



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 86 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF SECTION 7, 8, AND 9 OF THE LAW REFORM ACT

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE DECISION IN CMCC CIVIL SUIT NO 799 OF 2018

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE SENIOR RESIDENT MAGISTRATES

(MILIMANI CHIEF MAGISTRATES COURT).....1ST RESPONDENT

CORNER PLACE INVESTMENT LTD.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....1ST INTERESTED PARTY

SIUMA AUCTIONEERS.....2ND INTERESTED PARTY

EX PARTE

**1. TERESIA WAIRIMU (SUING AS ADMINISTRATIX OF THE
ESTATE OF GERISHON K. KIRIMA)**

2. ABDULLAHI HUSSEIN BARE T/A SPOTLESS CAR WASH

JUDGMENT

The Application

1. The *ex parte* Applicants herein, Teresia Wairimu and Abdullahi Hussein Bare (hereinafter the 1st Applicant and 2nd Applicant respectively), have filed a Notice of Motion dated 7th March 2018 in which they seek the following orders:

a) **An order for Certiorari to remove into the High Court and quash proceedings and orders issued by the Senior Resident Magistrate (Hon. I. Orange) on the 21st day of February, 2018, in the matter of Milimani Chief Magistrate Court Civil Suit No. 799 of 2018 between Corner Palace Investment Limited vs Spotless Car Wash, Peter Mugo and Teresia Wairimu.**

b) **An order for Prohibition prohibiting the prosecution of Civil Suit No. 799 of 2018 between Corner Palace Investment Limited vs Spotless Car Wash, Peter Mugo and Teresia Wairimu**

c) **Further and/or other consequential directions be made as part of the orders for Certiorari and Prohibition.**

d) **Costs of the application be provided for.**

2. The Application is supported by the grounds on its face and the Supporting Affidavits of the 1st and 2nd Applicants, which were both sworn on 1st March, 2018 and filed in court on the same date. The 1st Applicant also filed a Further Affidavit she swore on 16th March 2018. The Applicants stated that these judicial review proceedings originate from proceedings in Milimani Chief Magistrates in Court Civil Case No 799 of 2018, in which Corner Palace Investment Limited (the 2nd Respondent herein) procured orders of a mandatory injunction on 21st February 2018 against the 1st and 2nd Applicants to vacate the suit property. The said Court is sued as the 1st Respondent herein.

3. The Applicants contend that the said Court also ordered Siuma Auctioneers to execute the said orders with the assistance of the police. The Inspector General of Police and Siuma Auctioneers are thus joined as the 1st and 2nd Interested Parties herein.

4. The 1st Applicant averred that she learnt of Civil Suit No. 799 of 2018 on 27th February, 2018 from Parklands Police Station, and was not served with the pleadings in, or notice of the said suit. She also averred that she is the wife of the late Gerishom Kamau Kirima, and the co-administratrix of the estate of the said deceased, who was the sole proprietor of all the parcel of land known as L.R No. 209/1102/16 I.R 75352 located at City Park Estate Nairobi, which was allocated to her deceased husband in 1981 and which is the subject matter of this suit.

5. She further stated that she came to learn that in 2003, the then Nairobi City Council together with other third parties fraudulently created titles under the Registered Land Act, and one of the titles created fraudulently by the then council was NAIROBI BLOCK 37/73 which was eventually allocated to Corner Place Investment Limited, the 2nd Respondent herein. Furthermore, that there have been lawsuits regarding the fraudulent allocation of the said parcel, some of which are still pending in court. In addition, that NAIROBI/BLOCK 37/73 is the same piece of land as Plot No. L.R No. 209/1102/16 which had been assigned to her deceased husband.

6. In conclusion, the 1st Applicant averred that her deceased's husband's original title has never been surrendered, and that the same parcel of land cannot be registered under two different regimes hence the deceased estate has an indefeasible title to the suit property. It was also her aversion that the 1st Respondent lacked pecuniary jurisdiction to entertain the matter, as the property is valued at Kshs. 80,000,000/-. The 1st Applicant annexed a copy of a valuation report on the said property to her further affidavit.

7. The 2nd Applicant on his part averred that he trades in the name of Spotless Car Wash and is engaged in the business of washing cars. He stated that he operates outside the suit premises and has permit for temporary occupation from the Nairobi City County. He further averred that the pleadings in Civil Suit No. 799 of 2018 were not served on him or his agents, and he only came to learn about it from the 1st Applicant on 27th February, 2018. He informed the Court that he was condemned unheard, and urged the Court to allow the application.

The Response

8. The 1st Respondent filed Grounds of Opposition on 30th April 2018 of even date in response to the application. The 1st Respondent opposed the application on the grounds that it has the jurisdiction and competence to hear and determine the case before it, and that there is no allegation of procedural or substantive impropriety, or of perceived bias on its part. Lastly, that the order of prohibition cannot issue as the events sought to be prohibited have taken place.

9. The 2nd Respondent and the Interested Parties did not file any response to the application herein.

The Determination

10. The Application was canvassed by way of written submissions. The Applicant's Advocates on record, Anthony M. Mulekyo Advocates, filed submissions dated 17th September 2018; while Ngelechei Joyce, a State Counsel in the Attorney General's Chambers, filed submissions date 30th April 2018 on behalf of the 1st Respondent.

11. The Applicants submitted that a court's jurisdiction flows from the Constitution or legislation or both and relied on the case of **Samuel Kamau Macharia & Anor -vs- Kenya Commercial Bank Limited & 3 Others (2012) eKLR** to buttress that argument. It was their submission that section 7(1) and 9 of the Magistrates' Courts Act limits the 1st Respondent's pecuniary jurisdiction in land matters, and that courts must only act within the confines of power accorded to them by the relevant statutes and recognize the limits imposed on them by those statutes.

12. They further submitted that Honourable I. Orange, a Senior Resident Magistrate whose pecuniary jurisdiction is Kshs. 7,000,000/- under the Magistrates' Courts Act, acted *ultra vires* in adjudicating on Milimani Civil Suit No. 799 of 2018 where the value of the subject matter was Kshs. 80,000,000/- pursuant to a valuation report by Legend Valuers dated June, 2016.

13. On irrationality, the Applicants relied on the case of **Republic v Public Procurement Administrative Review Board & 2 Others ex parte Sanitam Services (EA) Limited, (2013) eKLR** where the terms illegality and irrationality were defined. They argued that the 1st Respondent condemned the Applicants unheard, and ignored, neglected and/or disregarded all their protest to be heard before being evicted of the suit premises, which amounted to an illegality. They contended in this respect that the 2nd Respondent filed a Notice of Motion application before the 1st Respondent on 9th February 2018 seeking the Applicants' eviction from the disputed property, and that the said application was heard *ex parte* on 21st February 2018. The decision by the Court of Appeal in **Kabito Karanja vs Attorney General [1997] eKLR** was cited by the Applicants for the position that a person must be heard before being deprived of his title.

14. The Applicants further submitted that 2nd Respondent lied under oath in the impugned proceedings before the 1st Respondent when he stated therein that there was no pending suit involving the same parties, yet the 2nd Respondent had previously filed **Milimani Chief Magistrates Civil Suit Number 7296 of 2017- Corner Palace Investment Ltd vs Teresia Wairimu and Peter Mugo** in the 1st Respondent Court seeking orders that the Applicants herein be evicted from Nairobi/Block 37/73. That the Applicants thereupon challenged the pecuniary jurisdiction of the court to hear the matter, and the 2nd Respondent consequently withdrew the said suit.

15. Furthermore, that the said 2nd Respondent and Applicants are also parties in Milimani Environment and Land Court (ELC) Petition No. 45 of 2016, and if at all he 2nd Respondent wanted to file an application to evict the Applicants from the suit premises, the same should have been done under ELC Petition No. 45 of 2016 to avoid multiplicity of suits, parallel court directions, and judgments in respect of the same subject matter. Therefore, that the 2nd Respondent had improper motives in instituting the impugned proceedings. The Applicants annexed copies of the pleadings filed in the cited cases.

16. The 1st Respondent on its part submitted that the remedy of judicial review is concerned with reviewing not the merits of the decision, but the decision making process. Further, that the 1st Respondent is a Senior Resident Magistrate at Milimani Law Courts whose mandate is to hear and determine all cases brought before it. As such, the orders sought would curtail the Senior Resident Magistrate's Court's statutory duty to hear and determine matter before it. It was the 1st Respondent's submission that the Applicants had not demonstrated any procedural or substantive impropriety on its part. In addition, that the issue of jurisdiction was never raised by the parties before the 1st Respondent for consideration.

17. The 1st Respondent further urged that judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandate, and cited the decision in **Republic vs Commissioner of Customs Services ex parte Africa K-Link International Limited (2012) e KLR** in this regard. In conclusion, the 1st Respondent submitted that carried out its statutory duties in accordance with the law and that section 6 of the Judicature Act protects it for any act done in the course of its judicial duty.

18. I have considered the pleadings and arguments made by the Applicant and 1st Respondent. The main issues arising for determination are whether the 1st Respondent acted outside its jurisdiction in granting the impugned orders on 21st February 2018; secondly, if not whether the said orders by the 1st Respondent made on 21st February 2018 were made in breach of natural justice, irrationally or with an improper motive; and lastly, whether the Applicant is entitled to the relief sought.

19. It is necessary at the outset to set out the parameters of judicial review in this regard. The broad grounds for the exercise of judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

“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 Bahikirwe Muntu 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 the 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 Bukoba 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*).”

20. As regards the remedies the Applicants seek, the Court of Appeal in the case in **Kenya National Examination Council vs Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996** held that an order of certiorari issues to quash a decision already made and if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with.

21. On the grant of an order of mandamus, the said Court held as follows:

“ ...What does an ORDER OF PROHIBITION do and when will it issue It is an order from the High Court directed to an

inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY’S LAW OF ENGLAND, 4th Edition, Vol.1 at pg.37 paragraph 128....”

22. Therefore, in order to be amenable to judicial review, the decision or action sought to be reviewed ought to be unlawful or likely to be unlawful, or the Applicant needs to demonstrate that there is failure to act in on the part of the Respondents in the exercise of a public function. In addition, the purpose of a prohibiting order as is sought by the Applicant, is to restrain threatened or impending unlawful conduct.

23. This Court was however faced with a number of legal challenges when addressing the issues raised by the application. Firstly, after perusing the Chamber Summons application dated 1st March 2018, the two supporting affidavits thereto sworn by the 1st and 2nd Applicants and the statutory statement accompanying the said Chamber Summons and the Further Affidavit sworn by the 1st Applicant, I noted that a copy of the order sought to be quashed was not annexed. The Applicants instead relied on a copy of handwritten proceedings in the 1st Respondent Court on 9th February 2018, 13th February 2018, and 21st February 2018, which they annexed. Upon perusal of the said proceedings, the Court also noted that the same were neither certified nor legible.

24. Under Section 107(1) of the *Evidence Act*, “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”. Accordingly, the burden is upon the party who challenges an administrative decision to bring enough evidence to show that the decision is invalid. The party must prove satisfactorily that the administrative action is illegal, unjust, unreasonable, arbitrary, capricious, or an abuse of discretion. Once such proof is provided, the onus then moves to the Respondent to show the legality of its actions.

25. It was held as follows in this regard in the Ugandan Case of J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85:

“As applied to judicial proceedings the phrase “burden of proof” has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence.... The *onus probandi* rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced.” See Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L); Trevor Price vs. Kelsall [1975] EA 752 at 761; Phipson on Evidence 12th Ed Para 91; Phipson At Para 95”.

This position was also reiterated by the Kenya Supreme Court in Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others, SC Election Petition No.1 of 2017 .

26. The Applicants herein have not brought evidence to establish that the 1st Respondent made the orders that they seek to have quashed, or the nature of the said orders. This Court is thus not in a position to interrogate the Applicant’s claims that the orders given by the 1st Respondent were outside its jurisdiction, neither can it also interrogate the decision making processes by the 1st Respondent, as the Applicant’s evidence in this regard is not comprehensible and verifiable.

27. Secondly, this Court also noted that the Applicants in their submissions stated that on the 28th February 2018, after being notified of the impugned proceedings, they filed an application under certificate of urgency in which they raised *inter alia* the arguments on the 1st Respondent’s jurisdiction, and that they had not been served in the matter. The 1st Applicant annexed some of the pleadings filed in that application to her Supporting Affidavit and Further Affidavit.

28. The Applicants’ submissions in this regard were as follows:

“...from the hand written proceedings in Milimani CMCC Suit No. 799 of 2018, the 1st Respondent never inquired whether the 2nd Respondent had served the Applicants herein and in addition to that it failed to consider the value of the subject matter to ascertain whether it had jurisdiction to adjudicate on the matter. Further, the foregoing, even after the Applicants herein filed an application under a certificate of urgency seeking to vary vacate or stay the aforesaid orders on grounds that, the applicants had been in the suit premises for over twenty years, they had not been served with the court proceedings, there is another suit in respect of the suit premises and court lacked jurisdiction, the 1st respondent blatantly refused to hear the applicants’ advocate, certify the application urgent and or vacate/stay the aforesaid orders. The 1st respondent condemned the applicants unheard and ignored, neglected and or disregarded all their protests to be heard before been evicted out of the suit premises.”

29. The issue of the 1st Respondent’s jurisdiction to hear the impugned proceedings, and the processes leading to the decision of 21st February 2018 is thus a pending matter before the said court, and to this extent the current application by the Applicants is premature. It is also notable that the current judicial review proceedings were commenced on 8th March 2018, days after the Applicants had, by their own admission, been given directions on how to proceed with their pending application before the 1st Respondent.

30. The Applicants should thus first exhaust the dispute resolution mechanism available to them in the 1st Respondent Court before moving this Court, as judicial review is a remedy of last resort, and this Court cannot usurp and curtail the jurisdiction of the 1st Respondent to hear and determine the Applicants’ pending application before it. J. Mativo explained this position as follows in Marimba Investments Limited v Director General of the National Transport and Safety Authority & 2 others [2018] eKLR:

“59. This court in JR 10/2017 Saferider Vehicle Technologies (PTY) & 2 Others vs The National Transport and Safety Authority (NTSA), and while adopting many other decisions of the Court of Appeal including Republic vs National Environmental Management of the National Assembly Nairobi CA 92/1992; Republic vs Ministry of Interior and Coordination of National Government and Another ZTE JR 442/2013; Francis Gitau Parsiramei vs The National Alliance Party of Kenya & 4 Others Petition 352/2012; Kipkalya Kones vs Republic and Another Exparte Kimani Wanyoike & 4 Others [2008] EA 291 did not shy away from asserting itself in line with the holdings in the above cases and held, inter alia:

“65. *Judicial Review, though now elevated to the Constitutional threshold, is a remedy of last resort since it does not substantially look into the merits of the decision but the legality, rationality and or procedural impropriety of the decision and decision making process. It therefore ought not to be resorted to where there exist appropriate efficacious remedies to redress the grievances complained of...*”

31. It was also emphasized by the Court of Appeal in Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that while Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.

32. Lastly, this Court also notes that the arguments raised by the 1st Applicant mostly turn on who is the rightful owner of the property that was the subject of the orders alleged to have been granted by the 1st Respondent on 21st February 2018. The Applicants have also stated that there are other pending suits touching on this issue, which averments were not disputed by the Respondents. This Court is in this respect mindful of the purpose of judicial review proceedings, which is to address defects in decision making processes by public bodies, and not to deal with the merits of a case.

33. The parameters of judicial review were addressed by the Court of Appeal in the case of Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows:

“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.”

34. It is my view that the orders sought by the Applicants, if granted, would have the effect of determining contested matters of facts, without having heard the parties on the merits. In addition, the merits of the Applicant’s arguments as to the issue of the rightful owner of the subject property can only be heard and determined by the Environment and Land Court, which is the Court conferred with the jurisdiction to hear and determine disputes relating to title to land pursuant to Article 162 of the Constitution, and not by this Court.

35. In the premises, the Applicants’ Notice of Motion dated 7th March 2018 is found not to have merit, and I accordingly order that the same be and is hereby dismissed, and that the stay orders granted herein on 1st March 2018 as variously extended be and are hereby vacated. In light of the uncontested averments made by the Applicants that the 2nd Respondent had filed a previous suit against the Applicants on the same subject matter before the 1st Respondent, being Milimani Chief Magistrates Civil Suit Number 7296 of 2017- Corner Palace Investment Ltd vs Teresia Wairimu and Peter Mugo, I further order that each party shall meet its own costs of the Notice of Motion dated 7th March 2018.

36. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF FEBRUARY 2019

P. NYAMWEYA

JUDGE