



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**JUDICIAL REVIEW MISC. NO. 79 OF 2017**

**(Formerly Machakos ELC JR No. 175 of 2014)**

**IN THE MATTER OF THE PRINCIPAL MAGISTRATE KAJIADO SPMCC NO. 290 OF 2013**

**AND**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS, CERTIORARI AND PROHIBITION BY STEPHEN TARAYIA MARASUA**

**AND**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS, CERTIORARI AND PROHIBITION TO PROHIBIT THE PRINCIPAL MAGISTRATE'S COURT FROM CONTINUING TO ADJUDICATE CIVIL CASE NO. 290 OF 2013 AND TO QUASH THE DECISION, THREAT AND REMOVE THE MATTER INTO THE HIGH COURT LANDS DIVISION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 22, 48 AND 50 AND THE ENVIRONMENT AND LAND COURT ACT 2012 AND ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES 2010, LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 8 OF THE LAW REFORM ACT CAP 26, LAWS OF KENYA**

**BETWEEN**

**STEPHEN TARAYIA MARASUA.....APPLICANT**

**VERSUS**

**MARIAM ALWI HUSSEIN (SUING AS THE LEGAL REPRESENTATIVE**

**OF ASHA HAJI MOHAMMED (DECEASED).....1<sup>ST</sup> RESPONDENT**

**COUNTY COUNCIL OF OL KEJUADO.....2<sup>ND</sup> RESPONDENT**

**THE PRINCIPAL MAGISTRATE, KAJIADO.....3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

The application before Court for determination is a Notice of Motion dated the 17<sup>th</sup> December, 2014 and filed on 6<sup>th</sup> January, 2015 brought pursuant to Section 3 and 3A of the Civil Procedure Act and Order 53 of the Civil Procedure Rules and all the other enabling provisions of the law. The Applicant seeks the following prayers:

- a. That this Honourable Court be pleased to grant an order of Certiorari to quash the judgement dated 12<sup>th</sup> September, 2014 issued

by the 3<sup>rd</sup> Respondent in the Civil Case No. 290 of 2013, against the Applicant, directed to the Respondent, the Senior Resident Magistrate Court at Kajiado to quash the ruling and order delivered on 2<sup>nd</sup> March, 2012 on an application dated 5<sup>th</sup> October, 2011 in Land Disputes Tribunal Case No. 53 of 2009.

b. That this Honourable Court be pleased to grant an Order of Prohibition to stop the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein from effecting the Judgement issued by the 3<sup>rd</sup> Respondent on 12<sup>th</sup> September, 2014.

c. That this Honourable Court be pleased to grant an order of Mandamus to compel the 3<sup>rd</sup> Respondent to refer the matter herein, as it pertains to a Land Dispute, to the Environment and Land Division of the High Court at Machakos and to further compel the 2<sup>nd</sup> Respondent to confirm that the Applicant herein is the rightful owner of the land in issue herein.

d. That the costs of this Application be borne by the Respondent herein.

The application is based on the summarized grounds that the Applicant is the bona fide owner of piece of property known as C. 28/BUSINESS – OROK MILE 9) T. CENTRE, hereinafter referred to as the ‘suit land’ which he has occupied and even built on since he was allotted by the County Council of Kajiado. The Applicant was served by the 1<sup>st</sup> Respondent’s Advocates with a Court Order in PMCC No. 290 of 2013 directing him to vacate the suit land. Further, on 3<sup>rd</sup> November, 2014 he received a letter from the 1<sup>st</sup> Respondent’s Advocates informing him of the Judgement entered against him on 12<sup>th</sup> September, 2014 who also gave him a 60 days notice to vacate the suit land. It is in the interest of justice and Rule of Law that an Order of Certiorari be issued to quash the decision and Judgment of the 3<sup>rd</sup> Respondent dated the 12<sup>th</sup> September, 2014 and refer the matter herein to the High Court to be heard in the Environmental and Land Division where it ought to have been handled in the first instance.

The application is supported by the affidavit of the Applicant STEPHEN TARAYIA MARASUA where he reiterates his claim and contend that sometime in September 2013, the 1<sup>st</sup> Respondent herein confronted him claiming the suit land which he was occupying belonged to her. He explains that immediately he approached the County Council Lands Board to make enquiries and he found in their records that he was the rightful owner of the suit land. He was later served with a Court Order in PMCC No. 290 of 2013 directing him to vacate the suit land with immediate effect.

The 1<sup>st</sup> Respondent opposed the application and filed Ground of Opposition where she stated thus:

1. The Applicant’s claim is defective as it offends Order 15 Rule 1(a) of the Civil Procedure Rules 2010 as it discloses no reasonable cause of action against the 1<sup>st</sup> Respondent on the ground that the Applicant’s Application dated the 17<sup>th</sup> December, 2017 refers to plot No. C28/ Business – Orok Mile 9 Town Centre whereas the judgement of the Honourable Principal Magistrate at Kajiado dated the 12<sup>th</sup> September, 2014 is in Civil Case No. 290 of 2013 that held the 1<sup>st</sup> Respondent to be the rightful owner of plot No. 152/ Business OROK (Mile 9) Town Centre.
2. There being no reasonable cause of action against the 1<sup>st</sup> Respondent, the Applicant’s aforementioned application is an abuse of court process and should be dismissed with costs.

The 1<sup>st</sup> Respondent further filed a replying affidavit sworn by MARIAM ALWI HUSSEIN who is the Legal Representative of the estate of ASHA HAJI MOHAMED (deceased) where she avers that no reasonable grounds have been mentioned by the Applicant to warrant the orders sought. She contends that the instant application is res judicata and this Court has no power to exercise its discretion under Section 17 of the Civil Procedure Act. She avers that the Applicant should have made the instant application before the Trial Court to vary its judgement but he failed to do so. Further, that this is an appeal disguised as judicial review. She insists the instant application is fatally defective as it offends the provisions of Order 15 Rule 1(a) of the Civil Procedure Rules. She explains that her late mother purchased the suit land from Loice Wanjiku Kamau on 9<sup>th</sup> October, 1994 and the said land was transferred to her by the Ol Kejuado County Council on the 9<sup>th</sup> October, 1994. Further, that the mother paid all land rates for the said suit land. She contends that on the 9<sup>th</sup> October, 2013, the Applicant unlawfully entered into the suit land and commenced constructing thereon. Further, that the 1<sup>st</sup> Respondent sought for restraining orders vide the Principal Magistrate’s Court and the court granted orders of temporary injunction on 14<sup>th</sup> October, 2013. She explains that despite her Advocate seeking verification of the suit land from the Kajiado County Government whose Surveyor visited the disputed site, they have failed to provide a verification of the suit land.

The 3<sup>rd</sup> and 4<sup>th</sup> Respondents opposed the application and filed Grounds of Opposition dated the 29<sup>th</sup> September, 2017 where they stated as follows:

1. The application is frivolous, vexatious and an abuse of the court process.
2. There is no judicial review application capable of being prosecuted as there is no administrative decision capable of being reviewed.
3. This Honourable Court granted the application dated the 19<sup>th</sup> November, 2014 on 21<sup>st</sup> November, 2014 granting leave to the Applicant to file the Notice of Motion in 21 days.
4. There being no Notice of Motion filed to date this matter ought to be closed.
5. The Applicant ought to have appealed/set aside the judgement as opposed to a judicial review application.

6. The issues of jurisdiction can be ventilated in the matter before the 3<sup>rd</sup> Respondent.
7. The 3<sup>rd</sup> Respondent acted within its jurisdiction.
8. There being no clear orders sought against the 4<sup>th</sup> Respondent, should be struck out of the proceedings with costs

The Applicant STEPHEN TARAYIA MARASUA filed a further affidavit where he stated that he was never served with the substantive proceedings in PMCC No. 290 of 2013 to enable him be heard. He confirms being served with consequent orders and insists the Magistrate's Court did not have jurisdiction to determine the matter. He contends that the Honourable Magistrate who heard and determined PMCC No. 290 of 2013 was not gazetted nor conferred with jurisdiction to hear Land Matters. He claims there are triable issues that require a Court with competent jurisdiction to hear the matter. He states that he was allotted the suit land on 11<sup>th</sup> November, 2011.

The Applicant, 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed their respective submissions that I have considered.

### **Analysis and Determination**

Upon perusal of materials presented in respect of the Notice of Motion application dated the 17<sup>th</sup> December, 2014 and filed on 6<sup>th</sup> January, 2015, the following are the issues for determination:

- Whether the Ex Parte Applicant's case merits orders for Judicial Review.
- Who should bear the costs of the suit.

It is the ex parte applicant's contention that the Judgement in PMCC No. 290 of 2013 should be quashed as the Magistrate who handled the matter did not have jurisdiction to do so. He insists the Judgement in the PMCC No. 290 of 2013 should be stayed and the dispute referred to ELC for hearing and final determination. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents opposed the application and contended that the Magistrate had jurisdiction to hear and determine the matter. I note that the Applicant filed the instant application for judicial review against a judgment of the magistrates' court and has not informed court on whether he lodged an appeal or application to set aside the judgement or not. It is Trite Law that Judicial review is not concerned with the merits of the decision being challenged but with the decision making process.

In the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, it was held that:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”**

Based on the evidence presented above, I note PMCC No. 290 of 2013 matter proceeded for hearing and the Magistrate in his judgment confirms there was sufficient service after which he proceeded to determine the said matter on its merit. The Applicant claims he was only served with subsequent orders issued after the judgement and was not aware of the suit herein. He has challenged the jurisdiction of the Court and stated that Magistrates' Court did not have jurisdiction to deal with this matter.

**‘THE PRACTICE DIRECTIONS ON PROCEEDINGS IN THE ENVIRONMENT AND LAND COURTS, AND ON PROCEEDINGS RELATING TO THE ENVIRONMENT AND THE USE AND OCCUPATION OF, AND TITLE TO LAND AND PROCEEDINGS IN OTHER COURTS. Number 7 provides that all proceedings which were pending before the Magistrates Court, having been transferred thereto from the now defunct District Land Disputes Tribunals, shall continue to heard and determined by the same courts. 8. Magistrates Courts shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction. All proceedings which were pending before the Magistrates Court, having been transferred thereto from the now defunct District Land Disputes Tribunals, shall continue to heard and determined by the same courts.’**

From a reading of these provisions, it is evident that despite the repeal of the Magistrates' Court Act, the Magistrates were actually allowed to conclude pending matter as per the above cited practice directions.

Further, Section 47 of the Constitution provides that: **‘(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—**

- (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and**
- (b) promote efficient administration’.**

While Section 9 (2) of the Fair Administrative Action Act provides that: **‘ The High Court or a subordinate court under subsection (1)**

**shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**

In relying on the above cited judicial authorities including the legal provisions quoted above, I find that the Magistrate acted within his jurisdiction to hear and determine the PMCC No. 290 of 2013. I opine that the remedies the Applicant is seeking in this judicial review are best canvassed at the Appeal and not in a Judicial Review. Further, that the Applicant ought to have appealed or applied to set aside the Magistrate's decision instead of resorting to judicial review which is only concerned with the process. It is my view that there was no 'procedural impropriety' during the hearing of the PMCC case No. 290 of 2013 as the basic rules of natural justice as well as procedural fairness was observed during the said process as demonstrated in the judgement. I indeed concur with the respondents that this instant application is an abuse of the Court process.

It is against the foregoing that I find the Notice of Motion application dated 17<sup>th</sup> December, 2014 and filed on 6<sup>th</sup> January, 2015 unmerited and dismiss it with costs.

**Dated signed and delivered in open court at Kajiado this 25th day of March, 2019.**

**CHRISTINE OCHIENG**

**JUDGE**