REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 408 OF 2015

IN THE MATTER OF AN APPLICATION BY NYANDO POWER TECHNIQUES LIMITED TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW FOR ORDERS OF PROHIBITION AND MANDAMAUS AGAINST NAIROBI CITY COUNTY GOVERNMENT

AND

IN THE MATTER OF NAIROBI CITY COUNTY BY LAWS

BETWEEN

NYANDO POWER TECHNIQUES LIMITED…..……APPLICANT

AND

NAIROBI CITY COUNTY…....……..…….RESPONDENT

SAHARI ALI…….....…….…INTERESTED PARTY

JUDGEMENT

Introduction

1. These proceedings were commenced by way of a Notice of Motion dated 8th December, 2015 in which the *ex parte* applicant herein, **Nyando Power Techniques Limited**, seeks the following orders:

a. **An order of Prohibition prohibiting the respondent from unlawfully sub-letting LR. NO. TOL along Muholo Annexe Road, South C or TOL VAL. 750/082/SG/10GTW/lgm to the interested party and/or interesting with the applicant's structures, properties and/or effects in/on LR. NO. TOL along Muholo Annexe Road, South C.**
b. **An order of Mandamus compelling the respondent to discharge its mandate and disapprove the interested party's request for sub-letting of the applicant's property.**
c. **Costs of the application be provided for.**
d. **Such further and other relief that the honourable court may deem just and expedient to grant.**

Ex Parte Applicant's Case

2. According to the *ex parte* applicant, sometimes in September, 2009, the applicant applied to be allocated the suit property by the Respondent for purposes of carrying out business and on 29th September, 2009, the respondent reverted thereby informing the applicant to satisfy inter alia the following terms and conditions before it is allocated the suit property:

    i. No conflict in terms of occupation of the space either from the neighbouring properties or otherwise.

    ii. A monthly rent of Kshs 5,000.00 in advance within seven (7) days of commencement of every month.

    iii. The site be used for the construction of modern kiosk.

    iv. The allocation is subject to obtaining the requisite license form the Chief Licensing Officer.

3. According to the Applicant, it satisfied the foregoing conditions and was allocated the suit property after which the applicant invested heavily on the suit property and had the suit property beautified and structures thereon erected upon obtaining requisite approval form the respondent. To the Applicant, it has been paying rent lawfully and has been carrying on business legally in the suit property to date. The Applicant disclosed that it engages in the business of buying and selling various/assorted merchandise and has at all material times observed the foregoing terms and conditions, including first obtaining approvals from the respondent before the developing the suit property and when required to do so. It was its case that it's proprietors derive their livelihoods from the suit properties which also caters for their children's education needs, shelter and feeds their families out of the suit properties.
4. It was however averred that sometimes in September 2015 the interested party herein applied to be sub-let the applicant's suit property and contrary to the law and the respondent's own By-Laws, the respondent approved this request and the interested party was issued with Temporary Occupation License VAL.740/082/SG/1/GTW/lgm. This, it was contended allowed the interested party to erect a container on the property to the applicant's utter detriment. In the Applicant's view, the unlawful decision to sub-let the suit property to the interested party also contravened the respondent's salient terms and conditions, which term provides that there be no conflict in terms of occupation of the space either from the neighbouring properties or otherwise.
5. The Applicant further averred that sometimes in October 2015, it registered its complaint with the respondent and on 27th October 2015 the respondent terminated the unlawfully/illegal sub-letting of the applicant's property to the interested party for contravening the terms and occupations applicable and ordered the interested party to vacate the suit property and clear all debris (if any) from the site. However, contrary to this decision, the respondent who was hell-bent on allocating the suit property to the interested party, convened a meeting scheduled for 18th November, 2015 to rescind its decision and have the interested party allocated the suit property. To the Applicant, the impugned decision to sub-let allocate the applicant's property was unreasonable, illegal and the Applicant was apprehensive that the scheduled meeting would proceed without its input and without according it a hearing prior to the intended deliberation on the suit property.
6. Further to the foregoing, the Applicant contended that the respondent also threatened to terminate the applicant's occupation on the suit property without any basis whatsoever and in contravention for the applicant's legitimate expectation to fair administrative action in dealing with the suit property. To the Applicant, the respondent failed to comply with the law and its own procedures of allotment, instead electing to arbitrarily deal with the suit property and rid members of the applicant of their property and divest them of all their rights to and interests over their properties aforesaid. It was the Applicant's case that in consequence of the respondent's action herein, the applicant was deprived of its constitutional right to property without lawful cause. According to it, its rights to secure protection of the law and constitutional entitlement to fair administrative action would continue to be violated and its rights to property and interests appurtenant thereto likely to

be violated through the actions threatened by the Respondent hence the orders sought herein.

Respondent's Case

7. In opposition to the application, the Respondent was of the view that the applicant was challenging the sub-letting of the suit property to the Interested Party and or interfering with the applicant's structures and or effects in/on LR.NO.TOL along Muhoho Annexe Road, South C.
8. According to the Respondent, the applicant acquired a license of the suit property LR.NO.TOL along Muhoho Annexe Road, South C by the respondent for purposes of carrying out business. On 29th September, 2009, the respondent reverted thereby informing the applicant to satisfy the terms and conditions alluded to hereinabove by the applicant.
9. To the Respondent, although the Applicants contended that it was allocated the suit parcel of land, there was no document exhibited to support that position. However, it was clear from letter dated the 29th September 2009 that the Respondents did authorize the Applicants to occupy the suit parcel of land from the 1st October 2009 and that the Applicants were to comply with sum set of terms and condition for the Applicants to occupy the said land. The Respondent averred that following a complaint by the applicant to the respondent sometimes in October, the respondent responded on 27th October 2015 by terminating the illegal occupation by **Sahali Ali**, the interested party herein's Temporary Occupation License VAL.740/082/SG/1/0/GTW/gm located along Popo Road besides Nakumatt South C for contravening the terms and conditions applicable on allocation of the suit property.
10. According to the Respondent, legitimate expectation is fashioned to review administrative bodies charged with decision-making powers affecting the rights of the others and it was this awareness that informed the decision to terminate the unlawful and illegal temporary occupation license to the Interested Party. To the Respondent, by terminating the temporary occupation to the Interested Party, the respondents rectified its wrong-doing therefore there was no need for the applicants to go to court and request for the remedies of prohibition and mandamus for actions that the respondent has already corrected.
11. It was the Respondent's case that the nature of a license is such that it is revocable by the licensor. It was therefore contended that the applicant cannot claim proprietary rights to the suit land. To the Respondent, the Applicant being a licensee has no interest in the said land but was only under occupation and therefore should not contend that it was claiming an interest in the property itself. This, according to the Respondent means that the suit property belongs to the Respondent and is allowed to deal with its property as it pleases. The question should have been whether as a licensee, were they accorded with an appropriate notice to vacate the suit property. However as the respondent had not issued any, the applicant was not under any threat of being evicted.
12. The Respondent asserted that the suit property was under a license and not a tenancy agreement hence the license could be terminated at anytime by either party without a reason. The respondent, however, had not given any directives to the applicants to vacate the premises. It was however the Respondent's position that it has the right to repossess the site immediately when and if it is required for the designated user or if the use to which the licensee put the site is no longer acceptable. It asserted that as an administrative body it is capable of owning property in its own name and hence has exclusive right of proprietorship of the suit property, and to restrict it in perpetuity from granting a license over the suit plot to any person other than the applicant is to curtail its property rights under Article 40 of the Constitution.
13. It was averred that for the doctrine of legitimate expectation to be enforced by the courts, the court has to be convinced that the administrative body did not follow the set rules or policies set. If the administrative body performed its duties in accordance to policy and public interest the court is however not allowed to interfere unless the decision or action taken amounts to an abuse of power. As the applicants had not been served with any notice requiring it to vacate the suit property, the Respondent averred that the Respondent could not be charged with contravening legitimate expectation and fair administrative action in dealing with the suit property.
14. The Respondent asserted that its decision to hold a meeting on the 18th November 2015 was therefore not irrational or unreasonable or illegal as alleged and that in determining this application the Court ought to apply the proportionality test keeping in mind the fact that the Applicants have no such notice given by the respondents to vacate the suit property.

15. According to the Respondent, the applicant's temporary license is not under a threat since the respondent terminated the unlawful and illegal temporary occupation license to the interested party and was ordered to vacate the suit property and clean all debris from the site and as the applicants have since not been issued with any notice to vacate the suit property, there is no form of threat that the applicants claim that affects this temporary license issued by the Respondent hence the application ought to be dismissed.

Determinations

16. I have considered the application, the supporting affidavit, the affidavit in opposition, and the submissions and authorities relied upon.
17. Before delving into the merits of the application, it is worth noting that the Respondent in the replying affidavit extensively reproduced legal principles replete with authorities. As held by the Court of Appeal in **Pattni vs. Ali and Others [2005] 1 EA 339; [2005] 1 KLR 269**:

> **"an affidavit is a sworn testimony on facts and as such the provisions of the Evidence Act have been applied to affidavits and therefore rules of admissibility and relevancy apply. Hearsay evidence and legal opinions are for exclusion… Where the portions complained of are fraught with argumentative propositions and expressions of opinion, it would be oppressive to allow such matters to masquerade as factual depositions and since Order 17 rule 6 donate the power to strike out scandalous, irrelevant or oppressive matter and as the three categories are to be read disjunctively the said portions are struck out".**

18. Parties and counsel ought not to turn affidavits, which is evidence and which ought to be restricted to factual matters, to submissions on points of law. Where a party relies on both facts and law, facts ought to be contained in an affidavit wile legal issues ought to be in grounds of opposition. Submissions on points of law which are disguised as factual averments contained in affidavits, unless sworn by legal experts deposing to matters relating to their knowledge of the law run the risk of being struck out. See **Muslim Mohamed Jaffer Abdulla Kanji T/A Airoquip and Applications vs. Agriquip Agencies (EA) Ltd Civil Appeal No. 55 of 1982 1 KAR 245; [1976-1985] EA 154.**
19. In this case the Respondent's case is that it has no intention of getting rid of the Applicant from the suit property and that when that time comes, it will notify the Applicant accordingly. I agree that the definition of a "licence" in ***Black's Law Dictionary*** is the correct description of what constituted an abridged description of licence as being *"a permission, usually revocable…….An agreement (not amounting to a lease or profit)."* I also associate myself with the holding in the case **Kamau vs. Kamau (1984)1 KLR (E&L)** (cited in **Jamila Ebrahim Attarwalla & Another vs. Hussein Abdulziz & Another [2014] eKLR**) for the holding that a license or dispensation, unless coupled with a grant, does not bind its assignors or assignees because it does not pass any interest in land; and that a license not coupled with an interest in land is revocable unless the contract for it contains express or implied terms that it shall not be revoked.
20. The position of a licensee vis-à-vis a lease or tenancy was no doubt properly explained in **Gabriel Amok & Others (Suing in their capacity as Mombasa Kiosk Water Vendors-Self Help Group) vs. Mombasa Water Supply & Sanitation Co. Ltd [2015] eKLR** where **Emukule, J** at paragraph 22 stated that:

> **"In contrast to a license, the licensee has only a right to take a product or render a service in terms of the license. Such right is unlike tenancy, does not confer exclusive right to the licensee outside the terms of the license. It is a limited right, it terminates in accordance with its terms. That right is neither human right nor a fundamental freedom. It is merely a contractual right."**

21. The law as I understand it is that a licensee as opposed to a trespasser is entitled to a notice before the licence is terminated. This position is supported by the decision of **Waki, J** (as he then was) in the case of **Omar & 8 Others vs. Murania & Another [2006] 1 KLR (E&L) 206** in which he

stated as follows:

> **"The applicants do not deny that they are licensees of the Municipal Council on the plots they occupy and have constructed kiosks therein. The council has power under section 144(5) of the Local Government Act to grant something upon the immovable property of the grantor and does not amount to the creation of the interest in the property itself. It is permissive right and personal to the grantee and since the licence has no interest or estate in the property such possession as he might have for enjoyment of the right is no judicial possession but only an occupation. Indeed the applicants concede to this position in law and did not understand their counsel to contend that they are claiming an interest in the property in the property itself....On that premise the only issue would be whether the notice given to them by the grantor to vacate the property was reasonable. For there is no doubt that even licensees are entitled to reasonable notice before their licences are determined, particularly where valuable consideration is being paid to the grantor. In as much as the grantor permitted the grantee the premises in question to carry on its business pending an agreement in return for valuable consideration the legal relationship of licensor and licensee was established between the parties and it was a contractual licence of indefinite duration and was only revocable upon reasonable notice."**

22. The orders being sought by the applicant herein are orders of prohibition and mandamus. In order to understand the matter at hand it is important to restate the scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition. This was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge and 9 Others Civil Appeal No. 266 of 1996** in which the said Court held *inter alia* as follows:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way… These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by**

statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done…Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."

23. *Mandamus* is a peremptory order, issuing out of the High Court commanding a body or person to do that which is its or his duty to do. It lies to secure the performance of a public duty, in the performance of which the applicant has sufficient interest. The issue of the order cannot be required as a right; it is a matter for the discretion of the court, which will render it as far as it can, where there is no other specific remedy for a legal right. Prohibition on the other hand is a means of preventing an order or decisions being made, which if made would be subject of an order of *certiorari.* So both *certiorari* and prohibition are based on violation of the rules of natural justice – the difference being, that for *certiorari* something has already been done which violates rules of natural justice whilst for prohibition, something has not yet been done. See ***Constitutional & Administrative Law*** 9th Ed. page 608 by **Wade & Philips.**
24. It is however clear that for prohibition to issue there must be an imminent threat of the respondent taking an action which constitutes grounds for the grant of judicial review relief. In other words where there is no such threat, an order of prohibition will not issue *in vaccuo*. See **Robert Gathinji Kamat vs. The Minister of Local Government Nairobi HCMA No. 427 of 2004.**
25. I have considered the material placed before this Court and I must say that there is absolutely no evidence apart from bare allegations denied by the Respondent that the Respondent intends to evict the Applicant from the suit premises. However it was upon the Applicant to present credible *prima facie* evidence that this was the case. The burden and standard of proof was expounded in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** where it was held:

"A prerogative order is an order of serious nature and cannot and should not be granted lightly."

26. In the absence of any tangible evidence of threat of eviction, it is my view that the threshold for the grant of an order of prohibition has not been met by the applicant. Judicial review orders ought not to be granted based on speculation and conjecture.
27. With respect to the prayer for an order of *mandamus* compelling the respondent to discharge its mandate and disapprove the interested party's request for sub-letting of the applicant's property, to grant the order in the manner sought would amount to the Court compelling the Respondent to exercise its discretion in a particular manner. That, however, is not the mandate of the Court in the exercise of its judicial review jurisdiction in matters of mandamus.
28. Having considered the foregoing, it must now be clear that this application must fail.

Order

29. Consequently, the Notice of Motion dated 8th December, 2015 fails but as the Respondent's replying affidavit fell foul of the rules relating to affidavits, there will be no order as to costs.
30. Those then shall be the orders of this Court.

Dated at Nairobi this 22nd day of June, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Owang for the ex parte Applicant

Mr Ouma for Prof Ojienda, SC for the Respondent

Cc Mutisya