of 2017:
- (e) A Declaration that the Applicant’s rights to fair Administrative action and the basic rules of natural justice were infringed and/or violated by the 1st Respondent:



- (f) A Declaration that the Respondent is obligated to constitutionally act lawfully, fairly and reasonably in the exercise of their Constitutional mandate, which principles were violated with its decisions dated 30th November 2023 and 4th April 2024 in Gladys Muthoni Wathanga vs Pevans East Africa Limited & Another Civil Case No. 45 of 2017.
- (g) The costs of this Application be provided for.
2. The motion which was premised upon Article 159 of *the Constitution* of Kenya 2010, Sections 3, 4, 6, 7, 8, 9, 11 and 12 of the Fair Administrative Action Act 2015, Sections 1A, 1B, 3, 3A of the Civil Procedure Act, Order 53 Rule 3 of the Civil Procedure Rules and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by one Robert Kenneth Wanyoike Macharia a director of the Ex-Parte Applicant.
3. The application was opposed. The matter was canvassed by way of written submissions. The Ex-parte Applicant filed the written submissions dated 5th June 2024 whilst the 2nd Respondent Richard Gitonga Wathanga (as the personal representative of the estate of Gladys Wathanga (Deceased) relied upon his written submissions dated 24th June 2024.

Background

4. This application arises from a suit filed at the Mukurweini Law Courts being Civil Suit Number 45 of 2017; Gladys Muthoni Wathanga -vs- Pevans East Africa Limited & Glamour Venture Limited.
5. The Defendant Pevans East Africa Limited filed its defence to the suit dated 18th December 2017 as well as a third party notice.
6. The plaintiff to the suit passed away on 31st May 2018. However the matter remained active in the Court until 3rd March 2023 when the suit was dismissed by the trial court for want of prosecution.
7. The personal representative of the plaintiff then filed an application dated 16th October, 2023 seeking reinstatement of the dismissed suit and seeking to substitute the deceased plaintiff in the matter.
8. The Ex Parte Applicant contends that the application of 16th October 2023 seeking reinstatement of the dismissed suit was based on concealment of material facts to wit the fact that the suit had already abated upon the expiry of one (1) year from the demise of the original plaintiff. Therefore according to the Ex-parte applicant the suit was non-existent at the time when the application for reinstatement was filed.
9. Vide orders made Ex-parte on 30th November 2023 the learned trial magistrate reinstated the suit. Aggrieved by that ruling the Ex Parte Applicant filed the application dated 31st January 2024 seeking to set aside the orders reinstating the suit.
10. Vide another ruling delivered on 4th April 2024 the trial court dismissed the application dated 31st January 2024 and upheld its orders of 30th November 2023 reinstating the suit and proceeded to give directions on pre-trial.
11. The Ex-parte applicant submits that they were not granted an opportunity to defend the application of 31st January, 2024 that the said application was premised upon wrong provisions of the law that said application amounted to an abuse of court process, limited the Ex Parte's right to access to justice and was an illegality.



12. That be refusing to grant the Ex Parte Applicant the right to be heard the learned trial magistrate infringed on the Applicants right to fair administrative action and the decisions of the trial court are not only ultra vires but go against the rules of National Justice.
13. The 2nd Respondent in opposing this application submitted that Judicial Review is concerned with the process and not the merits of a judicial decision. That this application was seeking review of the decision of the trial court under the guise of a judicial review application. The Respondent urged that the present application had no merit and ought to be dismissed.

Analysis And Determination

14. I have considered the application before this court as well as the written submissions filed by both parties.
15. The threshold of a constitutional petition was set out in the case of Anarita Njeru -vs- Republic [1979] KLR where the court observed as follows:-

“If a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.....”

16. Similarly in Communications Commission Of Kenya & Others -vs- Royal Media Services Limited & 5 Others [2014] eKLR the court stated that

“Although article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right to freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention of infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

17. Finally the court while considering the elements of a sustainable Constitution Petition in Grace Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot [2021] eKLR stated that

“It is indisputable that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of violation and/or threatened violation. I do not suppose it is enough to merely cite constitutional provisions. There has to be some particulars of the alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints.....Although I have in my foregoing discussion adverted to grounds (c) and (d) of the preliminary objection that there are no Constitutional issues that warrant adjudication by the Court and that the Petition may very well Constitute an abuse of the due process of the court, I need to observe that parties are increasingly filing matters that are essentially Civil matters and christening the same as Constitutional Petitioners



which is not proper. Where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court.” [Own emphasis]

18. This Notice of Motion in my view represents a classic example of what does not qualify for judicial review orders.
19. The application before this court is for judicial review of the decision of the lower court allowing the reinstatement for a suit that according to the Ex parte Applicant had abated. The applicant contends that the lower court, (the 1st Respondent) erred in reinstating the suit which had abated one year after the plaintiff died and that the lower court in reinstating it acted beyond its mandate.
20. The 2nd respondent contends that the Applicant is actually seeking to review the merits off the lower court decision by introducing new facts under the guise of judicial review.
21. Judicial review is concerned with the process leading up to the decision by a tribunal or administrative body. Judicial review jurisdiction, was discussed in the Ugandan case of *Pastoli vs Kabale District Local Government Council & Others*, (2008) 2 EA 300, where the court stated that:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis BahikirweMuntu and others v Kyambogo University*, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR) illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and he law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards; *Re An Application by Buka Gymkhana Club* [1963] EA 478 at page 479 paragraph “E” Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

22. In *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR, the Court of Appeal stated;

“Judicial review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether the in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters..... The court should not act as a court of appeal over the decoder which would involve going into the merits of the decision itself-such as whether there was or there was no sufficient evidence to support the decision”. [own emphasis]



23. Finally on this point in the case of Republic vs. Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hashan Lalji [2014] eKLR, where the court stated;

“Judicial review applications do not deal with the merits of the case but only with the process..... It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the innocent or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process.” [Own emphasis]

24. The issues being raised by the Petitioner in this application are largely concerned with the merits of the decision made by the trial court.

These include questions of whether Order 11 had been complied with, the hearing of the matter Ex Parte and the merits of the decision by the trial court, to reinstate the suit.

25. Reinstatement of a suit is a discretionary power bestowed upon a court.

In the case of Mwangi S Kimenyi -vs- Hon. Attorney General [2014] eKLR, it was stated that

“The decision whether a suit should be reinstated for trial is a matter of justice and it depends on the facts of the case”

26. As stated earlier judicial review is concerned with the process. The question of whether or not the trial court properly exercised its discretionary power in reinstating the suit goes to the merit of the decision and therefore would be a matter of appeal or review. It is not for this court under a judicial review application to delve into the merits of that decision.

27. In Judicial Review Division E001 of 2021 Republic v District Land Adjudication and Settlement Officer Maara Sub-County & 3 others; Exparte Applciant: M’nyiri Ragwa; Njeru Kiririka (Interested Party) [2021] eKLR the court observed as follows:-

“....It is common ground that the prayers sought are Judicial Review remedies and the rules governing grant of judicial review orders do apply. Judicial Review is about the decision-making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. Judicial Review is the review by a judge of the High court of a decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of law. Judicial Review is more concerned with the manner in which a decision is made that the merits or otherwise of the ultimate decision. As long as the process followed by the decision-maker are proper, and the decision within the confines of the law, a Court will not interfere.” [own emphasis]



28. In the premises I do find that this matter was erroneously brought under judicial review. The remedy available to the Applicant is to file an appeal and / or seek a review of the courts orders on 30th November 2023.
29. Accordingly I find no merit in the Notice of Motion dated 6th May 2024. The same is dismissed in its entirety. Costs to be met by the Ex Parte Applicant.

DATED IN NYERI THIS 25TH DAY OF OCTOBER, 2024.

MAUREEN A. ODERO

JUDGE

