Republic v Salim & 2 others; Gami (Exparte Applicant) (Environment and Land Judicial Review Case E006 of 2022) [2024] KEELC 5440 (KLR) (23 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5440 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E006 OF 2022

NA MATHEKA, J

JULY 23, 2024

BETWEEN

REPUBLIC .... APPLICANT

AND

AZIZA HUDER SALIM .... 1ST RESPONDENT

HILMY HUDER SALIM .... 2ND RESPONDENT

PRINCIPAL MAGISTRATES COURT HON C. N. NDEGWA 3RD RESPONDENT

AND

RAMJI DHANJI GAMI .... EXPARTE APPLICANT

JUDGMENT

1. The application is dated 21st December 2022 and is brought under Order 53 Rule 1(1) of the Civil Procedure Rules 2010 seeking the following orders;
    1. That an order of certiorari to remove this court and quash the decision of the 3rd respondent of the 22nd December 2012 and the proceedings thereof.
    2. An order of prohibition to remove into this court and prohibit the 1st and 2nd respondents from proceeding in any way and alienate, transfer or alter property known as plot No. sub division 10947 section 1 Mainland North Mtwapa.
    3. That costs of the application be provided for.
2. It is premised on the following grounds that the 3rd respondent had no jurisdiction to proceed with the hearing of Mombasa Civil Suit No. E014 of 2021 in the face of the ongoing High Court matter ELC No. 255 of 2018 over the same parties and subject matter. That he failed in refusing to grant the ex parte applicant a stay of the ruling pending appeal on 22nd December 2022 even when a formal application

dated 24th November 2021 was made which resulted in the 1st and 2nd respondents demolishing the ex parte applicant's permanent houses unlawfully evicting the ex parte applicant.

3. This court has considered the application and the submissions therein. 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".

4. 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 vs 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."

5. It was incumbent upon the Applicant to demonstrate that the decision-making organ, in this case, the 3rd Respondent acted ultra vires in making the impugned decision. In the case of Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR, the court held that;

> " Where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on 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."

6. 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".

7. In Halsbury's Laws of England 4th 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".

8. The 1st and 2nd respondents opposed the application and raised a preliminary objection that the application has been brought out of time. That Order 53 Rule 2 of the civil procedure rules as read with section 9(3) of the *law reform act* provides for a time limit of six months within which the application should have been filed. The applicants submitted that the 3rd respondent did not have pecuniary jurisdiction to entertain the matter and the same was sub judice.

9. Judicial review jurisdiction is a special jurisdiction which is neither Civil nor Criminal and it is governed by Section 8 and 9 of the *Law Reform Act* which is the substantive law while Order 53 of the Civil Procedure Rules sets out the procedural law. By those provisions the court is mandated to issue orders of mandamus, certiorari or prohibition in appropriate judicial review proceedings.

10. The *Civil Procedure Act* provides on how appeals are to be filed from the magistrate's court. It is apparent that the applicant herein did not pursue that right of appeal. He has now invoked the provisions of the *Law Reform Act* and the Civil Procedure Rules, which entitle a party, to apply for prerogative orders including orders of certiorari.

11. Be that as it may, applications for prerogative orders have a limitation period. The *Law Reform Act* Cap 26 Laws of Kenya, provides as follows at Section 9 (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 that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings 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."

12. The above provision is echoed in the Civil Procedure Rules, 2010, which in Order 53 rule 2 provides as follows:

> Order 53 Rule 2 – Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act; and where the proceedings is subject to appeal and the time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

13. It is discernible from the above, that one needs to file an application seeking leave to apply for orders of certiorari, within a period of 6 months of the decision. The decision that is sought to be quashed

is dated 22nd December 2021. The application was filed on 22nd December 2022. The application is therefore out of time.

14. The Court of Appeal case in Wilson Osolo v John Ojiambo Ochola & Another [1996] eKLR expressed itself thus;

> It can readily be seen that order 53 rule 2 (as it then stood) is derived verbatim from Section 9(3) of the *Law Reform Act*. Whilst the time limited for doing something under the civil procedure rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case the *Law Reform Act*." There is no provision for extension of time to apply for such leave in the *Limitation of Actions Act*//// (Cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here."

14. I am also guided by the case of Republic v Chairman Amagoro Land Dispute Tribunal & Another Ex-parte Paul Mafwabi Wanyama [2014] eKLR wherein D. Maraga JA (as he then was) held that:

> " The judicial review proceedings before the learned judge, which have given rise to this appeal were therefore special in nature and the leaned judge erred in importing provisions of the *Civil Procedure Act// and rules to proceedings governed by the said provisions of the Law Reform Act*// and Order 53 Civil Procedure Rules. We agreed with learned counsel for the appellant that the learned judge erred in extending time which he had no jurisdiction to do."

15. I am aware that by dint of the provisions of Order 50 Rule 5 of the Civil Procedure Rules, 2010, the court has power to enlarge time, where there is limited time provided for doing any act or taking any proceedings under the rules. Following this provision, it may be arguable that time may be enlarged to make application for Judicial Review outside the 6 months' limitation period. However, the challenge here, is that the limitation period is not just in the rules, but is also a statutory provisions set out in Section 9(3) of the *Law Reform Act* (above), and it is trite law that rules made under statute, cannot override a statutory provision. The *Law Reform Act* itself has no provision for extension of time. I have seen no law, which can entitle me to enlarge time for the filing of an application for certiorari outside the 6-month limitation period. The applicant ought to have filed an appeal against the decision of the 3rd respondent as opposed to a judicial review. I find this application is not merited and is hereby dismissed with costs to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF JULY 2024.

N.A. MATHEKA

JUDGE