



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISC. CIVIL APPLICATION NO. 42 OF 2011

REPUBLIC.....APPLICANT

VERSUS

THE MINISTRY OF ROADS 1ST RESPONDENT

THE KENYA RURAL ROADS AUTHORITY 2ND RESPONDENT

AND

VIPINGO RIDGE LIMITED 1ST EX-PARTE APPLICANT

SUNSAIL TRADING LIMITED 2ND EX-PARTE APPLICANT

RULING

INTRODUCTION

1. By Notice of Motion dated 12th March 2013, the ex parte Applicants seek the following principal ORDERS:

2. **THAT** the second Respondent be ordered to produce the Original Map annexed to the Affidavit of engineer S.O. Obara as Exhibit 'SOO1' for inspection of the Ex-parte Applicants as well as this Honourable Court; and

3. **THAT** this Honourable Court do order that Engineer S.O. Obara attends court upon the hearing of the Ex-parte Applicants' Notice of Motion dated 3rd May 2011 for the purposes of being cross-examined on the contents of his Affidavit sworn on the 7th day of December 2011 and filed herein on the 15th day of December 2011.

4. The application was supported by the supporting affidavit of Robert Ward and based on the following grounds:

“GROUNDS

- a. the second Respondent has failed to avail to the Ex-parte Applicants, despite request made, the Original Map, a Photostat copy of which is annexed to his aforesaid Affidavit as Exhibit 'SOO1';
- b. this matter relates to the contentious issue of an alleged public road allegedly said to traverse and pass through the Ex-parte Applicants' property. Given the conflicting Maps produced in his own

Affidavit and other documentation produced in the various Affidavits, it is imperative and in the interests of justice that the said Engineer Obara is cross-examined on the contents of his said Affidavit in order to seek clarification on how and when it is alleged the said road came into existence;

- c. the alleged road D556 is neither a classified nor a gazetted road and the request for cross-examination is made bonafides and without ill motive particularly given that the existence of the alleged road D556 and the allegation that it traverses and passes through the Ex-parte Applicants' property is disputed; and*
- d. no prejudice will be caused to the Respondents in any event.”*

RESPONSES

5. For the 1st respondent, Grounds of Opposition dated 25th March 2013 were filed:

“GROUNDS OF OPPOSITION FOR THE 1ST RESPONDENT

- 1. That the application is misconceived, frivolous, vexatious and an abuse of the process of the court.*
- 2. The orders sought are untenable and a nullity.*
- 3. That the application is res judicata.*
- 4. Applicant is guilty of laches.*
- 5. That the Applicant is the author of its own misfortunes.”*
- 6. The 2nd Respondent also filed Grounds of Opposition dated 3rd April 2013 as follows:*

“GROUNDS OF OPPOSITION FOR THE 2ND RESPONDENT

- 1. The application is misconceived, bad in law and an abuse of the process of the court*
- 2. The application is res judicata the same having been made orally in court on 3rd July, 2012 and orders sought in the present application declined on 26th July, 2012.*
- 3. The 2nd Respondent is not the custodian of the original maps and therefore an order compelling the 2nd Respondent to produce original maps shall be in vain.*
- 4. The Ex-parte Applicant has no justiciable case of action against the 1st Defendant.*
- 5. The Application is baseless and an afterthought and designed to delay the hearing and conclusion of this case.”*

ISSUES FOR DETERMINATION

7. Whether the 2nd respondent will be compelled to produce the original of a map attached by the deponent of its replying affidavit and whether the court would permit the cross-examination of the deponent of the affidavit on the ground that the contents thereof contradicted other affidavits filed in the suit.

SUBMISSIONS

8. Counsel for the parties – Mr. Khagram for the ex parte applicant, Ms. Lutta for the 1st respondent and Mr. Wafula for the 2nd respondent - made oral submissions with aid of caselaw authorities, and ruling was reserved.

9. The substance of the applicant’s case was that there the issue of the existence of a road on the ex parte applicant’s property was contentious in the affidavits filed for the applicant and in reply and the issue could be resolved by cross-examination of the deponent of the replying affidavit which asserts the existence of the road and the production of the original map drawn by the said deponent and offered as the map of the area in dispute.

10. The 1st respondent emphasized, principally, the objection of *res judicata* that Judge Tuiyott had in giving direction in the application found that cross-examination was not necessary and it was therefore not open to the *ex parte* applicant to reopen the issue, and it was in any event too late since the order on directions were given.

11. For the 2nd respondent, the special nature of judicial review proceedings, which concerns itself not with the merits of the case but the process of decision making, was set up in opposition to the application for cross-examination buttressed by the contention that the issue had already been considered and ruled upon by the previous trial judge when he gave directions as to the hearing of the application.

DETERMINATION

12. The outcome of this application for cross-examination of a deponent of an affidavit before the court and for the production of the original of a document produced as photocopy attachment to the affidavit depends on legal and factual considerations as discussed below.

Issue of *res judicata*.

13. I agree with the Court of Appeal decision in ***Pop-In (Kenya) Ltd & 3 Ors. v. Habib Bank AG Zurich*** (1990) KLR 609, where applying the House of Lords decision in ***Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor.***, (1975) AC 581, held that the plea of *res judicata* applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time.

14. I have noted the decisions of Ringera, J. (as he then was) and Ochieng, J., the former in ***Kanorero River farm Ltd. & 3 Ors v. National Bank of Kenya Ltd.***, Nairobi HCCC No. 699 of 2001 which was cited by the latter in ***Nzuki Mwinzi v. Kenya National assurance Co. (2001) Ltd. & Anor.*** [2005] eLKR, that the plea of *res judicata* applies both to suits and applications as the word ‘suit’ in section 7 of the Civil Procedure Act on *res judicata* is defined in section 2 of the Act as including any civil proceedings commenced in any manner prescribed under the rules. The issue here, however, is not whether an order made on an application, whether final or interlocutory, could operate as a plea of *res judicata*.

15. The question in this application, with respect, is whether a party may properly plead ***res judicata*** on a matter of directions as to hearing on the question of cross-examination of a deponent of affidavit. Directions as to hearing regarding whether to call viva voce evidence, cross-examination of witnesses or filing of written submissions or the discovery and inspection or production of certain documents in evidence are not a determination on an issue and cannot be taken to be *res judicata*.

16. For an order to operate *res judicata*, it must be shown to have been a determination of an aspect of the controversy before the court. In my view, an order as to the mode of hearing, production of evidence by affidavit or viva voce, cross-examination of deponents of affidavits, and such like matters are directions on the manner of process of fact finding and proof of the parties’ respective cases and not a determination on any issue before the court and cannot, therefore, operate *res judicata*.

17. As shown in ***Explanation No. 3*** of section 7 of the Civil Procedure Act cap. 21 Laws of Kenya on *res judicata* the principle applies to determination of the substance of disputes between the parties not on procedural directions. The Explanation No. 3 states:

“Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

18. The learned author of ***Mulla on the Code of Civil Procedure***, 18th Ed. (2012) puts paid to the issue when discussing interlocutory orders, as follows:

“18. Interlocutory Orders – It is needless to point out that interlocutory orders are of various

kinds, some like orders of stay, injunction, or receiver are designed to preserve the status quo pending the litigation and to ensure that parties might not be prejudiced by normal delay which the proceeding before the court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. **As they do not impinge upon the legal rights of parties to the litigation the principle of res judicata does not apply to the findings on which these orders are based, though if the applications were made for relief on the same basis after the same has once been disposed of, the court would be justified in rejecting the same as an abuse of process of court. There are other orders which are also interlocutory, but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo, or to preserve the property pending the final adjudication but are designed to ensure that the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit nor put an end to the litigation.**”

19. The order of the previous trial court herein that cross-examination or viva voce evidence would not be taken is in the nature of the latter category of interlocutory orders but still not **res judicata**. Moreover, the matter of cross-examination upon which the previous trial judge expressed himself was not a ‘matter in issue’ for purposes of *res judicata*. As observed in **Mulla**, *ibid.*, at p.208 “a matter is substantially in issue if it is of importance and value for the decision of the main proceeding.”

20. In addition, although it does appear from the record of proceedings that the previous trial judge was requested to give directions for cross-examination of the deponent of replying affidavit filed for the 2nd respondent, it does not appear that the issue was fully canvassed as it was being done before me, complete with the aid of decided caselaw on the subject.

21. The complete record of the relevant proceedings of 3rd July 2012 and the directions of 26th July 2012 are set out below:

“3rd July 2012

Before Hon. Justice F. Tuiyott

Court Clerk Moriasi

Khagram for Ex parte Applicant

Lutta for Eredi for 1st Respondent

Wafula for 2nd Respondent

Khagram

1. We filed and served the replying affidavits, we filed and served yesterday. We request that they be deemed as duly filed on time.
2. I think that we need to deal with the matter by way of written submissions.
3. We need to cross-examine the deponent of the affidavit sworn on 7th Feb 2011.

Lutta

I will need time to study the replying affidavit filed by the Ex parte Applicant. On the issue of cross

examination, this is a Judicial Review matter, it is not open for cross-examination.

Wafula

I need time to respond to the Ex parte Applicant's replying affidavit. Judicial Review proceedings are concerned about the process and not the merit of the decision, cross examination will not help. The issue of merit, this is not the proper forum. The issue of the roads existence is not in question – No need for cross examination.

Khagram

The court will have to determine whether or not the road exists.

Court

1.The Respondents are granted 14 days leave to respond to the replying affidavit of the Ex parte Applicant.

2.Mention on 26th July 2012 for the court to give directions on:-

(a) the issue of cross-examination

(b) disposal.

F. Tuiyott – J

26.7.2012

Before Hon. Justice F. Tuiyott

Court clerk – Moriasi

Siminyu

Lutta for Respondents

Khagram for Ex parte Applicant

Siminyu

For Directions.

Court

I have formed the view that there is no need to cross examine the Respondent witness. Hearing of Judicial Review on 8th November, 2012.

F. Tuiyott – J.”

22. With respect to my learned friend Judge Tuiyott, I venture to think that had the learned judge been served with the submissions made before me in the present application, he may have reached the same

decision here for the cross-examination of the deponent of the replying affidavit. I, accordingly, find that the judge's order that "**there is no need to cross examine the Respondent witness**" does not operate *res judicata* to the present motion for the cross-examination of the deponent. This court only need determine whether there exists a basis for the order cross-examination.

Cross-examination of deponent of affidavit in Order 53 applications

23. Modern litigation trends point consistently with substantial justice principle of Article 159 of the Constitution to full and fair hearing of court disputes. Hence, the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013**, the Court in a constitutional application is empowered to receive oral evidence, examine witnesses or direct cross-examination of deponents of affidavits as follows:

20. (1) *The hearing of the petition shall, unless the Court otherwise directs, be by way of—*

(a) affidavits;

(b) written submissions; or

(c) oral evidence.

(2) The Court may limit the time for oral submissions by the parties.

(3) The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.

(4) The Court may on its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence is likely to assist the court to arrive at a decision.

(5) A person summoned as a witness by the court may be cross examined by the parties to the petition."

24. Even in other branches of litigation the power and discretion to allow cross-examination of deponent of affidavits exists. Order 19 Rule 2(1) of the Civil Procedure Rules provides with regard to civil litigation that –

"2. (1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent."

25. Considering the issue in the context of an election petition, Muchelule J. in **Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & 7 Ors.**, [2013] eKLR, held that –

"In my view then, the provisions of Order 19 rule 2(1) of the Civil Procedure Rules and Rule 12(2) (c) of the Elections (Parliamentary and County Elections) Petition Rules should be interpreted to mean that the cross-examination of a deponent is not mandatory, but the court may, in the exercise of its discretion and on application by either party, order that a deponent be cross-examined. In the exercise of such discretion, the court should seek the demonstration by the applicant that there are sufficient grounds for making an order of for cross-examination. Such demonstration should be by reference to the material contained in the affidavit whose deponent is sought to be cross-examined to show that the affidavit contains disputed matters when examined against the affidavit by the respondent. Where no sufficient basis has been laid the request to cross-examine should be declined."

26. Although the application before the court is a judicial review application under Order 53 of the Civil Procedure Rules, similar latitude for cross-examination of a deponent of an affidavit has, albeit in

exceptional circumstances been acknowledged. A three-judge bench in **KANU v. Mwai Kibaki & 6 Ors.**, Nairobi HC Misc. Appl. NO. 128 Of 2003 (Nyamu and Ibrahim JJ. (as they then were) and Emukule, J.) quoted **Wade & Forsyth, Administrative Law**, 9th Ed. at p. 648 that –

“A feature of prerogative remedy procedure which remains unaltered is that evidence is taken on affidavit; i.e. by sworn statement in writing rather than orally. It is possible but exceptional, for the Court to allow cross-examination on the affidavits.”

27. In **R. v. Constituency Development Fund Board & Anor. ex parte Robert Itaramwa Kochale & 5 Ors.** [2012] eKLR, W. Korir, J., after considering the position as set out above, said:

“The second argument that the law and rules governing judicial review proceedings in Kenya do not contemplate cross-examination of deponents on the contents of their affidavits. I agree that indeed there is no provision for cross-examination in our laws. That, however, does not mean that this court cannot exercise its inherent jurisdiction and allow cross-examination if such a step would serve the interests of justice. I believe that the court can invoke its inherent jurisdiction and order cross-examination where it has been established that there is need to cross-examine a deponent on the contents of an affidavit. I, however, believe that the position which prevails in England is the correct position so that allowing applications for cross-examination should be done sparingly. The logic behind this policy is that judicial review proceedings are meant to be fast and quick fix to challenges encountered by citizens in their interaction with the administration. Allowing cross-examination would therefore lead to unnecessary delays. In any event, judicial review proceedings are ideally meant to proceed on undisputed facts.”

28. I, respectfully, agree with the decisions of Muchelule, J. and W. Korir, J. to the effect that the court has power and discretion to order cross-examination where the applicant has set out sufficient basis for the order. The court must retain such discretion as to whether or not to allow cross-examination, to be exercised judicially, where the court needs to ascertain the truthfulness and accuracy of a fact in issue or relevant fact in the proceedings before it.

The nature of Judicial Review proceedings

29. It is trite law that judicial review does not deal with the merits of the decision but the decision-making process. In **Judicial Review** by Peter Kaluma, cited by the counsel or the 2nd Respondent at p.47, the learned author, sets out a statement of the **Supreme Court Practice** on the nature and scope of judicial review as follows:

*“The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect 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 individual judges for that of the authority constituted by law to decide the matters in question’ (**Chief Constable of North Wales Police v. Evans** (1982) 1WLR 1155), page 1160; [1982] 3 ALL ER 141, page 143, per Hailsham, LC). Thus a decision of an inferior court or public authority maybe quashed (by an order of certiorari made on an application for judicial review) where the court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record, or the decision is unreasonable in the *Wednesbury’s* sense. The Court will not, however, on a judicial review application act as a ‘Court of Appeal’ from the body concerned; nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is *Wednesbury* unreasonable. The function of the Court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power be guilty of usurping power.”*

CONCLUSION

30. Clearly, although judicial review proceedings concern only the process rather than the correctness or merit of the decision, it may be an issue in certain proceedings whether facts exist such as to ground the making of the decision made in order to assess the legality or rationality of the decision within the meaning of the tests of judicial review of illegality, irrationality and procedural irregularity. In other words, whether facts exist which could justify the making of a decision with respect to the subject matter one way or the other. In so doing, the court will not be seeking to substitute its decision for that of the authority, such as 2nd Respondent - if the 2nd respondent is empowered to make the decision. The Court rather seeks to investigate whether there is a factual basis for the exercise of the jurisdiction by the authority such as the 2nd respondent in this case. It is purely a question of illegality or rationality or procedural impropriety in the decision making process.

31. In such circumstances, in my view, the court may properly examine the facts of the case upon which decision is based, not to see whether it was a correct or incorrect decision but, to determine whether there existed a basis, an occasion, or a foundation for the exercise of decision-making powers, if they existed, or whether the power to make the decision had crystallized, as it were, and/or whether its exercise was rational in the circumstances of the case.

Is there justification for allowing cross-examination of deponent?

32. The question, therefore, becomes whether there are exceptional circumstances of disputed facts which require to be tested on cross-examination before the court can make a determination as to the true state of affairs with respect to the facts of the case. In this case, the existence or otherwise of a road through the ex parte applicants parcels of land must provide the basis for the intervention by the 2nd Respondent. Without there being a road reserve, the 2nd respondent's decision and threatened action would be irrational and unsupported by law unless it be a compulsory acquisition of private property which has not been suggested in this case.

33. The fact of existence or otherwise of a road traversing the ex parte applicant's property is at the core of the suit herein as shown in the grounds upon which the relief is sought set out in the Statement filed in support of the application and repeated in the Notice of Motion, as flows:

- i. *the respondents are breaching and or contravening the Ex Parte Applicants' proprietary rights as guaranteed by the constitution of Kenya;*
- ii. ***the respondents are acting illegally and unlawfully in their persistence that an alleged road D556 is a classified road that cuts across the ex parte applicants' property known as LR 24880 (Original Numbers 8724/5, 7334/4 and 5025/96) comprised in Title No. C. R. 41234 when no such road actually exists in any records;***
- iii. *the respondents have and continue to act capriciously and in very high handed manner in breach of the rules of natural justice;*
- iv. *the demand by the respondents that the applicants remove and/or demolish the gates/barriers which provide access and security to their property and the development as a whole is illegal and unlawful and without any basis on law and is in breach of the applicants' proprietary rights and interest;*
- v. *the demand by the respondents that they are only willing to consider the question of a re-alignment once the subject gate/barriers are demolished is also malicious and intended to harm the business and reputation of the applicants and contrary to the provisions of the law;*
- vi. *the alleged road D556 does not pass through or cut across the applicants' property and the Respondents are acting in excess of and abusing their powers in imposing this onto the applicants' property; and*
- vii. *the condition imposed by the respondents seeking demolition of the gates/barriers before they consider an alternative or realignment proposal is wrong in law and so outrageous in its defiance of logic and the basic rules of natural justice and one which no reasonable person would impose.*

34. The Replying Affidavit of S. O. Obara responds to this specific issue by outright denial as follows:

“7. That the Road the subject of these proceedings is D556 and the same links important centres to each other and therefore the said road is very important to members of the public residing around the area.

8. That the said road D556 is of great importance and any decision involving blocking and or realigning the same must take into consideration the views of the stakeholders and in this case the stakeholders are the members of the communities using the road.

9. That the Community’s interest is represented by the Constituency Roads Committee and therefore the Committee is a stakeholder in this matter.

13. That the classified road D556 is under the purview of the Kenya Rural roads Authority and Constituency Roads Committee is a stakeholder. Annexed hereto and marked “SOO1” is a sketch map of the said road D556.

26. That it is not true that the road D556 has never existed as alleged by the ex parte Applicant.”

35. Clearly, a finding of fact as to the question of the existence of the road is crucial for the determination of the judicial review proceedings herein and, in view of the diametrically opposed positions of the parties in that regard, there exists, in my view, exceptional circumstances as to justify the cross-examination of the deponents of the various affidavits on the matter.

Exhibit No. SOO1

36. The sketch map attached as SOO1 to the replying affidavit filed on behalf of the 2nd Respondent is undated and its author and/or source are undisclosed. It is clearly a piece of hearsay evidence which is inadmissible as this proceedings are in the nature of originating process rather than interlocutory proceedings for which hearsay material is allowed under Order 19 Rule 3 (1) as follows:

“3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

*Provided that in **interlocutory proceedings**, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”*

37. Counsel for the 2nd respondent admitted that they did not have the original of the sketch map submitting as follows:

“If the court feels that the SOO1 should be produced, we do not have the original and the court may direct that the document may not be used.”

Being hearsay, the sketch map SOO1 is rejected and expunged from the record and it may not be used.

Orders

38. Accordingly, for the reasons set out above, I make the following orders on the ex parte applicant’s Notice of Motion dated 13th March 2013:

- 1. The exhibit No. SOO1 attached to the affidavit of S.O. Obara sworn on 7th December 2011 is expunged from the record and it may not be used.**
- 2. The deponent of the 2nd respondent’s replying affidavit, one S.O. Obara, will attend court on a date to be fixed for purposes of cross-examination on the issue of the existence of road no. D556, the subject of the judicial review proceedings.**
- 3. In the interests of equality of arms, the respondents will be at liberty to cross-examine the deponents of affidavits filed in support of the ex parte applicant’s case.**
- 4. Costs in the Cause.**

DATED AND DELIVERED THIS 30TH DAY OF MARCH, 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Ondego for Mr. Khagram for the Applicants

Mr. Ngari for the 1st Respondent

Mr. Wafula for the 2nd Respondent

Ms. Linda - Court Assistant