



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 316 OF 2015

IN THE MATTER OF AN APPLICATION FOR ORDERS OF PROHIBITION

AND

IN THE MATTER OF THE LAW REFORM ACT (CAP 26) LAWS OF KENYA

BETWEEN

REPUBLIC..... APPLICANT

AND

COUNTY GOVERNMENT OF KIAMBU.....1ST RESPONDENT

THE GITHUNGURI SUB-COUNTY ADMINISTRATOR2ND RESPONDENT

THE DEPUTY COMMISSIONER GITHUNGURI SUB-COUNTY3RD RESPONDENT

EX- PARTE: MBURU MIHANGO, MBURU MUCHINA AND SAMUEL KIGANYA KANGETHE

JUDGEMENT

Introduction

By a Notice of Motion dated 15th October, 2015, the ex parte applicants herein, **Mburu Mihango, Mburu Muchina and Samuel Kiganya Kangethe** seek the following orders:

a) That an order of Prohibition does issue to prohibit the Respondents whether acting by themselves and/or through their agents, employees, servants, officers and/or whosoever from entering, evicting, demolishing, compulsorily acquiring, threatening and/or otherwise interfering with the Applicants’ quiet possession, occupation and control of the subject plots being Plot Numbers 68, 71 & 109 Githunguri Market without following the due process.

b) That the costs of this application be in the cause.

According to the applicants, they are the *bona fide* allottees of the Kiambu County Council, the

predecessor of the 1st Respondent over **Plot Numbers 68, 71 & 109 Githunguri Market** of which they have been in occupation since the 1960's. According to them, they have continued to enjoy quiet possession of the said plots and in particular operating businesses thereon whilst at the same time paying all the dues to the Respondents in terms of rates, rents, licences and all other requisite outgoings in respect thereof.

However, they alleged, in a stunning turn of events, the Respondents through their agents, servants, officers and/or employees descended upon the said plots and marked them with an 'X' arbitrarily, without notice and without a colour of right. Despite their attempts to seek for explanation from the Respondents as to the full tenor and purpose of the said markings on the said plots, the Respondents wilfully refused, failed and/or neglected to proffer any explanation thereto. In lieu of an explanation aforesaid, the Respondents proceeded to mark the said Plots again but this time with a double crossing 'XX'. To exacerbate the situation, the Respondents through their agents, servants, officers and/or employees continually deployed tractors and demolition machinery on and around the said plots hence causing the applicants and our employees, clients, tenants and/or visitors undue anxiety, tension and/or distress.

In the applicants' belief, the Respondents' action smacks of impropriety, illegality, Wednesbury unreasonableness, irrationality, impunity, abuse of power, oppression, arbitrariness, unconstitutionality as well as grossly unfair and in flagrant disregard of the rules of natural justice. Further they believe that the Respondents frustrated their legitimate expectations that once they have paid the dues and once they have been licensed, the Respondents will allow us enjoy quiet possession of the said plots. To the applicants, unless this Court potently but urgently intervenes, the said plots might be demolished and/or deprived of their Constitutional rights to the said plots hence occasioning them immense prejudice and irreparable harm.

To the applicants, they have a Constitutional right to a fair and just administrative process as well as to the sanctity of their proprietary rights which rights have been violated and/or are under threat of violation and will continue to be violated unless the orders sought are granted.

Though served, the Respondents did not respond to the application hence the applicants' averments remain wholly uncontroverted.

Determinations

Article 40(3) of the Constitution provides:

The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

As allottees of the suit properties, it is clear that the applicants have an interest therein which interests, in the absence of contrary evidence, are protected under the aforesaid provisions. That Article must be read with the provision of Article 47 of the same Constitution which provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful,

reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

From the foregoing provisions it is clear that the right to property is constitutionally protected and a person can only be deprived of that right as provided under the Constitution. To do so Article 24(1) provides:

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

By placing the signs ‘X’ or ‘XX’ on the applicants’ properties, the Respondents no doubt were limiting or restricting the applicants’ rights to enjoy their properties. To do so without affording the applicants’ a hearing is not only arbitrary but clearly amounts to a violation of the applicants’ rights.

It is therefore clear that in order to justify a proprietor of land being deprived of property or interest in land by the State, the deprivation must either result from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or must be for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament which Act must provide for prompt payment in full, of just compensation to the person and allow the proprietor of the interest in, or right over, that property a right of access to a court of law.

Even where the exception under the provisions of Article 40(6) of the Constitution exists, with respect to property found to have been unlawfully acquired, before such a finding can be arrived at, the due process stipulated under the foregoing Constitutional and Statutory provisions must be adhered to and that determination ought not to be arbitrarily made without affording the persons to be affected thereby an opportunity of being heard. Any purported action which does not comply with the law must be set aside based on the three “I’s” – Illegality, Irrationality and Procedural Impropriety. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.

In my view, the Applicants who no doubt had an interest in the suit land were not afforded an opportunity of being heard. It is not a condition that for judicial review orders to be granted the Applicant must have legal title to the property. What is required is recognisable interest which from the case as presented by the Applicants the applicants no doubt has in the suit plot. As was held by **Warsame, J** (as he then was) **Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004** once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer

available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.

Therefore the only issue that the Court would be entitled to determine in this application is whether based on the uncontroverted facts before the Court the Respondent's threatened action ought to stand and not whether or not the applicant's title is lawful. From the evidence on record, it is clear that the Respondents' threatened action was both illegal, irrational and tainted with procedural impropriety, all which are grounds for granting judicial review orders and ought not to stand.

In the result, an order of Prohibition is hereby issued to prohibiting the Respondents whether acting by themselves and/or through their agents, employees, servants, officers and/or whosoever from entering, evicting, demolishing, compulsorily acquiring, threatening and/or otherwise interfering with the Applicants' quiet possession, occupation and control of the subject plots being Plot Numbers 68, 71 & 109 Githunguri Market without following the due process.

As the application was not opposed the applicants will have half the costs of these proceedings.

Dated at Nairobi this 15th day of March, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ochwa for Mr Kago for the Applicant

Cc Kazungu