REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

JUDICIAL REVIEW NO. E003 OF 2024

REPUBLIC ……APPLICANT

VERSUS

THE CHIEF MAGISTRATE
KITHIMANI LAW COURTS ……1ST RESPONDENT

QUERASHA ADAN MOHAMED ……2ND RESPONDENT

AND

ISMAIL MUSDAF ALI …….EXPARTE APPLICANT

JUDGMENT

1. Pursuant to leave granted on 27th February 2024, the Ex-parte Applicant instituted judicial review proceedings by way of a notice of Motion dated 21st March 2024 in which he seeks orders inter alia:

> "(a) ***An order of Certiorari to remove into this honourable court and quash the decision of the 1st Respondent of 18th May 2022 and all subsequent decisions that led to the issuing of warrants of arrest pursuant to a Notice to show cause dated 26th October 2023.***
>
> ***(b) An order of Prohibition directed to the Respondents, prohibiting further proceedings in Kithimani CMCC 126 of 2020 – Querasha Aden Mohammed v Ismail Musdaf Abdi & Anor and***

further prohibit the 2nd Respondent from executing the orders of warrants of arrest against the ex –parte applicant.

(c) Costs of the incidental to the application be provided for."

2. The application is expressed to be made under **Order 53 Rule of the Civil Procedure Rules as read together with Section 9(3) of the Law Reform Act** which states:-

- ***Order 53 Rule 2 of the Civil Procedure Rules provide that:***

  "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.

- ***Sec. 9 of the law Reform Act provides that:***

  "In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law….."

3. By the application, the Ex-parte Applicant has challenged the default judgment entered against him in the court below and the subsequent execution of the judgment by way of a warrant of arrest. It is his case that the decision of the court below is tainted with illegality, irrationality and procedural impropriety. He has also urged this court to find that the

decision was bereft of natural justice in that he was never served with summons to enter appearance as the firm of advocates served being the firm of Ahmed Nasir Abikadir & Co Advocates was not his agent. Further, that he did in fact file several applications for say of execution, in the court below , which have never been determined despite him having filed submissions and hence he has been condemned unheard contrary to the rules of natural justice. He accused the court below of abdicating its responsibility to administer justice fairly by failing to render its decision on an application dated 31st August 2023 and condemning him unheard by issuing warrants of attachment against his property. He contends that he has met the threshold for grant of the judicial review orders sought and is entitled to the same together with the costs of these proceedings.

4. In support of his submissions, learned counsel for the Ex-parte Applicant relied on the following cases:-

- **Republic v Minister for Lands & Another – ex parte Catherine Mateta Musing'a [2021] eKLR.**
- **Pastoli v Kabale District local Government Council & Others [2008] 2EA 300.**
- **Municipal Counsel of Mombasa v Republic Umoja Consultants limited [2002] eKLR.**
- **Onyango Oloo v Attorney General [1989] EA.**
- **Republic v Attorney General & 4 Others, Exparte Diamond Hashim Lalji & Ahmed Hashani Lalji [2014] eKLR**

- **Stanley Kaunga Nkarichia v Meru Teachers College & Anor [2016] eKLR**

5. For the Respondent it was argued that these proceedings have no merit; that the Ex-parte Applicant has concealed the multiple applications he filed in the court below and has therefore come to this court with unclean hands. That this court should therefore be persuaded by the case of **Uhuru Highway Development limited v Central Bank of Kenya & 2 Others Application No. 140 of 1995** cited in the case of **Evans Okanga Dondo v Housing Finance Company limited of Kenya [2005] eKLR,** where Omolo J A, as he then was, stated:

> "***Once the learned judge was satisfied, as he was, that the applicant had obtained the order by concealing other relevant material, he was entitled not to consider the applicant's application any further for the Courts must be able to protect themselves from parties who are prepared to deceive, whatever their motive for doing so may be and whatever the merits of the case might be. A man who is prepared to deceive a Court into granting it an order cannot validly claim that he has a meritorious case and would have been entitled to the order any way. If the case is meritorious, there can be no reason for concealing some parts of it from the Court."***

6. Learned Counsel for the Respondent further submitted that the Ex-parte Applicant seeks to have this court substitute, a decision arrived at procedurally with its own; that judicial review should not act as an appeal. Counsel cited a quote from Peter Kaluma's book (reference not given) and further stated that the Ex-parte Applicant has not demonstrated any form of illegality on the part of the 1st or 2nd Respondents. Counsel also cited

Article 158 of the Constitution which, according to him, requires that all disputes be concluded in a timely, effective and just manner; that as it is well settled in law, litigation must come to an end and the 2nd Respondent should be allowed to enjoy the fruits of their judgment and ought not to be subjected to further prejudice.

Analysis and determination

7. The power of this court to grant the judicial remedies sought flow from **Section 9(3) of the Law Reform Act ad Order 53 Rule 2 of the Civil Procedure Rules**. Though discretionary, the orders are granted upon known and settled legal principles. In the case of **Pastoli v Kabale District local Government Council & Others [2008] 2EA 300** the court established the threshold for grant of the orders as follows:-

> *"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety are when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with*

procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision."

8. Similarly, in the case of **Municipal Council of Mombasa v Republic Umoja consultants limited [2002] eKLR** it was held that:

> "***The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider 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 – and that, as we have said, is not the province of judicial review.***

9. It is evident therefore that in determining whether to grant the orders sought under **Order 53 of the Civil Procedure Rules**, the court is never interested in the merits of the decision as it would then be sitting on appeal over the decision. This was made clear in the case of **Republic v Attorney General & 4 others, Exparte Diamond Hashim Lalji [2014] and ahmed Hasam Lalji eKLR** where the court stated:-

> "***Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines 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."

10. Accordingly, in determining this application this court shall not go into the merits of the judgment of the lower court but shall confine itself to the question whether the proceedings culminating in the judgment were tainted with illegality, irrationality or procedural impropriety.

11. The gravamen of this application is that the Ex-parte Applicant was never served with summons to enter appearance and hence the entire judgment and execution proceedings are irregular and also that whereas the Ex-parte Applicant has filed several applications in the court below, the same have not been heard and determined. The Respondent is however adamant that the Ex-parte applicant was duly served; that he entered appearance and even filed a defence through the firm of Ahmed Nasir & Co Advocates and hence the judgement and subsequent execution proceedings are regular. This court is urged to take notice of the many applications the applicant has filed in an endeavour to ensure that the Respondent does not enjoy the fruits of his judgment.

12. As this court is confined to considering the legality, rationality ad procedural propriety of the proceedings in the lower court, I have carefully considered the proceedings and judgment of that court. The first thing I notice is that, whereas the proceedings were conducted as if the Ex-parte Applicant had been served and entered appearance and filed a defence but

did not attend the hearing, in the body of the judgment, the learned magistrate stated:

> "***Despite service, the defendant neither entered appearance nor field defence thus this matter proceeded in their evidence (sic) and the evidence adduced by the Plaintiff on the record of court stands unchallenged." (****see page 5 of the judgment****).***

13. The above being the position an interlocutory judgment should have been obtained before the court conducted the formal proof. Moreover, if indeed the defendant/applicant had entered an appearance and filed a defence through a firm of Advocates why did the learned magistrate indicate the contrary. That to me, is a procedural impropriety.

14. This court has also noted that no Notice of Entry of Judgment was served upon the Ex-parte Applicant as required under **Order 22 Rule 2 of Civil Procedure Rules**. Whereas it is alleged that the said notice was served via email, no proof of such service is found in the file and again that amounts to a procedural impropriety.

15. In the premises, this court finds merit in the application and it is allowed and orders are hereby granted as prayed. The judgment of the court below is quashed and the lower court file shall be returned forthwith so that the case can be heard by a magistrate other than B. S. Khapoya. The case shall be mentioned before Hon. Onkwani on 14th May 2026 for further directions and allocation to a magistrate for hearing.

16. In regard to costs, given the circumstances of the case, the order that commends itself to this court is that each party shall bear its own costs.

Orders accordingly.

Judgment signed, dated and delivered virtually on this 30th day of April 2026.

E. N. MAINA

JUDGE

In the presence of:

Mr. Wanyoro for 2nd Respondent

No appearance for Ex-parte Applicant

Mary- Court Assistant/Interpreter