



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 15 OF 2012

IN THE MATTER OF: THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE LOCAL GOVERNMENT AUTHORITY BUILDING BY
LAWS OF 1986

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW ORDERS OF PROHIBITION

BETWEEN

NATHANIEL NGONYO SIRYA.....APPLICANT

AND

ATTORNEY GENERAL.....1ST RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA.....2ND RESPONDENT

RULING

Introduction

0. The applicant who is unrepresented filed a *certificate of urgency* in which he indicated that he sought orders of leave to apply for judicial review orders of prohibition against the respondents. The certificate accompanied a *Notice of Application for Judicial Review* addressed to the Registrar of the High Court, a *Statement* expressed to be ‘under Order 53 Rule 1(2) of the Civil Procedure Rules and all enabling provisions of the Law’ and a *verifying affidavit* with annexures sworn by the applicant on 24th July 2012.
0. According to the Statement, the applicant sought relief as follows:

“RELIEFS SOUGHT

- a. *An Order of Prohibition do issue restraining the 2nd Respondent from removing the structures and or evicting the Applicant.*
- b. *Costs of these proceedings.*
- c. *Costs of the Application be in the motion.”*

0. The applicant's case is set out in the Statement's Grounds Upon Which Relief is Sought as follows:

"ON THE GROUNDS THAT:-

- i. *The Applicant is the legal owner of eight structures located in a parcel of land situate in Mafisini, Bamburi.*
- ii. *The Applicant has been an occupant of the said plot of land at Mafisini for over eight (8) years thus has adverse possession.*
- iii. *The eight structures are the sole business of the Applicant and his only means of survival.*
- iv. *The Respondent without prior notice of compliance served a notice for the Applicant to remove the structures deeming them unauthorised for failure to comply with local authority building by laws.*
- v. *The Applicant is a squatter and it is highly unprocedural for the local authority to seek to evict the Applicant on the basis of failing to comply with building by laws when Applicant has no title document.*
- vi. *The 2nd Respondent without due regard with procedure failed to serve the Applicant with a notice to comply or forward the matter to the Municipal Court.*
- vii. *In the circumstances the Respondents' actions are capricious, in breach of the rules of natural justice, unreasonable, in bad faith, and contrary to the legitimate expectation of the Applicant.*
- viii. *It is only fair that the orders sought be granted forthwith.*
- ix. *This court needs to intervene and ensure that justice does prevail for the sake of proper administrative actions of the Respondents.*
- x. *It is only fair and just that this Honourable Court do expeditiously grant the Applicant the Orders sought."*

0. There was not filed in the pleadings commencing the proceedings an application for leave by way of a chamber summons as prescribed under Order 53 rule 1 of the Civil Procedure Rules, 2010.

0. However, on 25th July 2012 the Court (Tuiyott, J.) upon hearing the applicant made orders extracted in a formal Order issued on the same date as follows:

1. ***That an order is hereby issued restraining the 2nd Respondent from effecting the Notice dated 17th July 2012.***
2. ***That inter partes hearing on 31st July 2012.***
3. ***That the Municipal Council of Mombasa to be served by the end of business tomorrow.***

0. In response, by a Notice of Motion filed on 21st January 2014 and amended on 27th March 2014, the 2nd respondent sought the striking out of the statement and the verifying affidavit in terms as follows:

1. ***That the Statement and Verifying affidavit of the Applicant filed herein on 25th July 2012 be struck out and the orders granted on the same be revoked in favour of the 2nd respondent.***
2. ***That the costs of the application be borne by the applicant.***

0. The 2nd Respondent's application for striking out was based on grounds set out in the application as follows:

1. *The application herein is incurably defective and bad in law for being filed without this Honorable Court's leave as mandatorily required under Order 53 rule 1 of the Civil Procedure Rules, 2010.*
2. *The application is incurably incompetent for blatant disregard of the mandatory requirements of Order 53 of the Civil Procedure Rules, 2010.*
3. *The Orders granted lack merit as they were granted based on the application filed that did not follow the correct and mandatory Civil Procedure Rules of 2010.*
4. *That in the above circumstances, the application and the subsequent orders granted are not only incurably defective, frivolous and vexatious but also an abuse of the Court process.*
5. *That in the interest of justice and expeditious disposal of this matter the statement and the verifying Affidavit filed by the Applicant and subsequent orders granted on 25th July 2012*

against the 2nd Respondent herein be struck out.

0. The applicant filed a replying affidavit sworn on 6th June 2014 in response to the 2nd respondent's application for striking out, in which he barely asserted that his application for judicial review is competent and in accordance with the requirement of Order 53 rule 3 of the Civil Procedure Rules, and that he had '*made an application for leave of court to apply for judicial review orders of prohibition dated 24th day of July 2012 which were served upon both the 1st and 2nd respondents*'.
0. The 1st Respondent did not enter appearance.

The issue for Determination

0. The Issue for determination is whether in fact an application for leave was made and its outcome and, if not, whether a judicial review application commenced without leave of court is competent.

Determination

0. As a matter of fact, there is no evidence that an application for leave was ever filed. Other than the reference to a prayer for leave of court in the Certificate of Urgency, no actual application exists in the pleadings filed in court. Indeed, the order of the court issued on 25th July 2012 makes no reference to an application for leave but rather to "Notice of Application for Judicial Review brought under Order 53 Rule 1(1) of the Civil Procedure Rules". In fact, no Notice of Motion was ever filed in the matters as required under Order 53 Rule 3 of the Civil Procedure Rules upon grant of leave of court to commence judicial review proceedings.
0. Order 52 Rule 1 (1) of the Civil Procedure Rules is in the following terms:

"1. (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) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought,

and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days."

0. The requirement for leave whose object is to sieve out frivolous applications is based on section 9 (2) of the Law Reform Act, which provides as follows:

"9 (1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court –

- a. Prescribing the procedure and fees payable on documents filed or issued in cases where an order of *mandamus*, prohibition or *certiorari* is sought;
 - b. Requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order.
 - c. Requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with leave of the court, other than the relief and grounds specified when the application for leave was made.”
0. The importance of the leave of court in judicial proceedings is exemplified by the consequences of default in obtaining it shown in the provision of section 9 (1) (c) of the Law Reform Act, above quoted, that “**no relief shall be granted and no ground relied upon, except with leave of the court, other than the relief and grounds specified when the application for leave was made.**”
0. It is therefore the opinion of this court that the requirement for leave of court is a mandatory requirement of the civil process default in respect to which renders any purported judicial review proceeding under Order 53 of the Civil Procedure Rules incompetent.
0. However, under Article 22 of the Constitution, the applicant may, if he is so advised, file a constitutional petition to redress any perceived infringement of his property rights protected under Article 40 of the Constitution. The applicant may also file a civil suit for the same purpose by way of plaint or by Originating Summons applicable to claims in adverse possession as set out in his grounds for the application in the Statement reproduced above.
0. Proceedings under the special judicial review jurisdiction must comply with the requirement of Order 53 of the Civil Procedure Rules. I do not consider that the provisions of Order 53 with regard to securing the leave of court before commencement of judicial review proceedings amount only technicalities which may be waived under the overriding objective of sections 1A and 1B of the Civil Procedure act or under the substantial justice principle of Article 159. I consider that the requirement for leave to commence judicial review proceedings is a device and crucial step for realization, in the context of public administrative law, of the object of the justice system that the court process is accessible for the expeditious and fair determination of *bona fide*, as distinguished from frivolous and vexatious, disputes capable of resolution by application of law and for the prevention of abuse of the court process.
0. The Court of Appeal in ***Makupa Transit Shade Ltd & Anor. v. KPA & Anor.*** Court of Appeal at Mombasa No. 44 of 2014 (2015) eKLR has emphasized the special nature of the judicial review jurisdiction, as follows:

*“Finally, we would observe that Judicial Review Jurisdiction is a special Jurisdiction that it is neither criminal nor civil. It operates within narrow confines of the Law Reform Act and **order 53** of the Civil Procedure Rules.”*

Orders

0. Accordingly, there being no leave granted for the commencement of judicial review proceedings herein, the proceedings herein have no foundation and the suit herein is struck out with costs to the 2nd Respondent. The orders of the court made thereunder on the 25th July 2012 are discharged.

DATED AND DELIVERED THIS 15TH DAY OF JULY 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Applicant in person

No appearance for the 1st Respondent

Mr. Gitonga for Mr. Lumatete for the 2nd Respondent

Linda Court Assistant.