



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

JUDICIAL REVIEW NO. 202 OF 2013

**IN THE MATTER OF: AN APPLICATION BY MBUNI DRY CLEANERS LIMITED FOR
JUDICIAL REVIEW ORDER OF CERTIORARI AGAINST THE CHIEF MAGISTRATE AT
EMBU**

REPUBLIC.....APPLICANT

VERSUS

CHIEF MAGISTRATE, EMBU LAW COURT..... RESPONDENT

KENYA POWER & LIGHTING COMPANY LIMITED...1ST INTERESTED PARTY

DANIEL OKUBI MUKABI.....2ND INTERESTED PARTY

MBUNI DRY CLEANERS LIMITED.....EX PARTE

J U D G M E N T

1. This is an application by the ex parte Applicant dated 11th January 2014 brought under Article 23(3)(f) of the Constitution of Kenya 2010, Part IV of the Law Reform Act and Order 53 Rule 1, 2, and 4 of the Civil Procedure Rules.
2. It seeks for orders of certiorari to move to this honorable court and quash the decision of the Chief Magistrate, Embu Hon. M.W. Wachira made on the 17th December 2013 in Embu CMCC No. 257 of 2012 staying the orders of Embu Ag. Senior Principal Magistrate Hon. R.O Oigara made on the 6th December 2013.
3. The facts leading to this application are that Hon.Ocharo granted orders on 19/12/2012 restraining the 1st interested party from disconnecting power supply to the Ex parte Applicant only after reading the actual consumption from the meter installed at the premises pending the hearing and determination of the suit. The 1st interested party had not filed defence or a reply to the Ex parte applicant's notice of motion.
4. On 28/11/2013 the 2nd interested party caused the disconnection of power from the Ex parte applicant's premises in contravention with the orders made on 19/12/2012. On application by the ex parte applicant Hon. R.O Oigara granted orders that the 1st interested party do reconnect the power supply and that he do fully comply with the orders made on 19/12/2012. Warrants of arrest against the 2nd interested party were issued for disobedience of the court order made on 19/12/2012.
5. It was on 17/12/2013 that the respondent Hon. Wachira granted a stay order granted on the 6th December 2013 pending the inter parties hearing of the application. The ex parte applicant was

aggrieved by the said stay order which it claims is oppressive to the ex parte applicant and violates its constitutional rights to have its economic interest protected by all persons including the respondent.

6. The ex parte applicant claims the order is illegal and that a contemnor has no audience before the court or the application to have it punished is heard and disposed of. The Ex parte applicant claims that the order was issued through an error of the law on the face of the record as the respondent failed to apply the provisions of Article 3 (1), 10 (2)(a) and (c), 19(1), 20(1), 27(1),46(1)(c) and (d) and 47(1) of the constitution.

7. The ex parte applicant seeks for orders of certiorari to quash the order of the respondent on ground that it is irrational, illegal and unprocedural. It is claimed that the proceedings are public of interest in that they are intended to promote consumer rights in Kenya.

8. The respondent in her grounds of opposition argued that the application is bad in law and an abuse of the due process of the court. That judicial review orders cannot issue to challenge decision of judicial officers in exercise of their judicial functions. That the grounds relied on do not support the application. Finally that the remedy of the applicant lies in the appeal process.

9. The parties agreed to disposed of this application by way of written submissions which were dully filed by both parties through their advocates. The Ex parte applicant was represented by Oyon Opini & Gachuba while the interested parties were represented by L.M Kambuni & Co. Associates. The respondent was represented by the Attorney General whose representative participated fully in these proceedings.

10. The 1st and 2nd interested parties in their joint replying affidavit sworn by David Makezi on 18th February 2014, opposes the application. It is deponed that the ex parte applicant is a customer of the 1st respondent through A/c No. 664436-01 at plot No. 1112/317 Kenyatta Avenue Embu Town. That the electricity bill was an undercharge in the month of October 2012 reflecting KSh.228.33 of October 2012 reflecting KSh.228.33 for 104 Kwhs. In the month of November and December 2012 and January 2013 the account was billed correctly reflecting Ksh.39,314.85 of 2,118 Kwhs, Kshs.20,444.92 for 1108 Kwhs and Kshs. 18,013.72 for 985 Kwhs. That the average monthly bill of the ex parte applicant was Kshs.20,000/= and it was expected he would have noticed the anomaly in the bill of the month of October 2012 and brought it to the attention of the 2nd respondent.

11. The interested parties state that the order of 19th December 2012 was served on the 2nd interested party but there has not been any disobedience of the order in regard to the relevant account no. 0664436-01. That the order of 19th December 2012 expired on 18th December 2013.

12. It is further argued that the orders of Hon. Ogara for warrant of arrest against Hon. Daniel Mukundi Ukumbi were without Mr. Ukumbi's participation in the proceedings. The person is not known in the 2nd respondent's head office for the current head is known as Daniel Okubi Mukabi. There is no proof of service of the order on the 2nd respondent's head of the Embu branch.

The orders by the respondent were ordered stayed because they were not issued by the trial court. The remedy available to the ex parte applicant is appeal but not judicial review.

13. The Ex parte applicant submitted that an order of certiorari should issue against the respondent for the following reasons:-

(a) *That she was biased against the ex parte applicant;*

(b) *She acted out of jurisdiction;*

(c) *She failed to take into account matters it ought to have considered;*

(d) *That she made a decision that was far from reasonable, fair and just and which was indeed*

oppressive;

14. The Exparte applicant submitted that the orders of Hon.Ocharo were still in force and that the interested parties were in contempt of court and that they had no audience of the court before Hon. Wachira. He relied on the following cases:-

(a) *Econet Wireless Ltd Vs Minister for Information & Communication of Kenya & Another [2005] eKLR*

(b) *Republic Vs Business Premises Rent Tribunal & Another Exparte Westland Sundries Limited & [2013] ECLR*

(c) *Republic Vs Minister for Lands and Settlement & 2 others [2007] eKLR*

(d) *Mecol Limited Vs Attorney General & 7 others [2006] eKLR*

15. It was submitted that the interested party disconnected electricity after the stay of the earlier order of 19/12/2012 was granted by the respondent and which order had expired after 14 days from the date of issue. It was also argued that the exparte applicant did not file these proceedings within 21 days as required by the law thus rendering the proceedings null and void.

16. The following decisions were cited:-

(a) **GERALD WANJOHI & ANOTHER VS DC KOIBTEK** here it was held that a High Court can only quash the decision of a magistrate if the magistrate acted without jurisdiction and in consideration of relevant matters.

(b) **NICHOLAS MUCHORA & 5 OTHERS VS SRM MILIMANI COMMERCIAL COURTS** where the high court held that the correct procedure was to file an appeal and not judicial review unless it was proved that the judicial officer had no jurisdiction or acted contrary to natural justice.

(c) **JUSTUS MAKHANDE ITOLI & ANOTHER VS LOISE ALILI OMBOTO & 3 OTHERS [2013] eKLR** where it was held that an order of certiorari can only be considered against a judicial officer where there is evidence that such officer acted without jurisdiction.

17. The interested parties argue that the respondent acted within the jurisdiction conferred to her by the law. The interested parties did not breach the order of the court in that they billed the exparte applicant for actual units consumed as per meter No. 020343828 as directed by the court.

18. The interested parties relied on the case of **PATRICK WAWERU MWANGI & ANOTHER VS HOUSING FINANCE OF KENYA LTD CIVIL SUIT NO. 595 OF 2012** where it was held that a party seeking a remedy must come with clean hands.

19. The exparte applicant was owing the interested party at the time of this application Kshs.267,970.18. He ought to clear the amount he owes to the 2nd respondent before he can obtain any remedy from the court.

20. The respondent argued that the judicial review proceedings cannot be brought against a judicial officer. The exparte applicant ought to have applied for review of the orders made by the respondent or appealed against them and relied on two authorities:-

(a) **REPUBLIC VS JUDICIAL SERVICE COMMISSION EXPARTE PARENO [2004] 1 KLR** where it was held that the court will not review orders like a court of appeal would do and neither will it interfere with the power or discretion of a court or any other body.

21. It was argued that the order issued by the respondent was an interim order pending hearing

interparties. The *ex parte* applicant had an opportunity to seek for orders setting it aside when the application came for mention.

22. The law governing judicial review proceeding is contained in the Constitution of Kenya. The Law Reform Act and the Civil Procedure Rules Article 23(3)(f) of the Constitution provides:-

In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(f) an order of Judicial review. Section 8 and 9 of the Law Reform Act empower the High Court of Kenya to make an order of mandamus, prohibition or certiorari. The procedural law is provided for by Order 53 of the Civil Procedure Rules that:-

1. No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

3.(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

7.(1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

(2) Where an order of certiorari is made in any such case as aforesaid, the order shall direct that the proceedings shall be quashed forthwith on their removal into the High Court.

23. The issues for determination in this application have been identified as follows:-

(i) Whether this application was filed within the stipulated time after obtaining leave;

(ii) Whether judicial review orders can be issued against a judicial officer for an act done in the course of his official duties;

(iii) Whether the applicant is entitled to a remedy of judicial review.

24. The jurisdiction of this court is well spelt out in Article 165 of the Constitution and it includes “supervisory jurisdiction over all subordinate courts, over any person or body or authority exercising a judicial or quasi-judicial functions.....”

25. This constitutional jurisdiction is supported by statutory provisions and guided by procedural rules. Section 8 and 9 of the Law Reform Act and Order 53 contain the relevant statutory and procedural framework. Both parties admit the jurisdiction of the court.

26. The instances where judicial review applies have been established through decisions of the Court of Appeal and the superior courts.

27. In the case of **PETER OKECH KADAMAS VS MUNICIPAL COUNCIL OF KISUMU Civil Appeal No. 109 of 1984 [1985] KLR 954** it was held:-

“The order of judicial review is only available where an issue of “Public law” is involved but the expression of “public law” and “private law” are recent immigrants and while convenient for descriptive purposes must be used with caution, since the English Law traditionally fastens not so much upon principles as upon remedies,..... the remedy of certiorari might well be available if the health authority is in breach of a “public law” obligation but would not be if it is only in breach of a private law obligation.”

28. In the case of **BAHAJI HOLDINGS LTD VS ABDO MOHAMED BHAJI AND CO. LTD & ANOTHER Nairobi Civil Application No. 97 of 1998**, the court of appeal held that certiorari covers every case in which a body of persons of a public as opposed to private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially.

29. In **MECOL LIMITED VS ATTORNEY GENERAL & 7 OTHERS [2006] eKLR** it was held:-

“Judicial review is available where a decision making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal have reached or abuses its powers”.

30. Interested party argued that the exparte applicant obtained leave to fill judicial review proceedings on 24th December 2013. The 21 days period given was to expire on the 14th January 2014 but the exparte applicant filed the motion on 22/01/2014 which was out of time.

Order 53(3)(1) provides that:-

“When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing”.

31. The record shows that the leave to file these proceedings was obtained on 24th December 2013. The proceedings were filed on 13th January 2014 which was within the 21 days allowed by the law and granted by the court. The application was therefore filed within time.

32. In the case of **REPUBLIC VS PUBLIC PROCUREMENT ADMINISTRATION REVIEW BOARD 3 OTHERS EXPARTE OLIVE TELECOMMUNICATION PVT LTD [2014] eKLR Nairobi J.R. Application No. 106 of 2014**, a three judge bench held that the purpose of judicial review is to check that public bodies do not exceed their jurisdiction or carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making.

33. In the **NAIROBI HIGH COURT J.R APPLICATION NO. 262 OF 2013 REPUBLIC VS CHIEF MAGISTRATE MILIMANI COMMERCIAL COURT & 2 OTHERS EXPARTE VIOLET NDANU MUTINDA & 5 OTHERS** it was held:-

“It is therefore my view that based on the clear breach of the rules of natural justice as well as manifest injustice which is likely to be occasioned to the applicants if the prayers seeking certiorari and prohibition are not allowed these prayers ought to succeed”.

34. The court in that case issued the aforementioned orders against the chief Magistrate Milimani commercial courts upon being satisfied that the rules of natural justice had been breached.

35. The rules of natural justice are minimum standards of fair decision making imposed by the Kenyan constitution and the common law and persons or bodies who are under a duty to act judicially; Article

50(1) of the Constitution provides:-

“every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

36. Instances of violation of order 50(1) or any breach of the rules of natural justice in a judicial process may be a good basis of granting an order of certiorari or mandamus against the judicial officer responsible for such violation or breach. Where a judicial officer act in excess of jurisdiction, judicial proceedings may provide the remedy. That an order of certiorari or mandamus may apply in respect to judicial proceedings before a court of law.

37. It is not in dispute that the first order was issued by Hon. Ocharo on 19/12/2012 in favour of the exparte applicant restraining the 1st interested party from disconnecting power supply to the exparte applicant's premises and not to bill the exparte applicant only after reading the actual consumption from the meter pending hearing and determination of the suit. The power supply was disconnected on the 28th November 2013. This was followed by further orders on application by the exparte applicant which were issued by Hon. R.O. Oigara to the affect that the 1st interested party reconnects and resumes power supply to the premises. In the same breath warrants of arrest were ordered issued against the interested parties for disobedience of the orders of 19/12/2012.

38. The interested parties filed an application under certificate of urgency dated 17th December 2013 seeking among other prayers for stay of the orders issued on 19th December 2012 pending hearing and determination of the application inter parties. The respondent dealt with this application and granted temporary stay pending disposal of the application inter parties before Hon. Ocharo. The matter was to be mentioned before the trial magistrate on 23rd December 2013.

39. The first question is whether the respondent acted in excess of her jurisdiction in granting the orders of 17th December 2013, or whether she denied the exparte applicant the right to be heard before issuing the said order. This is followed by the second question as to whether the applicant was given a fair hearing by the respondent.

40. The interested party submitted that the orders made by Hon. Ocharo were interim orders pending hearing of the application inter parties. The orders were so grave against the interests party thus necessitating the application to set the orders aside to be filed. It is argued further that the orders issued by the respondent were within her jurisdiction and that the interim orders of 19th December had expired.

41. The nature of an interim order is such that it is issued upon hearing only the applicant. In most cases, such orders are granted after the court examines the material before it and satisfies itself that the applicant has a *prima facie* case. The orders given on 19th December 2012 were temporary pending hearing inter parties at a later date. If the respondent is aggrieved by a temporary order, it is his/her right to challenge it even before the date for hearing of the first application inter parties. The interested party was within his right to seek orders to set aside the orders given on 19/12/2012.

42. The file was placed before the respondent who was the chief magistrate in charge of the station. It is not clear from the application as to where Hon. Ocharo was on the material day. He may have been on leave or off duty. There is a possibility that the respondent was the duty magistrate on 17th December 2012 when the file was placed before her.

43. In the absence of the trial magistrate or for the reason that the respondent was on duty dealing with certificates, the chief magistrate dealt with the application under certificate of urgency. Was this in excess of her jurisdiction? In the case of **REPUBLIC VS CHIEF MAGISTRATE MILIMANI (Supra)**, the magistrate had dealt with a matter in excess of her pecuniary jurisdiction which resulted in orders of certiorari and mandamus being issued against him/her.

44. I find the facts of the case before me different in that the matter before the magistrate was within her jurisdiction. The trial magistrate had not issued a final order in the first application. If the respondent found the material before her deserving the order sought, then she was entitled to grant it. The respondent did not arbitrarily grab the matter from her junior magistrate but fixed it for mention before the said magistrate so as to allow him to hear the application inter parties. This demonstrates that the magistrate was aware of the fact that the right person to hear and determine the two applications on record was Hon. Ocharo.

45. The interim orders made on 17/12/2013 was intended to address the grievance of the first interested party caused by the order of Hon. Ocharo. Provided that the respondent was convinced that the evidence placed before her was a sound legal basis of issuing such an order, it is my considered opinion that she did not act in excess of her jurisdiction.

46. What was the remedy open to the exparte applicant in respect of the order issued by the respondent? I find the case of **NICHOLAS MUCHORA & 5 OTHERS VS SRM COMMERCIAL COURT [2011] ECLR** relevant. The Senior Resident Magistrate Hon. Cheron E.C. Had issued an injunction which aggrieved the respondent. He filed an application seeking to discharge it which was fully heard and dismissed. The respondent filed judicial review proceedings arguing that the magistrate had erred in law and various other aspects. The court in dismissing the application held:-

“Where an applicant is aggrieved by a decision of a trial court because of alleged wrong interpretation or misapprehension of Law, that person ought to file an appeal against the decision and not a judicial review application.”.

47. The facts of the application before me are relevant to the **NICHOLAS MUCHORA** case. The exparte applicant herein was entitled to apply for review of the said orders or to appeal. The exparte applicant in the alternative would have awaited for the applications to be heard inter parties which may have ended in his favour.

48. Considering that the orders of 17/12/2012 were temporary orders pending the hearing and the determination of the application inter parties, the respondent cannot be said to have violated the provisions of Article 50(2). The exparte applicant's chance to be heard was yet to come before the trial magistrate.

49. The respondent's act did not violate the constitutional rights of the applicant and neither were the rules of natural justice contravened.

50. Due to the nature of these proceedings, I am of the considered opinion that determination of the issues raised by the respondent of the validity of the order issued 19/12/2012 as at 17/12/2013 and whether the interested parties were entitled to disconnect electricity are not within the jurisdiction of this court. The function of judicial review proceedings is to ensure that lawful authority is not abused by unfair treatment.

51. Having found that the respondent did not act in excess of her jurisdiction in issuing the orders of 17/12/2013 and that she did not deny the applicant the right to be heard, it follows that the applicant is not entitled to a remedy in these proceedings.

52. Consequently, the application dated 11th January 2014 is hereby dismissed with costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF MAY, 2015.

F. MUCHEMI

J U D G E

In the presence of:-

Ms. Kairu for the 1st and 2nd Interested Party