



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC JR NO. E011 OF 2020

REPUBLIC.....APPLICANT

VERSUS

HON P. MUHOLISENIOR RESIDENT MAGISTRATE.....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT NAIROBI

(MILIMANI COMMERCIAL COURTS).....2ND RESPONDENT

LUCMI (E.A) LIMITED.....INTERESTED PARTY

JUDGEMENT

1. This is the Notice of Motion application dated 18th December,2020 filed pursuant to leave granted on 17th December 2020.The Applicant seeks orders:-

a) Certiorari to bring into this court and quash the proceedings in Chief Magistrate Court (Milimani Commercial Courts) Civil Suit No.1999 of 2020 Lucmi (E.A) Limited v China Road & Bridge Corporation (k) Ltd relating to the title, right to use, or occupy a parcel of land measuring 265 acres situate within Jomo Kenyatta International Airport flight path in Nairobi and valued at kshs.1.3 billion.

b) Prohibition to prohibit Hon. P. Muholi Senior Resident Magistrate and or any other Magistrate from hearing, determining, or taking any further proceedings in the said Chief Magistrate Court Nairobi (Milimani) Civil Suit No.199 of 2020 Lucmi (E.A) Limited v China Road & Bridge Corporation (K) Ltd or any other dispute relating to the right to use or occupy the foresaid 265 acres of land situate within Jomo Kenyatta International Airport flight path in Nairobi.

c) Costs of the application.

2. The application was supported by the affidavit sworn on 19th October 2020 by Jude Obiero; Legal Officer at the Ex-parte Applicant. He deponed that there is a pending suit before the Hon. P. Muholi Senior Resident Magistrate in the Chief Magistrate's between the Ex-parte Applicant and the Interested Party over land described by the Interested Party as "all that property neighboring Nairobi National Park and situate in Embakasi" while the land occupied by the Ex-parte Applicant is described as "265 acres within the Jomo Kenyatta International Airport flight path in Nairobi" whose pecuniary value is kshs.13, 250,000/=.

3. He further deponed that Section 26(4) of the Environment and Land Court Act as read together with Section 7(1) of the Magistrate's Court Act limits the pecuniary jurisdiction of the Chief Magistrate to Kshs.20,000,000/= and at kshs.7,000,000/= for the Senior Resident Magistrate.

4. He also deponed that the 1st and 2nd Respondents are conducting the proceedings in a manner that violates the basic rules of natural justice by denying the Ex-parte Applicant the right to be heard. He pointed out that on 15th May 2020, Honourable T. Lewa S.R.M. issued an exparte mandatory injunction compelling the Ex-parte Applicant to vacate by removing any alien materials or persons placed thereon pending interpartes hearing of the Interested Party's application dated 13th May 2020.He added that on 19th May 2020,Hon.Orange S.R.M issued an exparte order directing the OCPD and or OCS Embakasi police station to supervise the eviction.

5. He deponed that the Ex-parte Applicant only learnt of the proceedings following an alert from Sina Advocates who learnt of the proceedings in **CMCC NO.1999 of 2020** when they saw it on the cause list of 8th June 2020.He added that the Ex-parte applicant's

application dated 15th May 2020 was heard also heard on that same day, 8th June 2020 and injunction orders granted Ex-parte.

6. He also deponed that the Ex-parte applicant wrote to the 2nd Respondent and to Osundwa and Company Advocates who were on record for the Interested Party in the lower court indicating that the Ex-parte Applicant was not served with any court process.

7. He deponed that the ex-parte applicant filed the application dated 9th July 2020 seeking to strike out the suit for failing/refusing to serve pleadings and in the alternative that the ex-parte proceedings and orders be set aside but the court declined to grant it a hearing date. He added that it also filed another application dated 7th August 2020 seeking to stay the Ex-parte orders issued on 15th May 2020 but it was not granted temporary stay.

8. He further deponed that on 11th August 2020, the Interested party filed a contempt application alleging that the ex-parte applicant disobeyed the orders of 15th May 2020 and 8th June 2020 and sought orders that himself and five other individuals namely Li Qiang, Erick Yu, Yu Mũito, Li Changgui, Du Siau, appear in court for the hearing and that they be detained in police custody until the application is heard. He added that on 14th August 2020, Honourable P. Muholi directed them to appear on 24th August 2020 to show cause why contempt proceedings should not be commenced against them.

9. He also deponed that the ex-parte Applicant objected to the pecuniary jurisdiction of Respondents vide its statement of defence filed on 17th August 2020 and the preliminary objection filed on 21st August 2020. He added that there is real and present danger that the Ex-parte Applicant will be evicted from the property, its officers detained in police cells for alleged contempt and prejudged by a court that does not have jurisdiction and by orders that are ultra-vires the powers of Hon. Muholi and the Magistrate's court.

10. The application is opposed by the Interested Party vide its preliminary objection dated 5th November 2020, grounds of opposition dated 5th November 2020 and its replying affidavit sworn on 15th October 2021 by Peter Muchiri a director of the Interested Party.

11. He deponed that the Interested Party is the holder of a valid and subsisting temporary occupation licence from the Nairobi city County over that parcel of land described as "Embakasi neighbouring Nairobi National Park" which is unalienated, unadjudicated, unsurveyed and unregistered.

12. He deponed that by a plaint dated 13th May 2020, the Interested Party approached the 2nd Respondent vide **Milimani Chief Magistrate Court Civil Case No.1999 of 2020** for judicial intervention following the Ex-parte Applicant's trespass on the suit land and the 2nd Respondent appointed the 1st Respondent to adjudicate over the matter.

13. He deponed that in response to that suit, the Ex-parte Applicant's defence was that it is the licensee of the parcel of land known as "land being part of JKIA flightpath situated in Nairobi measuring about 265 acres" from the National Land Commission.

14. He deponed that the Ex-parte Applicant's license from the National Land Commission lapsed on 7th May 2020 before the suit in the trial court commenced and it did not claim interest over the Interested Party's property described as "Embakasi neighbouring Nairobi National Park" and there are interlocutory orders persisting in the trial court prohibiting the Ex-parte Applicant from trespassing on "Embakasi neighbouring Nairobi National Park". The contempt of court proceedings are pending against it for failure to comply with the interim injunction orders.

15. He also deponed that at the trial court, the Ex-parte Applicant filed a notice of preliminary objection on the question of the 1st and 2nd Respondent's pecuniary jurisdiction to handle the subject matter in Milimani Chief Magistrate Court Civil Case No.1999 of 2020 which is still pending determination.

16. He further deponed that in support of that objection, the Ex-parte Applicant produced a valuation report which does not bear a parcel number, has no copy of title, deed plan or site map attached to it but only describes the valued land as "land being part of JKIA flightpath situated in Nairobi measuring about 265 acres" which does not relate to the land described as "Embakasi neighbouring Nairobi National Park" which is the subject matter in **Milimani Chief Magistrate Court Civil Case No.1999 of 2020**. He added that there can be no legal valuation of a parcel whose geographical boundaries have not been identified and whose ownership is undefined due to lack of alienation/registration.

17. He deponed that the Ex parte Applicant has since ceased its trespass on the Interested Party's land described as "Embakasi neighbouring Nairobi National Park" by vacating and though the parties have been negotiating settlement of the matter in the lower court, none has been concluded.

18. On the 28th April 2021, the court with the consent of parties directed that the notice of motion be canvassed by way of written submissions.

The Ex-parte Applicant's submissions.

19. They are dated 29th June 2021. Counsel for the Applicant submitted on the following issues:-

a) Pecuniary jurisdiction.

b) Denial of right to be heard.

20. On the issue of jurisdiction, he submitted that the Respondents have no jurisdiction in the dispute because **Section 26(4)** of the Environment and Land Court Act as read together with Section 7(1) of the Magistrates' court Act limits the pecuniary jurisdiction of the Chief Magistrate to kshs.20,000,000/= and kshs.7 Million for the Resident Magistrate yet the pecuniary value of the 265 acres of land within Jomo Kenyatta International Airport in Nairobi which is in contention is over Kshs.13,250,000,000/= at the conservative price of kshs.50 million per acre.

21. He relied on the case of **Republic vs E. Mutunga Senior Resident Magistrate, Mombasa & 4 others Ex-parte Dalu Chigamba Munga & Another [2017]e KLR** and **Shuhan Limited vs Chief Magistrates court, Thika & Another[2017]e KLR** where courts quashed injunctions issued by magistrate's courts for exceeding the pecuniary jurisdiction of the Magistrate's court.

22. On the issue of denial of a right to be heard, he submitted that the averments in the Ex-parte Applicant's affidavit showing that he was denied a right to be heard were uncontroverted. He asked the court to rely on those averments to find that the Ex-Parte Applicant was denied the right to hearing.

The Interested Party's submissions.

23. They are dated 15th October 2021 and addressed the following issues:-

a) Whether the Applicant has met the grounds for granting of judicial review orders of certiorari and prohibition.

b) Whether the application dated 18th December 2020 is merited.

24. On the issue whether the Ex-parte Applicant has met the grounds for grant of judicial review orders, counsel for the Interested Party submitted that Judicial review orders are sought if a decision is made without or in excess of jurisdiction and as such, the application is premature as there is no decision that has been made by the Respondents concerning the issue of jurisdiction since an objection on the issue of jurisdiction is pending hearing by the 2nd Respondent.

25. He relied on the case of **Municipal Council of Mombasa v Republic; Umoja Consultants Ltd [2002] eKLR** and the case of **Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji & 9 others Nairobi Civil Appel No.266 OF 1996.**

26. On the issue whether the application is merited, he submitted that that the application is not merited since the 1st Respondent has been sued in his own name yet judicial officers have absolute immunity granted by the law under **Article 160(5)** of the Constitution and **Section 6** of the Judicature Act.

27. He further submitted that if the 1st Respondent was to make a decision, it would be a judicial decision as opposed to an administrative decision and as such, it can only be challenged by way of an appeal or review.

28. He also submitted that the orders sought are not amenable to judicial review but are appealable to the High court and or review in the lower court. He added that the question as to whether or not the land title or pecuniary jurisdiction or ownership of the suit land are within the mandate of this court is not a matter to be determined by way of judicial review. It was his submission that the power of court to review is to be exercised sparingly, in exceptional circumstances where illegality, irrationality or procedural impropriety has been proved.

29. He cited the cases of **Nelson Kinyua Wambutu v County Government of Nyeri & Another [2016]eKLR** and the case of **Republic v Attorney General & Another Ex-Parte Ongata Works Limited [2016] e KLR** to submit that judicial review orders are discretionary in nature and asked the court to decline the to issue the orders sought.

30. I have considered the notice of motion dated 18th December 2020, the affidavit in support and the annexures. I have also considered the replying affidavit dated 15th October 2021. I have considered the rival submissions and the authorities cited. the issues for determination are:-

(i) Whether the notice of motion dated 18th December 2020 is merited.

(ii) Who should bear costs of this application?

31. The Interested Party herein LUCMI (EA) Ltd filed a suit against the Ex-parte Applicant vide a plaint dated 13th May 2020. In paragraph 10, the particulars of trespass against the Defendant (Ex parte Applicant) herein are set out as follows:-

“(a) Forcefully and illegally gaining entry into the property.

(b) stationing foreign equipment, materials, machinery, vehicles and persons on the property.

(c) Unlawfully interference with the Plaintiff's property and business.

32. In paragraph 17 of the Plaint, the prayers sought are:-

“(a) A declaration that the Plaintiff is the lawful occupier, allottee and licensee from the Nairobi City County Government of the property known as Embakasi Neighbouring National part.

(b) A permanent injunction to restrain the Defendants by themselves, their servants, agents, employees, officers, managers, directors, proxies, sponsors, associates, subsidiaries, parent company or howsoever otherwise from entering upon, remaining upon, trespassing, damaging, wasting, removing, disposing of, selling, or otherwise interfering with the property and plaintiff’s business situated in Embakasi Neighbouring National Park.

(c) An order to evict the Defendant from the property known as Embakasi Neighbouring National Park.

(d) Damages for trespass against the Defendant.

(e) Costs of this suit together with the interest thereon for such period and at such rate as this honourable court may deem appropriate.

(f) Any such other or further relief as this honourable court may deem appropriate to grant.”

33. Together with the Plaintiff the Plaintiff filed a notice of motion dated 13th May 2020 seeking interim orders of injunction which were granted on 8th June 2020.

34. The gist of the Ex-parte Applicant’s application herein is to quash the proceedings in CMCC No 1999 of 2020. The main ground is that Hon. P. Muholi Senior Resident Magistrate lacked the pecuniary jurisdiction to hear and determine the matter.

35. The Ex-parte Applicant had a valuation undertaken on a parcel of land measuring 265 acres situate within Jomo Kenyatta International Airport Flightpath in Nairobi.

36. According to the valuation report by Leo Realtors Limited, the land is Kshs.50 million per acre which translate to Kshs.13,250,000,000/-. The Ex-parte Applicant’s case is that this is way beyond the peculiar jurisdiction of the Senior Resident Magistrate.

37. It is not in dispute that the Interested party LUCMI (E.A) Limited holds a valid and temporary occupation license form Nairobi City County.

38. The Ex-parte Applicant is also a licensee on the said parcel of land.

39. It is not in dispute that neither the Ex-parte Applicant nor the Interested Party lays any claim to the suit property. Both are licensees having licenses from the National Land Commission and the Nairobi City County Government respectively.

40. I am of the view that the dispute before the honourable Senior Resident Magistrate was therefore one of the trespass and not ownership of the land in question.

41. It is not in dispute that the Ex-parte Applicant filed a notice of preliminary objection challenging the jurisdiction of the 1st and 2nd Respondents to handle CMCC No 1999 of 2020. The same is still pending before that court.

42. The purpose of judicial review was canvassed in the case of **Municipal Council of Mombasa vs Republic; Umoja Consultants Ltd, Nairobi Civil Appeal No 185 of 2007** where the Court of Appeal held that:-

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself- such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review.”

43. Similarly in **Kenya National Examination Council vs Republic Ex-parte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No 266 of 1996** the court held that:-

“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an order of prohibition do and when will it issue? It 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 law 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-see Halsbury’s Law of England, 4th Edition Vol.1 at page 37 paragraph 128”.

44. I agree with the Interested party’s submissions that the Ex-parte Applicant ought to have sought a review of the orders complained of in the lower court.

45. The above findings notwithstanding, the 1st Respondent has a duty to ensure that all parties are given an opportunity to be heard. The 1st Respondent has to ensure that the Ex-parte Applicant's right to fair hearing is achieved as enshrined in Article 50(1) of the Constitution.

46. In conclusion, I find no merit in the notice of motion dated 18th December 2020 and the same is dismissed. Each party do bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 17TH DAY OF FEBRUARY 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Masila for the Ex-parte Applicant

No appearance for the Respondent

Ms Shiunda for Mr. Osundwa for Interested party

Steve - Court Assistant