



**Republic v County Secretary, Nairobi City County & another;
Mungai (Exparte Applicant) (Judicial Review E046 of 2023)
[2024] KEHC 365 (KLR) (Judicial Review) (26 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 365 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E046 OF 2023
JM CHIGITI, J
JANUARY 26, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY SECRETARY, NAIROBI CITY COUNTY 1ST RESPONDENT

**COUNTY CHIEF OFFICER, REVENUE & ADMINISTRATION, NAIROBI
COUNTY 2ND RESPONDENT**

AND

WAINAINA KIGATHI MUNGAI EXPARTE APPLICANT

RULING

1. The applicant before this court is the Chamber Summons dated 31st March 2023 wherein the applicant seeks for the leave of the court to institute judicial review proceedings for the following; -
 - a. An Order of Prohibition to prohibit the Respondents from levying penalties and interest on rates which the Applicant has already paid or demanding payment of rates arrears or in any manner howsoever denying the Applicant from paying the annual rates in respect to his properties being L.R. NO. 7785/74 situated in Runda Estate, Nairobi and L.R. No. 209/7884 situated in Kyuna Estate, Nairobi.
 - b. An Order of Certiorari to quash the decision by the Respondents to levy penalties and interest on rates which the Applicant has already paid or demanding payment of rates arrears or in any manner howsoever denying the Applicant from paying the annual rates in respect to his



properties being L.R. NO. 7785/74 situated in Runda Estate, Nairobi and L.R. No. 209/7884 situated in Kyuna Estate, Nairobi.

- c. An Order of Mandamus to compel the Respondents to issue the Applicant with a current rates demand for the year 2023 in respect to his properties being L.R. NO. 7785/74 situated in old Runda Estate, Nairobi and L.R. No. 209/7884 situated in Kyuna Estate, Nairobi without any penalties and/or interest thereon on or before March 31, 2023.
2. That the leave so granted do operate as a stay of the directive or decision by the Respondents to restrict or prevent the Applicant from paying the annual rates for the year 2023 until the alleged arrears, penalties and interest are paid in full.
3. That the costs of this Application be provided for.
4. The application is opposed.

Grounds of Opposition (GO)

5. In the High court of Kenya at Nairobi Judicial Review MISC CASE NO.356 of 2013 and E. 046 of 2023; in the matter of an application by Wainaina Kigathi Mungai for JR Orders of Mandamus, Prohibition and Certiorari)
 1. That the Chamber Sermons dated 31st March 2023 is bad in law thus warrants dismissal in limine.
 2. That in the matter Judicial Review Misc Case NO. 356 of 2013 at Nairobi Judgement date 10th Day of July 2014, the Parties, (other than that the County Secretary who was in interim position then), Issues and Orders are the same as the Parties, Issues and Orders being sought in the Miscellaneous Application NO E046 OF 2023 Chamber Summons application dated 1st March 2023.
 3. That the JR Court in the matter judicial Review MISC CASE NO. 356 of 2013 at Nairobi exhaustively dealt with Prohibition, Mandamus and Certiorari Orders sought by the Applicant with clear verdict and court direction, because the Applicant was unable to prove illegality, unreasonableness and irrationality.
 4. That in the matter raised in the Chamber Sermons application in the Misc Application Case No E046 of 2023 herein and before this Court is res judicata to the extent that the issues and orders being sought under Mandamus, Prohibition and certiorari irrespective how they are framed the court has pronounced itself, same parties, in the matter of judicial Review MISC CASE NO. 356 of 2013 at Nairobi, hence this court is ex functus officio.
 5. That in the Judicial Review MISC CASE NO. 356 of 2013 at Nairobi the Applicant sought Mandamus Orders to compel the Respondent to issue the Applicant with a Rate Clearance Certificate in respect to the suit property being L.R. No.7785/74, the same was declined by Justus G V Odunga's Judgment dated 10th June 2014. The Court found it was improper to compel the Respondent to issue a Rate Clearance Certificate as this is tantamount to a waiver of outstanding rates which is contrary to Judicial Review Court principles
 6. That the Applicants' current application is a blanket mandamus order to compel the Respondent to issue the Applicant with the current rate demand without penalties and interest which order if issued deprives the Respondent its statutory and legal right to levy penalties, interest on unpaid and due rates as provide in Section 18 and 26 of the [Rating Act](#) Cap 227.



7. That the Applicants' Prohibition Orders sought MISC application case NO E046 of 2023 if granted it will deprive the Respondent Statutory rights empowered by Rating Act Sect. 26 Act. Cap 227 to levy penalties and interest and demand outstanding rates as long as they are due. The Applicant has not demonstrated the illegality, irrationality and procedural impropriety in levying penalties and interest on uncleared outstanding rate as at the time this Application was mounted on 31st March 2023.
8. That the Certiorari orders operates when a public body is in breach in its conduct or actions for illegality, irrationality, and procedural impropriety. In this application Misc Application Case No E046 of 2023, the Applicant has not demonstrated any settlement of the outstanding rates other than Payment Requests, notes supplied by the Respondent.
9. This court has no jurisdiction to issue certiorari orders to a public body to estoppel or preclude it from asserting the legal right or powers to sanction a third party as long as it is within the provision of the law. And in this case as provided under Section 107 and 109 of the Evidence Act, Cap 80 laws of Kenya the onus is on the Applicant to prove the illegality, irrationality, procedural impropriety, or unfairness of the Respondent in its actions.
10. That in the Judicial Review Msc Case No. 356 of 2013 at Nairobi the Court reemphasized the grounds and Jurisdiction to issue Mandamus as set out in the Uganda Case Pastoli vs Kabale District Local Government Council and Others [20081 2EA 300, Council of Civil Unions vs Minister for Civil service [1985] AC 2 and Bokobe Gymkhana Club [1963] EA 478 at 479 and held: "in order to succeed in an application for Judicial Review, the applicant has to show that decision or act complained of is tainted with illegality, irrationality and procedural impropriety"
11. That the Applicant has changed tact by asking this court to compel the Respondents to supply the Applicant with current demand rates, yet the Applicant does deny he owes neither has made any efforts to pay outstanding rates from 2014. Therefore, the findings in the Judgment of Judge G.N Odunga in the judicial Review MISC CASE NO. 356 of 2013 at Nairobi holds; sic "I have not seen any evidence that the Respondent promised or assured the Applicant that the Applicant would not pay the rates on its property. The fact that the same has not been demanded for long time may only entitle the applicant to reasonable notice to pay the same but does not entitle the Applicant to evade the payment of the rate which are legally due" it is the Respondents' position that the Applicant has been given ample time to clear all the outstanding rate.
12. That the Applicant in its Misc Application Case No E046 of 2023, has not placed before the Court material upon which the court can find that no rates are due from the Applicant to the Respondent. The Applicant has not exhibited any document showing the rates remitted by the Applicant to the Respondents. Therefore, it will be contrary to legal provisions and all enabling laws of Kenya for this court to make orders favorable to the applicant on based allegations.
13. That the Applicants' application dated 31st March 2023 be dismissed with costs. and the Respondents be at liberty to take possible measures to collect the outstanding rates due.



Analysis and determination:

6. I have considered the Chamber Summons, Verifying Affidavit and Statutory Statement. I have had due regard to the response on record and the learned submissions by counsel. The issue for determination is whether the Application for leave to commence judicial review proceedings is merited.
7. The requirement to seek leave to file for judicial review orders is provided for under Order 53 Rule 1 of the Civil Procedure Rules which stipulates in mandatory terms that no application for an order of mandamus shall be made unless leave therefore has been granted in accordance with the rule.
8. At the leave stage all the applicant has to show is not that it is, but that it might turn out to be, an arguable case.
9. In exercise of its discretion, this court has the duty to determine whether or not the Applicant has made out a case that has the potential of fitting into a case that is within the *Fair Administrative Action Act* framework.
10. The Applicant has to satisfy the court that there is a need to delve deeper into its case so as to establish that the respondent has acted ultra vires, irregularly or through procedural impropriety.
11. An applicant who wants the court to grant them leave so as to advance into the substantive phase of their case must demonstrate that they have a case that falls within the remit of Article 47 of *the Constitution*.
12. The standards and the burden of proof at the leave stage is not the same as what presents at the substantive hearing phase.
13. All that the court has to do at the leave phase is to carry out an initial assessment of what the applicant has presented before it. No doubt, an applicant who misleads the court and or fails to disclose to the court the truth simply exposes their case to the calamity of a dismissal when the truth comes out at the substantive hearing phase when the real merits of the case is assessed and determined.
14. The applicant at the leave phase owes the court a duty of candid disclosure and presentation of the facts. The days of an applicant who seeks to steal a match ex parte during the leave stage through intentional scheme, ill motive and material non disclosure plants a rotten seed that will kill their case in due course.
15. In *IRC V National Federation of Self-Employed and Small Businesses Ltd* (1982) 617, (1981) 2 ALL ER 93 Lord Diplock explained the need for leave as follows:

“Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.”
16. It would therefore appear that the reasons for leave are therefore two-fold and that is number one to save the court’s time and, two, so as not to leave public authorities in a state of uncertainty as to whether they can safely proceed with their operations.
17. In the same case, Lord Scarman saw the need for leave as ‘an essential protection against abuse of legal process’. In his words, “it enables the court to prevent abuse by busybodies, cranks and other mischief makers”. (see pages 653 and 113).



18. On his part, Woolf LJ referred to the need for leave, in the same case, as ‘the unique statutory means by which the court can protect itself against abuse of judicial review’.
19. In order to avoid from delving into the merits of the case, Lord Diplock, in IRC V National Federation of Self-Employed and Small Businesses Ltd (supra) suggested the following approach.

“If, on a quick perusal of the material then available, the court thinks the application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.”
20. The Respondent has gone all out in attacking the applicants’ case through the grounds of opposition.
21. The Respondent did not furnish the court with evidence that would help the court determine whether or not to grant leave. The grounds of opposition do not tender evidence like annexures in an affidavit.
22. The question of whether a case is arguable or not may occasionally require a light interrogation of the case’s merits. This type of questioning should not be done in a manner that will determine whether the Applicant will win or fail. The questioning must be very conservative and limited in nature, only going as far as is required to decide whether the matter can be argued, and nothing beyond. It is from this perspective that I have consider the applicant’s application.

Disposition:

23. On a quick perusal of the material availed to the court, it is my finding and I so hold that the application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.

Orders:

24.
 1. The Application dated the 31st March 2023 is allowed.
 2. The Applicant shall file and serve the substantive Motion within 14 days of today’s date.
 3. The Respondents shall file and serve their responses if any within 14 days of service.
 4. The Applicant shall thereafter file and serve its submissions within 7 days.
 5. The Respondents shall thereafter file and serve their submissions within 7 days of service.
 6. The matter shall be mentioned on 19th March, 2023 with a view to securing a judgment date.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2024.

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J. CHIGITI (SC)

JUDGE

