**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 50 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW FOR AN ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF LAND ACT, 2012 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**NAIROBI CITY COUNTY.....RESPONDENT**

**HANNAH WAITHIRA GATUNDU.....INTERESTED PARTY**

**EX PARTE: BONIFACE WACHIRA GICHIMU**

**JUDGEMENT**

## Introduction

1. By a Notice of Motion dated 17th February, 2016, the *ex parte* applicant herein, **Boniface Wachira Gichimu**, seeks the following orders:

> **1 An order of Mandamus to remove into this honourable court and compel the respondent to evict the interested party from that open space (public utility/road) blocking the ex parte applicants access to his land parcel number Nairobi/Block 119/2643.**
>
> **2 Costs of and incidental to the application be provided for.**

## *Ex Parte* Applicant's Case

2. The applicant's case is that he is the registered owner of all that land known as Nairobi /Block119/2643 situated within Nairobi County (hereinafter referred to as "the suit property"). According to the applicant,

while the process of obtaining the aforesaid certificate of lease was ongoing, he commenced developing the land by putting up a house for his family. The applicant disclosed that he intended to start constructing his house in March 2015 but was unable to do so since the interested party was blocking the access to his said plot by erecting structures on what is supposed to be the road to the applicant's land.

3. The applicant averred that upon realizing the foregoing he started engaging the interested party with a view to finding an amicable solution but the interested party claimed that she was there by right. The applicant thereafter engaged the local administration i.e. the chief of the area due to the fact that though the interested party was insisting that that area in front of the applicant's land was hers, she was not forthcoming when asked to provide her documentation in this regard. Further to the foregoing on several occasions, the interested party failed to attend meetings which were called to try and resolve the issue. However, after several meetings by the local administration, where they also involved the local elders, it was agreed that for the sake of harmony and peaceful co-existence, the interested party would cede between 3 to 5 metres of the area blocking the applicant's access so that he could be able to access his land.

4. The applicant however averred that sometime later after the said solution, the interested party callously blocked the said access by re-erecting a fence that had been agreed was to be removed and the applicant had duly removed and this was despite the fact that the applicant had put a fence around his plot, effectively and completely denied access to the applicant's land which position subsists to date.

5. It was further averred by the applicant that he commenced putting up his house sometime in August 2015 when he realized that any continued delay would be unsettling to his family. However, the same month he became aware that the interested party had engaged the services of a private surveyor who introduced himself as **Nicodemus Ogutu** who upon realising that the applicant had the necessary documentation, abandoned his exercise i.e. of putting new beacons on the area meant to be public utility land (a road). Thereafter, the interested party threatened that she would get assistance of young men from a neighbouring slum to help her to ensure she doesn't move. Being threatened, the applicant reported the matter to Kasarani Police under OB NO./39/24/12/15.

6. Notwithstanding this, the applicant claimed that sometime in August 2015 the interested party went to the area in front of his land and started constructing structures which included, but not limited to a temporary house as well as animal sheds where the applicant had earmarked to put his gate. The applicant then contacted his lawyers who sent a demand notice dated 18th august 2015 to the interested party.

7. It was contended by the applicant that once the transfer and registration of his land was completed by his lawyers he did a search at the Lands Registry and wrote to the provincial survey office so as to ascertain the true position of the boundaries to his land as well as the status of the land in front that the interested party was occupying to which the office of survey of Kenya responded to through their letter dated 15th December 2015. According to the applicant, the land on which the interested party has constructed her structures on is essentially public land which is meant for a road and that this is demonstrated by the survey maps. According to the applicant, from the interested party's conduct it is clear that she has no intention whatsoever of allowing the applicant unfettered access to his land. The applicant disclosed that upon completion of his house, he moved in with his family after his former landlord declined to grant extended stay, his notice to vacate having expired. According to him, he and his family are currently trespassing on a neighbour's land and that they are currently living in great peril since he is unable to construct a gate to protect them.

8. The applicant denied the interested party's claim that there exists a boundary dispute between himself and her and reiterated that at all times the interested party has never confirmed proof of ownership of the alleged plot number 00167 if indeed the same exists but instead on more than 10 occasions (read meetings) promised to avail documents confirming ownership to no avail. The applicant denied the interested party's averment that she has been settled at the material area for over 20 years and reiterated that it was in August 2015 that the interested party started putting up temporary structures in front of his property thereby blocking his access.

9. According to the applicant, it was obvious from the interested party's assertions that she had no clue whatsoever on whether the plot she allegedly purchased is bona fide at all as she seemed not to have conducted due diligence on the property she was buying. To the applicant, the proposed joinder of the 'company' into this matter would serve no purpose as it would not change the fact that the interested party has encroached on a public utility thereby depriving the applicant of a access to his land.

10. The applicant further averred that in addition, he duly notified the respondent through its Roysambu sub-county offices situate in Garden Estate and that the head of the aforesaid sub-county office visited the site and confirmed verbally to the interested party that she should vacate. According to the applicant, the documentation from survey of Kenya prove that the area the interested party is currently occupying is a public utility (i.e. a road) and that the interested party has not presented any iota of evidence to controvert the same.

11. It was the applicant's case that the respondent is in charge of zoning and development within the county of Nairobi and their mandate includes ensuring that areas set aside for public utilities such as roads are well protected. The applicant reiterated that he is currently relying on the good will of a neighbour who having fenced his property allowed him very small access.

**Respondent's Case**

12. The respondent's case on the other hand was that the application as drawn is fatally defective as well as the suit and should be struck out instant. To the Respondent, the application and the entire suit does not disclose any cause of action against the respondent and further that this Court does not have jurisdiction to deal with the application and the entire suit.

13. It was contended that the judicial review proceedings relate to quashing a decision made contrary to the natural rules of justice but the suit herein relate to trespass and/or ownership of land. It was contended that no decision to be quashed has been annexed to the pleadings herein hence the provisions of Order 53 of the ***Civil Procedure Rules*** have not been adhered to. To the applicant, a *mandamus* order can only be issued in the clearest of circumstances and this is not one case hence the orders sought can not be granted. It was the respondent's position that there is no *prima facie* case demonstrated for issuance of injunctive orders hence the application should fail. To the respondent, it can not be compelled to evict the interested party on an application without a full hearing of the parties wherein parties to this suit shall be given an opportunity to adduce evidence in their possession.

14. It was further contended that judicial review proceedings can not be instituted where an alternative remedy is available hence the application and suit herein are bad in law. Its position was that the applicant had not demonstrated how the respondent had sanctioned the interested party's actions of blocking access hence mandatory injunction against it is not necessary. It further asserted that the certificate of lease annexed to the pleadings herein can not be verified by way of affidavit hence need for *viva voce* evidence.

**Interested Party's Case**

15. On behalf of the Interested Party, it was averred that the interested party is aware of the boundary dispute between herself, the applicant and Githurai Tinganga Company Limited (hereinafter referred to as "the Company"). According to the interested party, in 1997, she bought a parcel of land no. 00167 from the company and was shown the plot after paying for it and settled thereat for over 20 yard. It was averred that at the time the applicant bought his parcel of land, the interested had already settled on the disputed land.

16. It was averred by the interested party that though the land was under subdivision, the same was eventually approved and that her parcel was not among the public utility land. It was averred that the Company is still processing the Titles for some members including the interested party.

17. The interested party however asserted that the disputed land or space is not a road but her plot which was allocated to her by the company and that it is situated between the Applicant's land and the road

forming a V-shape though the land is not part of the road. It was however contended that the applicant's land is served by a different road which passes on the eastern side.

18. It was the interested party's case that since the dispute herein is essentially boundary dispute, the company should be included in this matter to help in resolving this dispute. However instead of engaging the company the applicant has resulted to intimidating the interested party by using the local administration.

19. It was the interested party's case that the application is improperly before the Court as there are no eviction orders against the interested party which the Respondent has failed to implement. It was however contended that there is a constitutionally mandated to deal with public land yet the said body is not a party t these proceedings. She therefore averred that she stood to be condemned unheard and deprived of her land of twenty years.

**Determinations**

20. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions made.

21. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** it was held that:

> **"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…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."**

22. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

23. Judicial review is, therefore, concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

24. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.

25. It is now a 'cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy or the decision of the court is likely to affect 3rd parties or buyer for value without notice and without affording such parties effective remedy. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.

26. In ***Ex parte*** **Waldron [1986] 1QB 824 at 825G-825H, Glidewell LJ** observed that the court should always interrogate relevant factors to be considered when deciding whether the alternative remedy would resolve the question at issue fully and directly.

27. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**:

> **"Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced for the determination of the case on the merits...Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application…It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles**."

28. Therefore even where the threshold for the grant of judicial review orders has been met, ***Halsbury's Laws of England 4th Edition Vol. 1(1) paragraph 122***, states that the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised, the court would not grant the order sought even if merited. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

29. The scope of the judicial review remedy of *Mandamus* was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR** in which the said Court held *inter alia* as follows:

> **"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."**

30. Similar position was adopted in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** expressed himself, *inter alia*, as follows:

***"Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature…In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment…With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so...*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory…The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice."**

31. Similarly, in **Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707** it was held:

**"A *mandamus* issues to enforce a duty the performance of which is imperative and not optional or discretionary…The order of *mandamus* is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon 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 and no specific remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet the mode of redress is less convenient, beneficial and effectual."**

32. It is therefore clear that a person seeking an order of *mandamus* must satisfy the Court that the action he seeks to compel the respondent to perform is a duty which the respondent is under a duty whether at common law or by statute to perform. Where there is no such a duty or it is not clear to the Court that such a duty exists the Court would be reluctant to grant such an order.

33. In this case, the applicant's case is that between the applicant's parcel of land and the land occupied by the interested party there ought to be an access road which the interested party has blocked hence denying the applicant access to his residence. The applicant has however not pointed out to the Court which law, statutory or otherwise compels the respondent to undertake what they want the Court to compel the respondents to undertake in the circumstances of this case.

34. In my view, before this Court can compel the Respondent to evict the interested party from the disputed portion of the land, the Court will have to make a determination that the interested has in fact trespassed onto the alleged public utility land or road. To determine this, the Court will have to hear viva voce evidence not only from the parties to the suit but also expert evidence from the officers from both the land and survey departments. That, however, is the task of the Environment and Land Court. This is necessarily so because it cannot be said with certainty that the determination of the subject of this dispute will not affect other parties who are not before the Court. As is stated in ***Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270:**

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience *and the effect on third parties who deal with the body in question, would result from the order* and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."** [Emphasis added].

35. In the premises, it is my view and I so hold that to grant the orders sought herein would amount to putting the cart before the horse in that the Court would in effect be making a decision enforcing an order of trespass before determining whether there in fact is such trespass in the first place.

36. Therefore in the exercise of my discretion, I decline to grant the orders sought herein.

**Order**

37. Consequently, the Notice of Motion dated 17th February, 2016 fails and is dismissed but with no order as to costs as the substratum of the dispute remains unresolved.

38. It is so ordered.

**Dated at Nairobi this 24th day of October, 2016**

***G V ODUNGA***

***JUDGE***

***Delivered in the presence of:***

***Mr Isinta for the applicant***

***Miss Hanan for Mrs Mogusu for the Resondent***

***Mr Akusala for Mr Njiraini for the interested party***

***CA Mwangi***