REPUBLIC OF KENYA

High Court at Malindi

Judicial Review 61 of 2011

REPUBLIC …...APPLICANT

VERSUS

THE CHIEF MAGISTRATE, MALINDI …........................RESPONDENT

AND

MOHAMED ALI MOHAMED …..........................INTERESTED PARTY

1. Through a Chamber Summons dated 9th December, 2011 the Applicant seeks leave to institute Judicial Review proceedings for an order of certiorari to quash proceedings and the decision given in Malindi Chief Magistrate's Civil Case 178 of 2010 delivered on 6th July, 2011. The main ground is that the court lacked jurisdiction to hear the suit. The Interested party filed grounds of opposition dated 10th may, 2012. Stating, *inter alia*, that the proper recourse for the Applicant is through review and/or appeal but not by way of judicial review. This in summary represents the positions canvassed by the parties.

2. As a rule of the thumb, judicial review remedies are discretionary in nature. The applicant must establish a prima facie case that warrants the granting of leave. The issue of jurisdiction is raised in the instant matter. It is an issue of law. The court either had jurisdiction or it did not. The Court cannot confer upon itself jurisdiction where it had none and neither can parties by consent bequeath a court with it. The Applicant stakes his chamber summons on the ground that the trial court lacked jurisdiction. A court acting without jurisdiction acts *ultra vires* of the powers granted to it. In the legal text **Smith & Bailey on The Modern English Legal Systems 3rd ed. From page 976,** the author points out that courts have repeatedly stated that an application for judicial review ought to be made where a challenge is based on the doctrine of *ultra vires* rather than exercising the right to an appeal on a point of law. The final part of decision of the Lower Court appears to concede want of jurisdiction in light of the provisions of the Trustee Act.

3. In English jurisprudence, it has been established that judicial review remedies are generally not granted if there is some equally convenient and beneficial remedy such as a right of appeal or if such remedy existed but the claimant failed to use it, save in the most exceptional circumstances (see ***R v Epping and Harlow General Commissioner exp Goldstraw[1983]3 ALL ER 257*** and '**Judicial Remedies in Public Law' 3rd e.d, Clive Lewis:Thomson Sweet & Maxwell)**

A claimant will however not be required to resort to some other procedure if that other procedure is 'less satisfactory' or otherwise in appropriate even where it is statutorily provided for; see**R v *Hillingdon London Borough Council exp Royco Homes Ltd [1974]Q.B. 720*** an appeal to the minister against a

planning condition, where the appeal procedure was provided for by statute, was not regarded as convenient as that of the remedy of certiorari where the issue was purely of law. In the text **De Smith's Judicial Review 6th ed, Thomson Sweet & Maxwell** parag **11-074** the author argues that the alternative remedies should be raised as soon as possible and preferably at the leave stage and the claimant should indicate why they are opting for a judicial review remedy. The court may hear both sides on such a point.

4. Kenyan jurisprudence on the subject borrows heavily from the English jurisprudence. Our courts have established that the existence of another remedy is not a bar to the pursuit of judicial review. In the text **Digest on Civil Case Law & Procedure, LawAfrica parag: 1719,** G. V. Odunga cites the decision in ***Commissioner of Land & anor v Coastal Aquaculture Ltd Civil Appeal No. 252 of 1996*** **(UR)** (Akiwimu, Tunoi and Pall JJA, on 27th June, 1997) to the effect that the existence of a right to appeal is not a bar to an application for an order of prohibition; or that of certiorari as held in ***David Mugo t/a Manyatta Auctioneers v Republic , Civil Appeal Number 265 of 1997 (UR).*** The court however has qualified this principle by emphasizing as stated in ***The Republic v Rent Restriction Tribunal and ZN Shah and SM Shah ex parte MM Butt, civil appeal no. 47 of 1980 (UR)***(Miller, Law JJA and Simpson AJA, 13th March, 1981) that:

*“**If there is an equally, convenient, beneficial and effective remedy available a court will generally decline to exercise its discretion in favour of an applicant for a prerogative order**.”*

5. The three judge bench in ***Republic V The National Environmental Tribunal & 2 others exparte Ol Keju Ronkai Limited & anor [2010] eKLR*** considered the decision in the ***High Court at Mombasa in Republic –Vs- The Chief Magistrate’s Court Mombasa and Another Ex parte Abdo Mohamed Bahajj & Company Limited & Another, Misc. Civil Suit No. 264 of 1997 (UR)***, Therein, the Court relied on the Court of Appeal decision in ***David Mugo t/a Manyatta Auctioneers –Vs- Republic CA 265/97 (UR)*** wherein it was held that “**the remedy of judicial review is available, in appropriate cases, even where there is an alternative remedy**. In his judgment in this case, Chesoni C.J. said:-

“with respect to the learned judge the existence of an alternative remedy is no bar to the granting of an order of certiorari. The correct view, in this matter, is that expressed by Lord Parker C.J., in the English case of *R. –V- Criminal Injuries Compensation Board Ex. P. Lain [1967] 2 Q.B. 864* ***when he said:- “the exact limits of the ancient remedy by way of certiorari have never been, and ought not to be, specifically defined. They have varied from time to time, being extended to meet challenging conditions ..... We have reached the position where the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character, has to determine matters affecting subjects provided always that it was a duty to act judicially.”***

6. The foregoing position was further elaborated in ***Republic V National Environmental Management Authority [2011] eKLR*** where the court of appeal upheld the High Court's finding that “**the existence of an alternative remedy cannot by itself, prevent a court from issuing a judicial review order** .” The Court of Appeal affirmed that :

*“**The principle running through these cases** (the court was referring to the English cases of R V. Birmingham City Council, ex parte Ferraro LTD [1993] 1 ALL E.R 530. Horsham District Commission, ex parte Wenham [1955] 1 WLR 680; Harley Devt Inc V. Commission Of Inland Revenue [1996] 1 WLR 727; R V. Wandsworth County Court*

[2003] 1 WLR 475 and the local case of James Njenga Karume V. CR, 192/1992) ***is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it****.”*

7. In the instant suit, the applicant has raised the question of want of jurisdiction by the trial

court. It is well settled that a court cannot confer upon itself jurisdiction. (***Republic v Chairman, Lands Disputes Tribunal Kirinyaga District & another Ex- parte Peter Maru Kariuki [2005] eKLR*** the court stated inter alia:

"***if a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however precisely certain and technically correct, are mere nullities, and not only voidable: they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the court in which they are rendered, but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction***."

8. Jurisdiction therefore touches on the court's 'capacity' to deliver a valid judgment and is a point of law. Secondly, the rigour of an appeal is not as suitable as a judicial review procedure which aims at expeditious disposal of suits, in tandem with the spirit Section 1A of the Civil Procedure Act (cap 21 Laws of Kenya). This is a question of law that lends itself amenable to the application of Judicial Review.

9. Khamoni J. (as he then was) in ***Republic v Chairman, Lands Disputes Tribunal Kirinyaga District & another Ex- parte Peter Maru Kariuki [2005] eKLR*** upon a consideration of relevant authorities had this to say:

"To my understanding, the authorities mentioned above are not saying that such decisions *(in reference to decisions made by a court lacking jurisdiction)* ***be ignored so that nobody appeals against them or nobody asks for them to be judicially reviewed. Those authorities are saying that such decisions be set aside having been declared null and void and indeed it is the appellate authority or the court to do so, and do it on appeal or during judicial review or as otherwise provided by the law. They are not saying that an appeal can be substituted for a judicial review and vice versa. What they are saying is that each serves a different and useful purpose and the two can, as a result, co-exist serving their twin purposes. It is therefore stated at page 14 of "Judicial Review In Kenya" (Supra) as follows: "Judicial Review, is not an appeal from a decision, but a review of the manner in which the decision was made-------------. Unlike judicial review, Appeal concerns itself with the merits of a decision. When a matter goes on appeal, the major consideration that will govern the appellate court on whether to confirm or to disturb a decision is whether the decision in question is right or wrong on the basis of the law and facts. Judicial Review on the other hand concerns itself with the legality of the decision and the guiding principle in quashing a decision, is whether that decision is lawful or unlawful. Another major attribute of Appeal is that it is granted by Statute, that is, unless a statute expressly allows appeal, an aggrieved party cannot lodge an appeal against a decision. Conversely, in matters which are reviewable, the court exercises inherent powers which gives it authority to review unlawful decisions."*** *(….emphasis added)*

10. At this preliminary stage, it is premature to delve into the merits or otherwise of the jurisdictional challenge raised by this review. That must await the substantive hearing. Suffice to say that this court is satisfied that it ought to inquire into the legality of the proceedings in the Lower Court. I do therefore grant the chamber summons in terms of prayer 2 and 3. The Judicial Review proceedings are to be filed within 21 days of today's date.

Delivered and signed at Malindi this **5th** day of **November, 2012** in the presence of: Ms. Njebiu holding brief for Mr. Magiya for applicant.

No appearance for Interested party.

C. W. Meoli
JUDGE