



**Republic v Chief Magistrate Thika Law Court & another; Chepkwony (Exparte Applicant)
(Judicial Review E002 of 2024) [2024] KEHC 8141 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8141 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
JUDICIAL REVIEW E002 OF 2024
FN MUCHEMI, J
JUNE 27, 2024**

**IN THE MATTER OF ORDER 53 CIVIL PROCEDURE RULES
2010, CIVIL PROCEDURE ACT CHAPTER 21 LAWS OF KENYA
IN THE MATTER OF SECTION 8 & 9 OF THE LAW
REFORM ACT CHAPTER 26 LAWS OF KENYA**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

BETWEEN

REPUBLIC APPLICANT

AND

THE CHIEF MAGISTRATE THIKA LAW COURT 1ST RESPONDENT

CATHERINE WAIHERA MWANGI 2ND RESPONDENT

AND

JOSEPH KUGO CHEPKWONY EXPARTE APPLICANT

RULING

Brief Facts

1. By a Notice of Motion dated 28th March 2024, the ex parte applicant seeks the following orders:-
 - a. An order of certiorari to bring into this Honourable Court and quash the consent order dated 2nd August 2023 allegedly filed on behalf of the ex parte applicant by the advocate on record on behalf of the applicant and any other subsequent orders.



- b. An order of prohibition directed to the 1st respondent prohibiting further proceedings in Thika CMELC 107 of 2021 Joseph Kugo Chepkwony vs Catherine Waithira Mwangi and further prohibit the 2nd respondent from executing the decree dated 2nd July against the ex parte applicant.
2. In opposition to these proceedings, the respondent filed a Replying Affidavit dated 8th April 2024.

Ex parte Applicant's Case

3. The ex parte applicant deposes that he is the plaintiff in Chief Magistrate Court at Thika MCELC Case No. 107 of 2021 and the registered proprietor of the suit property namely Thika/Ithanga Phase IV/114 measuring approximately 2.9Ha. In 2009, the ex parte applicant states that he entered into a sale agreement for the sale of Thika/Ithanga Phase IV/114 to the 2nd respondent at a consideration of Kshs. 840,000/- with the deposit of Kshs. 150,000/- paid upon execution of the agreement and the balance of Kshs. 690,000/- to be paid in equal instalments of Kshs. 50,000/- on or before the 15th day of every month until payment in full.
4. A mutual term of the agreement was that the 2nd respondent would take possession of the suit property after eviction of a squatter by the court vide a matter filed in Thika CMCC No. 649 of 2002 whereby judgment was entered in the ex parte applicant's favour in 2019.
5. The ex parte applicant states that he executed the part of his contract but the 2nd respondent defaulted in discharging her obligation and only paid Kshs. 500,000/- of the purchase price. The ex parte applicant therefore let the 2nd respondent know of his intentions to rescind the contract and refunded Kshs. 50,000/- to her. Despite the refund of Kshs. 50,000/- and the ex parte applicant's willingness to refund the entire paid installments, the ex parte applicant states that the 2nd respondent lodged a caution against his suit property at the land's registry.
6. The ex parte applicant then instructed the firm of Mitey & Associates Advocates to file a suit against the 2nd respondent seeking for orders of removal of the caution. In 2023, the ex parte applicant states that his advocates obtained his instructions on a consent without due regard to the terms of the agreement of sale of land that he had entered with the 2nd respondent. Further, the ex parte applicant states that he is aware that the said consent was ratified by the court contrary to his wishes. The implications of the said consent agreement was to the effect that the ex parte applicant was to pay the 2nd respondent Kshs. 3 million for the removal of the caution.
7. The ex parte applicant states that the decree is dated 2nd July 2023 was drawn one month earlier than the consent which was entered on 2nd August 2023 which error has resulted in a higher interest rate totaling to Kshs. 245,000/-. The ex parte applicant is apprehensive that he will be committed to civil jail in the event he fails to pay Kshs. 3,246,000/- and shall therefore suffer irreparable loss and damage if the orders sought are not granted.

The 2nd Respondent's Case

8. It is 2nd the respondent's case that the motion is fatally defective as it has been filed contrary to the orders issued by the court on 14/3/2024. Further, the 2nd respondent argues that the application lacks merit, is misconceived because it purports or seeks to have the consent dated 2nd August 2023 cancelled or quashed and prohibits against the execution of the decree dated 2nd July 2023.
9. The 2nd respondent states that the consent was recorded by the parties in court on 6th July 2023 but the court directed the parties to put in a formal written consent to that effect. In compliance with the said



courts directions, the parties filed a written consent dated 2nd August 2023. The 2nd respondent states that the consent order having been recorded in court on 6th July 2023 disposing the suit amounted to a final decree of the court. Therefore, the 2nd respondent states that the application is a nullity as the consent order was recorded by the court on 6th July 2023.

10. The 2nd respondent further states that the tribunal, public body and/or institution that the said judicial orders for review are being sort against was not a party to the proceedings in which leave was granted. Furthermore, the ex parte applicant has not annexed the impugned decision of the court that he seeks to be quashed. That notwithstanding, the 2nd respondent argues that the ex parte applicant has not specifically stated what decision (if any) was made, and if so by whom and when and whether such decision was made in excess of or lack of jurisdiction or in violation of the rules of natural justice to warrant the issuance of the orders herein prayed for. Furthermore, the ex parte applicant has not demonstrated what decision making process was made and by whom that he is seeking the orders for judicial review.
11. The 2nd respondent states that the said consent agreement was entered into upon the ex parte applicant instructing his advocates but the ex parte applicant deliberately avoided and or omitted to state what was the nature of the consent. The 2nd respondent states that the gist of the dispute between herself and the ex parte applicant arises from a sale agreement for the sale of LR Thika/Ithanga Phase IV/114 measuring 2.9 Ha entered into on 21st October 2009. Clause 2 of the agreement of sale provided that the ex parte applicant undertook to fully evict a third party who was then in occupation and use of the suit property who was a squatter with no proprietary interest. However, the 2nd respondent states that she came to learn that there already existed a suit namely CMCC No. 649 of 2002 in Thika by one Cosmas Ndungu Njoroge vs Joseph Kugo Chepkwony & The Attorney General in respect to the ownership of the said parcel of land.
12. The 2nd respondent states that at the time she had already paid Kshs. 571,000/- to the ex parte applicant and therefore she stopped making further payments. On 5th October 2010, the trial court in Thika CMCC No. 649 of 2002 decided in favour of the plaintiff and held that Cosmas Ndungu Njoroge was the rightful owner of the suit land.
13. Despite the court finding the rightful owner as Cosmas Ndungu, the ex parte applicant entered into another sale agreement dated 19th June 2012 purporting to sell the suit land to one Charles Mwaura Kaara at a consideration of Kshs. 2,220,000/-. However, the said Cosmas Ndungu Njoroge filed a civil suit No. 1014 of 2010 against the ex parte applicant and the Attorney General seeking eviction orders from the said parcel of land. The trial court decided the said case on 20th February 2019 in favour of the ex parte applicant's counter claim thereof.
14. The 2nd respondent therefore approached the ex parte applicant with the intention of completing the sale transaction and eventually transfer of the land parcel to herself but the ex parte applicant was not willing which prompted her to lodge and register a caution against the suit property.
15. The 2nd respondent states that unknown to her, the ex parte applicant had vide another contract of sale dated 11th January 2021 purportedly sold the suit property at a consideration of Kshs. 10,500,000/- to one Nancy Njeri Muiruri. However the said purchaser Nancy, being unable to take up or assume possession as the property had already been sold to another party commenced proceedings against the ex parte applicant namely CMCC No. E577 of 2022 by way of originating summons. The 2nd respondent argues that taking into account the foregoing and notwithstanding that she sought for orders of specific performance, by way of transfer of the suit property in her favour, they agreed that



- she would be compensated for a sum of Kshs. 3 million which was the current market value of the property and the period in which the ex parte applicant held out on the purchase price.
16. The 2nd respondent states that the ex parte applicant ought to challenge the recorded consent in the suit it was so recorded and not by way of judicial review. The 2nd respondent further argues that the ex parte applicant is a dishonest person and in any event the application herein does not meet the threshold of judicial review and thus the same ought to be dismissed.
 17. The ex parte applicant filed a Further Affidavit dated 25th April 2024 and states that he filed his substantive motion on 2nd April 2024 as per the court's directions issued on 13th March 2024. The ex parte applicant further states that the substantive motion was served upon the 2nd respondent as per the court's directions and therefore the notice of motion is properly filed before the court.
 18. The ex parte applicant states that he seeks to recall and quash the consent order dated 2nd August 2023 as the same was recorded by his counsel on 6th July 2023 without his knowledge, express or implied authority. The ex parte applicant further states that he only came to know of the consent when his advocates asked him to sign a document giving them authority to record a consent in court. Further, the ex parte applicant argues that the process at which the said consent was recorded is not clear as the date on the decree is 6th July 2023 yet the consent was adopted on 2nd August 2023. The ex parte applicant further argues that he was not consulted on the issue of Kshs. 3million and only came to know about it when he was served with the mention notice of 29th February 2024. Furthermore, the ex parte applicant argues that he was not informed why his advocates recorded a consent yet the 2nd respondent was in breach of the contract. As such, the ex parte applicant urges the court to grant him prohibitory orders against the execution of the decree dated 2nd July 2023 as it was procured illegally and unprocedurally.
 19. The ex parte applicant states that his advocates who filed the application for leave erroneously forgot to include the magistrate's court as the 1st respondent but nonetheless the orders issued by the court and the motion was served upon them.
 20. The ex parte applicant confirms that it is true his advocates then sought his instructions on recording a consent but the authority was limited to his prayers in the plaint where he was seeking for an order of declaration that the 2nd respondent was in breach of the agreement and that the court compel her to remove the caution lodged on her property.
 21. The ex parte applicant further states that his advocates recorded a consent for Kshs. 3 million, an amount which is higher than what the 2nd respondent had paid as part of the purchase price and what was claimed by the 2nd respondent in her counter claim.
 22. Parties hereby disposed of the application by way of written submissions.

The Ex parte Applicant's Submissions

23. The ex parte applicant relies on Order 53 Rule 2 of the Civil Procedure Rules and Section 9(3) of the [*Law Reform Act*](#) and the case of Republic vs Minister for Lands & Another ex parte Catherine Mateta Musinga [2021] eKLR and submits that the subject decree dated 2nd July 2023 is still pending in court and his application for judicial review proceedings are in accordance to the law and have been filed within the statutory time limits.
24. The ex parte applicant further relies on the case of Council for Civil Services Unions vs Minister for Civil Services (1985) cited with authority in Republic vs National Council for Persons with Disability ex parte BNB [2020] eKLR and submits that the application filed meets the threshold for grant of



- orders sought as the same seeks to challenge the illegality, impropriety and irrationality of the 1st respondent decision to adopt a consent and issue a decree without due regard to the prayers sought by him in the plaint. The ex parte applicant further argues that the said decision was in defiance to logic and acceptable moral standards since it was the 2nd respondent who was in breach of the agreement and condemning him to pay Kshs. 3 million is against the rules of natural justice.
25. The ex parte applicant rely on the cases of *Pastoli vs Kabale District Local Government Council & Others* [2008] 2 EA 300 and *Onyango Oloo vs Attorney General* (1989) EA and submits that the respondents are in breach of the rules of natural justice as the 1st respondent adopted a consent without taking into account that the 2nd respondent was in breach of the terms of the agreement and further that she filed a defence and counterclaim seeking for orders for specific performance or in the alternative a refund of Kshs. 571,000/-. Further, the ex parte applicant submits that the process in which the court adopted the said consent was unprocedural as the consent itself filed for adoption is dated 2nd August 2023 yet the consent is said to have been adopted on 6th July 2023 which is a month before the said consent was presented in court for adoption.
26. The ex parte applicant submits that the process at which the said consent orders and the decree was arrived at was flawed and it denied him the right to be heard as he was never consulted on the said consent as his advocates sought authority from him to withdraw the suit against the 2nd respondent on condition that she will remove the caution. Relying on the cases of *Republic vs Minister for Lands & Another ex parte Catherine Mateta Musinga* [2021] eKLR; *Msaga vs Chief Justice & 7 Others NBI HCMA No. 162* and *Republic vs National Cohesion and Intergration Commission; Chama Cha Mawakili Limited (ex parte)* (Judicial Review Application E057 of 2022) [2022] KEHC 10206 (KLR) (14 July 2022), the ex parte applicant submitted that he was denied his constitutional right to fair hearing and the 1st respondent acted in an unfair manner by not adhering to due process before adopting the impugned consent and finally issuing a decree that is subject to execution against him.
27. The ex parte applicant relies on the cases of *Pastoli vs Kabale District Local Government Council & Others* [2008] 2 EA 300; *Municipal Council of Mombasa vs Republic Umoja Consultants Ltd Civil Appeal No. 185 of 2007*; *Republic vs Dedan Kimathi University of Technology Judicial Review E002 of 2021* and *Isaac Gathungu Wanjohi & Another vs Director of City Planning of Nairobi & Another* [2014] eKLR and submits that he has met the threshold of grant of judicial review orders as he has demonstrated that the 1st respondent's decision to adopt the consent is marred with procedural impropriety, illegality, irrationality and unreasonableness.

The 2nd Respondent's Submissions

28. The 2nd respondent relies on Order 53 Rule 2 of the Civil Procedure Rules and Section 9(3) of the *Law Reform Act* and submitted that the consent order for which the application sought leave is dated 2nd August 2023 hence the six months lapsed on 2nd February 2024, therefore a delay for a period of 40 days. Relying on the case of *Republic vs Kenya Revenue Authority ex parte Stanley Mombo Amuti* [2018] eKLR, the 2nd respondent submits that the court ought not to have granted leave sought and ought to have struck out the said chamber summons.
29. The 2nd respondent further relies on Article 47 of *the Constitution* and Section 7 of the *Fair Administrative Action Act* and submits that the body or institution against which its decision was or is intended to be challenged by way of seeking its impugned decision to be quashed, that is the Chief Magistrates Court, was not made a party to the application for leave. The 2nd respondent argues that no orders can be granted against a person, legal entity that is not a party to the proceedings. Further, the 2nd respondent submits that the attempt by the ex parte applicant to introduce the said Thika Chief



- Magistrate Court by adding or citing its name in the substantive motion does not cure the said anomaly which is fatal to the entire proceedings herein. As such, the 2nd respondent urges the court to strike out the said Chamber Summons without which the notice of motion before the court cannot stand.
30. The 2nd respondent submits that judicial review is the means by which the court is called upon to scrutinize public law functions, intervening as a matter of discretion to quash, prevent, require and/or classify not because it disagrees with the judgment or order but so as to right a recognizable public wrong which could be unlawfulness, unreasonableness, irrationality, unfairness made ultra vires or arrived at out of excess powers. The 2nd respondent submits that what is being sought to be removed from the chief magistrate's court is the consent order dated 2nd August 2023 yet the ex parte applicant has not filed the said court order or decree but has annexed the letter of consent by his advocates. The 2nd respondent argues that pursuant to Section 2 of the [Civil Procedure Act](#), the letter of consent does not in itself amount to an order of the court capable of being challenged by way of judicial review. The 2nd respondent submits that the ex parte applicant ought to have extract and attach a certified copy of the court order emanating from the said letter.
 31. The 2nd respondent further submits that from the consent what the parties sought for to be recorded and adopted by the court was an entry of judgment against the plaintiff for Kshs. 3 million. Thus, the final result would be issuance by the court of a court decree and not an order hence any challenge by way of judicial review would be for the recalling and quashing of a decree and not a consent order. Therefore, the 2nd respondent submits that the prerogative order by way of certiorari in so far as it is directed to the consent dated 2nd August 2023 cannot see the light of day.
 32. The 2nd respondent argues that it is trite law that where a party has filed a suit under the provisions of Order 53 and has not made a claim of violation of his rights under [the constitution](#), the court can only limit itself in examining and interrogating the process and manner in which the decision complained of was arrived at by the judicial officer and not on the merits of the decision per se. In the instant case, the 2nd respondent submits that the court recorded and adopted the consent order as presented to it by the parties. No explanation to the court was given by the parties as to what informed the parties or as to what were, or was taken into consideration in arriving at the said terms, which by law are not prohibited and by the look of it are not unreasonable. Thus the court did not make a decision that was ultra vires or in excess of its powers.
 33. The 2nd respondent submits that if the ex parte applicant was aggrieved by the consent order, which he admits was within his knowledge and/or instructions albeit without due regard to the terms of the agreement of sale, the available cause of action, relief or remedy would have been either to apply for review under Order 45 of the Civil Procedure Rules or seek to set aside the consent judgement. Furthermore, the 2nd respondent relies on Section 9(2) of the Fair Administration Act and the case of Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji Njoroge C.A No. 266 of 1997 and submits that the orders of prohibition cannot be granted as prohibition cannot quash a decision which has already been made but it can only preclude the making of a contemplated decision.
 34. Relying on the cases of *Holte vs Jesse* 18776 3CLD 177 and *KCB Limited vs Specialized Engineering Co. Ltd* (1982) KLR, the 2nd respondent submits that a consent is binding on all parties and cannot be set aside or varied unless it is proved that it was obtained by fraud, collusion or misapprehension or ignorance of the suit facts. The 2nd respondent submits that the ex parte applicant's suit was filed by M/s Mitey & Associates and were still on record and participated in the recording of the said consent and hence all the material facts were within their knowledge. Further, the sum of Kshs. 3 million as per the consent was arrived at by the fact that the ex parte applicant had purportedly sold the suit land to



one Nancy Njeri for a sum of Kshs. 10,500,000/- meaning that had the ex parte applicant effected the sale and transfer of the suit property, the 2nd respondent would have been worth Kshs. 10,500,000/-.

Issues for determination

35. The main issues for determination are:-
- a) Whether the application for an order of certiorari is time barred;
 - b) Whether these proceedings are defective misconceived and incompetent.
 - c) If the court finds the proceedings in order, it will determine whether the threshold of Judicial Review has been met.

The Law

36. It is important to look at the law that provides for Judicial review proceedings. Order 53 of the Civil Procedures Rules provides:-

- (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.

37. Order 53 Rule 2 of the Civil Procedure Rules as read with Section 9(3) of the *Law Reform Act* provides for the time limits within which an application can be filed. Order 53 Rule 2 of the Civil Procedure Rules provides:-

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 6 months after the date of the proceedings or such shorter period as may be described by any act; and where the proceeding is subject to appeal and a time is limited by the law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time.

38. Section 9(3) of the *Law Reform Act* provides:-

In case of an application for an order of certiorari to remove any judgment, order, or 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 period as may be prescribed under any written law.

39. The ex parte applicant argues that he seeks to challenge the consent dated 2nd August 2023, adopted as a judgment of the court on 6th July 2023 and the decree dated 2nd July 2023 is pending execution and was slated for mention on 14th March 2024. As such, he further argues that his application is competently before the court as the decision that is subject to this proceeding is still pending before the trial court. The 2nd respondent argues that the consent order for which the application sought leave is dated 2nd August 2023 and therefore the six months period lapsed on 2nd February 2024 and therefore there was a delay of at least 40 days in filing these proceedings.



40. The record is clear that the Chamber Summons that sought for leave for orders of certiorari against the consent order dated 2nd August 2023 was filed on 14th March 2024. The decision complained of was delivered on 2nd August 2023. The application was therefore filed 1 month and 12 days after the statutory time period provided by Order 53 Rule 2 and Section 9(3) of the Law Reform Act. As such the Chamber Summons was time barred under the relevant law. The 2nd respondent raised the issue of joinder of parties in that the 1st respondent in the substantive motion dated 28/03/2024 was erroneous. The Chamber Summons dated 12/03/2024 that sought leave named only one respondent Catherine Mwangi while the Notice of Motion added another respondent namely Chief Magistrate Thika who became the 1st respondent. Catherine is the 2nd respondent in the Notice of motion. If the ex parte applicant intended to sue two respondents, both of them ought to have been included in the initial application which sought leave to operate as stay. The ex parte applicant argues that although the Chamber Summons did not include the name of the Chief Magistrate, he took the initiative of serving the said party. Effecting of service of the application on a person who is not a party cannot cure the defect. I agree with the respondent that the act of bringing a new party to these proceedings in the substantive motion while the party was omitted in the initial application renders the proceedings defective.
42. The ex parte applicant seeks to bring to this court and quash the consent dated the 6th July 2023 recorded by the parties in Thika MC ELC No. E107 of 2021. The consent was formalized on 2nd August 2023. The ex parte applicant had sued the respondent for removal of caution on title L.R. Ithanga/Phase IV/114. The parties had entered into a land sale agreement whereas the ex parte applicant was selling the land to the 2nd respondent. The 2nd respondent paid KSh.571,000 being part of the purchase price but the ex parte applicant sold the land to another person. The parties recorded a consent to that the 2nd respondent be paid KShs.300,000 being the then current value of the land upon which she would remove the caution.
43. The ex parte applicant seeks to have the said consent quashed in that his advocate had no instructions to enter into that consent on his behalf. The purpose of judicial review proceedings is to check excesses in decisions of public bodies. This includes decisions where such a body was unfair in its decision, acted ultra vires, or unlawfully, irrationally and without reasonableness. In the proceedings before me, the ex parte applicant has used the 2nd respondent who is an individual. The Chief Magistrate Thika sits in a court that deals with cases and makes judicial decisions. If any party is aggrieved by the decision of the court, the law provides for one to appeal or apply for review under Order 45 of the Civil Procedure Rules. It is absurd to drag a judicial officer to court in judicial review proceedings in that the court is not a public body and neither is the magistrate. The ex parte applicant in my view ought to have utilized the options provided for by the law. The suing of an individual and a judicial officer in my considered opinion is flawed and renders these proceedings defective.
44. The ex parte applicant seeks for further orders of prohibition against the respondents without explain the future wrongs that are likely to occur in regard to the matter complained of that would deserve orders of this court. This prayer is misplaced and incompetent in my view.
45. Having identified several flaws in these proceedings, I will not venture into the merits.
46. I come to a conclusion that these proceedings are defective for the foregoing reasons. Consequently, I strike out the entire proceedings with costs to the 2nd respondent.
47. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27TH DAY OF 2024.



F. MUCHEMI
JUDGE

