



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

JUDICIAL REVIEW APPLICATION NO. 2 OF 2019

**IN THE MATTER OF: APPLICATION BY HENRY NDWIGA KIURA FOR LEAVE TO APPLY
FOR ORDERS OF CERTIORARI AGAINST ENVIRONMENT AND LAND COURT AT EMBU,
ENVIRONMENT AND LAND REGISTRAR AT EMBU AND ATTORNEY GENERAL.**

IN THE MATTER OF: THE LAW REFORM ACT, CAP. 26 SECTIONS 8 & 9 LAWS OF KENYA

AND ALL OTHER ENABLING PROVISIONS OF THE LAW.

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES 2010, CAP. 21, LAWS OF KENYA

AND

**IN THE MATTER OF: ARTICLES 2, 22, 23, 25, 27, 47, 48, 50, 159 AND 165 OF THE CONSTITUTION OF KENYA
2010**

AND

IN THE MATTER OF: THE JUDGMENT DATED, SIGNED AND DELIVERED

IN OPEN COURT AT EMBU ON 11.07.2019 BY HON. JUSTICE ANGIMA AND

DECREE ISSUED AT EMBU ON 12.07.2019 IN ELC CASE NO. 210 OF 2015

BETWEEN

**CHARLES NJERU MUGANE AND JOSEPH MUTHEE MURATHI (HEREIN REFERRED AS
PLAINTIFFS) AND HENRY NDWIGA KIURA (HEREIN REFERRED AS DEFENDANT)**

BETWEEN

REPUBLIC.....APPLICANT

AND

HENRY NDWIGA KIURA.....EXPARTE APPLICANT

AND

ENVIRONMENTAL & LAND COURT AT EMBU

(Judgement of Y. Angima delivered on 11.07.2019 in

E.L.C Case No. 210 of 2015 between Charles Njeru

Mugane Murathi(herein referred as plaintiffs and Henry

Ndwiga Kiura (herein referred as defendant).....1ST RESPONDENT

THE DEPUTY REGISTRAR,

ENVIRONMENT AND LAND COURT,

EMBU LAW COURTS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

CHARLES NJERU MUGANE.....1ST INTERESTED PARTY

JOSEPH MUTHEE MURATHI.....2ND INTERESTED PARTY

AMOS MUCHANGI MURITHI.....3RD INTERESTED PARTY

RULING

1. The applicant herein moved this court by way of chamber summons dated 19.12.2019 brought under Article 47 of the Constitution of Kenya 2010, Order 53 Rules 1, 2 and 3 of the Civil Procedure Rules 2010, Section 9 of the Law Reforms Act Cap 26 of the Laws of Kenya and section 7 and 11 of the Fair Administrative Actions Act.

2. The application is dated 19.12.2019 and the impugned decree issued on 12.07.2019 in ELC Case No. 210 of 2015 (formerly Kerugoya ELC No. 467 of 2013). As such, the application was filed within the six months' statutory timeframe as provided for under Section 9 (3) of the Law reform Act and Order 53 Rule 2 of the Civil Procedure Rules, 2010.

3. Essentially, the applicant seeks (under prayer 2);

(a) To remove into this Honourable Court and quash, the 1st respondent's judgment dated 11.07.2019 by Honourable Y. Angima and subsequent decree issued on 12.07.2019 in ELC Case No. 210 of 2015 (formerly Kerugoya E.L.C. No. 467 of 2013).

(b) The applicant further prayed that the grant of leave herein do operate as a stay of the judgment dated signed and delivered in open court at Embu on 11.07.2019 by Hon. Justice Y.M. Angima and subsequent decree issued on 12.07.2019 in ELC Case No. 210 of 2015 (formerly Kerugoya E.L.C. No.467 of 2013).

(c) That the court be at liberty to make such further and other orders as it deems fit to meet the ends of justice.

4. The said application is premised on the grounds on its face and it's supported by the verifying affidavit by the ex parte applicant. The applicant's case is that despite the applicant filing a notice of motion dated 20.06.2019 under certificate of urgency in ELC case No. 210 of 2015 seeking for orders inter alia : that the application be certified as urgent and service be dispensed with in the first instance; that the court stays the proceedings pending determination of Embu High Court Succession No. 09 of 2016 and a date for inter partes hearing be given, the court proceeded to deliver its ruling to the application simultaneously with the judgment of ELC Case No. 210 of 2015 and subsequently a decree of the court was issued. Further that, from the impugned judgment, the court proceeded to issue eviction orders against the applicant herein. The extent of the said blatant abuse of discretion, unreasonableness, violation of the applicant's legitimate expectations and errors of law were itemized in the grounds in support of the application, the verifying affidavit and equally in the applicant's statutory statement.

5. At the hearing of the application, Mr. Osoro, the learned counsel for the *ex-parte* applicant relied on the affidavit and the statement of fact of the applicant herein in canvassing the same.

6. The application was canvassed by way of written submissions and wherein the applicant generally submitted that the application herein meets the threshold for grant of leave to apply for judicial review orders sought as he had demonstrated an arguable case warranting the grant of leave. The applicant relied on the case **Judges & Magistrates Board & 2 Others V Centre for Human Rights & Democracy & 11 Others [2014] e KLR** on the test for granting leave to commence judicial review proceedings. It was further submitted that the court ought to order that the grant of leave operate as a stay to prevent the furtherance and/or implementation of the decree of the impugned judgement

delivered on 11.07.2019 in ELC Case No. 210 of 2015 (formerly Kerugoya ELC No. 467 of 2013). That the said stay ought to be given pending the hearing of the substantive judicial review application. Reliance was made on Order 53 Rule 1(4) of the Civil Procedure Rules 2010.

7. I have considered the application herein and further perused through the annexures thereto. I have further considered the applicant's written submissions and it is my considered view the main issue for determination is whether the same is merited.

8. As I have already noted, the gist of the application is leave by the applicant to commence judicial review proceedings. Under Order 53 Rule 1 of the Civil Procedure Rules 2010, it is mandatory that the applicant in such applications must seek leave before he can file the substantive application.

9. The reasons for leave were 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** and the dictum in that decision is that, leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; 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; 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.

10. Learned Judge further held that leave may only be granted 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. Granting of leave to file for judicial review is an exercise of the court's discretion but as always it has to be exercised judiciously.

11. It is therefore clear from the above that in an application for leave such as the present one, this 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.

12. The applicant herein deposed and further averred that in the year 1999, the 1st and 2nd interested parties filed a succession cause vide No. 1251 of 1999. That on 28.02.2000, the 1st and 2nd interested parties were issued with certificate of confirmation of a grant whereby Land Parcel No. GATURI/NEMBURE/2657 was to be shared equally among the two interested parties. That the said Succession Cause No. 1251 of 1999 (Nairobi) was filed in the matter of estate of William Patrick Mugane (Deceased) and the same was done without the *ex parte* applicant's knowledge. Further that, the 1st and 2nd interested parties having the confirmed grant dated 28.02.2000 filed ELC Case No. 210 of 2015 formerly Kerugoya No. 467 of 2013 seeking for inter alia eviction orders. He continued to state that, in the year 2007, the *ex parte* applicant filed a Succession Cause No. 354 of 2007 (In the matter of the estate of Njeru Wamichi-Deceased) which succession was heard and the *ex parte* applicant granted letters of administration pending confirmation.

13. That in the year 2008, one Ileri Wamichi (brother to Njeru Wamichi) filed succession cause No.111/2008- Embu in the Estate of Njeru Wamichi) claiming Land Parcel No. GATURI/NEMBURE/ 2657. That again, in the year 1985 and 1997, one William Patrick Mugane (stranger purporting to be a nephew to Njeru Wamichi) and Ileri Wamichi (brother to Njeru Wamichi) had previously filed succession causes No. 87 of 1985 and 94 of 1997 respectively over the same estate of Njeru Wamichi. And that the Succession Causes No. 9 of 2016 Embu (formerly 1252 of 1999 - Nairobi), 354 of 2007, 111 of 2008, 87 of 1985 and 94 of 1997 were consolidated under Succession No.9 of 2016 Embu are still pending hearing and determination before the High court of Kenya at Embu. The applicant deposed that the above acts of the 1st respondent amounted to abuse of discretion, unreasonableness violation of his legitimate expectation and error of law.

14. It is trite that judicial review is more concerned with the manner in which a decision is made than the merits of the decision. The court is concerned with the lawfulness of the process by which the decision is made. The grounds upon which an order of judicial review can issue include where the decision complained of is tainted with illegality, irrationality and procedural impropriety (where there is failure to act fairly on the part of the decision-making authority in the process of taking a decision) or where the rules of natural justice are not complied with. It may also be issued where the decision is made without or in excess of jurisdiction. {See **Republic vs- National Land Commission & another Ex-parte Farmers Choice Limited (2020) eKLR**}.

15. When the application came up before the court on 24.03.2021, the court gave directions that the applicant submits on whether the court has jurisdiction to entertain the application.

16. Jurisdiction goes into the heart and soul of any proceeding. In this regard, the question of jurisdiction should not only be raised at the earliest opportunity, but it must be the first issue to be resolved from the outset.

17. In **Republic v Karisa Chengo & 2 others [2017] eKLR**, the Supreme Court of Kenya held:-

“Jurisdiction” has emerged as a critical concept in litigation. Halsbury’s Laws of England (4th Ed.) Vol. 9 at page 350 thus defines “jurisdiction” as “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.” John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term ‘jurisdiction’ as follows: -

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.

The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be

extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited.

A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

18. In the celebrated Court of Appeal decision in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, Nyarangi JA famously held: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.

A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

19. In regards to the matter at hand, the main determination is in regards to judgment delivered on 11.07.2019 in E.L.C Case No. 210 of 2015 between Charles Mugane & Joseph Muthee Muraithi versus Henry Ndwiga Kiura by Justice Angima upon which the applicant herein wishes this court to determine.

20. The Constitution of Kenya, 2010 has pronounced itself clearly on the jurisdiction of various Courts of law in Kenya. It is trite that the jurisdiction of a Court can neither be implied nor conferred by agreement of parties, by judicial craft or legal sophistry, it must be expressly provided for in the Constitution or in statute. This was the holding of Supreme Court in the case of, Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, where the court held, that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

21. It therefore follows that the jurisdictional limit of the High Court is anchored in Article 165(3) of the Constitution which states:-

“Subject to clause (5), the High Court shall have-

- a) *Unlimited original jurisdiction in criminal and civil matters;*
- b) *Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;*
- c) *Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;*
- d) *Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-*
 - (i) *The question whether any law is inconsistent with or in contravention of this Constitution;*
 - (ii) *The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.*
 - (iii) *Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*
 - (iv) *A question relating to conflict of laws under Article 191; and*
 - e) *Any other jurisdiction, original or appellate, conferred on it by legislation.*

22. It is clearly expressed under Article 165(5) as follows:-

“(5) The High Court shall not have jurisdiction in respect of matters—

- a) *reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or*
- b) *falling within the jurisdiction of the courts contemplated in Article 162 (2).”*

23. Further under Article 165 (6) of the Constitution it is stated as follows:-

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

24. On decisions issued by courts of concurrent jurisdiction in the case of Robert Alai Onyango v Cabinet Secretary in Charge of Health & 7 others [2017] eKLR, in which the Petitioner challenged the decision of the Labour Court, the High Court, in striking out the Petition, opined as follows:

“There seems to be a general misconception among some legal practitioners, litigants, and a section of members of the public that this court, sitting as Constitutional and Human Rights Division of the High Court, has special jurisdiction to supervise superintend or direct other superior courts. Granted, the High Court has jurisdiction under Article 165 (6) to supervise subordinate courts and any person, body or authority exercising a judicial or quasi-judicial functions.

The court also has jurisdiction to redress violation and infringement of fundamental rights under the Bill of Rights. However, sub Article (6) is clear that the High Court has no supervisory jurisdiction over superior courts. Superior courts in terms of Article 162 (1) are the Supreme Court, Court of Appeal, High Court and Courts of Equal status. Courts of equal status are those courts mentioned under Article 162(2); that is; Employment and Labour Relations Court and Environment and Land Court.

The High Court draws its jurisdiction from the constitution. It has wide jurisdiction to deal with allegations of violation and/or infringement of fundamental rights. It also has jurisdiction of supervisory nature but that supervisory jurisdiction is limited. It cannot be exercised over superior courts.

Article 23(1) is also clear that the court must exercise the jurisdiction given under Article 165.

25. Looking at the prayers in this application, the court is being asked to assume a supervisory role and quash the judgement and subsequently stop execution of orders issued by that superior court. Taking such a step would amount to this court exercising jurisdiction it does not have, and which is excluded.

26. Similarly, the Court of Appeal was of the view that:

Jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing while quoting the case of Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another (2013) eKLR where the Court succinctly settled this point in the following words:-

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kagenyi v. Musirambo (1968) EA 43.

27. It was held in Republic vs. National Environment Management Authority [2011] eKLR, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at pages 15 and 16 of its judgment:

“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v Birmingham City Council, ex parte Ferrero Ltd case. The Learned judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge.”

28. It is therefore clear from the foregoing that the claim by the applicant was filed before a court devoid of jurisdiction and as such, the application is a nullity *ab initio*.

29. The remedy available to the applicant is appeal and not judicial review. This court being a court of equal status with the ELC that made the decision, does not have jurisdiction to quash the decision, which is the subject of the application herein.

30. It is my considered view, therefore, that the application is in want of merit and the same is struck out.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF DECEMBER, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents

.....for Interested Parties

.....for Exparte Applicant