



**Republic v Kangundo Senior Principal Magistrate’s Court & another; Ivulu (Interested Party); Ivulu & 2 others (Exparte Applicants) (Environment and Land Judicial Review Miscellaneous Application E018 of 2021) [2024] KEELC 1336 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1336 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND JUDICIAL REVIEW  
MISCELLANEOUS APPLICATION E018 OF 2021**

**CA OCHIENG, J**

**MARCH 14, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**KANGUNDO SENIOR PRINCIPAL MAGISTRATE’S COURT ... 1<sup>ST</sup>  
RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**PHILLIP MAVEKE IVULU ..... INTERESTED PARTY**

**AND**

**JOSEPH IVULU ..... EXPARTE APPLICANT**

**ANGELINA MWETHYA ..... EXPARTE APPLICANT**

**PIUS MAVEKE ..... EXPARTE APPLICANT**

**RULING**

1. What is before Court for determination is the Ex-parte Applicants’ Notice of Motion Application dated the 1<sup>st</sup> September, 2021 where they seek the following orders:-

1. Spent



2. The court be pleased to grant leave to the Ex-parte Applicant to apply for orders of Judicial Review in the nature of certiorari to quash the proceedings, Ruling and Order of the 1<sup>st</sup> Respondent's Court in Kangundo Senior Principal Magistrate's ELC MISC. 39 of 2020.
  3. The leave so granted to operate as a stay of the Ruling and Orders of the 1<sup>st</sup> Respondent's Court in Kangundo Senior Principal Magistrate's ELC Misc. 30 of 2020 issued on the 30<sup>th</sup> August, 2021 pending the hearing and determination of the proceedings herein.
  4. The court be pleased to grant an order of Judicial Review in the nature of certiorari to bring to this Honourable Court to quash the proceedings, Ruling and Order of the 1<sup>st</sup> Respondent's Court in Kangundo Senior Principal Magistrate's ELC. MISC. 30 of 2020 made on the 30<sup>th</sup> August, 2021.
  5. The costs of this Application.
2. The Application is premised on the Statutory Statement and Supporting Affidavit of JOSEPH IVULU where he deposes that sometime in March 2020, the Interested Party who is his father sued them in Kangundo SPM ELC No. 39 of 2020 seeking to be allowed to freely subdivide ten (10) acres of the land parcel number Matungulu/Nguluni/751 into two equal shares and sell the same. He explains that the Interested Party also filed a Notice of Motion Application dated the 3<sup>rd</sup> March, 2020 seeking to be allowed to subdivide his land. He confirms that together with other Interested Parties, they filed Replying Affidavits and Defences. He contends that the Court made a Ruling on 30<sup>th</sup> August, 2021 granting final orders to the Notice of Motion Application dated the 19<sup>th</sup> March, 2020. Further, they only came to know of the Ruling on 31<sup>st</sup> August, 2021. He reiterates that the impugned Ruling made by the 1<sup>st</sup> Respondent was devoid of procedural and substantial justice including fairness contrary to the Fair Administrative Action Act and the Constitution of Kenya.
  3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the instant Application by filing Grounds of Opposition where they contend that Judicial Review is not the right forum to quash the Ruling that was delivered by the 1<sup>st</sup> Respondent in exercise of its mandate. They insist that the Ex-parte Applicants' ought to exhaust the remedies available which are either to Appeal against the said Ruling or apply to review the Orders but not to file a Judicial Review Application. They argue that the Ex-parte Applicants' have not demonstrated the grounds upon which prerogative orders should be granted. They reiterate that the Ruling, the substance of this Application, is not attached which renders this Application moot. Further, that the instant Application is not properly before court and the same should be struck out.
  4. The Interested Party opposed the instant Application and filed a Replying Affidavit where he confirms that he was the Plaintiff in the Kangundo Senior Principal Magistrate's ELC SUIT No. 39 of 2020. He contends that he is the sole proprietor and/or registered owner of all that parcel of land known as Matungulu/Nguluni/751 measuring 10 acres or thereabouts situated in Nguluni on which, he has all along established his home, stayed and/or settled thereon, together with the Ex-parte Applicants' herein who are his wife and sons, respectively. He explains that before he moved to court in Kangundo SPM ELC No. 39 of 2020, the Ex-parte Applicants herein, had perpetually been assaulting him and had gone as far as chasing him from his own home forcing him to move and live at his brother's home. He states that all these hostilities by the Ex-parte Applicants' herein have been meted on him for reasons that he has resisted their attempt to sell part of his aforesaid land to third parties without his authority. Further, that out of the Ex-parte Applicants' actions as stated above, he has been forced to undergo severe physical, psychological and emotional torture. He reiterates that his efforts to bring in elders to advise the Ex-parte Applicants' to stop assaulting and beating him have not yielded any fruit as they totally refused to attend the elder's meetings, forcing him to report them to the police, whereupon they



were arrested and charged in court but they successfully came out on bond, putting his life at stake and/or in danger. Further, it is out of all the above acts that he approached the Senior Principal Magistrate's Court in Kangundo vide ELC. No. 39 of 2020 seeking for an order to allow him to subdivide his land parcel No. Matungulu/Nguluni/751, share out part of it, to the Ex-parte Applicants' herein and sell two acres from his share to sustain and seek medical care. He reaffirms that he wishes to sell and/or dispose off, part of his share of the land herein, to be hived from the suit land herein so as to enable him buy a new piece of land and set up a new home. He explains that the Honourable Magistrate at Kangundo, on hearing his submissions, evidence and facts on record, made a decision in his favour. Further, that despite the Ruling herein, he had given each of his sons, and their mother; the Ex-parte Applicants' herein one and a half acres of land from land parcel No. Matungulu/Nguluni/751, and only remained with 2 acres (since he already sold two (2) acres earlier), but the Applicants' have refused to accept what he gave them insisting that he should give them all his land and remain with nothing for reasons that he is old and do not need any land.

No parties filed written submissions to canvass the instant Application.

### **Analysis and Determination**

5. Upon consideration of the instant Notice of Motion Application including the respective Affidavits, Statement, Annexures and Grounds of Opposition, the only issue for determination is whether the Ex-parte Applicants' are entitled to leave to commence proceedings of certiorari to quash the proceedings, Ruling and Order of the 1<sup>st</sup> Respondent in Kangundo Senior Principal Magistrate's ELC No. 39 of 2020 and leave so granted to operate as a stay of the Ruling.

On leave to apply for Judicial Review, Order 53 Rule 1 of the Civil Procedure Rules provides that:-

- (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution. (4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days."

6. In this instance, the Ex-parte Applicants' seek to quash the decision of the Kangundo SPM, where he granted orders allowing the Interested Party to sell a portion of his land to cater for his livelihood. Lord Diplock in the case of Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D clearly set the standards of judicial review when he stated that:-

Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power



and must give effect to it...By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

7. While in the case of the Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo [2015] eKLR, it was held that:-

It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”

8. It is trite that Judicial Review challenges the administrative action of a person in position of authority. From the averments in the respective parties including documents presented, I note the Ex-parte Applicants’ were parties in the Kangundo SPM ELC No. 30 of 2020 and participated in the proceedings by filing their Defence including Replying Affidavits. The trial Court after considering the pleadings therein delivered the impugned Ruling in favour of the Interested Party, which forms the fulcrum of this suit. Further, that they have confirmed that they were aware of the terms of the Ruling but were dissatisfied with it.
9. Based on the facts as presented including associating myself with the decisions cited above, it is my considered view that the issues the Ex-parte Applicants’ are challenging especially the proceedings and Ruling of the Kangundo SPM’s Court are governed by the Civil Procedure Rules and do not fall within the ambit of Judicial Review. Further, I find that the trial Magistrate was undertaking his mandate in accordance with the *Magistrates’ Courts Act*, 2015 while dealing with the aforementioned case and delivering the impugned Ruling. I opine that if the Ex-parte Applicants’ were aggrieved by his decision, they should have applied for review or lodged an Appeal instead of instituting the instant Notice of Motion Application. In the circumstances, I find that the Ex-parte Applicants’ are hence not entitled to leave as sought.
10. In the foregoing, I find the Notice of Motion Application dated the 1<sup>st</sup> September, 2021 unmerited and will dismiss it but make no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 14<sup>TH</sup> DAY OF MARCH, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of;

Odhiambo for Interested Party

No appearance for Applicant

Court Assistant – Simon/Ashley

