



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 1 OF 2021

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS

UNDER ARTICLE 47 OF THE CONSTITUTION 2010,

SECTIONS 4, 5,9 AND 9 OF THE FAIR ADMINISTRATIVE

ACTIONS ACT 2015

AND

IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF

CERTIORARI AND DECLARATORY ORDERS

BETWEEN

KENYA REVENUE AUTHORITYAPPLICANT

VERSUS

CHIEF MAGISTRATE'S COURT AT MIGORI.....RESPONDENT

AND

MAURICE JUMA ACHARINTERESTED PARTY

RULING

A. Introduction

1. The applicant, Kenya Revenue Authority, moved this court via a Chamber Summons Application dated 5/1/2021 for orders: -

a) Spent;

b) That the court be pleased to grant leave to the ex-parte applicant herein to apply for an order of **CERTIORARI** to remove to this court and quash the decision made by the respondent, Chief Magistrate's Court at Migori on 9/10/2020 by which it allowed the interested party's application for the release of its detained motor vehicle without according the ex-parte applicant a right to be heard;

c) That the court be pleased to grant leave to the ex-parte applicant to apply for an order of **MANDAMUS** to compel the respondent Chief Magistrate's Court at Migori to hear and determine the ex-parte applicant's preliminary objection dated 21/10/2020;

d) That the court be pleased to grant leave to the ex-parte applicant to apply for an order of **MANDAMUS** to compel the respondent Chief Magistrate's Court at Migori to hear and determine the interested party's application dated 7/10/2020;

e) That the court be pleased to grant leave to the ex-parte applicant to apply for an order of **CERTIORARI** to remove this court and

quash the decision made by the respondent, Chief Magistrate's Court at Migori on 11/12/2020 which directed it the production of the ex-parte applicant's employee Mr. Richard Kibor to be cross - examined or be committed to civil jail;

f) That leave be granted to operate as stay of the Respondent's order of 9/10/2020 pending the hearing and determination of this application;

g) That leave be granted to operate as stay of the Respondent's order of 11/12/2020 pending the hearing and determination of this application;

h) Costs be provided for.

2. The application is supported by the grounds on the face of it, the statutory statement dated 5/1/2021 and the verifying affidavit sworn by Richard Kibor and the bundle of annexures thereto. The ex-parte applicant contends: -

i. The respondent on 9/10/2020 granted mandatory orders on the interested party's application for the release of his detained motor vehicle registration number KCX 276S in the absence of the ex-parte applicant (the '**motor vehicle**');

ii. The ex-parte applicant challenged the order through an application dated 15/10/2020 and the same was admitted as a response to the interested party's application;

iii. The respondent issued a temporary order on the basis that the ex-parte applicant do undertake that in the event the interested party's application is successful, the ex-parte applicant do pay the damages;

iv. The matter was fixed for mention on 21/10/2020 but the same was not listed. It was diarized for mention and/or hearing on 21/11/2020 being a Saturday but not on 21/10/2020 on a Thursday;

v. The matter was placed before a different Magistrate who directed that it be mentioned before the trial court on 3/12/2020;

vi. The ex-parte applicant filed a preliminary objection on the grounds that the interested party's application was fatally defective, which application is still pending to date since the trial court did not sit on 21/10/2020;

vii. On 3/11/2020 the interested party was granted leave to file a contempt of court application dated 4/11/2020 which was served upon Richard Kibor, the ex-parte applicant's employee and the same fixed for hearing on 11/11/2020 but the respondent was not sitting;

viii. The interested party's contempt application came for hearing on 9/12/2020 which application was allowed;

ix. The respondent's decision was ultra vires as in all occasions the court deliberately refused to hear the ex-parte applicant; that the respondent did not afford the ex-parte applicant a chance to be heard and its right to fair hearing guaranteed under Article 50 (1) of the Constitution was denied; that the respondent issued a mandatory order in a miscellaneous application and substantive orders via a mention which is improper; that the respondent disproportionately and unfairly applied the law arriving at an irrational and unreasonable conclusion.

3. The application was opposed. The interested party filed a replying affidavit sworn by Maurice Juma Achar dated 2/3/2021 and filed on 8/3/2021. The dependent deposed:

i. That he filed a Miscellaneous application dated 7/10/2020. The matter was heard on the same date and it was directed that the application be served upon the ex-parte applicant and service was dispensed with the same date and inter - parties hearing was scheduled on the 9/10/2020;

ii. On the hearing date, the ex-parte applicant failed to attend court and a mandatory order was issued that the ex-parte applicant release the motor vehicle;

iii. On 15/10/2020, the ex-parte applicant filed an application for stay of the orders issued on 9/10/2020 which were granted on condition but again the ex-parte applicant failed to comply with. The conditions were that the motor vehicle would be released unconditionally provided that the applicant gave a written undertaking within three days that if they fail to prove their case they would compensate for the loss of the punishable grounds. However, the applicant did not give the undertaking;

iv. By consent of both Counsel, the motor vehicle was taken to the ex-parte applicant's customs warehouse yard at Isebania for verification and removal of avocados which had started to rot but the ex-parte applicant failed to conduct the verification and removal of the avocados;

v. The ex-parte applicant raised a preliminary objection dated 21/10/2020 and the interested party filed an application dated 2/11/2020 citing the ex-parte applicant for contempt;

vi. When the matter came up for mention, the ex-parte applicant prayed that the preliminary objection be heard first but the same was opposed by counsel of the interested party as the ex-parte applicant could not be heard when they are in contempt of court orders. . The respondent ordered that Richard Kibor an employee of the ex-parte applicant be summoned to court to explain the

failure to comply with the court orders but he did not and today the orders which orders have not been complied with;

vii. That contrary to the averments of the ex-parte applicant, they had been given audience by the court but they failed to comply with the orders;

viii. That the ex-parte applicant's application should be dismissed with costs.

4. The respondent through the Office of the Attorney General, filed undated grounds of opposition on 24/9/2021. The grounds are: -

a) That the application is unmerited and is intended to curtail the statutory obligations and duties of the respondent;

b) The ex-parte applicant if aggrieved with the court's decision, ought to have filed an appeal and not come under a judicial review;

c) That the application is premised on explanations that ought to be made before the requisitioning officer and this court would be usurping the statutory mandate of the respondent if it were to take up the role as proposed by the ex-parte applicant;

d) The ex-parte applicant is challenging the merit and not the procedure and the proper avenue to challenge the same is by filing an appeal;

e) The ex-parte applicant in essence seeks that this court directs a public officer to exercise or not to exercise his/her statutory discretion in a particular manner hence usurp the said officer's authority;

f) The application is premised on the presumption that the ex-parte applicant had foreknowledge of what the requisitioning officer was looking for in terms of evidence;

g) The Respondent urged the court to dismiss the application with costs.

B. Submissions

5. The ex-parte applicant filed skeletal submissions dated 26/8/2021 on 7/9/2021. The interested party filed his submissions dated 29/6/2021 on 7/7/2021. The respondent did not file submissions.

C. Discussion and Disposition

6. I have considered ex-parte's chamber of summons and, the rival. In light of the foregoing, the following are the issues for determination: -

a) Whether the applicant has met the threshold for grant of leave to commence Judicial Review Proceedings.

b) Whether leave granted do operate as stay of the respondent's decisions of 9/10/2020 and 11/12/2020.

c) Who bears the costs.

7. The law applicable in bringing Judicial Review applications is **Order 53 Rule 1 of the Civil Procedure Rules** which provides that no application for commencement of Judicial Review proceedings shall commence without leave of court. The rationale for leave was succinctly stated by **Waki J** in the case of **Republic vs County Council of Kwale & Another ex parte Kondo & 57 Others (1998) 1 KLR (E&L) the court held: -**

“The purpose of the 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 the substantive hearing if the court is satisfied that there is a case fit for further consideration. 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 judicially.” (emphasis mine).

See also **Agutu Wycliffe Malley vs= The registrar Academic Affairs Dedan Kimathi University of Technology De Kut (2011)eKLR**

8. At the leave stage, all that the court is concerned about is whether there is a ***prima facie*** case which even before delving into the case itself, could succeed as an arguable case from the facts and grounds which are presented by the ex-parte applicant in the statement of facts and verifying affidavit. It is not to be granted as a matter of formality or of course. The court uses this opportunity at the leave stage to weed out frivolous, vexatious and hopeless cases which are meant to delay and embarrass the judicial process.

9. Turning to whether the ex-parte applicant has demonstrated that they have an arguable case, the ex-parte applicant alleges that the respondent refused to hear his preliminary objection application dated 21/10/2020, irregularly issued ex-parte orders without according to it a chance to be heard, among others facts which the interested party has strenuously opposed and the respondent is of the view that the right procedure to be followed was through an appeal and not the Judicial Review process.

At this stage I must ask myself what is the purview of Judicial Review? In **Municipal Council of Mombasa vs= Republic & Another (2002) eKLR**, the Court of Appeal stated as follows:-

“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.”

10. **Mativo J in R vs Chief Magistrate Court Milimani and Director Of Public Prosecutions & 3 Others JR Misc. Application No. 662 of 2018 (eKLR)** held:-

“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 should not attempt to adopt the 'forbidden appellate approach'. Judicial Review is the review by a judge of the High Court of a decision; proposed 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.”

In **Pastoli v Kabale District Local Government Council and others (2008) 2 EA 300 Page 300-304 (Uganda)**, J. Kasule explained when Judicial Review Orders can issue. The judge said:-

*“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...Illegality is when the decision-making authority commits an error of law in the process of taking 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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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 the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a 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.”*

11. The Court of Appeal in **Mirugi Kariuki vs Attorney General (1992) eKLR** held:-

“The mere fact that the exercise of discretion by the decision-making authority affects the legal rights or interests of some person makes it judicial, and therefore subject to the procedure required by natural justice. Thus, that discretion must be exercised judicially, that is to say, fairly. The fact that the exercise of discretion is administrative does not make it any the less judicial for this purpose...It is not the absoluteness of the discretion nor the authority exercising it that matter but whether in its exercise, some of the person’s legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review.”

In seeking Judicial Review orders, the applicant must demonstrate that any of the above discussed impropriety or breach of rules of natural justice.

The applicant is seeking leave to commence Judicial Review proceedings to seek the orders of certiorari and mandamus. The Court of Appeal in **Kenya National Examination Council vs= Republic exparte Geoffrey Githinji and Others NRB Appeal No. 266 of 1996** set out the scope of the said orders when it said:-

“Only an order of certiorari can quash a decision already made and an order of certiorari must issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons..”

For certiorari, to issue, the applicant has to demonstrate a decision has already been made and that the 1st Respondent acted ultra vires or outside his jurisdiction or breached the rules of natural justice which includes right to fair hearing.

In the same case **KNEC exparte Githinji** (supra) the court in considering an order of mandamus said;

“What is the scope and efficacy of an order of mandamus ... we turn to HALSBURY LAW OF ENGLAND 4th Edition Volume 1 page 111 from paragraph 89, the learned treatise says:

“The order of mandamus is of a most extensive remedial nature, and is in form, a command issuing from the High Court of Justice directed to any person, corporation or inferior Tribunal, requiring him or them to do some

particular thing therein specified which pertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly, it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific remedy, for enforcing that right, and it may issue in cases where although there is an alternative remedy, yet the mode of redress is less convenient, beneficial and effectual.”

In this case, no doubt the court is a public body and it is subject to the supervisory jurisdiction of the High Court through an order of certiorari or mandamus but the applicant has to bring themselves within their scope of its applicability.

I have had a chance to see the record of the lower court, considered together with the submissions of both counsels. On 9/10/2020, when the matter came up for hearing and directions taken before the Respondent, counsel for the Interested Party explained that the applicant had been served but ignored or refused to attend court. Having confirmed that the application was duly served, the court went ahead to allow the application in terms of prayers 2, 3 & 4. On 15/10/2020 the applicants counsel filed the application of even date seeking to set aside the orders made on 9/10/2020 which was allowed on condition that since the goods were perishable and since the applicant wanted unconditional release of the vehicle, the applicant was ordered to give a written undertaking within three days that if they fail to prove their case and lose the matter, they would compensate the loss of perishable goods. The applicant failed to comply with the said undertaking. Infact it was not until this Judicial Review

Application had been filed that on 27/7/2021 Mr. Mboya counsel for the Interested Party confirmed that they had been allowed to remove the avocados from the truck as per the orders of the court. Having considered what transpired before the trial court, I find no evidence to support the allegation that the applicant was not given a hearing. First, despite being served, the applicant failed to attend court and the court exercised its discretion and granted the orders sought. When served with the order, the applicant did not obey the court orders.

The Applicant filed an application to set aside the order of 9/10/2020, the court allowed the application on conditions. Again the applicants did not comply. The applicant filed a preliminary objection on jurisdiction, that the miscellaneous application filed by the Interested Party was defective, but that the Interested Party also filed an application seeking leave to file contempt proceedings on 7/10/2021, but that the court did not take directions on it. Instead, the court summoned Mr. Richard Kibor who was summoned to appear in court on 4/1/2021 instead of the hearing of the application for contempt and the yet applicants' application was challenging the court's jurisdiction.

In Making the order to call Richard Kibor, the same was to enable the said Kibor explain why the orders of the court had been disobeyed. Had he been examined, may be the court would have set aside the orders of 9/11/2020.

No doubt there had been disobedience of the court's order. The law is clear, that the orders of the court must be obeyed and a party seeking audience of the court must purge that contempt before being heard. The court has actually to protect its dignity and authority. In the celebrated case of **Hadkinson vs Hadkinson (1952)** the court stated as follows:-

“It is plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Having not complied with clear orders, the appellant came with unclean hands. He who seeks the court's discretion must show that he deserves the same. It is for these reasons that I dismiss the application dated 17th January 2018 with costs.”

Guided by the above decision, even if a party believes that the court's order is irregular or void, the party must first of all comply before seeking the intervention of the court. The court could not entertain the preliminary objection dated 21/10/2020 and the application dated 7/10/2020 when there was still disobedience of the court's order.

All in all, the applicant has not demonstrated that the court denied the applicant the right to be heard. The court gave the applicant the opportunity to be heard and that opportunity was partly squandered and in view of the law on disobedience of court orders, the court had a right to insist on obedience before hearing the applicants on any application. In the end, what the applicants are seeking to challenge are the merits of the court's decision but not the process. There is no evidence that the court acted maliciously or irrationally or was that there breach of rules of natural justice. The court merely exercised its discretion in making the impugned orders.

If a party wishes to challenge the merits of a court's decision, he must do so by way of appeal. That is what the applicant should do in this case.

In the end, I found that no basis had been laid for grant of leave to commence Judicial Review proceedings. The applicant has failed to establish an arguable case to be entitled to leave to commence Judicial Review Proceedings. The Chamber Summons is hereby dismissed with costs to the Interested Party.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 11TH DAY OF NOVEMBER, 2021.

R. WENDOH

JUDGE

RULING DELIVERED IN THE PRESENCE OF

MR. KOIMA FOR THE EX-PARTE APPLICANT.

NO APPEARANCE FOR THE RESPONDENT.

MR. MBOYA FOR THE INTERESTED PARTY.

NYAUKE COURT ASSISTANT.