



**Republic v Principal Magistrate, Hon. J. A. Agonde Ruiru Law Courts &
3 others (Suing as Legal Representative of the Estate of Daniel Kimemia
Mwangi (Deceased)); Mathai (Exparte Applicant) (Judicial Review Application
E001 of 2022) [2022] KEHC 14633 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
JUDICIAL REVIEW APPLICATION E001 OF 2022**

**RB NGETICH, J
OCTOBER 19, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**PRINCIPAL MAGISTRATE, HON. J. A. AGONDE RUIRU LAW
COURTS 1ST RESPONDENT
ROSE WANGARI GITHINJI 2ND RESPONDENT
ELIZABETH WAIRIMU NJOROGE 3RD RESPONDENT
CICILIA WAMBUI MWANGI 4TH RESPONDENT
SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF DANIEL KIMEMIA
MWANGI (DECEASED)**

AND

ERIC GITHAIGA MATHAI EXPARTE APPLICANT

RULING

1. This is a ruling from a Notice of Motion Application dated February 15, 2022 and filed on February 17, 2022, seeking the following orders:-
 - a. A writ of an order of certiorari quashing the proceedings, judgment and orders made in Ruiru Civil Case No 401 of 2020 on November 30, 2021 and the subsequent orders thereto by the 1st Respondent.



- b. A Writ of prohibition prohibiting the execution of the judgment and orders made in Ruiru Civil Case No 401 of 2020 on November 30, 2021 and any subsequent orders thereto issued by the 1st Respondent.
 - c. Any further orders that the court may deem fit.
 - d. Costs of the application be borne by the 1st and 2nd Respondents.
2. The application is premised on the grounds that the *Ex-parte* Applicant was not accorded a chance to fully present his case in the trial proceedings. Directions were issued on November 1, 2021 by the 1st Respondent to have the 2nd Respondent's advocate file written submissions within fourteen (14) days thereafter upon service and the 2nd Respondent to file and serve its submissions within fourteen (14) days.
 3. Judgment was to be pronounced on November 30, 2021. Contrary to the said orders the 2nd Respondent has failed to file and serve the submissions, the *ex-parte* applicant notified the 1st Respondent of the failure to file submissions by the 2nd Respondent and sought to have the judgment deferred, the 1st Respondent declined the request and proceeded to issue judgment on November 30, 2021.
 4. The Applicant's argument is that the 1st Respondent acted in excess or in the absence of jurisdiction, which is prejudicial, oppressive, irrational, high-handed, biased, vindictive, frivolous, and made untenable and illegal orders and the proceedings were therefore a gross violation of the principles of natural justice and core principles of litigation and should be declared null and void as it amounted to an infringement of the applicant's right to a fair trial.
 5. In response to the application, Elizabeth Wairimu Njoroge filed a replying affidavit sworn on May 17, 2022 in which she disposes the 1st Respondent had been erroneously named in the suit and offends the doctrine of judicial immunity. The *Ex-parte* applicant was present during the hearing of the suit and his advocate cross-examined all the five (5) witnesses who testified for the plaintiff. The applicant also adduced evidence before the trial court and the 2nd Respondent advocate filed submissions therefore the process of making the decision and writing the judgment was not in excess of the court jurisdiction.
 6. Further that the applicant has not demonstrated the process was illegal, irrational and affected the merits of the decision. The application forms a basis for appeal but does not warrant a grant of judicial review orders of certiorari and prohibition.

Applicant's Submissions

7. Counsel filed a submission on July 21, 2022. It was submitted the applicant's right to natural justice was infringed. There was a breach of the Constitutional right by the 1st Respondent and specifically Article 47(1) and (2).
8. At the close of the case, the trial court was to direct the parties to file closing arguments in form of submissions in rebuttal of the evidence adduced by the opposing party. In the concept of natural justice, judicial bodies and administrative agencies rely on the rule of *Audi Alteram Partem*. That no party should be condemned unheard and all parties should be given a fair opportunity to represent their case.
9. The apportionment of the ratio in accident matters is determined by the submissions to apportion liability. The testimonies by the parties were not sufficient as the parties had to file their submissions to



defend their positions. In breach of natural justice, the 1st Respondent locked out the applicant from filing submissions.

10. Counsel submitted if the judgment is allowed to be executed it will subject the applicant to injustices since the applicant was not allowed to argue and ventilate his case. The 2nd Respondent did not comply with the court orders and acted in an ultra vires manner. The judgment as it breached the principles of natural justice should be rendered null and void *ab initio* cited the case of *Ridges Vs Baldwin* (1963) 2 ALL ER 66 at 81 Lord Reid expressed himself “ time and again in the cases I have cited it has stated that a decision given without the principles of natural justice is void.”
11. It was further submitted that the immunity of the judiciary was not exercised in a fair manner to all parties and the 1st Respondent demonstrated a partisan approach to the manner of handling the matter. The 1st Respondent does not fall in the categories of Judges and thus does not enjoy any immunity.
12. In conclusion, counsel contends the applicant has demonstrated the 1st Respondent did not meet the requirement of Section 4(1), (3) (b) of the *Fair Administrative Actions Act*. The court was urged to find merit in the application and allow the reliefs sought with costs to the Respondents.

2nd Respondent Submissions

13. Counsel filed a submission on July 18, 2022, it was submitted the application for judicial review is fatally defective and offends the principle of judicial immunity and cited the case of *Maina Gitonga vs Catherine Nyawira Maina & Anor* (2015) eKLR quoted in the case of *Republic vs BR Kipyegon senior Resident Magistrate Kericho Chief Magistrate’s court & 3 Others ex-parte Spero Africa Limited* (2018) eKLR.

“It is undoubted that under the established doctrine of judicial immunity, a judicial officer is absolutely immune from a criminal or civil suit arising from acts taken within or even in excess of his jurisdiction. Judicial immunity is necessary for various policies. The public interest is substantially weakened if a Judge or a Magistrate allows fear of a criminal or civil suit to affect his decisions. In addition, if judicial matters are drawn into question by frivolous and vexatious actions, there never will be an end of causes; but controversies will be infinite... judicial officers should not be put in a position that forces them to look over their backs every time they make a decision, whenever a judicial officer has to make a decision, he should make such decisions in good faith and without fear that he will be taken to court for making the decision. Whenever a party wants to challenge the decision of a judicial officer by way of a judicial review, he should not make the judicial officer who made the decision a respondent..”

14. The respondent submitted that the ex-parte applicant was accorded a full and fair hearing in which he participated and cross-examined the witnesses. The defence witnesses also testified and were examined by the Plaintiff. Submissions cannot, therefore, take the place of the evidence and cited the case of *John Katua Mwalula Kivula vs Daniel Ibulu Muketi* (2021) eKLR stated as follows:-

“The court of appeal in *Avenue Car Hire & Anor vs Slipha Wanjiru Muthegu* Civil Appeal no 302 of 1997 held that no judgment can be based on written submissions and that such a judgment is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the Civil Procedure Rules (now order 18 Rule 2 of the *Civil Procedure Rules*). The same court in *Muchami Mugeni vs Elizabeth Wanjugu Mungara & Anor* Civil Appeal No 141 of 1998 found the practice of making awards on the basis of the submissions rather than the evidence deplorable”.

15. In conclusion, the respondent submitted that the ex-parte applicant was accorded a fair hearing and the court’s decision was discretionary and the *ex- parte* applicant should file an appeal if aggrieved by the decision of the trial court.



Analysis And Determination

16. I have considered the application and the submissions filed by the parties. The issue for determination is whether the application is merited.
17. From the record, it is not disputed that the applicant indeed participated in the proceeding in the trial court. The applicant cross-examined the 2nd Respondent witnesses. At the close of the pleadings, the court directed all parties to file submissions. The applicant did not file submissions and cited non-service of submissions by the 2nd Respondent.
18. I wish to consider whether the judgment was unprocedurally entered. The trial court had issued directives on the filing of submissions at the close of the pleadings with each party being allocated fourteen (14) days. The applicant's contention is that, Counsel for the 2nd Respondent filed their submission in court and failed to serve submissions upon the applicants who sought the court leave to extend the time for filing their submissions and the trial Magistrate declined to extend the time to file submissions.
19. Further judicial review orders are intended to control Administrative exercises which result in injustices. The applicant must satisfy before the court that the impugned decision is tainted with illegality, irrationality or procedural impropriety.
20. The question before this court is whether the trial court acted in excess of its jurisdiction thereby occasioning injustice on the applicant. From the record it is clear the court gave the parties clear timelines for filing their submissions which the applicant failed to comply with. I do not find any prejudice suffered by the applicant, the applicant had participated in the trial court proceedings, he cross-examined the Respondent's witnesses and also adduced his evidence and had the chance to be cross-examined.
21. The only issue was the applicant did not file his submissions in which he contends he was denied the right to be heard. I do agree with the counsel for the Respondent that submissions are not the mode of adducing evidence before the court.
22. The Court of Appeal in *Avenue Car Hire & Another vs Slipha Wanjiru Muthegu* Civil Appeal No 302 of 1997 held that no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the Civil Procedure Rules [now Order 18 rule 2 of the [Civil Procedure Rules](#)]. The same Court in *Muchami Mugeni vs Elizabeth Wanjugu Mungara & Another* Civil Appeal No 141 of 1998 found the practice of making awards on the basis of the submissions rather than the evidence deplorable.
23. The parties had filed and argued their case before the trial court but the parties failed to file submissions. The court went ahead to pronounce judgment based on the evidence that was adduced during the trial.
24. It is trite law that parties having adduced their case, submissions will not introduce new evidence in a case, they will highlight points that the court should give close scrutiny to. The trial Magistrate after hearing the case proceeded to pronounce judgment in the absence of submissions for the applicant. This was within the powers of the trial Magistrate. I hold the same position of the trial Judge, in the case of *Erastus Wade Opande vs Kenya Revenue Authority & Another* Kisumu HCCA No 46 of 2007: "Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."
25. In most cases, once the case is closed, the court may proceed to give its judgment. Some advocates opt to rely on the evidence on record and not file submissions.



26. In *Ngang'a & Another vs Owiti & Another* [2008] 1KLR (EP) 749, the Court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with but the main basis of a decision in a case, we can say are: the claim properly laid, the evidence fully presented and the law applicable.”

27. I have not been convinced the delivery of the judgment in the absence of the filed submissions was irrational, illegal or improper. Further, I do not find the submissions will inform any change of the trial Magistrate’s judgment as the submissions will not introduce new evidence.

28. Further, the Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on the evidence presented.”

29. For the above reasons I do not find that the trial court decision was clothed with irregularity and irrationality. I find no injustice occasioned by the trial court and application herein without merit.

Final Orders;

1. The application dated February 15, 2022 is hereby dismissed.
2. Costs to the Respondents.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 19TH DAY OF OCTOBER, 2022

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RACHEL NGETICH

JUDGE

In the Presence of:

Kinyua/Martin – Court Assistant

Ms. Abasi holding brief for Ading for 2nd Respondent

