



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 243 OF 2017

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE NAIROBI CITY COUNTY.....RESPONDENT

AND

**MAUREEN MUNYAZI MWANGOVYA & ANOTHER (SUOING AS THE LEGAL
REPRESENTATIVES OF JOSEPH PAUL MWANGOVYA (DECEASED)...INTERESTED
PARTIES**

EX PARTE: CITY SEA BREEZE LIMITED

RULING

1. On 19th May, 2017 after considering the application dated 17th May, 2017 I granted leave to commence these proceedings having found that the allegation by the ex parte applicant herein that the decision being challenged was tainted with procedural irregularities established a prima facie case for the purpose of leave.
2. Apart from leave the applicant also sought that the leave operate as a stay of the decision disapproving the building plans registration and the execution of the enforcement notice the subject of these proceedings. I however found that the manner in which the said prayers were crafted if granted would have had the effect of permitting the applicant to continue with its developments before the determination of these proceedings. I therefore limited the stay to directing the Respondent not to evict the applicant from the suit premises.
3. However when the matter came up for directions on 7th June, 2017, counsel for the ex parte applicant and the Respondent appeared before me and learned counsel for the Respondent disclosed that the Respondent was not opposed to the applicant continuing with construction on the suit premises. Accordingly, the Court varied the order issued on 19th May, 2017 and directed that the leave would operate as stay with the effect that the applicant would be at liberty to continue with construction pending the hearing and determination of the Motion.
4. It is this variation that provoked the application dated 10th October, 2017 by the interested parties herein, in which they substantially seek that the orders of stay issued on 7th June, 2017 be set aside and

that these proceedings be stayed pending the hearing and determination of the ELC Case No. 1456 of 2016.

5. According to the interested parties, the suit premises belong to **Joseph Paul Mwangovya** now deceased and there is pending before the ELC in case No. 1456 of 2016 filed by the interested parties against the ex parte applicants herein and 3 others in which fraud and false representations are alleged. It was the interested parties' case that these proceedings were instituted based on the false misrepresentation that the ex parte applicant was the registered owner of the suit property with the aim of defeating the ends of justice and depriving the estate of the deceased of the suit property yet the applicant is a trespasser herein.

6. It was contended by the applicants through their legal counsel, **Mrs Kinyanjui** that had the Court been made aware of these proceedings, it would not have granted the order of stay in the manner it did without affording the interested parties a hearing.

7. The application was however opposed by the ex parte applicant through its learned counsel, **Mr. Muriungi**. According to the Respondent, by the time the ex parte applicant moved this Court it was not aware of who instigated the issuance of the enforcement notice as he said notice did not indicate who the complainant was. While learned counsel conceded the existence of the said ELC Case it was his view that in the absence of an injunction and in the absence of the disclosure of the complainant pursuant to whose complaint the enforcement notice was issued the applicant was under no obligation to join the interested parties to these proceedings. He therefore denied that there was a violation of the rules of natural justice or that there was non-disclosure of material facts.

8. There were other issues raised by learned counsel which in my view are irrelevant in so far as the instant application is concerned.

9. On behalf of the Respondent it was contended through its learned counsel, **Mr. Oonge** that the interested parties have not proved that they were the complainants and that the Respondent was not a party to the ELC Case. According to him, the decision not to oppose the stay was informed by the need to mitigate any losses that may be suffered by the Respondent and was not through collusion to circumvent the orders that might be granted in the ELC Case. It was disclosed that between the date of the recording of the stay order and now the construction is complete.

10. I have considered the issues raised in the instant application. Order 53 rules 3(1) and (2) of the **Civil Procedure Rules** provide that:

(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

11. In this case the ex parte applicant was clearly aware that there were proceedings pending before the ELC in which the interested parties had laid a claim to the suit property. They were aware that there was a pending interlocutory application which was yet to be determined. The said suit revolves around the ownership of the suit property. The ex parte applicant must have been aware that by the order of stay whose effect was to permit it to continue the developments on the suit parcel, any order of injunction that the ELC might grant would either be futile or would lead to an absurd situation. This in my view was clearly a material fact that the ex parte applicant ought to have disclosed before this Court at latest by the time the stay was being granted. The ex parte applicant however chose to maintain a very loud silence on the issue. In fact nowhere in its pleadings did it disclose the existence of litigation surrounding the suit

property. Instead it maintained that it was the lawful proprietor of the same.

12. In my view by agreeing to have a stay in place whose effect would render the application pending before the ELC superfluous and in effect develop the suit property without notice to the interested parties, the ex parte applicant was not only guilty of gross abuse of the court process but clearly conducted itself in a manner violative of the rules of fairness and natural justice.

13. In **Board of Education vs. Rice; [1911] AC 179** in which Lord Loreburn LC stated that:

“...that a decision-making body should not see relevant material without giving those affected a chance to comment on it and, if they wish, to controvert it, is fundamental to the principle of law (which governs public administration as much as it does adjudication) that to act in good faith and listen fairly to both sides is ‘a duty lying upon everyone who decides anything.’”

14. In **Peninah Wambui Mugo vs. Moses Njaramba Kamau Nakuru HCCS No. 238 of 2004 Koome, J** (as she then was) was of the following view, a view with which I respectfully associate myself:

“Under section 80 of the Civil Procedure Act, any person, though not a party to the suit, whose direct interest is being affected by the judgement therein is entitled to apply to a review. The words “any person” and “for any sufficient reason” used under section 80 of the Civil Procedure Act clearly are meant to include a person who has a direct interest in the litigation or its result but has been deprived of a hearing as a party in relation to his interest...Since the plaintiff and the defendant were aware of the applicant’s interest in the suit property but chose not to make her a party there is merit in the application since the applicant has discovered new and important facts being that the defendant and the plaintiff failed to disclose her interest and to have her summoned to court as the person who was in occupation and who will be affected by the orders of the court”.

15. The Court of Appeal in **Wangechi Kimita & Another vs. Mutahi Wakibiru [1985] KLR 317; [1986] KLR 578; 1 KAR 977; [1976-1985] EA 229**, while citing **Flora N. Wasike vs. Destimo Wamboko [1988] KLR 429; [1982-88] 1 KAR 625**, and **Sadar Mohamed vs. Charan Singh [1959] EA 793** expressed itself as follows:

“Notwithstanding the contractual effect of a consent order Section 67(2) of the Civil Procedure Act is not a bar to setting aside a Judgement and decree by consent or grounds which would justify setting aside a contract...The acts of the appellant in visiting the land to witness the surveying and establishing once and for all the acreage of the land is sufficient reason analogous to the discovery of new and important matter. There is no reason why the words “for any other sufficient reason” need be analogous with the other grounds in Order 44 because clearly section 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words “for any other sufficient reason” need not be analogous with the other grounds specified in the Order.”

16. With respect to the grounds upon which such a consent would be set aside, the same Court in **Flora N. Wasike vs. Destimo Wamboko** (supra) held that it is well-settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out. If a consent is to be set aside, it can only really be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material matters by legally competent persons. In other words *Prima facie* a consent order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement. The East African Court of Appeal on its part in **Brooke Bond Liebig (T) Ltd. vs. Mallya Civil Appeal No. 18 of 1975 [1975] EA 266** expressed itself

as follows:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by agreement contrary to the policy of the court... or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement... It is well settled that a consent judgement can be set aside only in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.”

17. It is my view that the failure to afford a person an opportunity of being heard when the person is or stands to be directly and adversely affected by the decision or the proceedings in question amounts to a sufficient reason to review and set aside a consent order. It does not matter whether at the commencement of the proceedings the applicant were aware of that fact. Once the fact is brought to the attention of the Court appropriate corrective measures must be taken.

18. In my view there is no plausible justification for allowing the stay orders issued herein to stay in place. The Respondent contends that the construction is complete hence no useful purpose will be served by granting the orders sought herein. However as was held by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456:**

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone’s advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio.” [Emphasis mine].

19. This was a restatement of **Lord Wright’s** decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

“If the principles of natural justice are violated in respect of any decision, it is, indeed

immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision.”

20. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, Lord Reid expressed himself as follows:

“Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void.”

21. Therefore it does not matter whether the developments on the suit property are complete or not. The order of stay issued herein must be vacated. It is so vacated.

22. With respect to stay of these proceedings, Article 165(3) of the Constitution provides as follows:

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

.....

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

23. Article 165(5)(6) and (7) thereof on the other hand provides:

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

24. The Courts contemplated in Article 162(2) are those with the status of the High Court to hear and determine disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land. Parliament was donated the power to establish the said Courts and determine their jurisdiction and functions by the same Article.

25. It is now trite law that the High Court in the exercise of its judicial review jurisdiction exercises neither a criminal jurisdiction nor a civil one since the powers of the High Court to grant judicial review remedies is *sui generis*. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

26. Therefore in exercising its judicial review jurisdiction the High Court does not exercise the powers conferred upon it under Article 165(3)(a) but rather the powers conferred upon it under Article 165(3)(e) as read with Article 165(6) and (7) of the Constitution.

27. However, the High Court’s power and authority is derived from the Constitution and where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. In my view by specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts.

28. Under Article 165(5)(b) of the Constitution this Court has no power to determine issues which **fall within the jurisdiction of the courts contemplated in Article 162(2)** aforesaid. Pursuant to the powers conferred upon Parliament under Article 162(3) of the Constitution to “*determine the jurisdiction and functions of the courts contemplated in clause (2)*”, Parliament did enact **The Environment and Land Court Act, 2011** which Act commenced on 30th August 2011. Section 13 of the said Act provides as follows:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

29. It is therefore clear that the ELC is empowered to determine disputes relating to title or **any other dispute relating to environment and land** and in so doing has the jurisdiction to grant *inter alia prerogative orders* which are the nature of the orders being sought herein.

30. It is further clear that the issue of ownership is pending before the ELC. These proceedings are about the process through which the enforcement notice was issued. Once the ownership is determined, the determination of the enforcement notice would automatically follow since the enforcement notice is based on the dispute as to who is the owner of the suit property. Since under section 13 of the **Environment and Land Court Act**, the ELC has the power to issue orders in the nature of judicial review, I direct that further proceedings in this matter be dealt with before the ELC in order to avoid a situation which would have occurred in this case, of the court process being turned into circus by the courts making contradicting decisions on similar issues.

31. The costs of the instant application are awarded to the interested parties to be borne by the ex parte applicant.

32. It is so ordered.

Dated at Nairobi this 27th day of November, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Muruingi for the applicant

CA Ooko