



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW CASE NO. 63 OF 2013

IN THE MATTER OF AN APPLICATION BY OUTDOOR ADVERTISING ASSOCIATION OF KENYA FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, THE COUNTY GOVERNMENT ACT NO. 17 OF 2012 AND THE PHYSICAL PLANNING ACT, CAP 286 OF THE LAWS OF KENYA

AND

IN THE MATTER OF OUTDOOR ADVERTISING ASSOCIATION OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

EX-PARTE OUTDOOR ADVERTISING ASSOCIATION OF KENYA

RULING

Introduction

1. By a Notice of Motion application dated 28th October 2013 upon grant of leave to file an application for judicial review, the ex-parte applicant sought for the following specific orders:

- a. An order for certiorari be and is hereby issued to remove into this court and quash the entire decision by the respondent made on 29.05.2013 and 8.10.2013 directing the pulling down and removal of all erected advertising signages, structures and devices of members of the ex-parte applicant within Mombasa County Road Reserves.
- b. An order of Prohibition be and is hereby issued prohibiting the respondent from pulling down and removing all erected advertising signage, structures and devices of members of ex-parte applicant within Mombasa County Road Reserves.
- c. The costs of the application be paid by the respondent.

Judicial Review

2. Upon hearing the application for judicial review, the court on 14/04/2014 gave judgment for the ex parte applicant and made the following orders:

- a. *An order of certiorari is granted as prayed in prayer No. 1 of the Notice of Motion.*
- b. *The order for prohibition sought in prayer No. 2 of the Notice of Motion is declined for having been overtaken by events.*
- c. ***The ex-parte applicant's members herein will be awarded such damages for breach of fair administrative action as the court***

shall determine upon submission in that behalf by the parties on a date to be fixed.

3. The ex-parte applicant filed an affidavit in support of claim for damages, which prompted the respondent to file this instant application before the court. The director of Visions Advertising, Mr. Jabess O. Mdhai, and the legal officer of Magnate Ventures Limited filed affidavits in support of the claim for damages, as follows.

Affidavit in support of claim for damages by Laura Kenyan

4. She is the Legal Officer of Magnate Ventures Limited a member of the applicant. She averred the respondent's action had led to the destruction of seven (7) structures located at Likoni (2), Buxton (3) and Nyali bridge (2) which were 10 x 12 double sided structures were 6 and 20 x 12 structure which was one. The cost of constructing a double sided 10 x 12 including cost of construction materials cost of erecting a structure and labour for base construction and fabrication amounting to Ksh. 24,379,308/=. The annexure shows the billboard fabrication and erection costs breakdown was done by Pace Associates Consulting Engineers on 11/06/2014.

Further the cost of constructing a 20 x 12 included cost of constructing materials, cost of erecting structure and labour for base construction and fabrication which amounted to Ksh. 5,653,616/= which was done by Pace Associates Consulting Engineers.

5. She further averred that Magnate Ventures Limited entered into contracts with various clients including Safaricom Limited, Reckitt on two sites, BDF, Jubilee insurance, Samsung Electronics East Africa Limited, Equity Bank Limited and K-Rep.

Further Affidavit by Jabess O. Mdhai

6. He swore an affidavit as the Director of Visions Advertising a member of the Outdoor Advertising Association of Kenya. He stated that this court on 14th April 2014 awarded the applicant damages for breach of fair administrative action for the destruction of structures.

7. The deponent averred that structures were destroyed and the costs incurred included: costs of erecting the structures costs of printing the flexis and rent from the clients as at 31st January 2014. He listed the various clients who had paid for their services. The contracts for the work, the local purchase orders, invoices and receipts evidencing payments were attached.

8. In addition to this, he averred that the total cost of the structures and the flexis was Ksh.20,793,600/=. The cost for loss of revenue as a result of the loss of rent from the clients was Ksh. 1,340,000/= from 31st January 2014 until payment in full. (the annexures of the said documents were attached).

Issue for determination

9. The court has referred to the application and the submission in support of and in opposition of the objection. The following issue arises for determination:

- i. Whether or not the court has jurisdiction to hear and determine the assessment of damages.

Determination

10. The court in its Judgment dated 14/04/2014 had issued the following orders at paragraph 20, as follows:

"For the reasons set out above, I make the following orders on the ex-parte applicant's Notice of Motion dated 28th October 2013.

1. An order of certiorari as granted as prayed in prayer No. 1 of the Notice of Motion.

2. The order for prohibition sought in prayer No. 2 of the Notice of Motion is declined for having been overtaken by events.

3. The ex-parte applicants members herein will be awarded such damages for breach of fair administrative action as the court shall determine upon submission in that behalf by the parties on a date to be fixed".

11. From the above, the applicant went ahead and filed documents for the court to assess damages. The respondent urged that the court did not have jurisdiction to determine the issue of damages once it issued the judgment. The applicant on the other hand urged this court to dismiss the application and assess the damages.

12. This court in its judgment at paragraph 19 had stated as follows:

*"it is clear that the respondent's decision violated the ex-parte applicants constitutional right to fair administrative action under Article 47 of the Constitution and the ex-parte applicant's members are in the circumstances of the case entitled to damages for breach of the Constitutional right. **As damages are not recoverable under the judicial review procedure, the court will in interests of justice deem the proceedings as having been brought under Article 22 of the Constitution for the enforcement of the Constitutional provisions of fair administration action and consequently award damages for the breach thereof.**"*

13. The respondent urged that the applicant did not plead damages in its Judicial Review application and relied on the decision of the Court

of Appeal at Malindi between **Gideon Nassim Kiti v. Faiza Oscar Meuli & Anor Civil Appeal No. 35 of 2013**, where the trial Judge had ordered the appellant to allow the respondents to have quiet and peaceful enjoyment of the suit land and the Court of Appeal held that “we agree that a Judge can only give what has been asked for”. Similarly, in **Nairobi City Council v. Thabiti Enterprises Civil Appeal No. 264 of 1996** where it was held that a Judge had no power or jurisdiction to decide on an issue that had not been pleaded unless the pleadings were suitably amended.

14. In granting the judgment for damages for breach of fair administrative action, this court was clear that the order on damages for breach of fair administrative action was not awardable under Judicial Review Procedure, and consequently deemed the proceedings as proceedings for the enforcement of the Bill of Rights under Article 22 of the Constitution which provides as below:

- i. “Every person has a right to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been deemed, violated or infringed, or is threatened.
- ii. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by;
 - a. A person acting on behalf of another person who cannot act in their own name
 - b. A person acting as member of, or in the interest of, a group or class of persons.
 - c. A person acting in the public interest or
 - d. An association acting in the interest on one or more of its members.

In so doing the Court relied on the Court of Appeal decision in **Githunguri v. Attorney General** (1986) KLR 1.

15. However, in a subsequent decision of **Emfil Limited v. The Registrar of Titles Mombasa & 2 Ors (2014) eKLR** the Court of Appeal has decreed that a court is not entitled to deem an application for judicial review as one made under the constitution where the applicant has consciously chosen to adopt the special procedure for judicial review in preference of the constitutional procedure of the new Constitution of Kenya 2010, and held as follows:

“[17] In the appellant’s case, the application for Judicial Review was made in August 2011 after the promulgation of the Constitution of Kenya 2010 (hereinafter the Constitution), which replaced the repealed Constitution. **Article 23 of the Constitution, provides for an order of Judicial Review as an appropriate relief that may be granted in the enforcement of the Bill of Rights. Clearly, the appellant had the option to bring his application under Article 22 and 23 of that Constitution, but opted for Judicial Review proceedings under Order 53 of the Civil Procedure Rules.**”

[18] The extract of the judgment of the High Court reproduced herein above (paragraph 13) reveals that the adoption of the constitutional reference proceedings under **Article 22 and 23** by the learned judge was basically to expand the proceedings in order to include the issue of compulsory acquisition. But the appellant in the notice of motion only mentioned compulsory acquisition in passing. It was not a specific relief that was sought. Unlike the **Githunguri case**, it cannot be said that it was necessary to convert the applicant’s Judicial Review proceedings to a constitutional reference in order to allow the court the latitude in granting relief. The issue of compulsory acquisition was not before the judge for determination, such as to justify expanding the proceedings to accommodate it. The only interest that was advanced by the change in the nature of the proceedings was that of the alleged squatters. The appellant having specifically moved the court for orders of Judicial Review, which were available to the appellant under **Order 53 of the Civil Procedure Rules**, the court had no business tampering with his application by turning it into an application for enforcement of the bill of rights under the Constitution.

[19] **Judicial Review proceedings, are proceedings of a sui generis nature subject to its own peculiar rules. While we appreciate Article 159 of the Constitution and the need to apply substantive justice, that article provides no justification for a court to ignore a specific procedure provided by law and deliberately chosen by a litigant, nor does it allow a court to bend backwards to accommodate persons who have deliberately failed to protect or assert their interest. Thus the court was bound to apply the specific provisions of Order 53 of the Civil Procedure Rules. Rule 4 of the Order provides that the relief granted in Judicial Review proceedings can only be the relief sought in the statutory statement filed under Rule 2 of the same Order, and in this case neither compulsory acquisition nor compensation for compulsory acquisition was a relief sought by the appellant.**

[20] Further, the order made by the trial judge converting the proceedings from one of Judicial Review to that of a Constitutional Reference was in the nature of a direction that ought to have been given during the pre-trial stage. Coming as it did at the final stage in the judgment it had the effect of re-opening the proceedings. The judgment was therefore not a final decision as envisaged under **Order 21 Rule 1&4** of the Civil Procedure Rules. In this regard the order made by the learned judge may be distinguished from that made in the **Githunguri case**, in which the order of prohibition that was issued finally determined the litigation. In light of the orders which were made by the trial judge, declining to protect the appellant’s constitutional right to property, the conversion of the appellant’s application from one of Judicial Review to one of enforcement of the bill of right was prejudicial to the appellant and was purely for the benefit of the squatters who had opted not to pursue their rights.”

16. The matter would also appear to be affected by the decision of Court of Appeal on the principle of **functus officio** in **Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 Ors [2016] eKLR** held as follows:

“Subject to limited exceptions, **delivery of judgment renders a trial court functus officio.** The trial court erred in law in reserving for itself outstanding issues to be considered after judgment. The court further erred in allowing affidavits and or pleadings to be

filed after delivery of judgment.

Whereas a court has jurisdictional competence to issue interim orders, the trial court failed to appreciate that the concept of partial or interim judgment is not part of the Kenyan legal system. Whereas a trial court has the jurisdictional competence to make interim orders, the trial court erred in delivering a judgment that was not a final judgment that determined the rights and liability of parties.

17. This Court is bound by the decisions of the Court of appeal and I, respectfully, accept that in the circumstances of this case, the court had no jurisdiction to alter the case of the ex parte applicant and deem it as one made under constitutional procedure for the enforcement of the Bill of Rights of the Constitution of Kenya 2010 and that following the judgment of the Court, this court became *functus officio*.

Orders

18. The court therefore makes the following orders:

a. The preliminary objection by the respondent is allowed.

b. There shall be no order as to costs.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 11TH DAY OF OCTOBER 2018.

E.K. OGOLA

JUDGE

Appearances:

M/S Havi & Co Advocates for the Ex parte Applicant.

M/S Mogaka Omwenga & Mabeya Advocates for the Respondent.