



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

ELC MISC APPLICATION NO. 17 OF 2014

**IN THE MATTER OF AN APPLICATION BY MICHAEL GICOVI NJAGI TO APPLY FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI AGAINST THE ACTING SENIOR
RESIDENT MAGISTRATE J.P NANDI RUNYENJES**

AND

**IN THE MATTER OF A DECREE DATED THE 19TH DECEMBER 2013 IN RUNYENJES
PRINCIPAL MAGISTRATE'S COURT NO. 64 OF 2013, FELISTA GATHONI NJERU VERSUS
MICHAEL GICOVI NJAGI**

REPUBLIC OF KENYA.....APPLICANT

EX-PARTE: MICHAEL GICOVI NJAGI

VERSUS

J.P. NANDI ACTING RESIDENT MAGISTRATE RUNYENJES.....RESPONDENT

AND

FELISTA GATHONI NJERU

JOSEPH NJERU MUKUTHU.....INTERESTED PARTIES

JUDGMENT

The applicant herein **MICHAEL GICOVI NJAGI** filed this Notice of Motion on 5th May 2014 seeking the following orders:-

- 1. That the applicant be granted an order of certiorari to remove into this Honourable Court to be quashed the Decree of J.P. Nandi Ag. Senior Resident Magistrate Runyenjes issued on 19th December 2013 in Runyenjes PMCC No. 64 of 2015 FELISTA NJERU VS MICHAEL GICOVI.***
- 2. The costs of this application be awarded to the applicant.***

The basis of the application is that Hon. J.P. Nandi Ag. Senior Resident Magistrate acted in excess of jurisdiction by handling an Environment and Land Court matter and also in violation of the rules of natural justice in condemning the applicant un-heard. It is also the applicant's case that the Ag. Senior Resident Magistrate acted in violation of the Rules of Civil Procedure with regard to entry of judgments, hearing and prosecution of the suit and also with respect to execution of Decree. It is similarly the

applicant's case that the Ag. Senior Resident Magistrate acted in violation of Civil law by invoking the coercive powers of the Police in a case of a civil nature while the interested parties were guilty of non-disclosure in failing to disclose the existence of two previously filed cases between the same parties over the same subject matter namely:-

1. ***Embu CMCC No. 62 of 2009 between JOSEPH NJERU MUKUTHU and MICHAEL GICOVI NJAGI.***
2. ***Embu HCCA No. 85 of 2011 and now Kerugoya ELCA No. 84 of 2013 between MICHAEL GICOVI NJAGI and JOSEPH NJERU MUKUTHU.***

The interested parties are also guilty of non-disclosure in that they jointly and severally failed to disclose to the Court that the second interested party filed an application in CMCC No. 62 of 2009 dated 19th April 2012 for the eviction of the applicant from the suit property which application was dismissed on 29th April 2013.

In his verifying affidavit, the applicant states that at all material times, the land parcel No. GATURI/GITHIMU/8297 (of which the parent title remains GATURI/GITHIMU/10010/10009) belonged to his late father **SAMUEL NJAGI NJAMWERI** but on 8th March 2007, the ownership mysteriously changed hands to the second interested party herein yet at that time, the applicant had already acquired a registrable interest in land parcel No. GATURI/GITHIMU/8297 as a gift from his father. Upon discovering this, the applicant caused a restriction to be entered against the title. However, the second interested party had the restriction removed and proceeded to file a suit being CMCC No. 62 of 2009 at Embu where he obtained a judgment against the applicant and the restriction was removed. The applicant therefore filed Embu H.C.C.A No. 85 of 2011 now Kerugoya ELCA No. 84 of 2013 which is still pending. During the pendency of that appeal, the 2nd interested party filed an application in Embu CMCC No. 62 of 2009 seeking the eviction of the applicant but that application was dismissed on 19th April 2012. After the dismissal of that application, the second interested party transferred the land parcel No. GATURI/GITHIMU/8297 to his wife the first interested party who then sub-divided it into two portions being GATURI/GITHIMU/1009 and 10010 and on 21st December 2013, he was evicted by a gang of armed men and when he went to the Police Station to complain, he was shown a copy of decree in PMCC No. 64 of 2013 ordering the Officer Commanding Station (OCS Embu) to preside over his eviction. It was then that he learnt about the Court cases at Runyenjes in which he was never served with summons. That the interested parties concealed from the Court the existence of other civil suits over the same subject matter and the Ag. Senior Resident Magistrate acted in error. The applicant has annexed to his affidavit various documents including a copy of the Green Card in respect of land parcel No. GATURI/GITHIMU/8297 and the application for transfer thereof from his father SAMUEL NJAGI NJAMWERI to himself, the plaint and defence in Embu CMCC No. 62 of 2009, the Memorandum of Appeal in Embu HCCA No. 85 of 2011, the application in Embu CMCC No. 62 of 2009 seeking the applicant's eviction from land parcel No. GATURI/GITHIMU/8297, the ruling in Kerugoya ELC Case No. 84 of 2013, the certificates of search in respect of land parcels No. GATURI/GITHIMU/8297, GATURI/GITHIMU/1009 and GATURI/GITHIMU/10010 and the decree in Runyenjes PMCC No. 64 of 2013.

The interested parties resisted the application by filing grounds of opposition and replying affidavits.

The 1st interested party FELISTER GATHONI NJERU stated that the second interested party had the right in transferring the land parcel No. GATURI/NEMBURE/8297 (it is not clear if this is the same land known as GATURI/GITHIMU/8297) to him. That the applicant has since been evicted therefrom following the Court orders in Runyenjes PMCC No. 64 of 2013 and the applicant could not stop his father from doing whatever he wanted with the land and the applicant should therefore divert his claim against his father if he (applicant's father) recanted any promise to gift him the land. That the applicant was not evicted by a gang but rather by authorized officers with the surveillance of Police from Embu Police Station. That the first interested party bought the land procedurally.

On his part, the second interested party stated that he did not mysteriously transfer the land to the first

interested party and if the applicant had any claim of the said land, it ought to have been directed at his father who had promised to gift him the land. The second interested party having been registered as the proprietor of the land had an indefeasible title and was entitled to sub-divide it as he did and the Police acted lawfully in executing the eviction orders.

In addition, both the first and second interested parties filed replying affidavits in which the first interested party confirmed that the second interested party gifted her land parcel No. GATURI/GITHIMU/8297 and she was registered as the proprietor thereof having obtained the relevant consent. She then sub-divided it into GATURI/GITHIMU/10009 and 10010 and sued the applicant in Runyenjes PMCC No. 19 of 2013 seeking his eviction therefrom.

On his part, the 2nd interested party deponed that he purchased land parcel No. GATURI/GITHIMU/8297 from SAMUEL NJAGI NJAMWERI and was issued with the title deed on 9th March 2008 but the applicant placed a caution on the land alleging that it had been given to him by his father. The second interested party therefore moved the Court in Embu CMCC No. 62 of 2009 and obtained judgment against the applicant and the caution was removed and he transferred the said land to the first interested party. He deponed further that he was not a party to Runyenjes PMCC No. 64 of 2013 nor is he aware of EMBU HCCA No. 85 of 2011 now KERUGOYA ELC No. 84 of 2013. Annexed to the interested parties replying affidavits were the sale agreement between SAMUEL NJAGI NJAMWERI and the second interested party in relation to land parcel No. GATURI/GITHIMU/8297 as well as copy of judgment and decree in Embu CMCC No. 62 of 2009 and decree in Runyenjes PMCC No. 64 of 2013.

Submissions have been filed both by Mr. Morris Njage advocate for the applicant and Mr. Kenneth Githinji advocate for the interested parties.

I have considered the application, statement of facts and the replying affidavits as well as the submissions by counsels.

This is a Judicial Review Application and in the case of **PASTOLI VS KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS 2008 2 E.A 300**, it was held as follows:-

“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 law or its principles are instances of illegality.... Irrationality is where 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..... 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”

As was held in the case of **MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC & UMOJA CONSULTANTS C.A CIVIL APPEAL NO. 185 OF 2001**, Judicial Review is concerned with the decision making process and not with the merits of the decision itself. So in Judicial Review, the Court will be concerned with, for instance, whether the body that made the decision complained of had the jurisdiction over the matter. The Court will not be concerned with whether or not there was sufficient evidence to support the decision. That is a function of an Appellate Court and not a Court exercising Judicial Review Powers.

In this application now before me, the twin issues that have been raised are that:-

1. ***The Ag. Senior Resident Magistrate Hon. J.P. Nandi had no jurisdiction in handling an Environment and Land Court matter in Runyenjes PMCC No. 64 of 2013.***

2. *The Ag. Senior Resident Magistrate Hon. J.P. Nandi violated the rules of Natural Justice by failing to give the applicant a hearing.*

I shall commence with interrogating the complaint that Hon. J.P Nandi, Ag. Senior Resident Magistrate had no jurisdiction to handle Runyenjes PMCC No. 64 of 2013 as it was essentially a land matter and therefore the preserve of the Environment and Land Court. I must say that I did not derive much assistance from the pleadings annexed by the applicant to his Notice of Motion with regard to Runyenjes PMCC No. 64 of 2013. I should have expected a copy of the plaint and defence in that case to enable this Court address the issue as to whether infact the trial magistrate had jurisdiction in the matter. All that has been annexed is a decree issued in that case on 19th December 2013 ordering the eviction of the applicant herein from land parcel No. GATURI/GITHIMU/10009 and GATURI/GITHIMU/10010 and directing the office in charge of Embu Police Station to supervise the eviction exercise and provide security. There is nothing in the decree itself to suggest that the dispute property was valued in excess of the pecuniary jurisdiction of Hon. J.P. Nandi, Senior Resident Magistrate. All that has been stated is that Hon. J.P. Nandi, Senior Resident Magistrate acted in excess of jurisdiction in handling a dispute that was the preserve of the Environment and Land Court. Under **Section 107 to 109 of the Evidence Act**, the burden of proof was on the applicant to demonstrate that indeed Hon. J.P. Nandi, Ag. Senior Resident Magistrate, had no jurisdiction over Runyenjes PMCC No. 64 of 2013. No such evidence has been placed before me. It is of course common knowledge that the **Environment and Land Court Act** which established the **Environment and Land Court** came into force on 30th August 2011 and from the decree, Runyenjes PMCC No. 64 of 2013 was filed some two years later. However, unless it can be shown that the dispute involved a subject matter whose value was well in excess of the pecuniary jurisdiction of Hon. J.P. Nandi, Ag. Senior Resident Magistrate or that the issues involved touched on subjects such as adverse possession which are the preserve of this Court, I am not persuaded, on the material before me, that Hon. J.P. Nandi Ag. Senior Resident Magistrate had no jurisdiction to handle the matter before him and issue the orders that he did.

I am aware that following the enactment of the **Environment and Land Court Act No. 19 of 2011** which established the **Environment and Land Court**, there have been some confusion as to whether Magistrate's Courts can handle land cases. This was largely because the **Land Act 2012** provided under **Section 150** that the **Environment and Land Court** had "**exclusive jurisdiction**" to hear and determine disputes concerning land under that Act. However, a closer look at the provisions of the **Environment and Land Court Act** clearly shows that it could not have been the intention of Parliament to take away the jurisdictions of Magistrate's Courts to hear land disputes where the value of the land was within such Court's pecuniary jurisdiction. **Section 13 (1) of the Environment and Land Court Act**, prior to the amendment through **Act No. 12 of 2012**, read as follows:-

"The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of the Act or any other written law relating to environment and land" emphasis added

If the **Environment and Land Court Act** exercises appellate jurisdiction, that can only mean that Magistrate's Courts have jurisdiction to determine matters falling within the jurisdiction of the Environment and Land Court and their decisions will then be appealable to the Environment and Land Court. Otherwise how else will the Environment and Land Court exercise such appellate jurisdiction? My view is that it was due to that confusion that Parliament in its wisdom has now moved and under the Statute Law (**Miscellaneous Amendments**) **Act No. 25 of 2015** has amended **Section 101 of the Land Registration Act** and **Section 150 of the Land Act** to include Subordinate Courts. **Section 101 of the Land Registration Act** now reads as follows:-

"The Environment and Land Court established by the Environment and Land Court Act 2011 and subordinate Courts have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act"

Section 150 of the Land Act now reads as follows:-

“The Environment and Land Court established in the Environment and Land Court Act and the subordinate Courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act”

My view therefore is that there was never any intention to take away the jurisdiction of Magistrate’s Courts to handle land disputes in matters falling within the pecuniary jurisdiction of those Courts and that is why the confusion arising from the interpretation of ***Section 13 (1) of the Environment and Land Court Act*** had to be addressed by the Statute Law (***Miscellaneous Amendment) Act No. 25 of 2015***. My finding therefore, is so far as this application is founded on the complaint that Hon. J.P. Nandi Ag. Senior Resident Magistrate had no jurisdiction to handle Runyenjes PMCC No. 64 of 2013, the same cannot succeed. There is no material placed before me to suggest, for example, that the subject of Runyenjes PMCC No. 64 of 2013 which was land parcels No. GATURI/GITHIMU/10010 and GATURI/GITHIMU/10009 were beyond the pecuniary jurisdiction of Hon. J.P. Nandi Ag. Senior Resident Magistrate or that the order sought and granted therein could not be granted by a subordinate Court. That complaint is therefore dismissed.

The second complaint is that Hon. J.P. Nandi Ag. Senior Resident Magistrate violated the rules of Natural Justice by failing to give the applicant a hearing. The right to be heard as a rule of Natural Justice is embodied in the Latin phrase ***“audi alteram partem”*** which literary means ***“hear the other side”***. This rule imposes a duty on the Court or any tribunal or body vested with the authority of resolving disputes to fairly hear both parties and consider their cases before arriving at a decision. No party should therefore be condemned un-heard. The complaint against Hon. J.P. Nandi Ag. Senior Resident Magistrate with regard to violation of the rules of Natural justice, as I can discern from the applicant’s statement, is that he was condemned un-heard and that there was a violation of the Rules of Civil Procedure with respect to execution of the Decree. Specifically, the applicant takes issue with the fact that the Police were employed in a matter of a pure civil dispute. The Decree in Runyenjes PMCC No. 64 of 2013 dated 19th December 2013 reads as follows:-

“DECREE

CLAIM FOR

- a. ***The defendant himself, his servants, agents and property be forcibly evicted from the plaintiff’s land parcels number GATURI/GITHIMU/10010 and GATURI/GITHIMU/10009.***
- b. ***The Officer In-charge Embu Police Station be authorized to supervise the eviction exercise and provide security during the exercise.***
- c. ***Costs of the suit and interest.***

The matter coming up for formal proof on 5th December 2013 before Hon. J.P. Nandi Ag. Senior Resident Magistrate and having heard a M/S Githinji advocate for the plaintiff and the plaintiff in absence of the defendant and the same coming up for judgment on 19th December 2013

IT IS HEREBY ORDERED:-

1. ***That the defendant himself, his servants, agents and properties be and it is hereby ordered that they be forcibly evicted from the plaintiff’s land parcels number GATURI/GITHIMU/10010 and GATURI/GITHIMU/10009.***
2. ***That the Officer In-charge Embu Police Station be and is hereby ordered to provide security and to supervise the eviction exercise***
3. ***That the plaintiff to have costs and interest of the suit”.***

emphasis added

The fact that Runyenjes PMCC No. 64 of 2013 was determined by way of formal proof is a clear indication that the applicant (who was the defendant in that case) did not file any defence to resist the claim against him and interlocutory judgment was entered and the first interested party (who was the

plaintiff in that case) then fixed the case for formal proof. **Order 10 of the Civil Procedure Rules** empowers the Court to enter judgment against a party who has not entered appearance or filed a defence and this Court can only conclude that Hon. J.P. Nandi Ag. Senior Resident Magistrate must have been satisfied that indeed there was compliance with that provision before proceeding to enter judgment against the applicant. In paragraph 23 of his affidavit, the applicant has deponed that he was never served with summons and the proceedings proceeded ex- and in any event, the case ought to have been heard in Embu and not in Runyenjes. If the applicant was not served with any summons, then all that he should have done was to invoke the provisions of **Order 10 Civil Procedure Rules** and approach the Court to exercise its wide discretion and set aside the ex-parte judgment obtained against him. This Court sitting on a Judicial Review Application cannot interrogate the merits or otherwise of the orders issued by Hon. J.P. Nandi, Ag. Senior Resident Magistrate as to do so would be tantamount to sitting on an appeal over the decision of the magistrate and that is not the province of a Court hearing a Judicial Review Application. In my view, the orders issued by Hon. J.P. Nandi, Ag. Senior Resident Magistrate could only be properly impugned in an appeal rather than in a Judicial Review Application. That would be the most efficacious route to take. Further, Judicial Review orders are discretionary and the Court may decline to grant them where to do so would serve no useful purpose or where the remedy has been overtaken by events – **REPUBLIC VS JUDICIAL SERVICE COMMISSION EX-PARTE PARENO (2004) 1 K.L.R. 203.** As I have indicated above, I do not see that the remedy of Judicial Review is the most efficacious in the circumstances of this case.

The applicant has taken issue with the fact that the interested party used the Police in the execution of a civil Decree. The Police have no role to play in the civil process other than ensure the maintenance of law and order. In **KAMAU MUCHINA VS THE RIPPLES C.A CIVIL APPEAL NO. 186 of 1992** the Court stated:-

“Paragraph 4 of the formal order extracted on 22 September 1992 says that Police assistance may be enlisted to ensure that the plaintiff (i.e. respondent) is reinstated in the premises. It would be unlawful to utilize the Police in civil action for the purpose of effecting or aiding private evictions or reinstatements”

Having said so, the Police have a duty under Section 24 of the National Police Service Act to maintain law and order. The Decree issued by J.P. Nandi Ag. Senior Resident Magistrate was that the officer In-charge Embu Police Station do ***“provide security and to supervise the eviction exercise”***. The import of that was that the eviction exercise was being performed by other persons and the role of the Police was to ***“supervise”*** and ***“provide security”***. Nothing turns on that because as I have indicated above, it is the role of the Police to maintain law and order and a party who has reasons to believe that there may be need to employ the Police in maintaining security during the execution process is entitled to approach the Court for an order that the Police be present during the exercise to prevent the break-down of law and order. The mere presence of the Police during such an exercise does not by itself amount to using the Police to execute civil processes.

The other issues raised in the Notice of Motion is that the interested parties were guilty of non disclosure in that they failed to disclose the existence of two previously filed cases between the same parties over the same land namely:-

1. ***Embu CMCC No. 62 of 2009 between JOSEPH NJERU MUKUTHU and MICHAEL GICOVI NJAGI and***
2. ***EMBU HCCA No. 85 of 2011 now Kerugoya ELCA No. 84 of 2013 between MICHAEL GICOVI NJAGI and JOSEPH NJERU MUKUTHU***

From his own affidavit, the applicant confirms that he learnt about the Decree issued in Runyenjes PMCC No. 64 of 2013 on 21st December 2013 when a gang of men armed with guns and demolition weapons descended upon his home and evicted him. That should have been the signal for him to move with haste and apply to the Court to set aside that judgment and in the process, raise objections to the effect that Runyenjes PMCC No. 64 of 2013 was infact res-judicata in view of the two other suits mentioned above. He says he filed an appeal which is pending. That, in my view, was the proper step to take in addressing

his grievances because the appellate Court will be in a position to interrogate the merits or otherwise of the judgment in that case. This Court cannot exercise such jurisdiction.

Having considered all the issues herein, I am not persuaded that an order of certiorari is the most efficacious remedy in the circumstances of this case. I am not satisfied that Hon. J.P. Nandi, Ag. Senior Resident Magistrate exercised a jurisdiction that he did not have or that the rules of Natural Justice were violated or that the ***Civil Procedure Rules*** were flouted.

In the circumstances, I find no merit in the applicant's Notice of Motion filed herein on 5th May 2014. The same is accordingly dismissed with costs to the interested parties.

B.N. OLAO

JUDGE

11TH MARCH, 2016

Judgment delivered in open Court this 11th day of March, 2016

Mr. Njage for the Applicant present

Mr. Moriasi for Mr. Githinji for the Interested party present

Mr. Nyaga Court clerk present

Right of appeal explained.

B.N. OLAO

JUDGE

11TH MARCH, 2016