



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

MISCELLANEOUS CIVIL APPLICATION 1271 OF 2002

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW AND FOR THE ORDERS
OF CERTIORARI, PROHIBITION AND MANDAMUS**

**IN THE MATTER OF THE DECISION OF THE COUNTY COUNCIL OF NAROK MADE ON
THE 10TH MAY 2002 AND RECORDED AS MINUTE 18/2002 OF THE COUNCIL AND THE
DECISION OF THE FINANCE, STAFF, TENDERS AND GENERAL PURPOSE COMMITTEE
OF THE COUNTY COUNCIL MADE ON THE 10TH MAY 2002 AND RECORDED AS MINUTE
25/2002 OF THE COMMITTEE**

IN THE MATTER OF : THE LOCAL GOVERNMENT ACT CAP 265

IN THE MATTER OF: THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE CIVIL PROCEDURE ACT CAP 21

IN THE MATTER OF: THE ADVOCATES ACT CAP 16

IN THE MATTER OF:

THE REPUBLIC

-versus-

THE COUNTY COUNCIL OF NAROK.....RESPONDENT

- A N D -

WAMBUU – WAINAINA & COMPANY

ADVOCATES.....1ST INTERESTED PARTY

LIVINGSTONE KUNINI OLE NTUTU.....2ND INTERESTED PARTY

-exparte-

OLKIOMBO LIMITED.....1ST APPLICANT

SHADRACK ROTIKEN.....2ND APPLICANT

WILLIAM SALAON OLE YIAILE.....3RD APPLICANT

SAMUEL SOITANAE OLE KORIARA.....4TH APPLICANT

NJAANGA OLOLOIGERO.....5TH APPLICANT

KOILEKEN OLE KIRROKORR.....6TH APPLICANT

R U L I N G

This Notice of Motion dated 7th November 2002 was filed under Part VI of the Law Reform Act, Cap 26 Laws of Kenya, Order LIII Rule 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya – being a judicial review for orders of

“(a) Certiorari to call up and bring into the High Court and to quash the decision of the County Council of Narok made on the 10th May 2002 and recorded as minute 18/2002 together with the decision recorded as minute 25/2002 made on the 10th May 2002 by the Finance Staff and General Purposes Committee of the County Council;

(b) Prohibition to prohibit the County Council of Narok by itself its agents or servants or by the Interested Party from implementing or otherwise taking any proceedings or actions founded on the decisions recorded in minute 25/2002 of the Finance, Staff and General Purposes Committee of the County Council of Narok and the decision recorded in Minute 18/2003 of the Full Council meeting of the County Council of Narok made on the 10th May 2002;

(c) Mandamus directed to the Respondent to revoke the erroneous Full Council Minute 18/2002 of

10th May 2002 and the Finance Staff and General Purposes Committee Minute 25/2002 of 10th May 2002 so as to avoid breach of the Constitutional trusteeship that the County Council has over L.R. 13325 leased by the County Council of Narok to Olkiombo Limited under the Registration of Titles Act under Grant No. I.R. No.4453 and to ensure that High Court Civil Case No.1565 of 2000 (Livingstone Kunini Ntuntu (Plaintiff) versus The County Council of Narok, Olkiombo Limited (Defendants) and the Attorney – General (Third Party) proceeds to full hearing unless properly compromised by the parties thereto.”

During the proceedings before me, Mr. S. Musalia Mwenesi and M/s Njeri Thuku, Advocates, represented the Applicants; Mr. Fred Ngatia from Ngatia & Company Advocates represented the Respondent County Council of Narok; Mr. J. Harrison Kinyanjui, Advocate, represented the 1st Interested Party while Mr. Kioko Kilukumi of Kilukumi & Company Advocates represented the 2nd Interested Party.

The court is informed that while in a previously instituted civil suit, HCCC No.1565 of 2000 the Plaintiff is Livingstone Kunini Ntutu, the 1st Defendant is The County Council of Narok and the 2nd Defendant is Olkiombo Limited; in the Judicial Review Proceedings, before me being H.C. Misc. Civil Case No.1271 of 2002, there are six Applicants. These are the Applicants as named at the beginning of the first page in this ruling. There is one Respondent namely; The County Council of Narok. Wambuu Wainaina & Company Advocate are the 1st Interested Party while Livingstone Kunini Ole Ntutu is the 2nd Interested Party.

Wambuu Wainaina & Company Advocates are the 1st Interested Party in the Judicial Review proceedings because they were The County Council of Narok's Advocates who participated in the writing and signing of the consent letter dated 13th May 2002 in HCCC No.1565 of 2000 having replaced the County Council's first advocate Kenta Moitalel & Company. Livingstone Kunini Ole Ntutu is the 2nd Interested Party in the Judicial Review Proceedings because he is the Plaintiff in HCCC No.1565 of 2000 whose advocates, Kilukumi & Company participated in writing and signing the consent letter dated 13th May 2002.

The 2nd to 6th Applicants in these Judicial Review proceedings are Councillors in The County Council of Narok while at the same time Directors of Olkiombo Limited the 1st Applicant in the Judicial Review and the 2nd Defendant in HCCC No.1565 of 2000.

That is how interests are intertwined in this matter so that after Mr. Fred Ngatia of Ngatia & Company Advocates who seems to have replaced Wambuu Wainaina & Company Advocates, had so vigorously and eloquently presented The County Council of Narok's case before me in accordance with the full instructions he said had received on the basis of which he had filed the papers and submissions he was defending, he, the following day when hearing resumed, brought to the attention of the court that after the rising of the court the previous day, he received a text message on his mobile phone to the effect that his client, The County Council of Narok, wanted time to reconsider this matter as they appear to have expected him to have supported the Judicial Review instead of opposing it as he had done.

He remarked that he did not understand that because he had opposed the Judicial Review on the basis of his instructions when The County Council of Narok filed its replying affidavit, deposed by its then Town Clerk and that he, as their Counsel had received no further instructions to the contrary.

Mr. Mwenesi left the issue to the court as Mr. Kinyanjui and Mr. Kilukumi opposed the suggestion for adjournment Mr. Ngatia having closed his submissions the previous day. I rejected the idea of adjournment and hearing of the Judicial review continued to the end. Hence this ruling – deciding the judicial review.

I have decided to be brief although each learned counsel brought quite much before me. This Judicial Review arises out of a pending High Court Civil Suit No.1565 of 2000 (HCCC 1565/2000) where the

Plaintiff is Livingstone Kunini Ntutu and where by an amended plaint dated 21st September 2000 the Plaintiff seeks, *inter alia*, a declaration that with effect from 14th October 1997, the Plaintiff was the legal and beneficial owner of all that parcel of land registered as CIS-MARA TALEK 155 measuring approximately 4000 acres. Within that property is a portion measuring approximately 20 acres wherein Olkiombo Limited carries on its business pursuant to a lease issued by County Council of Narok to Olkiombo Limited. The Attorney General was enjoined in the suit as a third party.

I have been told that all the parties filed detailed and elaborate pleadings wherein issues were joined regarding the Plaintiff's acquisition or ownership of the suit property and the manner in which Olkiombo Limited leasehold was extinguished.

By a Notice of Change of Advocates dated 13th May 2002 and prompted by the two impugned decisions which have given rise to these judicial review proceedings, the law firm of Wambuu Wainaina & Company Advocates took over the defence of The County Council of Narok from the law firm of Kenta Moitalel & Company Advocates who were on record and had filed a most comprehensive defence and counterclaim on behalf of the County Council.

Following the two impugned decisions aforesaid, by a consent letter dated the same day 13th May 2002, the Plaintiff and the Country Council of Narok requested the Deputy Registrar to sign consent judgment in the following terms:

- “1. The 1st Defendant statement of defence and counter-claim dated 7th October 2000 be struck out.**
- 2. Judgment be entered against the 1st Defendant and in favour of the Plaintiff in terms of prayers 1 and 2 of the amended plaint dated and filed in court on 18th December 2000.**
- 3. The Plaintiff waives prayers 3, 4 and 5 of the amended plaint dated and filed in court on 18th December 2000.**
- 4. The suit be marked as settled between the Plaintiff and the 1st Defendant with no order as to costs.”**

That consent letter was signed by Wambuu Wainaina & Company Advocates for the 1st Defendant and Kilukumi & Company Advocates for the Plaintiff.

The consent generated several complaints and applications, among the complaints being that Olkiombo Limited and the Attorney General were not consulted at all, that the counsel, Kenta Moitalel & Company Advocates, hitherto representing The County Council of Narok, was irregularly replaced so that a compromise could be made with the Plaintiff and that Olkiombo was denied an opportunity to vindicate its legal rights.

That situation prompted the filing of a Notice of Motion dated 6th June 2002 and filed 7th July, 2002 a copy of which is seen at page 12 of the Applicant's bundle of documents praying for court orders that:-

- “1. The consent judgment entered herein between the Plaintiff and the 1st Defendant on 15th May 2002 pursuant to a consent letter dated 13th May 2002 and all consequential orders be reviewed and set aside.**
- 2.the suit between the Plaintiff Livingstone Kunini Ntutu and the Defendants County Council of Narok and Olkiombo Limited and the Honourable Attorney General respectively do proceed to full hearing with liberties to the parties to apply.”**

Grounds the basis of that Notice of Motion are virtually same grounds on the basis of which these judicial review proceedings have been instituted among them being: -

“ a) (i) The purported consent effectively seeks to extinguish the 2nd Defendant’s registered leasehold interest without its consent or without due process;

(ii) The purported consent extinguishes the 2nd Defendant’s interest in LR No.13325 without regard to the requirements of Section 117 of the Constitution of Kenya and 23(2) (c) of the Land Adjudication Act.

b) The 2nd Defendant which is directly affected by the said consent judgment was not consulted neither is it privy to the purported consent judgment.”

The grounds continue up to ground (h) and that Notice of Motion was filed under **Sections 80 and 3A** of the **Civil Procedure Act, Order XLIV Rules 1 and 6** and Order L Rule 1 of the Civil Procedure Rules. It was filed in HCCC No.1565 of 2000 by the 2nd Defendant in that suit **“Olkiombo Limited”**.

There is another Notice of Motion in the same suit HCCC No.1565 of 2000 filed by Kenta Moitalel & Company Advocates seeking **inter alia** the production of the minutes of the Finance, Staff and General Purposes Committee meeting held on 10th May 2002 as well as the Full Council Meeting of the same date. The Notice of Motion is dated 10th July 2002. There are other applications seeking to set aside the consent judgment all filed and yet to be heard and determined in HCCC No.1565 of 2000.

Indeed in ground number (IV) in this Judicial Review motion it is stated:

“The Applicants are keen that HCCC 1565 of 2000 should proceed unimpeded. If the suit is compromised in the manner following the impugned decisions, justice will neither be done nor be seen to be done.”

That being the position, are these Judicial Review Proceedings before me now necessary?

IMPUGNED DECISIONS

There are 2 decisions which are the basis of the Judicial Review Proceedings.

The 1st is the decision made by the Finance, Staff and General Purposes Committee held on 10th May 2002 which is as hereunder;

“MINUTES OF FINANCE, STAFF AND GENERAL PURPOSES COMMITTEE HELD ON 10TH MAY 2002

XTRACT

MIN.25/2002 APPOINTMENT OF LAWYERS AND MATTERS PENDING IN COURT: H.C.C.C. NO.1565 OF 2000 - LIVINGSTONE KUNINI NTUTU vs COUNTY COUNCIL OF NAROK AND OTHERS

The Council noted the progress so far made in the suit pending in the High Court at Nairobi over all that parcel of Land known as: - Title No. CIS-MARA ALEK 155. It was drawn to the Council’s attention that the Plaintiff has a Title issued to him by the Government after completion of the adjudication exercise. The Lands Registry indicated the Plaintiff as the owner. Upon issuance of a Title Deed, the Land ceased being trust land and the Council’s interest on the land ceased.

The Council’s right to that parcel of land appears to have ceased and the firm of Kenta Moitalel & Company Advocates appear to be interested in earning fees in a no win situation.

After exhaustive deliberations on the issue, it was proposed by Councillor Nakutiti Nkoitiko and seconded by Councillor Joseph Kuaet that: -

- 1. It was costly for the Council to be involved any further with litigation over a parcel of land duly and lawfully registered in the name of the Plaintiff.**
- 2. The law firm of Kenta Moitalel & Company Advocates is mandated to represent the Council in all other legal matters save for the above suit. The clerk is hereby mandated to appoint a Replacement in respect of the aforesaid suit.**
- 3. On condition that the Plaintiff waives his claim against the Council for an account and refund of rent, tariff, royalty fees and other revenue collected by the Council since 14th October 1997, from the use, occupation, enjoyment or lease of the said parcel of land the Council's lawyers do sign a consent order fully settling the suit pending in the High Court as against the Council with no order as to costs against the Council.**

“Certified True Copy of the Minutes”

Signed

J. L. OLEKAYIONI

CLERK”

The 2nd is the decision made by the Full Council Meeting held on 10th May 2002 as follows;

“MINUTES OF FULL COUNCIL MEETING HELD ON 10TH MAY 2002 EXTRACT

MIN. 18/2002 ADOPTION OF MIN.25/2002 – OF FINANCE STAFF AND GENERAL PURPOSE COMMITTEE

Consequent upon recommendation of the Finance, Staff General Purposes Committee Meeting held on 10th May 2002, Councillor Salau Karkar stood and pursuant to Standing Orders moved a motion that “The Full Council Adopts” the recommendations and resolution of the Finance, Staff and General Purposes Committee Min. 25/2002.

After a short deliberation, it was proposed by Councillor Musere Turere and Seconded by Councillor Joseph Rotich that the full Council adopts the recommendations and consequent resolution of the Finance Staff and General Purposes Committee passed of Lawyers and matters pending in court.

“Certified True Copy of the Minutes”

Signed

J. L. OLE KAYIONI

CLERK

NAROK COUNTY COUNCIL”

Both extracts of the decisions are attached to an affidavit sworn by the then Clerk, County Council of Narok in his replying affidavit sworn on 22nd July 2002 and filed in H.C.C.C. 1565/2000. The affidavit is at page 131.

As stated already, it is the decisions aforesaid that caused the County Council of Narok to compromise H.C.C.C. 1565/2000 in the manner afore-said; a compromise which provoked complaints and applications which are yet to be resolved in H.C.C.C. 1565/2000 as already stated.

Without doubt, what is sought in the judicial review is a reversal of all acts that culminated to the filing of a consent judgment inclusive of a reversal of the consent judgment in H.C.C.C.1565/2000.

While I am avoiding discussing the validity of the Judicial Review Proceedings based on the procedure adopted in the institution of the proceedings, I will dismiss the Notice of Motion dated 7th November 2002 for the following reasons bearing in mind I decided to be brief:

Firstly, I do not see why and how any advice given to The County Council of Narok by its Clerk to Council could invalidate proceedings and decisions of the Council simply because the Clerk was not an Advocate or a lawyer. Further the legal position that where a Council acts on a recommendation of its committee, there is no need for a Notice of Motion has not been disproved.

Secondly, it was High Court Civil Case No.1565 of 2000 which gave rise to the existence of the two impugned decisions. That is a civil suit, involving personal interest and not public interest. As such I do not see how it can be said that a party in such a suit has no right to compromise his rights in the suit. This is private litigation and if any other party in same suit is aggrieved, it is the aggrieved party's right to proceed and make appropriate application or otherwise take appropriate step in the same suit. They do not go to public litigation where Judicial Review is found. Litigants in private litigation are the best guardians of what is in their best interest and compromising a suit is one aspect of that.

Thirdly, the 2nd to 6th Applicants are not party in H.C.C.C. No.1565 of 2000. I do not therefore see the basis upon which they are entitled to challenge a decision in H.C.C.C. No. 1565 of 2000 either inside that suit or outside that suit. They have no *locus standi*. Their absence from the meeting in which The County Council of Narok passed the impugned decisions does not, in law, invalidate the Council's decision. Moreover, that was a decision which was confirmed.

Fourthly, I do not want to go into the issue whether or not a Judicial Review is a suit, but the issue of collateral proceedings leading to collateral attack cannot be avoided. Parties litigating over same subject matter in two different tribunals or courts. It is being seen that what is in the Notice of Motion dated 6th June 2002 and filed in H.C.C.C. No. 1565 of 2000 is not different from what the parties are having in this Judicial Review Proceedings. Moreover, among the two cases HCCC No.1565 of 2000 is the one which was instituted first. Where such a situation occurs, and it has occurred in this matter, proceedings are improper. Two parallel proceedings concerning same subject matter between same parties. Abuse of process of court results.

Fifthly, parties loosely talk of consent judgment without exhibiting it. But since, each party talks as if such a judgment exists, I will assume it exists – and that therefore what the Senior Deputy Registrar, then Mr. Njai, refused to be done was the drawing up of the relevant decree. If that is so, what is the effect of an order of this court granting the prayers sought in this judicial review. I do not dare answer that question when this court's HCCC No.1565 of 2000 is still pending.

Sixthly, judicial review proceedings are only available when matters in issues are in an inferior tribunal. The matter in issue in this judicial review are in a superior court in HCCC No.1565 of 2000. The granting of the prayers sought will be contrary to law and an exercise in futility.

Seventh, now assuming that HCCC No.1565 of 2000 does not exist; if it were not there so that it were not a problem in these proceedings, would the prayers sought have been granted bearing in mind the manner in which prayers in the Notice of Motion dated 7th November 2002 have been framed?

Prayer (a) "*certiorari*". The prayer in (a) clearly says that the two impugned decisions be quashed. To quash is to discharge or set aside. Granting prayer (a) therefore means that the court would destroy, removing completely, discharging or setting aside the two decisions so that nothing of those decisions remains. Of course, in the circumstances of these proceedings, I would not have granted "*Certiorari*" because of the first six reasons I have given above for dismissing the Notice of Motion.

Prayer (b) is “**Prohibition**” used not only to restrain an inferior tribunal from exceeding its jurisdiction or acting contrary to the rules of natural justice, but also to control a minister or public authority in the exercise of their judicial or quasi-judicial functions. In this matter, there was no question of exceeding jurisdiction or acting contrary to the rules of natural justice or controlling a public authority in the exercise of its judicial or quasi-judicial functions. None of those prerequisites are there as neither the County Council of Narok nor the Finance Staff and General Purposes Committee of that County Council exercises those functions – when deciding what case to file, which advocate to hire and fire, which case to compromise, withdraw, prosecute, defend and so on.

Further, when prohibition issues, it issues against the inferior tribunal or against the minister or the public authority only. The order does not extend to agents or servants or interested parties as injunctions do for an order of prohibition is not the same as an injunction and those other people like agents and servants are not lawfully permitted to exercise the functions in question. An important aspect therefore is that prohibition is issued before those functions are performed by the inferior tribunal or court or by the minister or Public Authority so that the question of “**implementing or otherwise taking any proceedings or actions founded ona decision**” already made as framed in prayer (b) herein does not arise.

It follows that prayer (b) seeks to apply the remedy of “**prohibition**” in a manner that remedy is not lawfully available and that is something not acceptable by this court. **Prohibition prevents an action before the action takes place and has no time for dealing with consequences of the prohibited action which consequences never come to exist anyway. In other words prohibition issues to prevent a future event. It does not issue to correct a wrong decision already made and cannot issue to correct anything wrong the Respondent has done in the events complained of in this matter.**

Prayer (c) “**Mandamus**”. That remedy comes into play where there is a vacuum created by the application of “**certiorari**” and there is reluctance subsequently to perform functions required or where the need for certiorari did not arise but there is refusal to perform a public duty. Mandamus comes in to command or compel. It commands or compels performance of a public duty where no other effective means of redress is available.

Mandamus cannot therefore be issued for the purpose for which certiorari is issued as it is sought to be done in these proceedings where “**certiorari**” and “**Mandamus**” are intended to be used simultaneously so that at the time “**certiorari**” is used to “**quash**” the two decisions complained of, “**Mandamus**” is being used to “**revoke**” the same two decisions. With all due respect, that is a clear misconception of the application of the remedy of mandamus, firstly because once “**certiorari**” has quashed a decision that decision no longer remains in existence to be “**revoked**” by “**Mandamus**”. Secondly, “**Mandamus**” is never used to “**revoke**” any decision or action. It never applies to what is there. It is a command and therefore only commands or compels performance of a public duty which has not been performed as at the time the command or compulsion is made.

Before I conclude, let me remark that although there are three types of orders an applicant for judicial review is entitled to pray for, it does not follow that in every such application the applicant must pray for orders under each type certiorari, prohibition and mandamus. This is because an applicant should only go for the order or orders he properly and lawfully requires. Do not for example ask for “**Mandamus**” when all you want that “**Mandamus**” to do is to “**revoke**” a decision which should be properly “**quashed**” by the “**certiorari**” you have already asked for.

From all I have been saying therefore, I do not see how this Notice of Motion dated 7th November 2002 can stand. In my view HCCC No.1565 of 2000 is a better place for issues raised in this judicial review to be raised, as they were indeed raised, be prosecuted, canvassed and be determined there instead of being left asleep there as parties in that suit are doing and therefore getting time to weaver and meet a Judicial Review they should avoid.

Accordingly, this Notice of Motion dated 7th November 2002 be and is hereby dismissed with costs to the 1st and 2nd Interested Parties. I do award no costs to the Respondent, County Counsel of Narok, because of its conduct when the said Respondent wanted to frustrate and delay the hearing and conclusion of these

Judicial Review Proceedings before me as already recorded elsewhere in this ruling.

Delivered, signed and dated at Nairobi this 8th day of May 2009.

J. M. KHAMONI

JUDGE

Present:

Mr. Mwenesi for the Applicant

Mr. Kinyanjui for the 1st Interested Party

Mr. Kalu holding brief for Mr. Kilukumi for the 2nd Interested Party

Court Clerk – Florence J. Boswony