REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

JUDICIAL REVIEW NO. 8 OF 2012

REPUBLIC.....APPLICANT

VERSUS

KIRINYAGA COUNTY COUNCIL.....1ST RESPONDENT

SENIOR RESIDENT MAGISTRATE'S COURT KERUGOYA...2ND RESPONDENT

AND

STEPHEN MURIITHI NJERU

JAMES KAMARU MATHENGE.....EXPARTE (interested parties)

JUDGMENT

The parameters of Judicial Review were set out by the Court of Appeal in the case of ***MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC AND UMOJA CONSULTANTS LTD CIVIL APPEAL No. 185 of 2001*** in which it 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***". Emphasis added

Similarly, in the case of ***COMMISSIONER OF LANDS VS KUNSTE HOTEL LIMITED (1997) e K.L.R (E & L) 1 at page 249,*** the Court of Appeal stated as follows:

> ***"But it must be remembered that Judicial Review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected".***

Lastly, I may cite ***HALSBURY's LAWS OF ENGLAND 4TH EDITION VOLUME 2 Page 508*** where it is stated thus:

"Certiorari is a discretionary remedy which the Court may refuse to grant even when the requisite grounds for its grant exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The judicial discretion of the Court being a judicial one, must be exercised on the basis of evidence and sound legal principles". Emphasis added

This Court will therefore be guided by the above broad principles and other binding precedents and of course the relevant laws in determining the matter at hand.

By a Notice of Motion dated 20th December 2012 and filed on the same day, the applicants herein **STEPHEN MURIITHI NJERU** and **JAMES KAMARU MATHENGE** sought the following orders:

1. That the Honourable Court do issue orders of certiorari to remove into the High Court and quash the decision made by HON. K.K. CHERUIYOT dated 26th October 2012 in his ruling delivered on the case No. 145 of 2012.

2. That the Honourable Court do granted (sic) leave to apply for an order of prohibition to issue against the Kirinyaga County Council to stop dealing and interfering with land parcels No. BARAGWI/RAIMU/2281 to 2305 through their agents or servants.

3. That the Honourable Court do issue an order of mandamus to the Kirinyaga Land District Officer to cancel title No. BARAGWI/RAIMU/38 and reinstate title Nos BARAGWI/RAIMU/2281 to 2305.

4. That the costs of this application be provided for.

The application is supported by the applicants' joint affidavit and statement of facts. It is their case that they are the legal owners of land parcels No. BARAGWI/RAIMU/2281 and 2305 which were allocated to them by the then Kirinyaga County Council in 1989 following vigorous Court proceedings. Having been issued with the title documents to those land parcels, there followed **NYERI HIGH COURT CIVIL CASE No. 265 of 1997** which ruled in their favour and an appeal against that judgment was dismissed by the **COURT OF APPEAL NYERI in APPEAL No. 242 of 2000**. However, the defendant in **NYERI HIGH COURT CIVIL CASE No. 265 of 1997** colluded with others and filed **KERUGOYA SENIOR PRINCIPAL MAGISTRATE'S CIVIL CASE No. 145 of 2012** and fraudulently obtained orders to cancel their titles. However that judgment was set aside by the same Court after they raised the issues that it was res-judicata. The 1st respondent then applied for and obtained orders for stay of execution of the setting aside orders which were granted notwithstanding the fact that the dispute over the above parcels of land had been heard by the highest Court in the land. That led to the filing of these Judicial Review proceedings in which the applicants seek the quashing of the proceedings in **KERUGOYA SENIOR PRINCIPAL MAGISTRATE'S CIVIL CASE No. 145 of 2012**.

Though served with the application on behalf of the **SENIOR RESIDENT MAGISTRATE'S COURT KERUGOYA** (the 2nd respondent herein), the Attorney General did not file any reply thereto. However, the 1st respondent **KIRINYAGA COUNTY COUNCIL** through its **Clerk J.K. ARITHI** filed a replying affidavit in which it is deponed as follows:

- ***That this application is an abuse of the due process of the Court – since the issues being raised are the same issues that were raised in KERUGOYA SENIOR PRINCIPAL MAGISTRATE's COURT CIVIL CASE No. 145 of 2012.***

- ***That in NYERI HIGH COURT CIVIL CASE No. 265 of 1995, the High Court issued a decree dated 15th December directing that all resultant parcels arising out of the sub-division of land parcel No. BARAGWI/RAIMU/38 be nullified and that decision was up-held on appeal in NYERI COURT OF APPEAL CIVIL CASE No. 242 of 2000.***

- ***That despite those orders, the applicants are seeking the closure of title to land parcel No.***

BARAGWI/RAIMU/38 which the Court of Appeal found had been acquired for the expansion of the Kianyaga Township so how can that title be closed and titles No. BARAGWI/RAIMU/2281 to 2305 be reinstated.

- ***That in KERUGOYA SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL CASE No. 145 of 2012 the Court had made orders on 23rd October 2012 cancelling titles to BARAGWI/RAIMU/2281 and 2305. That led to the filing of KERUGOYA HIGH COURT CIVIL APPEAL No. 19 of 2012 by the 1st respondent together with a stay of execution of the magistrate's orders which was granted on 26th October 2012 and which application is pending hearing inter-parte.***

- ***That those issues cannot be raised in such a Judicial Review application but should instead be canvassed through an appeal or an application.***

Submissions on the Notice of Motion have been filed both by the firms of **A.P. KARIITHI & COMPANY** Advocates for the applicants and **MAINA KAGIO & COMPANY** Advocates for the 1st respondent.

I have considered the application, the statement of facts and other supporting document, the replying affidavit and submissions by counsel.

I commenced this judgment by outlining the parameters of a Judicial Review application such as this one and it is clear from the case of **MUNICIPAL COUNCIL OF MOMBASA AND UMOJA CONSULTANTS** (supra) that the Judicial Review process is concerned with the decision making process and not with the merits of the decision itself. Further, that a Court hearing an application for Judicial Review should not sit as an appellate Court and such orders will not be granted as a matter of course but are a discretion of the Court which must consider if such orders are most efficacious in the circumstances of each case.

When this Court granted the applicants leave to commence these proceedings on 13th December 2012, one of the orders issued was that all such persons as may be affected with it be served within 14 days of filing. The application herein arises from the findings of the Magistrate in **KERUGOYA SENIOR PRINCIPAL MAGISTRATE CIVIL CASE No. 145 of 2012** in which the plaintiffs and defendants have not even be made parties yet the orders sought to be issued herein would affect them.

In **REPUBLIC VS INLAND REVENUE COMMISSIONER EX-PARTE OPMAN INTERNATIONAL 1986 1 ALL E.R 328**, the Court held that the fact that there is an alternative procedure available to address a particular grievance does not mean one cannot apply for the remedy of Judicial Review. The Court went on to add as follows:

> "***Judicial Review is however the procedure of last resort and is a residual procedure which is available in those cases where the alternative procedure does not satisfactorily achieve a just resolution of the applicant's claim"***

See also ***RE-PRESTON 1985 A.C 835*** where it was also held in similar terms that the remedy of Judicial Review is one of last resort which should not be applied for where there exist appropriate remedies to address the complaint of the party aggrieved by a particular decision. And in ***SPEAKER OF NATIONAL ASSEMBLY VS KARUME C.A CIVIL APPLICATION No. 92 of 1992 (2008 1 K.L.R 426***), the Court of Appeal stated that where there is a clear procedure to address a particular grievance, it should be followed. Looking at the circumstances of this case, this Judicial Review application is really an appeal against the decision of the Magistrate made in **KERUGOYA SENIOR PRINCIPAL MAGISTRATE'S CIVIL CASE No. 145 of 2012** yet in an application such as this, the Court should be concerned with the decision making process and not the merits of that decision. Further, it is my view that Judicial Review remedies being sought herein are not the most efficacious in the circumstances. It is submitted that already there is **ENVIRONMENT AND LAND COURT APPEAL NO. 125 OF 2013** (formally **HIGH COURT CIVIL APPEAL NO. 19 OF 2012)** filed by the 1st respondent against the same orders subject

of this Judicial Review application. This Court has been informed by counsel for the 1st respondent that the said appeal is still pending and indeed our records confirm as much. In my view, that appeal should be the most efficacious way of addressing the applicant's grievance which in my view questions the merits of the decision of the **SENIOR RESIDENT MAGISTRATE KERUGOYA in CIVIL CASE No. 145 of 2012**. It is not a proper exercise of Judicial Review process to litigate over this application when there is pending at this same Court an Appeal against the same decision. That is more the case where, as in this case, the Judicial Review application is really an appeal over the decision of a subordinate Court.

Finally, Judicial Review orders are granted at the discretion of the Court. Courts therefore have the discretion to refuse to grant such orders even where a foundation has been laid for the same although such discretion must be used sparingly. In ***BLUESEA SHOPPING MALL LIMITED VS CITY COUNCIL OF NAIROBI AND OTHERS C.A CIVIL APPEAL No. 129 of 2013 (NBI***), the Court of Appeal said the following on the issue of discretion in Judicial Review applications:

> ***"In administrative law matters, Courts have discretion to withhold a remedy of Judicial Review even where a substantive foundation has been laid because administrative law remedies are inherently discretionary. But Courts are slow to deny the remedy. The discretion to refuse to grant Judicial Review orders where they are merited must be very sparingly exercised".***

In the circumstances of this case, taking into account the fact that the orders sought in this Judicial Review application appear to question the merits of the decision made by the subordinate Court, that this matter has been the subject of previous litigation both in this Court and the Court of Appeal and that there is also appeal No. 19 of 2012 pending at this Court over the same decision, I am not inclined to exercise my discretion in favour of the applicants herein.

The up-shot of the above is that the applicants' Notice of Motion dated 20th December 2012 and filed herein on the same day is devoid of any merit. It is accordingly dismissed with costs to the 1st respondent.

B. N. OLAO

JUDGE

5TH MAY, 2017

Judgment dated, signed and delivered in open Court this 5th day of May 2017

Mr. Ngigi for Mr. Kagio for 1st Respondent present

Mr. Kariithi for the Interested parties absent

Interested parties are however present

Right of appeal explained.

B. N. OLAO

JUDGE

5TH MAY, 2017