



**Wagari v Nyang'au (Environment and Land Judicial Review Case  
E003 of 2023) [2024] KEELC 987 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 987 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E003 OF 2023  
NA MATHEKA, J  
FEBRUARY 28, 2024**

**BETWEEN**

**NJERI NJAU WAGARI ..... APPLICANT**

**AND**

**PETER O NYANG'AU ..... RESPONDENT**

**RULING**

1. The Respondent herein raised a preliminary objection *in limine* on grounds that;
  1. The Applicant is in contempt of Court Orders of the Environment and Land Court in Mombasa ELC Case No 239 of 2014-*Peter O. Nyang'au v Njeri Njau Wagaki* issued by Hon. Lady Justice N. A. Matheka on 15<sup>th</sup> July 2019 and further Court Orders issued on 8<sup>th</sup> February 2023.
  2. The Applicant has been cited for contempt of Court in the Environment and Land Court, Mombasa in ELC Case No 239 of 2014-*Peter O. Nyang'au v Njeri Njau Wagaki*.
  3. The Applicant/Contemnor ought to appear before the Environment and Land Court, Mombasa to Show Cause why she has not complied with Court Orders issued on 8<sup>th</sup> February 2023. Therefore without purging contempt proceedings, to give audience to the contemnor in this Court will be tantamount to condoning an illegality.
  4. The Applicant/Contemnor should in the first instance satisfy this Court that they have purged contempt in the Environment & Land Court in MSA ELC Case No 239 of 2014-*Peter O. Nyang'au v Njeri Njau Wagaki* before being granted audience.
2. This court has considered the preliminary objection and the submissions therein. The respondent states that the judicial review proceedings should not be entertained as the applicant is in contempt of court orders in a different matter before the same court. The purpose of judicial review was enunciated



in the case of *Municipal Council of Mombasa v Republic Umoja Consultants Ltd*, Nairobi Civil Appeal No.185 of 2007(2002) eKLR, where the Court of Appeal 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 make 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 they 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 this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review".

3. It is trite law that a court exercising judicial review jurisdiction is only concerned with the procedural propriety of a decision and not the merits. This position was adopted by the court in *Associated Provincial Picture Houses, Ltd. v Wednesbury Corporation* (1947) 2 All E.R. 680. As a result, it is only in exceptional circumstances that the court can consider merits of a decision. These exceptional circumstances were enumerated by the learned Mumbi Ngugi J in *Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited* (2013) eKLR, while citing the *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* (*supra*) namely:

"where the administrative body has acted outside its jurisdiction, has taken into account matters it ought not to have taken into account, or failed to take into account matters it ought to have taken into account; or that it has made a decision that is 'so unreasonable that no reasonable authority could ever come to it.'"

4. The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision- making process as was held by Mumbi Ngugi J in the case of *Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited* (*supra*),

"That the purpose of the remedies availed to a party under the judicial review regime is to ensure that the individual is given fair treatment by the authority to which he has been subjected. The purpose is not to substitute the opinion of the court for that of the administrative body in which is vested statutory authority to determine the matter in question."

5. Similarly, in the case of *Commissioner of Lands v Kunste Hotel Limited* (1997) eKLR (E & L) 1 at page 249, the Court of Appeal stated that;

"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".

6. In Halsbury's Laws of England 4<sup>th</sup> Edition Volume 2 Page 508 where it is stated that;

"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”.

7. This Court will therefore be guided by the above principles and other binding precedents and the relevant laws in determining the matter at hand. 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.
8. In the case of *Republic v Inland Revenue Commissioner Ex Parte Opman International* 1986 1ALL 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 stated that;  

"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"
9. Be that as it may, in the case of *Speaker of National Assembly v 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 and contempt proceedings aside, the Applicant submits that this court made orders in Mombasa ELC Case No 239 of 2014-*Peter O. Nyang'au v Njeri Njau Wagaki* and the same court should now issue orders of certiorari quashing them in terms and conditions it deems fit. This is totally unprocedural and an abuse of the court processes. The court cannot be invited in a judicial review proceeding to act as an appellate court to reverse its own decision. The Applicant should appeal against the said decision if she feels aggrieved. I find the preliminary objection is merited and that the Applicants' judicial review before this court is struck out with costs.
10. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28<sup>TH</sup> DAY of FEBRUARY 2024.**

**N.A. MATHEKA**

**JUDGE**

