



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MACHAKOS

ENVIRONMENT AND LAND COURT CASE NO. 31 OF 2018

(FORMERLY MISCELLANEOUS CIVIL APPLICATION NO. 294 OF 2018)

REPUBLIC.....APPLICANT

AND

RIDGEWAY INTERNATIONAL LIMITED.....EX-PARTE APPLICANT

NATIONAL LAND COMMISSION1ST RESPONDENT

MILICONS LIMITED.....INTERESTED PARTY

R U L I N G

What is before Court for determination is the Interested Party’s Notice of Motion application dated the 26th September, 2019 where it seeks the following orders:

1. **THAT** the Ex-parte Applicant’s Notice of Motion dated 15th July, 2019 be struck out for being an abuse of court process.
2. **THAT** the costs of the suit be awarded to the Interested Party.

The application is premised on the grounds on the face of it as well as the supporting affidavit of MANGATTU RAGHAVAN LAKSHMI NARASIMHAN, its Chief Finance Officer, who deposes that the ex-parte Applicant has failed to disclose to court of another previous suit namely Machakos ELC. 127 of 2017 against the Respondent and Interested Party in respect of the same suit properties, which suit is yet to be heard and determined. He contends that the ex parte Applicant’s application is frivolous and amounts to a grave abuse of the court process as the Respondent made its decision on 23rd May, 2016 and this suit is time barred. Further, there is the aforementioned subsisting suit and ex parte Applicant withheld material facts in order to obtain leave to institute proceedings herein.

The ex parte Applicant opposed the application and filed a replying affidavit sworn by its director GEORGE GATHUMBI MWANGI where he deposes that the instant application is misguided, unfounded and in bad faith. He confirms that the ex parte Applicant filed the ELC 127 of 2017 in respect of the suit properties against the Respondent, the Interested Party and seven (7) others and the same was necessitated by the fraudulent compensation of the Interested Party during the compulsory acquisition, as this was done without any determination having been issued by the Respondent. He provides a history of the suit properties and contends that the ex parte Applicant was allocated parcel number LR No. 337/4762 and LR No. 337/4763 formerly LD PLOT NO. 33745/VII//161A vide an approved and signed Part Development Plan (PDP) No. 8/79/3A by Commissioner of Lands dated 30th November, 1979 and approved by the said Commissioner of Lands on 22nd January, 1980. Further, the Allotment was made vide Allotment Letter dated 11th May, 1980 issued after payment of relevant statutory dues. He avers that the ex parte Applicant learnt through a Gazette Notice Number 8467 dated 22nd July, 2011 about a public hearing in Athi River District. Further, the ex parte Applicant immediately filed a complaint with the Respondent to initiate a review of all grants and deliver an ownership including proprietary rights to the suit properties. He explains that the Respondent proceeded to uphold the Interested Party’s title prior to 18th February, 2016, when the hearing of its complaint was to be concluded. He claims the ex parte Applicant was a stranger to the determination purported to be issued on 23rd May, 2016. Further, that the alleged determination of the Interested Party’s title does not meet the prescriptions of regulation 29, 31 and 32 of the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations, 2017 and cannot qualify as a determination by the Respondent; neither was it certified nor published. He denies that the ex parte Applicant withheld any information to the court and confirms that Machakos ELC 127 of 2017 has other parties. He further denies that the ex parte Applicant’s claim is an abuse of court process nor statute barred as it seeks orders of mandamus. Further, prayers sought in the instant suit are different from the ones sought in the civil suit.

The application was canvassed by way of written submissions

Analysis and Determination

Upon consideration of the Notice of Motion application dated 26th September, 2019, including the respective affidavits and rivalling submissions, the only issue for determination is whether the ex-parte Applicant's Notice of Motion dated 15th July, 2019 should be struck out with costs to the Interested Party.

The Interested Party in its submission contends that this suit is frivolous. Further, that the **judicial review order of Mandamus sought by the ex-parte Applicant in order to compel the Respondent to issue a decision on the legality and propriety of LR NO. 337/4762 and LR NO. 337/463 is unreasonable since the Respondent had already issued its decision on the 23rd May, 2016 upholding the Interested Party's title and ownership.** It further submits that this suit is sub judice and should not be entertained. It reiterates that this suit **amounts to an abuse of the Court process. Further, that the ex- parte Applicant's deliberate failure to disclose to this Court material information in order to obtain leave to institute the proceedings herein shows the manner in which the judicial process has been abused and how frivolous and malicious the Application is.** To buttress its averments, it has relied on the following decisions: **Trust Bank Limited v Amin Company Ltd & Another (2000) KLR 164; Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 others [2017] eKLR; Kampala High Court in the case of Nyanza Garage v Attorney General Civil Suit No. 450 of 1993 quoted in the case of Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 others [2017] eKLR; Graham Rioba Sagwe & 2 others v Fina Bank Limited & 5 others [2017] eKLR**, the court placed heavy reliance in a Nigerian case of **Amaefule & other vs the State (1998)4SCNJ 69 at 87; Agwusin V Ojichie** which was quoted in the case of **Graham Rioba Sagwe & 2 others v Fina Bank Limited & 5 others [2017] eKLR.**

The ex parte Applicant in its submissions insists the instant application is totally misguided, unfounded and brought in bad faith. Further, that the filing of the Machakos ELC 127 of 2017 suit was necessitated by inter alia the fraudulent compensation of the Interested Party during the compulsory acquisition while this substantive Judicial Review Application was necessitated by the Respondent's failure to issue a determination on the same. The illegality, unreasonableness and failure by the Respondent to comply with the rules of natural justice is what had prompted the ex parte Applicant to file this Judicial Review Application. Further, the alleged determination does not even meet the prescriptions of regulation 29, 31 and 32 of the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations, 2017 and cannot qualify as a determination of the Commission. Further, it relied on article 23(3)(f) of the Constitution and urged that the orders being sought could only be issued by a way of a Judicial Review Application and not by way of Civil Suit no 127 of 2017. It insisted the Judicial Review Application is not in any way an abuse of the court process and neither is it time barred as it seeks only an order of mandamus. It insists the Judicial Review Application is not frivolous or sub judice as the Respondent did not issue a decision on the legality and propriety of LR No. 337/4762 and LR No. 4763 on 23rd May 2016 upholding the Interested Party's title and ownership.

To support its arguments, it has relied on the following decisions: **Republic –v – National Land Commission Ex-parte Krystalline Salt Limited [2015]**, as cited in **Super Nova Properties Limited v The National Land Commission [2019] eKLR**; **Selehaddin Gulen v Inspector General of Police & 5 others [2021] eKLR**; **Republic v County Government of Mombasa Ex-parte Outdoor Advertising Association of Kenya [2014] eKLR**; **REPUBLIC VS. PAUL KIHARA KARIUKI, ATTORNEY GENERAL & 2 OTHERS EX PARTE LAW SOCIETY OF KENYA (2020) eKLR.**

In the current scenario, the ex parte Applicant was granted leave on 2nd July, 2019, upon which it applied for an order of Mandamus against the decision of the Respondent in respect to the suit properties vide its application dated 15th July, 2019. . The Interested Party opposed the said application and sought for the application to be struck out for being an abuse of the court process as it is related to Machakos ELC. 127 of 2017 which is dealing with the dispute over the same suit lands, hence this matter is sub judice. Further, that it is time barred. In the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, Judicial Review was described as follows:

“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...”

Further, in the case of **Reid vs. Secretary of state for Scotland (1999) 2AC 512** it was held that: **“Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case.**

As to whether the instant judicial review application dated 15 July, 2019 amounts to an abuse of the court process as Machakos ELC 127 of 2017 whose fulcrum is the same as the dispute herein is yet to be determined. I wish to make reference to the case of **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**, where the Court of Appeal held that:

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in *bona fides* and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

- i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.**
- ii. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.**

iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.

In applying the parameters set in this Court of Appeal decision to the circumstances at hand, I note in the Machakos ELC. 127 of 2017 the Plaintiff therein who is the ex parte Applicant herein has sought for various orders including declaratory orders, permanent injunction, revocation and cancellation of title and compensation which cannot be granted in a judicial review. While in the judicial review proceedings, the ex parte Applicant seeks orders of mandamus against the Respondent's decision. I opine that it is only in the aforementioned civil case where this court will have an opportunity to examine the evidence presented before making its decision on merit. Further, the orders sought in the said case cannot be granted in the instant judicial review application which clearly falls within the realm of public law and cannot properly be merged with the private law claim in ELC 127 of 2017. Further, in associating myself with the decision of **Republic Vs. Paul Kihara Kariuki, Attorney General & 2 Others Ex Parte Law Society of Kenya (2020) eKLR** and looking at the substance of the claim herein to determine if the instant judicial review application is sub judice, I find that it is not identical to Machakos ELC 127 of 2017. I further hold that the judicial review application is not time barred as it sought for orders of mandamus.

It is my considered view that the Interested Party's claim that the instant judicial review application is sub judice cannot apply as the said judicial review proceedings are sui generis in nature and are only concerned with legality of a decision of government and/or public body as envisaged in article 47 of the Constitution as well as the Fair Administrative Action Act, which is different from the civil claim in Machakos ELC 127 of 2017.

Based on the facts as presented, while associating myself with the decisions cited above, I find that the Notice of Motion application dated the 15th July, 2019 does not amount to an abuse of process of court nor is it sub judice.

In the circumstance, I find the Interested Party's Notice of Motion application dated the 26th September, 2019 unmerited and will dismiss it with costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 27TH DAY OF JANUARY, 2022

CHRISTINE OCHIENG

JUDGE