REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

J.R. MISC. APPLICATION NO.61 OF 2013

IN THE MATTER OF: AN APPLICATION BY YUSUF NEVI & IDDI IBRAHIM, FOR ORDERS OF CETIORARI DIRECTED AT THE COMMISSIONER OF LANDS AND THE REGISTRAR, MOMBASA

AND

IN THE MATTER OF: AN APPLICATION BY YUSUF NEVI & IDDI IBRAHIM, FOR ORDERS OF PROHIBITION DIRECTED AT THE COMMISSIONER OF LANDS, THE LAND REGISTRAR, MOMBASA AND THE 1ST, 2ND, 3RD, INTERESTED PARTIES

IN THE MATTER OF: AN APPLICATION BY YUSUF NEVI & IDDI IBRAHIM, FOR ORDERS OF MANDAMUS DIRECTED AT THE LAND REGISTRAR, MOMBASA

AND

IN THE MATTER OF: THE HIGH COURT OF KENYA AT MOMBASA CIVIL SUIT NO. 328 OF 2010 (OS)

AND

IN THE MATTER OF: THE REGISTERED LAND ACT CAP. 300, THE LAND DISPUTES ACT, THE LAND REFORM ACT CAP. 26 OF THE LAWS OF KENYA, THE CONSTITUTION AND ORDER 53, Rule1 (1) & 2 OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC.....APPLICANT

AND

YUSUF NEVI

IDDI IBRAHIM.....EX-PARTE APPLICANTS

AND

THE COMMISSIONER OF LANDS.....1ST RESPONDENT

THE LAND REGISTRAR, MOMBASA.....2ND RESPONDENT

AND

SAID ABDALLA SALIM.....1ST INTERESTED PARTY

MATANO AHMED.....2ND INTERESTED PARTY

REHANA ISMAIL.....3RD INTERESTED PARTY

ABDALLA ALI.....4TH INTERESTED PARTY

SHAIB HAMISI MTUWA.....5TH INTERESTED PARTY

RULING

Introduction

1. Before the Court is an application for judicial review orders of Certiorari, Prohibition and Mandamus made by the Ex-parte Applicants on behalf of 125 other individual members of the Duruma Clan in their capacity of officials of the Mabirikani Village Land Committee.

2. The 1st, 2nd and 3rd Interested Parties claim that they are registered owners of the suit parcels of land.

3. The 4th and 5th Interested Parties also claim to be the legal and beneficial owners of part of the suit property as purchasers of a portion of the suit property measuring approximately 30 acres, having purchased the said portion from the Ex-parte Applicants. The 4th and 5th interested Parties did not file a replying affidavit in the matter.

4. The 1st and 2nd Respondents have also not filed any documents although represented by various Litigation Counsel over time.

Directions for ***viva voce*** evidence

5. On the 16th December, 2013, in the presence of, and upon hearing, Counsel for the Ex-parte Applicant, Counsel for the Respondents and Counsel for 4th and 5th Interested Parties and in the absence of Counsel for 1-3 Interested Parties (although duly served by newspaper advertisement in accordance with the order of the court for substituted service made on 22/11/2013) the Court made the following pre-trial directions in the matter ahead of the hearing of the matter:

> ***1. The Respondents to file and serve replying affidavits within 14 days.***
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> ***2. Hearing is set for 21/1/2014.***
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> ***3. The hearing for the matter to proceed on the basis of viva voce evidence.***
>
> ***4. The Commissioner of Lands to produce before the Court personally or by representative the registration documents with regard to subdivision No. 288 Section I MN and LR MN/B/2432, 2429, 2431, 2433 and 2430 at the hearing.***
>
> ***5. The 1st, 2nd, and 3rd Interested Parties to be served with this order and hearing notice through newspaper advertisement in the daily Nation and The Standard on one day of the working days of the week.***

6. The Respondents and the 4th and 5th Interested Parties did not file replying affidavits as directed.

Submissions

7. The main disputant parties - the Ex parte Applicants and the 1-3 Interested Parties - then filed written submissions. But on before the supplemental oral argument by highlighting of the submissions could be done, counsel for the 4th and 5th Interested Parties objected that the matter was not ready for hearing as the directions for the taking of ***viva voce*** evidence had not been implemented, and explained their failure to file replying affidavit as the parties would in accordance with the said directions be able to give oral testimony.

8. Counsel for the *Ex-parte* Applicants considered that the issue before the court "is that there are two parallel titles and the Registrar ought to produce the documents rather than proceeding on submissions [and] it is in the interests of justice that the parties adduce oral evidence" and urged that costs occasioned by the written submissions be in the Cause.

9. The Counsel for Respondents did not attend.

10. Counsel for 1-3 Interested Parties in objecting to the delay likely to be occasioned by ***viva voce*** hearing urged the court to proceed on the basis of affidavit evidence and submissions, and prayed for costs thrown away in preparation and filing of written submissions, if the court proceeded with hearing in accordance with the direction for oral hearing.

11. Hence this ruling on Directions.

Determination

Matter governed by Court of Appeal authority in ***Emfil.***

12. Despite the parties' apparent consent for ***viva voce*** evidence to be taken subject to the claim for thrown away costs by Counsel for the 1-3 Interested Parties, this matter is now governed by case-law authority. As the Court of Appeal has held, the deeming of a Judicial Review as a constitutional reference [which may permit the taking of *viva voce* evidence] is not permissible. In ***Emfil Limited v Registrar of Titles Mombasa & 2 others*** [2014] eKLR of 18th July, 2014, the Court considered an appeal from a judicial review application in which this Court

had deemed the proceedings as a constitutional application, and guided as follows:

> *"[14] What was originally before the trial judge were Judicial Review proceedings under **Order 53 Rule 3(1)** of the Civil Procedure Rules. Indeed, the judge was alive to this fact hence the order that the Judicial Review proceedings be deemed to be an application under the Bill of Rights for enforcement of fundamental rights. In support of his decision to convert the proceedings to an application for enforcement of the Bill of Rights under **Article 40** of the Constitution, the learned judge stated thus:*
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> > *"Although the proceedings before the court are for Judicial Review, the allegations of infringement of the Constitutional Right to property under **Article 40** brought the application into the purview of **Article 22** of the Constitution. In accordance with long established practice of deeming an application brought under Judicial Review to be an application under the Bill of Rights to enable the court a wide latitude of the choice of remedies (see **Githunguri v Attorney General No. 2 [1986] KLR 1**), I will treat this application as an application for enforcement of the bill of rights with respect to the right to access to the court in cases of compulsory acquisition or takeover of private land, and direct that the issues of the applicant's title to the suit property and the payment of compensation under **Article 40** of the Constitution be determined hereinafter on the basis of the pleadings filed by the applicants and affidavits evidence to be filed by the respondent within the next fourteen days from the date of this ruling."*
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> *[15] We have perused the **Githunguri v Attorney General No.2 [1986] KLR 1** (**Githunguri case**) which was relied upon by the learned judge. In the first place the constitutional reference leading to the **Githunguri case** was made under the former Constitution of Kenya (hereinafter referred to as the repealed Constitution). The holding criticizing the reference from the subordinate court to the Constitutional Court under **Article 67** of the repealed Constitution was made obiter as the court was not sitting on appeal in regard to the reference. The judges nonetheless expressed the view that the questions referred to the Constitutional Court under **Article 67** of the repealed Constitution ought to have been framed as an infringement of the applicant's fundamental rights, thereby bringing the matter within **Section 84(1)** of the repealed Constitution.*
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> *[16] In addition, the deeming of the proceedings as dealing with enforcement of the Bill of Rights in the **Githunguri case** was not prejudicial to the accused, but was in his interest as evident from the following statement from that judgment:*
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> > *"It seems to us that the application in these proceedings comes true appropriately as a fundamental right application under Article 77(1) of the Constitution as referred to in Article 84(1) above.*
>
> ***Section 77(1)** is:*
>
> > *'if a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law.'*
> >
> > *In the interests of justice, we will treat the application before us as having been made, and to deem it amended and to have been brought under Article 84(1)."*
>
> *[17] In the appellant's case, the application for Judicial Review was made in August 2011 after the promulgation of the Constitution of Kenya 2010 (hereinafter the Constitution), which replaced the repealed Constitution. **Article 23** of the Constitution, provides for an order of Judicial Review as an appropriate relief that may be granted in the enforcement of the Bill of Rights. Clearly, the appellant had the option to bring his application under **Article 22** and **23** of that Constitution, but opted for Judicial Review proceedings under **Order 53** of the Civil Procedure Rules.*
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> *[18] The extract of the judgment of the High Court reproduced herein above (paragraph 13) reveals that the adoption of the constitutional reference proceedings under **Article 22** and **23** by the learned judge was basically to expand the proceedings in order to include the issue of compulsory acquisition. But the appellant in the notice of motion only mentioned compulsory acquisition in passing. It was not a specific relief that was sought. Unlike the **Githunguri case**, it cannot be said that it was necessary to convert the applicant's Judicial Review proceedings to a constitutional reference in order to allow the court the latitude in granting relief. The issue of compulsory acquisition was not before the judge for determination, such as to justify expanding the proceedings to accommodate it. The only interest that was advanced by the change in the nature of the proceedings was that of the alleged squatters. The appellant having specifically moved the court for orders of Judicial Review, which were available to the appellant under **Order 53** of the Civil Procedure Rules, the court had no business tampering with his application by turning it into an application for enforcement of the bill of rights under the Constitution.*
>
> *[19] Judicial Review proceedings, are proceedings of a sui generis nature subject to its own peculiar rules. While we appreciate **Article 159** of the Constitution and the need to apply substantive justice, that Article provides no justification for a court to ignore a specific procedure provided by law and deliberately chosen by a litigant, nor does it allow a court to bend backwards to accommodate persons who have deliberately failed to protect or assert their interest. Thus the court was bound to apply the specific provisions of **Order 53** of the Civil Procedure Rules. **Rule 4** of the Order provides that the relief granted in Judicial Review proceedings can only be the relief sought in the statutory statement filed under **Rule 2** of the same Order, and in this case neither compulsory acquisition nor compensation for compulsory acquisition was a relief sought by the appellant.*
>
> *[20] Further, the order made by the trial judge converting the proceedings from one of Judicial Review to that of a Constitutional Reference was in the nature of a direction that ought to have been given during the pre-trial stage. Coming as it did at the final stage in the judgment it had the effect of re-opening the proceedings. The judgment was therefore not a final decision as envisaged under **Order 21 Rule 1&4** of the Civil Procedure Rules. In this regard the order made by the learned judge may be distinguished from that made in the **Githunguri** case, in which the order of prohibition that was issued finally determined the litigation. In light*

of the orders which were made by the trial judge, declining to protect the appellant's constitutional right to property, the conversion of the appellant's application from one of Judicial Review to one of enforcement of the bill of right was prejudicial to the appellant and was purely for the benefit of the squatters who had opted not to pursue their rights.

[21] Moreover, ***Order 53*** *of the Civil Procedure Rules provides for Judicial Review proceedings to be conducted by way of affidavits, such that an applicant for Judicial Review must not only file a statutory statement setting out the relief sought and the grounds on which it is sought, but also an affidavit verifying the facts. Once served, the respondents and other interested parties to the proceedings are also required to serve an applicant with copies of the affidavits they intend to use at the hearing. The respondents did not file any affidavits in response to the appellant's statutory statement or verifying affidavit. To that extent, it can be concluded that the averments, which were made by the appellant in their statements and verifying affidavits were not disputed."*

13. The directions for ***viva voce*** evidence in these judicial review proceedings were given before the guidance of the Court of Appeal in ***Emfil,*** supra, and the Court must now accept the position established therein and accordingly review the directions for the taking of oral evidence in the judicial review matter.

14. In any event, having transferred from the High Court of Kenya at Mombasa, there is no opportunity for this court to conclude the hearing of the matter, and it would be inopportune for the court to impose on the discretion of the trial court of equal jurisdiction its own views as to the hearing of the dispute before it.

Orders

15. Consequently, the directions for the hearing of the judicial review proceedings by way of ***viva voce*** in addition to affidavit evidence already filed by the parties are reviewed and set aside to enable fresh directions thereon by the Court that eventually hears the matter.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 30th DAY OF April 2018.

E.K.O. OGOLA

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JUDGE

Appearances:

Mr. Tindi for Ex parte Applicants.

Mr. Eredi for the Respondent.

Mr. Buti for the 1-3 Interested Parties.

Mr. Taib for the 4-5 Interested Parties.