



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC JUDICIAL REVIEW APPLICATION NO. 3 OF 2018

WAZIRI ABUBAKARI ALI

BAKARI ORATA AMISI

ATHUMANI WESONGA WAZIRI.....APPLICANTS

VERSUS

DYPHINA M. KHAONYELI.....RESPONDENT

RULING

The respondent raised a preliminary objection on a point of law that the court lacks the requisite jurisdiction to entertain this application as enshrined in article 165 (6) as read with article 162 (1) and (2) of the Constitution. This court has no jurisdiction to entertain the judicial review application on a judgement of the high court as this court is of equal status. The application is based on order 53 and not 45 and should be struck out.

The applicant in reply to the preliminary objection which is brought on a point of law that the honourable court lacks the requisite jurisdiction to entertain this application as enshrined in Article 165 (6) as read with Article 162 (1) and (2) of the constitution replied as follows:-

That the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi – judicial function, but not a superior court.

And Article 162 (1) provides;

- (i) The Superior Courts are the Supreme Court, the Court of Appeal, the High Court to hear and determine disputes relating to:-
 - (a) Employment and labour relations, and
 - (b) The environment and the use and occupation of and title to land.

Their application for judicial review is therefore properly founded under order 45 Rule 1 (1) (a) and Rule 2 (2) which provide as hereunder;

- 1. Any person considering himself aggrieved
 - (a) By a decree or order from which an appeal is allowed, but from which not appeal has been preferred.

And

- 2. If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

Therefore the Preliminary objection filed on 21st May, 2018 is unfounded in law and does not apply to their present application and therefore should be disallowed.

This court has carefully considered the application and the submissions herein. It is true that Article 162(2)(b) and 165(3)(a) of the Constitution of Kenya 2010 and Section 13 of the Environment and Land Court Act, 2011 the jurisdiction of the Environment and Land

Court is to determination of disputes relating to environment planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, evaluations, mining, minerals and other natural resources, compulsory acquisition of land, land administration and management, public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land and any other dispute relating to environment and land. I wish to refer to the case of John Kimani Njenga v Margaret Wanjiru Kanyiri & others ELC No. 345 Of 2014 where it was held that the ELC Court had jurisdiction to hear and determine disputes, actions and proceedings concerning land. Indeed section 105 of the Land Act provides as follows;

“The Environment and land Court established under the Environment and land Court Act is vested with the exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act”.

The Environment and land Court has the equal status as the High Court. On the issue of judicial review applications, I am guided by the case of Republic v Kenya Revenue Authority & another Ex-Parte Tradewise Agencies [2013] eKLR, para. 21 G.V. Odunga, J. in quoting from Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300

observed thus:

“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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... 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..... ”

In Republic vs Kenya Revenue Authority ex parte Yaya Towers Limited (2008) eKLR it was held that the remedy of judicial review is concerned with the reviewing not the merits of the decision of which the application for judicial review is made , but the decision making process itself. The decision whether or not to grant judicial review orders is an exercise of discretion. As stated in Halsbury’s Laws of England 4th Edition Vol. II page 805 paragraph 1508, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles.

In Republic vs. Judicial Service Commission of Kenya Ex Parte Stephen S. Pareno Nairobi HCMA No. 1025 of 2003 (2004) 1 KLR 203, it was held that judicial review orders are discretionary and not guaranteed hence even if the case falls into one of the categories where judicial review will lie the court is not bound to grant it and what orders the court will make depends upon the circumstances of the case.

Judicial review is a discretionary remedy. They are prerogative remedies. It is in the orders to quash, prohibit or compel. In the Kenya legal system, the said prerogative remedies may be obtained under Order 53 of the Civil Procedure Rules (2010) and the Law Reform Act, Cap 26, Laws of Kenya (Part VI of the Act). It has been noted that judicial review proceedings as envisaged under Order 53 of the Civil Procedure Rules are a special procedure; which are invoked whenever orders of certiorari (quash), mandamus (mandamus) or prohibition are sought in either criminal or civil proceedings - See Welamondi vs The Chairman, Electrol Commission of Kenya(2002) 1 KLR,

“..... in exercising powers under Order 53, the court is exercising neither civil or criminal jurisdiction in sense of the word. It is exercising sui generis”

In the case of Republic v Chairperson Business Premises Rent Tribunal & another Ex-parte Keiyo Housing Cooperative Society Ltd & another (2014) eKLR it was held that;

“Being discretionary remedies, judicial review orders will only issue based on various considerations by the court and peculiar circumstances of each case. In the book “Judicial Remedies in Public Law” by Clive Olive, it is noted that “there are varieties of considerations discernible in the case law which are relevant to the exercise of the judicial discretion to refuse a remedy. Some are related to the conduct of the claimant, such as delay or waiver; others are related to the circumstances of the particular case, such as the fact that a remedy would be of no practical effect. Other considerations relate to the particular nature of public law where the court may need to have regard to the wider public interest as well as the interest of the claimant in obtaining an effective

remedy.”

In Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003, Omolo JA stated as follows;

“The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way.”

From the foregoing this court lacks jurisdiction to deal with this matter as it is a decision from a court of equal status. As stated above the said prerogative remedies may be obtained under Order 53 of the Civil Procedure Rules (2010) and the Law Reform Act, Cap 26, Laws of Kenya (Part VI of the Act). It has been noted that judicial review proceedings as envisaged under Order 53 of the Civil Procedure Rules are a special procedure; which are invoked whenever orders of certiorari (quash), mandamus (mandamus) or prohibition are sought in either criminal or civil proceedings. The applicant is not asking for review under order 45 of the Civil Procedure Rules. I find the preliminary objection has merit and I strike out this application with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE