REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO 151 OF 2012

REPUBLIC...APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI…......…………………1ST RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

EX-PARTE

SHITAL BHANDARI

JUDGEMENT

1. On 12th May, 2012 this Court (Ochieng, J) granted leave to the Applicant Shital Bhandari to commence judicial review proceedings and apply for orders of certiorari, prohibition and mandamus. The Applicant subsequently filed an undated notice of motion on 20th April, 2012. Through the said notice of motion the Applicant prays for orders as follows:

> **"1. Judicial Review by way of an Order of CERTIORARI to bring into Court and quash the decision of the Chief Executive Officer, Ethics and Anti-Corruption Commission as contained in the letter dated 28th February 2012 purporting to institute recovery proceedings to have the court declare Title L.R. No. NAIROBI/BLOCK 90/599 (ORIGINALLY NAIROBI BLOCK 90/584, 585 & 586) hereinafter "the premises", to have been acquired unlawfully by the applicant**

2. Judicial Review by way of an Order of PROHIBITION directed at the Chief Executive Officer, Ethics and Anti-Corruption Commission preventing him from effecting the recommendations contained in the letter dated 29th February 2012 purporting to institute recovery proceedings to have the court declare the premises to have been acquired unlawfully by the applicant.

3. Judicial Review by way of an Order of MANDAMUS directed at the Town Clerk – City Council of Nairobi, and all officers, servants or agents of the City Council of Nairobi compelling them to approve the building plans for a perimeter wall, hoarding and authority to conduct a survey.

4. THAT this Honourable Court does issue such other orders, reliefs and/or directions as the Honourable Court may deem necessary and expedient in the circumstances.

5. Costs be provided for.”

2. Previously, the Applicant had on 16th April, 2012 filed an application seeking that the leave granted on 12th April, 2012 do operate as stay of the decision of the 2nd Respondent, Ethics and Anti-Corruption Commission (EACC) dated 29th February, 2012. The application for stay was dismissed in a ruling delivered on 22nd May, 2012 by Warsame, J (as he then was).

3. From the papers filed in Court, it emerges that the Applicant is the registered owner of L.R. No. Nairobi/Block 90/599 Loresho Estate, Nairobi. Through a letter dated 19th January, 2011, the EACC wrote to the Applicant informing him that it was investigating an allegation that his parcel of land was illegally alienated as it was part of a water reservoir in Loresho Estate. The Applicant was invited to appear before the EACC with the documentation pertaining to the ownership of the said parcel of land.

4. After the Applicant appeared before an officer of the 2nd Respondent everything appears to have gone quiet thereafter. On 19th January, 2012 the Applicant's counsel wrote to the 2nd Respondent seeking to find out the outcome of the investigations. The EACC replied to that enquiry through a letter dated 29th February, 2012 and stated as follows:

> **“RE: INVESTIGATION INTO ILLEGAL ACQUISITION OF LR NO. NAIROBI/BLOCK 90/599 (ORIGINALLY NAIROBI BLOCK 90/584, 585, AND 586)**
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> **Our investigations have revealed the following facts;**
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> 1. **That the original parcel is No. 229 which was reserved as a Water Reservoir for public utility**
> 2. **That Parcel No. 229 was “surveyed” later into parcels 584-587**
> 3. **That Parcel No. 587 which was hived off Parcel No. 229 was later “subdivided into Parcels 591-596.**
> 4. **Parcels No.584-586 was later amalgamated into Parcel No. 599.**
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> **From the above information, Parcel No. 599 formed part of Parcel No. 229 which was reserved public utility land as a water reservoir. The said Parcel 229 was alienated land for public utility and was never in law available for any further alienation. So, all the purported surveys and subdivision of parcel 229 were *illegal ab initio* thereby creating no legal or equitable interest in any subsequent beneficiaries. Such property is open to recovery under the Constitution, Anti-Corruption and Economic Crimes Act, and Ethics and Anti-Corruption Commission Act.**
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> **The Commission will institute recovery proceedings to have the court declare the property to have been acquired illegally and unlawfully. Your client may however restore the property within 14 days and avoid any precipitate proceedings.”**

5. The Applicant was not amused by the contents of the said letter and his counsel wrote back to the 2nd Respondent on 14th March, 2012 dismissing the contents of the 1st Respondent's demand notice and threatening to take action unless the 1st Respondent acknowledged the Applicant's proprietary rights over the parcel of land in question.

6. The EACC replied to the Applicant on 19th March, 2012 telling him that the threatened legal action had no legal basis. Thereafter the Applicant approached the Court through these proceedings.

7. The pleadings filed in Court by the parties reveal that the Applicant has been engaged in a protracted fight with some residents of Loresho Estate over the legitimacy of his title. In **Nairobi High Court Civil Case No. 3063 of 1997, Paul Nderitu Ndungu, Kihara Waitaka & Richard Gathecha Njomba (suing on their own behalf and on behalf of Loresho Estate Nairobi) v Pashito Holdings Limited & Shital Bhandari,** the plaintiffs had sought declarations whose effect was to declare the defendants' titles null and void as the parcels of land represented by those titles had been alienated for public utilities namely a water reservoir and a police station and were thus not available for alienation. Upon hearing the parties Mbogholi, J granted an injunction pending hearing of the case. The defendants were aggrieved by the ruling and order and moved the Court of Appeal seeking to set aside the same vide **Nairobi Civil Appeal No. 138 of 1997, Pashito Holdings Limited & Shital Bhandari v Paul Nderitu Ndungu, Kihara Waithaka, Richard Gathecha Ngomba on their own behalf and on behalf of Loresho Estate Nairobi).** The appeal was allowed and the injunction set aside.

8. There is also **Nairobi High Court Civil Case No. 921 of 1998, James Waiboci & Eustance Nkonge v Pashito Holdings Limited, Shital Bhandari, Commissioner of Lands, Wilson Gachanja, Maywood Limited, Mitema Holdings Limited, Mova construction Co. Limited and Director of Surveys.** In the said suit the plaintiffs challenge the legitimacy of the title of the Applicant herein. This particular case is now registered as **ELC No. 921 of 1998** in the Land & Environment Division.

9. The third case related to this matter is **Nairobi Milimani Commercial Court CM Civil Case No. 4678 of 2010.** In that matter, a consent was recorded on 19th October, 2010 before S. A. Okato, Principal Magistrate in the following terms:

"1. THAT a permanent order of injunction be and is hereby issued restraining the defendants jointly and severally and whether by themselves, their agents, servants or by anybody claiming under and/or with them from remaining or continuing in occupation of NAIROBI/BLOCK 90/599.

2. THAT an order be and is hereby issued to the defendants whether by themselves, their agents, servants or by anybody claiming under and/or with them to deliver up vacant possession of the suit LAND NAIROBI/BLOCK 90/599 to the plaintiff forthwith.

3. THAT eviction orders be and are hereby issued with the assistance and/or supervision of the police from the Muthangari Police Station may issue against the defendants whether by themselves, their agents, servants or anybody claiming under and/or with them in default thereof.

4. THAT the plaintiff shall bear the costs of the suit."

10. From the pleadings, the Applicant's case is that the EACC should be stopped from effecting the contents of the letter dated 29th February, 2012. Further, that the 1st Respondent the City Council of Nairobi (now the County Government of Nairobi) should be compelled to issue him with permission to develop his plot.

11. The 1st Respondent opposed the application through the replying affidavit of Karisa Iha sworn on 23rd October, 2012. According to Mr Iha, the application is a nullity in law as it offends the mandatory provisions of Order 53 Rule 1(2) of the Civil Procedure Rules, 2010 and Section 8(2) of the Law Reform Act, Cap 26. Further, that it is not the mandate of the Town Clerk or the unspecified officers of the 1st Respondent to approve building plans and the Applicant's prayer for an order of mandamus is thus untenable in law.

12. On a without prejudice basis, Mr Iha avers that the Director of the 1st Respondent is statutorily mandated by Section 27 of the Physical Planning Act, Cap 286 ("PPA") to approve development plans but in doing so, the Director is obliged to observe all laws. According to Mr Iha, under Section 45(1)(a) of the Anti-corruption & Economic Crimes Act, Cap 65 ("ACECA") it is an offence to fraudulently or unlawfully acquire public property or a public service or benefit.

13. Mr Iha averred that he was aware from a search of the suit property that the same was under investigation by the respondents with a view to determining if it was alienated or reserved for public use; whether the same was fraudulently alienated by the Commissioner of Lands to those from whom the Applicant allegedly bought the land; and whether the Commissioner of Lands could legally alienate the suit land to the allottees who allegedly sold the land to the Applicant after the land had already been alienated for public use. It is the 1st Respondent's case that Section 47 of the ACECA prohibits dealing with a property that is reasonably believed to have been acquired as result of corrupt conduct and issuing orders as prayed by the Applicant would amount to compelling it to commit an offence.

14. The 1st Respondent contends that judicial review is about the decision making process and is not concerned with the merits of the decision but what the Applicant is trying to do in this matter is to invite the Court to make a determination on merits of the impugned decision.

15. The 1st Respondent concedes that the suit property is a rateable property under the Valuation for Rating Act, Cap 266 and the Applicant being in possession of the suit land is liable under Section 7 to pay rates to the Respondent but such payment of rates cannot legitimize any illegally acquired title over the suit land.

16. On its part, the 2nd Respondent opposed the application through the affidavit of Josephine Makokha sworn on 5th October, 2012. Through that affidavit it is the case of the EACC that it is an independent Commission envisaged by Article 79 of the Constitution and established by Section 3 of the Ethics & Anti-Corruption Commission Act, 2011 ("the Act") with functions and powers as set out in sections 11 and 13 of the Act. It is the 2nd Respondent's assertion that acting on its mandate as provided by Section 13(1)(c) of the Act, it commenced investigations into the alleged illegal allocation of the suit property.

17. The investigations revealed that the suit property was public property as it formed part of a water reservoir that was serving the people of Loresho Estate and was thus not available for alienation. The Applicant was summoned and he recorded a statement. At the conclusion of the investigations, the 2nd Respondent formed an opinion which was conveyed to the Applicant through the letter dated 29th February, 2012.

18. It is the 2nd Respondent's case that the Applicant's assertion that the ownership of the plot in question was determined by the Court of Appeal in the judgment delivered on 14th November, 1997 in **Civil Appeal No. 138 of 1997 Pashito Holding Limited & another (supra)** is not correct as that judgement only set aside an injunction issued at the preliminary stage of the matter and no conclusive finding had been made on the validity of the titles in question.

19. Further, that an order of certiorari cannot issue to quash the letter dated 29th February, 2012 as the same is a mere demand letter indicating that if the Applicant does not surrender the suit property then the 2nd Respondent would move to Court for recovery. It is the 2nd Respondent's case that the Applicant has not established any illegality, irrationality or breach of the rules of natural justice to warrant the issuance of judicial review orders.

20. The 2nd Respondent contends that the Applicant was extensively engaged prior to the issuance of the demand letter and he cannot complain of non-compliance with the rules of natural justice. Further, that the Applicant's aim is to obtain an order stopping the EACC from carrying out its statutory functions. It is the 2nd Respondent's case that it is mandated by Section 11(1)(k) of the Act to institute and conduct proceedings in Court for purposes of recovery or protection of public property. The EACC asserts that granting the orders sought would breach Article 48 of the Constitution as it would deny it the right to access justice on behalf of the citizenry of Kenya. Further, that in the event that the 2nd Respondent moves to Court, the Applicant is guaranteed a fair hearing by virtue of Article 50 of the Constitution.

21. The 2nd Respondent also filed grounds of opposition dated 5th October, 2012. Through the said grounds, the EACC attacks the application for being fatally defective as it was not brought in the name of the Republic and for invoking the wrong provisions of the law. It is also EACC's argument that there is no evidence that the 1st Respondent has failed, refused and/or neglected to perform its duty and an order of mandamus is therefore not available in the circumstances.

22. The Applicant replied to the respondents' responses through a supporting affidavit sworn on 7th January, 2003. Through that affidavit he averred in response to the 1st Respondent's reply that the mandate of approving building and development plans squarely lies with it through one of its departments namely the City Planning Department. The mandate is executed in consultation with the Physical Planning and Survey Department.

23. The Applicant avers that the 1st Respondent was part of the consent recorded in **Nairobi Milimani Commercial Courts CMCC No. 4678 of 2010** which barred the 1st Respondent, its agents, servants or anybody else from claiming or occupying the suit land.

24. In addition, the Applicant contends that the 1st Respondent approved, received payment and issued him with the licence to construct a wall and it should not be allowed to insinuate that it rejected the approval for the construction of the hoarding wall.

25. The Applicant reiterated that the issues as to whether the suit property was a public property and whether it was acquired illegally was adjudicated upon by the Court of Appeal in **Civil Appeal No. 138 of 1997** where an injunction previously obtained against the Applicant was discharged. It is the Applicant's case that the issue of ownership was also determined by the issuance of permanent injunctive orders against the 1st Respondent and others in **Nairobi CMCC No. 4678 of 2010.** The Applicant asserted that the question of ownership is now *res judicata.* It is therefore the Applicant's assertion that the property was legally and justly acquired.

26. The Applicant reiterated that by accepting rates from him the 1st Respondent acknowledges that the property is rightfully registered in his name.

27. In answer to the 2nd Respondent's response the Applicant asserted that the investigations and findings of the 2nd Respondent were hastily done, inaccurate, malicious and only geared towards depriving him of his constitutional right to own property. It is the Applicant's case that had the 2nd Respondent been serious in its investigations it would have established that it is the registered proprietor of the suit property both in the lands registry and the 1st Respondent's records.

28. The Applicant reiterated that the Court of Appeal determined the issue of the ownership of the property in question. He asserted that orders can issue against the 2nd Respondent's letter as the import of that letter is that his title is null and void and consequently deprives him of property. He averred that it is only courts that can declare a title null and void.

29. The Applicant adhered to his view that the 2nd Respondent failed to comply with the rules of natural justice by making the declaration which was founded on inaccurate investigations.

30. With the leave of the Court, the parties filed further affidavits. The Applicant swore and filed a supplementary affidavit dated 2nd May, 2014. It is through this affidavit that the Applicant gave more information in support of his application. He revealed that in February 1996 he bought three plots namely Nairobi/Block 90/584 to 586 for Shs.3 million each from the original allottees. He was issued with three new certificates of lease in March of the same year. He applied for change of user of the plots from residential to commercial and this was approved in December, 1999. He also applied to the 1st Respondent for consolidation of the plots and this was done in 2001. The Applicant averred that subsequently he received the certificate of lease dated 30th January, 2007 for the amalgamated plots

reflecting his ownership of LR. No. Nairobi/Block 90/599.

31. It is his case that by virtue of obtaining the three plots and subsequently having them registered in his name, he became the first registered owner of those plots and the subsequent amalgamation. As the first registered owner, his title to the suit property was impeachable and/or indefeasible. He pleaded with the Court to protect his ownership right over the plot.

32. Ms Judith T. Mwanzia swore a further affidavit for the 2nd Respondent. Through that affidavit, she averred that the Applicant failed to disclose to the Court the existence of **HCCC No. 921 of 1998, James Waiboci & another v Pashito Holdings Limited & 7 others** in which the plaintiffs are seeking a declaration that the sub-division of Nairobi/Block 90/299 into sub-plots L.R. Nos. Nairobi/Block 90/584-586 and the subsequent amalgamation into L.R Nairobi/Block 90/599 was unconstitutional, illegal, null and void. The 2nd Respondent therefore accuses the Applicant of withholding material information from the Court.

33. The parties made lengthy submissions. I have considered those submissions together with the pleadings and in my view the issues for the consideration by the Court are:

a) Whether the 1st Respondent made a decision capable of attracting judicial review orders;

b) Whether an order of mandamus is available to compel the 1st Respondent to issue development permission to a developer;

c) Whether any or all the orders sought are available to the Applicant in the circumstances of this case;

d) Whether there is a competent application before the Court; and

e) Who should meet the costs of the application?

34. I have already reproduced the 2nd Respondent's letter of 29th February, 2012. The said letter is self-explanatory. It is a demand letter asking the Applicant to surrender the suit property failure to which recovery proceedings would be commenced in court. The Applicant does not deny that the 2nd Respondent has the mandate to investigate the alleged illegal circumstances surrounding the creation of his title. He also does not dispute the fact that the law allows the 2nd Respondent to institute court proceedings for recovery of any property it alleges to have been corruptly acquired.

35. What I get the Applicant to be saying is that the legitimacy of his title has been sanctioned by no less than the Court of Appeal and the 2nd Respondent cannot therefore be allowed to carry out investigations or institute recovery proceedings. This argument is untenable. The 2nd Respondent has correctly pointed out that in arriving at the decision to set aside the injunction given by the High Court, the Court of Appeal noted that since the Applicant was the registered owner of the suit property, there was no *prima facie* justification for interference with the property. The appeal was therefore allowed and the injunction set aside. This was an interlocutory application and the Court did not make any conclusive finding on the substantive case which was yet to be heard by the High Court. Unfortunately, none of the parties has disclosed the fate of **Nairobi HCCC No. 3063 of 1997** and it is safe to presume that the case remains undecided to date. There is also **Nairobi HCCCC No. 921 of 1998** which is still pending before the Environment and Land Court.

36. The Applicant argues that **Nairobi Milimani Commercial Courts CMCC No. 4678 of 2010** confirmed beyond reasonable doubt that the property belonged to him. I will only point out two things about that case. The first one is that it was filed while two cases were already pending before the High Court between some of the parties and involving the same issues. That raises queries about the legality and purpose of that case. Secondly, no compromise or consent can take away the statutory

powers of the 2nd Respondent to investigate the alleged illegalities surrounding the acquisition of the title to the suit property by the Applicant. In any case, the 2nd Respondent was not a party to that case. The less said about the proceedings before the Magistrate's Court the better.

37. The Applicant has submitted at length about the validity of his title. Unfortunately, in judicial review proceedings, the Court is not equipped with the necessary tools to enquire into how the title was acquired and make a competent decision about its validity. That question will be answered in the two cases pending before the High Court. The many authorities cited by the Applicant to show that the Registrar of Lands has no powers to cancel a title without involving the Court are therefore irrelevant to this case. The Registrar of Lands is not a party to these proceedings and there is no evidence that the Applicant's title has been cancelled. The 2nd Respondent proposes to file recovery proceedings and this is in compliance with the law.

38. The letter dated 29th February, 2012 is not a decision capable of attracting judicial review orders. The 2nd Respondent has simply expressed its view that the Applicant's title is invalid. It is the Court which will determine the legitimacy of the title and the 2nd Respondent cannot be stopped through judicial review orders from doing that which the law requires it to do. I therefore find these proceedings have no legal basis in so far as they relate to the 2nd Respondent's letter dated 29th February, 2012.

39. There is the Applicant's prayer for an order of mandamus against the 1st Respondent. Even though the 1st Respondent initially attempted to deny its statutory the responsibility of issuing development permits, it eventually admitted that it is mandated by the PPA to issue development approval.

40. An order of mandamus will issue to compel a public official to perform a statutory duty. Mandamus will not however compel the official to perform the duty in a certain way. In **Nairobi Civil Appeal 266 of 1996** K**enya National Examination Council v Republic ex-parte Geoffrey Gathenji Njoroge & 9 others,** the Court of Appeal delineated the purpose and reach of an order of mandamus as follows:

> **"The next issue we must deal with is this: What is the scope and efficacy of an <u>ORDER OF MANDAMUS</u>? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-**
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> > **"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 and 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."**
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> **At paragraph 90 headed "the mandate" it is stated:**
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> > **"The order must command no more than the party against whom the application is made 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."**

What do these principles mean? They mean that an order of mandamus will 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."

41. In a situation where the 1st Respondent refuses to consider an application for development permission, the Court will issue an order of mandamus to compel the 1st Respondent to make a decision on the application. The onus of deciding whether to grant or deny development permission belongs to the 1st Respondent and not the Court. It must, however, be remembered that whatever decision the 1st Respondent makes, the same must pass the test of legality, rationality and compliance with the rules of natural justice.

42. In the matter before this Court, the 1st Respondent states that it could not give development permission to the Applicant as his title was under investigation. Whether that is an acceptable reason is a matter that can be addressed through judicial review proceedings. I will, however, shortly demonstrate why the 1st Respondent's stated response cannot be interrogated in these proceedings.

43. In a case like this where no decision is forthcoming, an applicant cannot be told to resort to the Liaison Committee created by the PPA. The Liaison Committee is useful where there is a decision to be appealed against. When there is no decision, as has been alleged in this case, then judicial review is an ideal remedy.

44. However, the Applicant's case as presented to this Court faces some challenges. In the first place, the Applicant has not produced any evidence to show that he has applied for development permission. If an order of mandamus is issued to direct the 1st Respondent to consider the matter, which application is the 1st Respondent expected to consider? Secondly, even if there was an application for development permission, there is no evidence that the Applicant has asked for it to be considered and the 1st Respondent failed or refused to consider it.

45. In **Republic v Kenya Forest Service Ex-parte Joseph Kakore Ole Mpoe & 5 others [2010] eKLR (Nakuru H.C. JR No. 31 of 2010)** Maraga, J (as he then was) stated that:

"I concur with Lenaola J's view in Wamwere Vs Attorney General, [92004] 1 KLR 166 that a public officer cannot:-

"…be compelled to do something when there was no evidence of refusal or at the very least apparent refusal on the part of the public officer to do the thing. Even if such refusal has been shown it must also be shown to be unlawful."

I have perused the annextures to the affidavit in support of this application but I have not been able to find the Applicants application to the Respondent which it has refused to consider. In the circumstances, I agree with counsel for the Respondent that mandamus cannot issue and I accordingly dismiss the prayer for that order."

46. The Applicant herein has not exhibited any application for development permission and neither has he tabled any evidence to show that a demand was made upon the 1st Respondent but it didn't act on it. There is also no evidence that the 1st Respondent has refused to consider the application for development permission. In the circumstances of this case, I find that the Applicant has failed to test for

the grant of an order of mandamus.

47. Considering my findings so far, I need not address the issue of the defectiveness of the application in detail save to state that what the respondents have raised amount to technicalities which are curable by Article 159 (2)(d) of the Constitution. The 2nd Respondent's assertion that the application for leave was not accompanied by a verifying affidavit is incorrect. There is a verifying affidavit sworn on 11th April, 2012 by the Applicant. Had there been no verifying affidavit then I would have agreed that the application is incurably defective. That, however, is not the case in this matter.

48. For the reasons already stated, I find that the Applicant's case has no merit. I dismiss the same with costs to the respondents.

Dated, signed and delivered at Nairobi this 29th day of April, 2015

W. KORIR,

JUDGE OF THE HIGH COURT