IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)

CIVIL APPEAL NO. 41 OF 2013

BETWEEN

IN THE MATTER OF AN APPLICATION BY: PAUL MAFWABI WANYAMA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF BUSIA PRINCIPAL MAGISTRATE'S COURT LAND DISPUTES TRIBUNAL CASE NO. 89 OF 2008

AND

IN THE MATTER OF DECISION OF AMAGORO LAND DISPUTES TRIBUNAL CASE NO. 15 OF 2007 – NORTH TESO LOCATION

BETWEEN

REPUBLIC .....APPLICANT

AND

THE CHAIRMAN AMAGORO LAND DISPUTES TRIBUNAL .....RESPONDENT

AND

JACINTA PAPA.....INTERERSTED PARTY

EX-PARTE

IN THE MATTER OF PAUL MAFWABI WANYAMA.....APPLICANT

(Appeal from a Ruling of the High Court of Kenya at

Busia (Hon. Justice S. M. Kibunja, J) dated 31st July, 2013

in

BUSIA HCC JR No. 10 OF 2010

****

JUDGEMENT OF THE COURT

Jacinta Papa ("**the appellant"**) named as Interested Party in this appeal, filed a dispute against Paul Mafwabi Wanyama at the Amagoro Land Disputes Tribunal concerning a parcel of land known as Title Number North Teso/Kocholya/122. That Tribunal ruled in her favour in its decision handed down on 17th November, 2008 and its award was adopted as a judgement of the court by the Principal Magistrate's Court at Busia on 16th December, 2008. That did not go down well with Paul Mafwabi Wanyama ("**the respondent"**) who moved to the High Court of Kenya at Bungoma with an application for leave to apply for the judicial review order of certiorari and that such leave to operate as a stay of the judgement of the Busia Magistrate's Court.

The respondent appeared before Mbogholi, J, on 30th January, 2009 who heard the ex-parte application and being satisfied on the material presented before him granted leave to apply for judicial review ordering further the that leave granted was to operate as stay of the said judgment and the substantive application be filed within twenty one (21) days. The substantive application was not filed within the twenty one days ordered by the learned judge but was filed three days out of time.

The respondent then moved the court by a Notice of Motion in which he prayed in the material part that the respondent be granted leave to file the substantive motion out of time.

The appellant took preliminary points of law stating that the application was an abuse of the court process and that the judicial review proceedings should be dismissed.

The application for extension of time was heard by S. M. Kibunja, J, who in the Ruling delivered on 31st July, 2013 granted leave extending time and deemed the motion already filed as properly filed and served. Those orders prompted this appeal premised on two grounds of appeal faulting the learned judge for extending time. It is also stated that the learned judge erred in law in delivering a ruling which was contrary to statutory and procedural law.

The only issue that calls for our consideration is whether the learned judge had jurisdiction to apply rules of procedure in the Civil Procedure Act in the matter that was before him.

The application for extension of time was anchored on Sections 3 and 95 of the Civil Procedure Act. The learned Judge set out those provisions in his Ruling and further held that he had power to extend time under those Sections and as provided by **Order 50 Rule 6** of the C**ivil Procedure Rules.**

Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and it is governed by Sections 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 High Court is mandated to issue orders of mandamus, certiorari or prohibition in appropriate judicial review proceedings.

Judicial review is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application –

See **Commissioner of Lands v Hotel Kunste Limited Civil Appeal No. 234 of 1995 and Sanghani Investment Limited Officer in Charge Nairobi Remand and Allocation Prison [2007] 1EA 354.**

The question in judicial review applications is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking the supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R v Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

Judicial review applications do not deal with the merits of the case but only with the process. For instance judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were given an opportunity to be heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute, the Court would not have jurisdiction in such proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.

The purview of judicial review was clearly set by Lord Diplock in the case of **Council for Civil Service Unions v Minister for Civil Service [1985] A.C. 374, at 401 D** when he stated that:-

"Judicial review as I think developed to a stage today when … one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety".... By "illegality" as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it..... By "irrationality" I mean what can now be succinctly referred to as "Wednesbury unreasonableness".... it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.... I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."

Judicial review is thus concerned with the decision making process and illegality or otherwise of the decision rather than with the merits thereof. As was held in **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision. It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but its a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

The judicial review proceedings before the learned judge, which have given rise to this appeal were

therefore special in nature and the learned 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 agree with learned counsel for the appellant that the learned judge erred in extending time which he had no jurisdiction to do.This appeal is therefore allowed with the consequence that the Order extending time for filing judicial proceedings is hereby set aside. The appellant shall have costs of this appeal and costs of proceedings in the High Court.

Dated and Delivered at Kisumu this 18th day of December, 2014

D. MARAGA

…….

JUDGE OF APPEAL

F. AZANGALALA

……

JUDGE OF APPEAL

S. ole KANTAI

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR