



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISCELLANEOUS CIVIL APPLICATION NO. 275 OF 2018**

**IN THE MATTER OF APPLICATION FOR JUDICIAL**

**REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE VIOLATION OF THE PROVISIONS OF**

**ARTICLES 40, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF SECTION 8 LAW REFORMS ACT (CAP 26 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURES RULES, 2010**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**1. SENIOR PRINCIPAL MAGISTRATE,**

**KANGUNDO LAW COURTS**

**2. JOEL MWANIKI**

**3. MARY WAMAITHA MURIU**

**4. THE LAND REGISTRAR, MACHAKOS COUNTY.....RESPONDENTS**

**EX PARTE APPLICANT.....FAMILY BANK LIMITED**

**JUDGEMENT**

1. By a notice of motion application dated 30<sup>th</sup> August, 2018, the ex parte applicant essentially seeks:

*a) An order of certiorari to quash the 1<sup>st</sup> respondent's judgement dated 12<sup>th</sup> July, 2018 in Criminal Case No. 757 of 2015, (Kangundo) (Republic v. Mary Wamaitha Muriu) to the extent that the property known as L.R. No. Donyo Sabuk/Komarock Block 1/12869 belongs to the 2<sup>nd</sup> Respondent and that the same should revert to him.*

*b) An order of certiorari to quash the orders issued by the 1<sup>st</sup> respondent on 18<sup>th</sup> July, 2018 in Criminal Case No. 757 of 2015, (Kangundo) (Republic v. Mary Wamaitha Muriu) to the effect that property known as L.R. No. Donyo Sabuk/Komarock Block 1/12869 should revert to the 2<sup>nd</sup> respondent from the 3<sup>rd</sup> respondent as it was illegally transferred without his knowledge or consent and directing the 4<sup>th</sup> respondent to comply with the said orders.*

*c) An order of prohibition to prohibit the 4<sup>th</sup> respondent from executing and/or implementing the judgment rendered by the 1<sup>st</sup> respondent on 12<sup>th</sup> July, 2018 and all consequential orders in Criminal Case No. 757 of 2015, (Kangundo) (Republic v. Mary Wamaitha Muriu) to the effect that property known as L.R. No. Donyo Sabuk/Komarock Block 1/12869 ('subject land') is the property of the 2<sup>nd</sup> respondent and that the same should revert back to him.*

2. The court on 6<sup>th</sup> November, 2018 gave directions that the motion be canvassed by way of written submissions. When the matter came up on 24<sup>th</sup> January, 2019, learned counsel for the ex parte applicant Mr. Juma indicated that he was under instructions to have the motion withdrawn. While learned counsel for the 2<sup>nd</sup> respondent stated that he had no objection to the application, Mr. Mburu learned counsel for the 3<sup>rd</sup> respondent objected to the withdrawal of the motion. He argued that once leave has been granted then Judicial Review proceedings ceases to be in personum and proceeds to be in rem hence the ex parte applicant no longer controls the proceedings. He stated that the court should proceed since it should check the excesses of a public body. He argued that the Judicial Review is premised on the bias and unreasonable action taken by the 1<sup>st</sup> respondent which tends to confer interest upon the 2<sup>nd</sup> respondent. That there is non-compliance with mandatory procedures by the 1<sup>st</sup> respondent as to whether it had jurisdiction to grant orders. That this then raises unprocedural proceedings in the conduct of the 1<sup>st</sup> respondent and is an error in law. In support, counsel cited Makula International Ltd v. His Eminence Cardinal Nsubuga & Another (1982) H. C. B II and stated that the court held that a court would not allow an illegality. Hence the attempt to withdraw the application should be rejected since the wrong complained of must be corrected. That in Republic v. Resident Magistrate's Court at Kiambu Ex parte Geoffrey Kariuki Njuguna & 9 others (2016) eKLR it was held that the court should ensure that the withdrawal must be in good faith and should not prejudice other parties. That the order challenged had the effect of transferring property from the 3<sup>rd</sup> respondent to the 2<sup>nd</sup> respondent yet the 1<sup>st</sup> respondent had no jurisdiction to do so. That the 3<sup>rd</sup> respondent is still the owner of the suit property and the order by the 1<sup>st</sup> respondent is invalid since the Land Registrar has been directed to register the property to the 2<sup>nd</sup> Respondent and thereby deprive 3<sup>rd</sup> Respondent of her proprietary interest in the suit property. He stated that the 3<sup>rd</sup> respondent has filed a substantive response to the motion and had cast her lot with the case of the Exparte applicant thereby she will be prejudiced. That the 3<sup>rd</sup> respondent had been in agreement with the ex parte applicant's motion and would not be willing for it to be withdrawn and wishes to proceed with the motion.

3. Mr. Kago counsel appearing for the 3<sup>rd</sup> respondent together with Mr. Mburu stated that the ex parte applicant's interest is hinged on the 3<sup>rd</sup> Respondent's proprietary interest on the land. That the 3<sup>rd</sup> respondent is extremely prejudiced as the ex parte applicant is likely to come back to her over the loan. That the 3<sup>rd</sup> respondent should be allowed to proceed even if the ex parte applicant wishes to jump ship.

4. Mr. Kamonjo for the 2<sup>nd</sup> respondent submitted that the 3<sup>rd</sup> respondent cannot be substituted as an ex parte applicant upon the exit of the ex parte applicant. That the 3<sup>rd</sup> respondent cannot prosecute an application that she has not filed. He stated that the 3<sup>rd</sup> respondent is riding on the ex parte applicant's application to enjoy orders. That she will not be prejudiced if the withdrawal is allowed. That there is a pending civil suit No. 159 of 2015 at Kangundo involving the ex parte applicant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. That the application should be withdrawn so that the parties proceed with the pending civil suit. That the 3<sup>rd</sup> respondent had been an employee of the ex parte Applicant. That the withdrawal of the motion will not directly affect the 3<sup>rd</sup> Respondent since the pending civil cause would deal with the issue of the ownership of the suit property.

5. Mr. Juma for the ex parte applicant submitted that the withdrawal is lawful. That the Civil Procedure Act allows for withdrawal of suit. He further referred court to Order 25 and 51 of the Civil Procedure Rules. He stated that it is not correct that order 25 on withdrawal of suit does not affect withdrawal of Judicial Review under order 51. That the 3<sup>rd</sup> respondent is at liberty to file her own Judicial Review and prosecute it. That the ex parte applicant wishes to withdraw the application and there is no way the remaining parties will seek to rely on ex parte applicant's documents to advance their case.

6. Mr. Mburu argued that the 3<sup>rd</sup> Respondent has a response to the motion and has her own documents in support of her grievances. That the 3<sup>rd</sup> Respondent will proceed with the matter even upon the exit of the ex parte applicant. That this could still have had to determine on the issue of the conduct of the 1<sup>st</sup> respondent. That the ex parte Applicant could be excused to exit and the parties remaining be allowed to continue with the motion. That the ex parte Applicant seems to have been pushed by external forces to withdraw the motion which is very prejudicial to his client. That the 2<sup>nd</sup> respondent is the one who gains by the withdrawal since the suit property has been ordered to be registered back into his name. That the Judicial Review only deals with the decision-making process and her evidence impinges that decision-making process. That the ex parte applicant's case is brought under Fair Administrative Actions Act which demand that all bodies should consider the Constitutional violations. That Judicial Review is therefore unique since it is the public which comes in to check the excesses of the public bodies.

7. In rebuttal, Mr. Juma stated that the withdrawal is on the ex parte applicant's own volition. That the Board made the said decision to have the Notice of Motion withdrawn.

8. Judicial Review is a special procedure. The Constitution does not provide the procedure for instituting or withdrawing Judicial Review rather its mode of institution is provided for under Order 53 of the Civil Procedure Rules and there is no express provision in the Civil

Procedure Rules stipulating how Judicial Review should be withdrawn.

9. The Supreme Court of Kenya in *John Ochanda v. Telkom Kenya Ltd, SC APP. NO 25 OF 2014, Ibrahim SCJ*, had this to say in a similar issue:

***“I do hold the view that a prospective Appellant is at liberty to withdraw a Notice of Appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs, which can be claimed by the respondents, if any. In this particular case, there cannot be any reason for inter partes hearing and the matter can proceed ex parte as the right to withdraw cannot be taken away.”***

10. In *Nicholas Kiptoo Arap Korir Salat V. IEBC & 7 Others, SC APP. No. 16 of 2014* the court stated:

***“A party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”***

11. While I acknowledge the said holdings, I am clear in my mind that the Supreme Court in so deciding did not lose sight of the ends of justice. The circumstances therein were different from the case at hand. There is no dispute that the order made by the 1<sup>st</sup> respondent is to the effect that the 3<sup>rd</sup> respondent shall lose title to the property she alleges is hers and secondly that the issue addressed in this case is that the said order was improperly granted rather without jurisdiction and without according her a fair hearing. Allowing the applicant to discontinue a matter that addressed the same may lead to injustice. I say so noting that a party may use such a process to defeat justice and this court has inherent power to stop such a party. However there is in existence of a **Civil Case No. 169 of 2015 at Kangundo Law Courts** involving the parties herein who are expected to ventilate their issues therein as regards ownership of the suit property.

12. Learned Counsel for the 3<sup>rd</sup> Respondent has rightly submitted that the Ex parte Applicant’s Judicial Review Application once leave was granted crystallized into suits in rem (public) as opposed to those in personum (personal). This being the position, then the matter fell under those for public interest litigation. Indeed the 1<sup>st</sup> Respondent who had been trying the 3<sup>rd</sup> Respondent before the Kangundo Law Courts finally convicted her and further proceeded to order the 4<sup>th</sup> Respondent to effect transfer of ownership of some land in dispute from the 3<sup>rd</sup> Respondent to the 2<sup>nd</sup> Respondent. Naturally the 3<sup>rd</sup> Respondent was aggrieved by the said order and that is why she had cast her lot with the Exparte Applicant in the Judicial Review Application which was meant to challenge the action by the 1<sup>st</sup> Respondent. Indeed the 3<sup>rd</sup> Respondent’s Counsel has submitted at length in that regard and hence the action of the Exparte Applicant in seeking to withdraw the Judicial Review Application has come as a shocker to the 3<sup>rd</sup> Respondent. There is no doubt that the said Judicial Review has a public interest element and as such a withdrawal of the same must be cautiously handled so as to ensure that there is no adverse effect to the public interest or the interests of any individuals involved. The 3<sup>rd</sup> Respondent has insisted that she intends to proceed with the Judicial Review even if the Exparte Applicant pulls out. This is now the dilemma in which the parties herein find themselves. On the one hand the Exparte Applicant wishes to pull out for its own strategic interests and purposes while the 3<sup>rd</sup> Respondent is determined to continue with the matter. Learned Counsel for the 3<sup>rd</sup> Respondent has sought reliance in the case of **Kiambu JR No. 1 of 2016 R Vs Geoffrey Kariuki Njuguna & Others Ex parte Applicant** where Ngugi - J declined an application to withdraw the Judicial Review Application by the Ex parte Applicant but permitted the said Applicant to withdraw from further participation in the suit. The Learned Judge allowed the remaining parties to continue with the suit.

13. The circumstances obtaining in the Kiambu case (supra) were quite different from those of the parties in this case and I am not inclined to agree with the suggestion by Learned Counsel for the 3<sup>rd</sup> Respondent that the remaining parties should be left to continue once the Exparte Applicant exits the scene. It transpired that there is a pending Civil Case at **Kangundo court** being **PMCC No. 169 of 2015** where the 2<sup>nd</sup> Respondent had sued the 3<sup>rd</sup> Respondent and the Exparte Applicant over ownership of the suit property **DONYO SABUK/KOMAROCK BLOCK 1/12869**. The said property had been held as security for a loan facility granted to the 3<sup>rd</sup> Respondent herein by the Exparte Applicant. It would therefore appear to me that the withdrawal of the Judicial Review by the Exparte Applicant would not at all prejudice any of the parties since their rival issues would be ventilated in the pending civil case at Kangundo being heard by the 1<sup>st</sup> Respondent. All the issues in controversy revolve around the said property **DONYO SABUK/KOMAROCK BLOCK 1/12869** and nothing else. However if the 3<sup>rd</sup> Respondent’s desirous of pursuing her issues in the form of a Judicial Review, then she shall be at liberty to file another one and the court will give the appropriate directions. I find it would not be fair and just to deny the Exparte Applicant its request to withdraw the application herein. The 3<sup>rd</sup> Respondent’s protestation appears to suggest that the Exparte Applicant should be compelled to continue with the matter against its will while the Applicant has its own strategic interests and reasons for the withdrawal. The rival issues involving the parties herein would best be resolved in the pending **Civil Suit No. 169 of 2015**. It is not tenable for the remaining parties, upon the exit of the Exparte Applicant, to seek to rely on the Ex parte Applicant’s documents to advance their case. Once the withdrawal is effected, then all the Exparte Applicant’s pleadings and documents remain withdrawn and hence the remaining parties will be left in the wilderness as it were and cannot proceed without their own pleadings and documents. They will have no option but to go back to the drawing board and come up with their own application together with documents in support.

14. In view of the foregoing observations, I find merit in the Exparte Applicant’s request to withdraw the Judicial Review Application. The same is allowed. This Judicial Review is now marked as withdrawn with costs to the 3<sup>rd</sup> Respondent.

It is so ordered.

**Dated and delivered at Machakos this 10<sup>th</sup> day of April, 2019.**

**D. K. KEMEI**

**JUDGE**