



**Republic v Senior Resident Magistrate, Nyahururu & 2 others;  
Njihia (Exparte) (Environment and Land Judicial Review Case  
E002 of 2023) [2024] KEELC 5883 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEELC 5883 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2023  
AK BOR, J  
AUGUST 20, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**SENIOR RESIDENT MAGISTRATE, NYAHURURU ..... 1<sup>ST</sup> RESPONDENT**

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

**JOSIAH MUCHANGI GACHANJA ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**JOHN NJOROGE NJIHIA ..... EXPARTE**

**JUDGMENT**

1. The Applicant brought the motion dated 15/12/2023 under Order 51 Rules 1 and 3 of the Civil Procedure Rules, Sections 4 and 13 (7) (b) of the Environment and Land Court (ELC) Act, Articles 23, 49, 50 and 159 (2) (a) of *the Constitution* of Kenya and Sections 4 (1) (3), 7, 9 and 11 of the Fair Administrative Actions Act seeking stay of execution or suspension of the orders made by Hon. M.N. Osoro, Senior Resident Magistrate, on 14/12/2023 in Nyahururu CM ELC Case No. 38 of 2019 committing the Applicant to imprisonment for 30 days for alleged contempt of court and to have him taken to GK Prison Nyahururu. He also seeks an order of certiorari to bring to this court the proceedings of 14/12/2023 in Nyahururu CM ELC Case No. 38 o 2019 for purposes of being quashed for being unconstitutional, unprocedural, null and void. Lastly, he seeks an order of prohibition to restrain Hon. M.N. Osoro, Senior Resident Magistrate, from hearing or entertaining proceedings in Nyahururu CM ELC Case No. 38 of 2019 in view of the unconstitutional, unprocedural and illegal orders she issued against the Applicant on 14/12/2023.



2. The grounds on which the application was made are that the 3<sup>rd</sup> Respondent filed an application dated 15/11/2023 in Nyahururu CM ELC Case No. 38 of 2019 seeking to have the Applicant punished for contempt of the court order dated 26/11/2023. The Applicant filed a replying affidavit on 23/11/2023 denying that he was in contempt of court and sought to have the process server who allegedly served him with the court order summoned for cross examination by his advocate.
3. The Applicant contends that when the matter came up on 14/12/2023, he appeared in court with his advocate and the Learned Magistrate conducted proceedings to the exclusion of the parties' advocates by personally cross-examining the Applicant and proceeded to convict and sentence him to imprisonment for a month at the GK Prison in Nyahururu without affording him a hearing and in violation of his fundamental right to a fair hearing and legal representation.
4. The Applicant contends that having refuted the allegation of contempt of court, he ought to have been heard on his defence which was not considered in the ruling made by the trial Magistrate. He went further to claim that he was not afforded the right to mitigate against the custodial sentence for it was meted out in him without the option of a fine which is against the notions of justice. The Applicant maintained that the manner in which the matter was conducted and the sentence passed was unconstitutional, unprocedural, illegal and therefore null.
5. The Applicant swore the affidavit in support of the application and averred that he has been involved in a land row with the 3<sup>rd</sup> Respondent where the 3<sup>rd</sup> Respondent sued him over his occupation of Ol Kalou Township Block 2/228 on which he had erected a permanent commercial building. The case was partly heard by Hon. Charles Obulutsa and was pending for further defence hearing at the time Hon. Charles Obulutsa was transferred. The 3<sup>rd</sup> Respondent obtained an ex parte injunction based on his application dated 22/11/2023. The Applicant maintained that the order was never served upon him. The 3<sup>rd</sup> Respondent filed the application date 15/11/2023 seeking to have him punished for contempt of the court order dated 26/11/2023. He filed a replying affidavit on 20/11/2023 denying being in contempt of court. He reiterated the grounds set out on the face of the application and exhibited some of the documents filed before the trial court.
6. Josiah Muchangi Gachanja, the 3<sup>rd</sup> Respondent, swore the replying affidavit on 18/12/2023 opposing the claim. He argued that the judicial review application was filed without leave and was therefore incompetent and suitable for striking out. Regarding service, he averred that the order of injunction dated 26/11/2023 was served upon the Applicant's advocate on the same date yet the Applicant had not addressed this fact. Further, that the Applicant was personally served with the order for injunction on 26/11/2023 based on the affidavit of service which he exhibited. He maintained that the Applicant was duly served with the injunction order and was aware of it and that despite being aware of the order, the Applicant continued undertaking new construction works and putting up a new development in violation of the injunction order which prompted him to file the application for contempt of court.
7. He averred that the Applicant did not file a replying affidavit to his application dated 22/11/2023 following which the order dated 26/11/2023 was issued. He maintained that the Applicant had not denied having commenced new construction works and new developments on the suit property. He went on to add that the Applicant alleged in his replying affidavit sworn on 20/11/2023 that the new construction works and developments on the suit property were being undertaken by his tenants without his knowledge which in the 3<sup>rd</sup> Respondent's view was evasive and an afterthought.
8. The 3<sup>rd</sup> Respondent explained that the Applicant appeared before court on 14/12/2023 and was questioned by the court with respect to the application for contempt of court and he was thus given a chance to respond to the allegation of contempt of court levelled against him. He argued that



- the Applicant was afforded an opportunity to be heard before the trial court on 14/12/2023 and maintained that the trial court acted within the law when it committed the Applicant to 30-days imprisonment for disobedience of the court order.
9. Parties entered into a consent on 19/12/2023 for the release of the Applicant and for the filing of responses and submissions with regard to the application for contempt. The Applicant filed a supplementary affidavit in which he stated that he did not require leave to institute a judicial review application under Article 23 (1) (f) of *the Constitution*. He reiterated that he was not aware of the injunction order of 26/11/2023 since it was never served upon him personally which is why he sought to cross-examine the process server. He reiterated that he was denied the chance to cross-examine the process server or defend himself against the allegations that he was undertaking construction work on the suit property as claimed and added that if such construction were being done by third parties he could not be held vicariously liable for contempt of court proceedings.
  10. He emphasized that he personally attended court on 14/12/2023 and that both his advocates and that of the 3<sup>rd</sup> Respondent who appeared virtually were denied participation in the proceedings of that day as the Magistrate performed the role of prosecutor and judge thereby denying him legal representation. That the court proceeded to convict and sentence him without affording him the right of a fair hearing or mitigation before passing the sentence.
  11. He urged that the procedure adopted by the Learned Magistrate in conducting the contempt proceeding against him was flawed and a departure from the tenets of a fair hearing enshrined in Article 49 and 50 of *the Constitution* read with Section 5 of the *Judicature Act*. He averred that this court had jurisdiction to review that decision under Section 3 (1), 7 (2) (ii) and 8 of the Fair Administrative Actions Act.
  12. The court directed parties to file submissions which it has considered. The Applicant recounted the chronology of events that took place before the trial court in his submissions and denied being served the order for injunction made on 26/11/2023. He denied undertaking any construction works on the suit land.
  13. Regarding leave, he cited the decision of Peter Orengo Migiro (suing on behalf of the late Christopher Orange Makori) v Samwel Omagwa James & 2 Others [2022] eKLR where the court observed that leave was not required to seek judicial review as a relief under Article 23 (3) of *the Constitution* where the proceedings were instituted to enforce the Bill of Rights under Article 22 of *the Constitution* or where they were brought under Section 7 of the Fair Administrative Actions Act for review of administrative action. The court clarified that leave was required where an Applicant for judicial review moved the court under the *Law Reform Act* and Order 53 of the Civil Procedure Rules. He added that in Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali & 2 others, Murtaza Turabali Patel (interested parties) [2022] eKLR an order of certiorari was issued against the Principal Kadhi, Mombasa sitting in exercise of his judicial function as a subordinate court established under Article 169 (1) (b) of *the Constitution*.
  14. He quoted several decisions on the exercise of the judicial review power and when an order of certiorari should be made. This include where the decision is made without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not complied with. He reiterated that judicial review was not concerned with the private rights or the merits of the decision challenged but with the decision making process.
  15. The Applicant cited Dande & 3 others v Inspector General, National Police Service & 5 others [2023] KESC 40 eKLR where the Supreme Court analysed the place of judicial review under the new Constitution and its scope. The Supreme Court observed that when a party approached the court



under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if it was filed under Section 53 of the Civil Procedure Rules and did not claim any violation of rights in *the Constitution*, then the court was to limit itself to the process and manner in which the decision complained of was reached or the action taken and not the merits of the decision per se. The Supreme Court noted that the appellants had invoked the judicial review jurisdiction of the High Court alleging that their rights to fair administrative action had been violated and the court was required to conduct a merit review of the questions before them and that the superior court's dismissal of the appellant's plea as requiring no merit review was misguided.

16. The Applicant also relied on *Alfred Mutua v Boniface Mwangi* [2022] eKLR on the law governing contempt of court proceedings. Justice J.V Odunga observed that the English law applicable in England at the time the contempt was committed was the law to govern contempt of court proceedings. The court set out the requirements of a contempt application under Rule 81.4 of the English Civil Procedure Rules (Amendment no. 3) Rules, 2020. These include the nature of the breach or contempt, the dates and terms of the order breached, confirmation that the order was personally served unless the court dispensed with personal service, confirmation that the order breached included a penal notice, a brief summary of the facts alleged to constitute the contempt, the defendants' rights to be legally presented in the contempt proceedings, the defendant being afforded reasonable time to prepare for the hearing, the defendant's entitlement to give evidence in his defence or remain silent.
17. The court could only proceed in the absence of the defendant and find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting the contempt. If the court were satisfied that the defendant had committed contempt, it could punish the defendant by a fine, imprisonment, confiscation of his assets or other punishment under the law. The judge also cited Rule 18.5 which deals with the manner of service of the contempt application and the fact that there must be evidence to show that it was served on the defendant personally. Where the application is served on the advocates representing the defendant, the rules provide for how the advocate could object in writing.
18. Rule 81.7 deals with directions for the hearing of contempt application. Justice Odunga observed that it was at the stage of directions when the court had power to direct the manner of hearing the application for contempt and whether witnesses would need to attend. He noted that the court could not compel a defendant to give evidence orally or in writing and that the court's power was limited to securing the attendance of the defendant.
19. The 3<sup>rd</sup> Respondent submitted that although the instant application for judicial review was filed under Article 23 (3) of *the Constitution* and Section 7 of the Fair Administrative Actions Act, the impugned order made by the 1<sup>st</sup> Respondent was not within the purview of the judicial review and was therefore not amendable to judicial review. The 3<sup>rd</sup> Respondent cited the decision in *National Social Security Fund v Sokomania Limited & another* (2021) eKLR where the Hon. Mr. Justice S. Okongo expressed the view that orders made by Magistrates' Court in exercise of judicial function should be appealed against or where sufficient reason existed, they should be reviewed under the supervisory jurisdiction of the court pursuant to Article 165 (6) of *the Constitution* rather than being subjected to judicial review. The 3<sup>rd</sup> Respondent also relied on Section 29 of the ELC Act and Order 40 Rule 3 of the Civil Procedure Rules on the powers exercised in punishing a defendant for contempt of court orders.
20. The 3<sup>rd</sup> Respondent submitted that the issue of personal service of the order raised by the Applicant goes to the merits of the committal order and not to the illegality of the impugned committal order and maintained that there was evidence of service of the injunction order upon the Applicant's advocates, Gakuhi Chege and Co. Advocates which was not denied. He emphasised that the 1<sup>st</sup> Respondent was



well within her judicial powers to punish the Applicant for contempt of court on the basis of the material and evidence placed before the court and urged this court to dismiss this matter with costs.

21. The issue for determination in this matter is whether the court should suspend execution of the orders of the trial court made on 14/12/2023; whether the court should issue an order of certiorari to quash the proceedings of 14/12/2023 in Nyahururu CM ELC Case No. 30 of 2019 for being unconstitutional, unprocedural and void, and lastly, whether an order prohibiting Hon. M.N Osoro Senior Resident Magistrate from hearing or dealing with the proceedings in Nyahururu CMC ELC Case No. 38 of 2019 should issue.
22. The considerations the court needs to take into account are service of the order said to have been disobeyed as well as the penal notice, service of the application for contempt, certainty of the terms of the order and its breach and conduct of the contempt proceedings by the trial court since such proceedings are quasi criminal in nature and touch on the loss of one's liberty if the defendant is found to be in contempt of court.
23. Regarding the issue of service, the court notes that in his Replying Affidavit filed in court on 15/12/2023 the Applicant denied being served with the order. He clarified that he lived in Kirima Village, Huhirio Location and that it was not true that he was served at Rironi Village, Wanjohi Location as the process server averred in the affidavit of service he swore on 11/10/2023. In this court's view this was a good ground for the trial court to grant the defendant's application for the cross examination of the process service since the issue of service of the court order was germane.
24. The Applicant has persuaded this court through this suit and the supporting documents that the procedure and summary manner in which the Learned Magistrate conducted the contempt proceedings on 14/12/2023 fell short of the requirements of the applicable law which as Justice Odunga pointed out in Alfred Mutua v Boniface Mwangi [2022] eKLR is the English law applicable in England at the time the contempt was committed, which would be English Civil Procedure Rules of 2020 pursuant to Section 5 of the Judicature Act.
25. The court issues an order of certiorari to quash the proceedings and orders made by Hon. M. N Osoro, SRM on 14/12/2023 in Nyahururu CM ELC Case No. 38 of 2019 for being unprocedural. The application for contempt of court and further proceedings in Nyahururu CM ELC Case No. 38 of 2019 will be dealt with by another Magistrate other than Hon. M. N Osoro, SRM.
26. Each party will bear its own costs.

**DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF AUGUST 2024.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Ms. Eunice Ndegwa holding brief for Mr. Gakuhi Chege for the Applicant

Ms. W. Karanja holding brief for Ms. M. Kiarie for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents

Court Assistant: Diana Kemboi

No appearance for the 3<sup>rd</sup> Respondent

