



**Njagi v Muchiri & another (Judicial Review E006 of 2023)
[2024] KEELC 1812 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 1812 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
JUDICIAL REVIEW E006 OF 2023**

JM MUTUNGI, J

APRIL 12, 2024

**IN THE MATTER OF JUDICIAL REVIEW FOR AN ORDER OF CERTIORARI
AND
IN THE MATTER. OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

BETWEEN

PETER NBAMBIRI NJAGI APPLICANT

AND

STEPHEN M. G. MUCHIRI 1ST RESPONDENT

COUNTY GOVERNMENT OF KIRINYAGA 2ND RESPONDENT

RULING

1. This Ruling is in respect of the 1st Respondent's Notice of Preliminary Objection dated 31st October 2023 seeking to strike out the Applicant's Notice of Motion dated 13th October 2023, on the grounds:
 - i. The application offends the provision of Order 53 Rule 1 & 2 of the [Civil Procedure Rules, 2010](#).
 - ii. The application is frivolous vexatious and an abuse of the Court process, a waste of Court's and parties' time.
 - iii. The application is trying to emasculate a quasi-judicial institution from performing its duties.
 - iv. The application is only meant to annoy the Respondents.



2. The background of this suit is that the Applicant filed the Notice of Motion dated 13th October 2023 seeking for orders:
 - a. That the Honourable court do issues an order for certiorari against the 2nd Respondent quashing the proceedings on the 27th September 2023 and verdict of the Dispute Resolution Committee of (land, physical planning and urban development) dated the 4th October 2023 in respect to Plot No 182B Wang'uru and Plot No B302 Wang'uru.
 - b. Cost of the Judicial Review application as shall be assessed by the Honourable Court.
 - c. Any other order or further orders and/or writs and/or directions the Honourable Court may deem fit to grant.
 - d. Costs of the application.
3. The Applicant's motion was predicated upon the annexed affidavit sworn by Peter Ndambiri Njagi in which he depones that he was the registered proprietor of Plot No B182 Wanguru and that the 1st Respondent was the registered owner of Plot No B302 Wang'uru. He avers that a dispute of ownership of his Plot No B182 arose between the Applicant and the 1st Respondent, that necessitated a dispute resolution meeting which was convened by the Lands, Physical Planning and Urban Development Committee on 27th September 2023. He states that a verdict that did not consider all the material facts was passed against him. He prays that his application be allowed.
4. The Court on 1st November 2023 gave directions that the Preliminary Objection should be disposed of first and that it should be canvassed by way of written submissions. The 1st Respondent filed his written submissions on 4th December 2023 and the Applicant filed his on 7th February 2024.
5. The issue that arises for determination in regard to the Respondent's Notice of Preliminary Objection is Whether the Court lacks jurisdiction to entertain the matter on the basis that the Applicant failed to adhere to the statutory requirement that leave should be obtained before judicial review proceedings can be commenced.
6. The Court of Appeal in the Case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 laid down the principle as to what constitutes a Preliminary Objection. A Preliminary objection to be valid must be on a point of law and must be founded on facts that are not in dispute. If evidence would require to be adduced to establish the facts, then a Preliminary Objection would not be sustainable. In the Case of *Mukisa Biscuit Case (supra)* Law, JA stated as follows:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of Limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to the arbitration.”
7. In the present matter the Respondent has hinged his Preliminary Objection on the fact that the Applicant should have complied with Order 53 Rule 1 & 2 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya and the [Civil Procedure Rules, 2010](#). The question whether or not the Applicant had complied with a mandatory statutory requirement goes to the jurisdiction of the court to entertain the suit. If it is found that the Applicant had not, then the Court lacks the jurisdiction to entertain the same. If the Court were to proceed to hear and adjudicate the suit when it lacked the jurisdiction, its decision would be null and void.



8. Order 53 of the [Civil Procedure Rules](#) provides for the procedure for seeking review. It states as follow:
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 shall be made ex parte to a judge in chambers and accompanied by —
 - (a) a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and
 - (b) affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.

Order 53 has its underpinning on Section 8 and 9 of the [Law Reform Act](#) (Cap 26 Laws of Kenya). Section 9 of the [Law Reform Act](#) provides as follows:

3. 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 the Judgment, Order, Decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.
9. It is the Respondent's argument that the requirement of leave is necessary and vital and argues that rules of procedure are critical in the administration of justice. On the other hand, the Applicant asserts that he has anchored his application under the [Constitution](#) of Kenya and the [Fair Administrative Actions Act](#), 2015 and that leave was not a prerequisite for one to file a Judicial Review application. According to the Applicant, leave is not required to seek judicial review under the [Fair Administrative Actions Act](#). He has made references to the Cases of [National Social Security Limited v Dokomoja Limited](#) (2021) eKLR, [Matagei v Attorney General; Law Society of Kenya \(Amicus Curiae\)](#) (Petition 337 of 2018) (2021) E=KEHC 460 (KLR) and [Peter Orengo Migiro \(Suing on behalf of the Late Christopher Orengo Makori\) v Samuel Omagwa James & 2 others](#) (2022) eKLR, to buttress his position.
10. It is common ground that the grant of leave is an exercise in judicial discretion. An application for leave ordinarily ought to be heard ex-parte but according to the proviso to Rule 1 of Order 53 of the [Civil Procedure Rules](#), the Judge hearing the matter has the discretion to direct that the application be heard inter partes. The reasons underlying the need for leave were well-explained in [Republic v County Council of Kwale & another Ex-parte Kondo & 57 others](#), Mombasa HCMCA No 384 of 1996, as cited in [Republic v Anti-corruption Commission & another; Mike Mbuvi Sonko & another \(Interested Parties\) Ex parte Paul Ndonge Musyimi](#) (2020) eKLR, as follows:

“The purpose of application for leave to apply judicial review is firstly to eliminate at an early stage any applications for JR which are frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for Judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative



error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial review of it were actually pending even though misconceived.”

11. The Court upon hearing an application for leave will determine whether there exists an arguable case or not and will proceed to deny leave where an arguable case has not been demonstrated. The requirement that leave be sought was intended to act as a sieve to ensure undeserving cases were not brought to Court and as it were to ensure the court process is not abused by parties filing frivolous suits thus impeding instead of enhancing access to justice.

Under Section 7 of the [Fair Administrative Action Act](#), 2015 no grant of leave is required before the institution of Judicial Review proceedings. Section 7(1) of the Act provides as follows: -

7(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to –

- a. A Court in accordance with Section 8; or
- b. A tribunal in exercise of its jurisdiction conferred in that regard under any written law.

Section 8 of the Act provides that an application for review of an administrative action or an appeal under the Act shall be determined within 90 days of filing the application. It is thus clear that under the Fair Administrative Actions no leave is required before an application for review is filed in Court.

In the Case of [Kenya Human Rights Commission v Non-governmental Organisations Co-ordination Board](#) [2016] eKLR the Court stated as follows:

“It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that article 47 is promoted the court is not limited to the traditional judicial review grounds. The [Fair Administrative Action Act](#), 2015 must be viewed in that light.”

12. A brief look at the history of judicial review in our jurisdiction is vital at this juncture. Judicial review in Kenya originated as a common law remedy for checking administrative actions. The practice of the courts exercising judicial review powers was largely borrowed from the United Kingdom as can be clearly seen from the provisions of the [Law Reform Act](#). Prior to the promulgation of the current Constitution, the judicial review jurisdiction of the Kenyan courts was firmly grounded on the provisions of Sections 8 and 9 of the [Law Reform Act](#) with its’ procedure provided in Order 53 of the [Civil Procedure Rules, 2010](#). Judicial Review process enabled the High Court to superintend the actions of the Executive Arm of Government through the writs of certiorari, prohibition and mandamus.

13. Upon the promulgation of the Kenya Constitution in 2010, Judicial Review attained constitutional underpinning under Article 47, with Judicial Review remedies being accorded constitutional status by Article 23 of the [Constitution](#). In regard to Judicial Review the [Constitution](#) achieved two objectives: it entrenched judicial review in the [Constitution](#) under Article 47 and expressly provided under Article 23 of the [Constitution](#) that an order of Judicial Review is one of the remedies available for correcting constitutional violations. The Supreme Court in the Case of [Communications Commissions of Kenya v Royal Media Services Ltd](#) [2014] eKLR stated thus:

“However, notwithstanding our findings based on the common law principles estoppel and res-judicata, we remain keenly aware that the [Constitution](#) of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing



their grievance as a constitutional question, the 1st, 2nd and 3rd Respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the Court and have their grievance resolved on the basis of articles 22 and 23 of the Constitution...The famous United States Supreme Court Case of *Marbury v Madison* 5 US 137 (1803) established the principle of the possibility of judicial review of legislation, and at the same time the key place of the courts in the upholding of the US Constitution. This principle is enshrined in our Constitution (articles 23(3)(d) and 165(3)(d)). A close examination of these provisions shows that our Constitution requires us to go even further than the US Supreme Court did in *Marbury v Madison* (Marbury). In Marbury, the US Supreme Court declared its power to review the constitutionality of laws passed by Congress. By contrast, the power of judicial review in Kenya is found in the Constitution."

14. As a consequence of the above analogy, this Court notes that our jurisdiction has two Judicial Review processes that co-exists, that is the common law prerogative writs and Constitutional Judicial Review. Sections 8 and 9 of the Law Reform Act were not repealed upon the promulgation of the Constitution and hence Order 53 of the CPR exists and runs alongside Article 23 and 47 of the Constitution of Kenya. As a consequence, where an Applicant anchors his Judicial Review application on the Constitution, he is not required to seek for leave. For instance, in Masai Mara (SOPA) Limited v Narok County Government (2016) eKLR the Court held: -

“on the issue of the application of Order 53 of the Civil Procedure Rules to a constitutional petition where a party seeks judicial review reliefs I must hasten to point out that since the promulgation of the Constitution in 2010, administrative law actions and remedies were also subsumed in the Constitution. This can be seen in the eyes of article 47 which forms part of the Bill of Rights. It is safe to state that there is now substantive constitutional judicial review when one reads article 47 as to the right to fair administrative action alongside article 23(3) which confers jurisdiction, on the court hearing an application for redress of a denial or violation of a right or freedom in the Bill of rights, to grant by way of relief an order for judicial review. Order 53 of the Civil Procedure Rules do not consequently apply to Constitutional Petitions where the court is expected to exercise a special jurisdiction which emanates from the Constitution and not a statute.”

15. In conclusion, the law as it is allows a litigant to choose between the common law Judicial Review process and/or the Constitutional Judicial Review process. In the present case, the Applicant chose to rely on the Constitution and the Fair Administrative Action Act and consequently was not required to seek and obtain leave. The Applicant was entitled to make a choice regarding the process he preferred and cannot be faulted.
16. The net result is that the Preliminary Objection is without merit and is hereby dismissed.
17. The costs of the Preliminary objection shall be in the cause.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 12TH DAY OF APRIL, 2024.

J. M. MUTUNGI

ELC - JUDGE

