REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 404 OF 2013

IN THE MATTER OF AN APPLICATION TO FILE JUDICIAL REVIEW PROCEEDINGS IN THIS COURT

AND

IN THE MATTER OF APPLICATION TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE RESPONDENTS

AND

IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26 AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF THE LAND ACT AND LAND REGISTRATION ACT LAWS OF KENYA

AND

IN THE MATTER OF REASONABLENESS WITH RESPECT TO THE ACTIONS OF MACHAKOS COUNTY GOVERNMENT

AND

IN THE MATTER OF ALLEGED LAND GRABBING OF COMMUNITY AND PRIVATE LANDS

AND

IN THE MATTER OF DEVELOPMENT OF MACHAKOS CITY

AND

IN THE MATTER OF PRINCIPLES OF PROPORTIONALITY AND LEGITIMATE EXPECTATION

AND

AND

IN THE MATTER OF THE DOCTRINE OF NEMO DAT QUOD NON HABET

BETWEEN

HON. SENATOR JOHNSTONE MUTHAMA.....1ST APPLICANT/RESPONDENT

-VERSUS-

MACHAKOS COUNTY GOVERNMENT.....RESPONDENT

AND

CS, FOR AGRICULTURE, LIVESTOCK & FISHERY.....1ST INTERESTED PARTY

NZILANI MUTETI.....2ND INTERESTED PARTY

RULING

1. By a Notice of Motion dated 2nd June, 20152, the respondent in these proceedings, **Machakos County Government**, seeks the following orders:

> **1. That the honourable court be pleased to certify this matter as urgent, service thereof be dispensed with and the same be heard Ex parte in the first instance.**
>
> **2. That this honourable court be pleased to stay its orders made on the 25th May 2014 pending the hearing and determination of this application.**
>
> **3. That this honourable court be pleased to review and/or set aside the orders made on the 25th May 2014.**
>
> **4. That the contents of the 1st Respondent's replying affidavit sworn by Dr. Alfred N. Mutua on the 11th November 2013 be relied upon and/or be considered as part of response to the Notice of Motion dated 4th February 2014.**
>
> **5. That the 1st Respondent be granted leave to file a further affidavit for purposes of annexing the physical development plan approved by the Director of Physical Planning and the notice by advertisement in the Daily Nation dated 13th February 2015.**
>
> **6. That the court be pleased to issue any directions it may deem appropriate in the interest of justice and the Rule of Law.**
>
> **7. That costs of this application be in the cause**
>
> **Applicant's Case**

2. The said application is based on the following grounds:

> **1. That the Applicant herein filed judicial review application vide a Notice of motion application before this honourable court on 12th February 2014.**
>
> **2. That the averments made in the Respondent's replying affidavit sworn on the 11th November 2014 and filed in court on the 13th November 2013 substantially addressed matters raised in the Notice of Motion dated 4th February 2014.**

3. That the Respondent has never filed a substantive response to the application since then owing to difficulties in getting the physical development plan maps from the Director of Physical Planning in regards to the land earmarked for development of the new city.

4. That there us now in place an approved physical development plan by the Director of Physical Planning in respect of which an advertisement was placed in the Daily Nation of 13th February 2015 hence orders sought have since been overtaken by events.

5. That the aforesaid development plan was drawn as a consequence of powers exercised by the National Land Commission in respect of land within the County of Machakos where Machakos city investment program was launched by the President of Kenya on 8th November 2013,

6. That the lands subject matter of these proceedings was reserved by the National Land Commission in exercise of functions bestowed on it by the Constitution of Kenya, 2010 at Article 67.

7. That the Ex parte Applicant has not joined the Director of Physical Planning and the National Land Commission to these proceedings

8. That it is in the spirit of fairness, justice and the rule of law that the court ought to grant prayers sought.

9. That no prejudice shall be suffered by the Respondents/Interested Parties if the prayers sought herein are granted.

3. The Application was supported by an affidavit sworn by **Hon. Dr. Alfred N. Mutua** who was wrongly described therein as the County Secretary of the County Government of Makueni.

4. According to the deponent, the Applicant herein filed judicial review application vide a Notice of Motion application before this honourable court on 12th February, 2014 to which the Respondent never filed a substantive response owing to difficulties in getting the physical development plan from the director of physical planning in regards to 2nd Interested Parties interest. The aforesaid Physical Development Plan, it was deposed, was triggered by the reservation made by the National Lands Commission in respect of L.R. No. 1491/R.

5. Whereas it was the deponent's view that the replying affidavit sworn on the 11th November wo13 and filed in court on the 13th November 2013 substantially addresses the matter herein, it was his opinion that it is important for the court to be supplied with a copy of the aforesaid Physical Development Plan together with the statutory notice thereto, to enable it arrive at an informed decision on the matter.

6. It was therefore sought that, owing to the new discovery and/or new development, this honourable court has discretion to review and/or set aside its orders to pave way for record that would assist the court arrive at an informed decision in the spirit of fairness, justice and rule of the law hence the orders sought herein.

7. To the Respondent, no prejudice shall be suffered by the Respondents/Interested Parties if the prayers sought herein are granted.

Response to the Application

8. The application was however opposed by the ex parte applicant herein, **Hon. Senator Johnstone Muthama**, who filed the following grounds of opposition:

1. **That there is no discovery of new and important matter or evidence to justify a review of the orders pronounced by this honourable court.**
2. **That the Applicants had not exercised due diligence to bring the evidence before the court and yet this was a matter within their knowledge at the time when the orders were made.**
3. **There is no sufficient reason that justifies a review of the orders made by this honourable court and therefore the court granting such an application would be to defeat justice on the part of the Respondent.**
4. **That there is no mistake or error apparent on the face of the record that would guarantee a review.**
5. **That granting such review would defeat the spirit of fairness, justice and rule of law to the Respondents who have exercised due diligence to have the matter prosecuted up to this stage.**
6. **That the Respondent shall suffer prejudice if the prayers sought are granted.**
7. **The circumstances that justify review are set out clearly in the Civil Procedure Rules. These circumstances do not exist in the instant application.**

Determination

9. Before I deal with the merits of the application, it is important to note that by a ruling dated 18th June, 2015, I directed that these proceedings be heard and determined by another Judge. That direction was not based on any application made by a party to these proceedings and was not premised on any impartiality on the part of the Court but was simply based on the need to avoid any negative impression that may be formed by any of the parties to the proceedings. However subsequent to the said decision the parties herein expressed full confidence in this Court and urged the Court to proceed to determine the issues raised herein. In order to avoid any delay that may be occasioned by the matter being heard by a different Judge, this Court favourably considered the same and has consequently decided to set aside the directions given on 18th June, 2015.

10. I have considered the application, the supporting affidavit and the grounds of opposition and the submissions filed herein.

11. In order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the ***Civil Procedure Rules***, certain requirements must be met. The said provision provides as follows:

> ***"(1) Any person considering himself aggrieved—***
>
> a. ***by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
> b. ***by a decree or order from which no appeal is hereby allowed,***
>
> ***and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***
>
> ***(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."***

12. The foregoing provisions are based on section 80 of the ***Civil Procedure Act*** Cap 21 Laws of Kenya which states as follows:

"Any person who considers himself aggrieved—

a. ***by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
b. ***by a decree or order from which no appeal is allowed by this Act,***

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

13. It is clear that unlike Order 45 (which is a delegated legislation), section 80 of the ***Civil Procedure Act***, (which is the parent Act) gives the Court wide and unfettered jurisdiction in the exercise of its powers of review and does not prescribe the conditions upon which an application for review may be granted. In **Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation vs. Firestone EA (1969) Limited Civil Appeal No. 172 of 1998** the Court of Appeal held that section 80 of the ***Civil Procedure Act*** enables a court to make such orders on review application which it thinks just so that the words "or any sufficient reason" as used in Order 44 [now Order 45] rule 1 of the ***Civil Procedure Rules*** are not *ejusdem generis* with the words "discovery of new and important matter" etc. and "some mistake or error apparent on the face of the record" and that those words extend the scope of the review. Accordingly, the said court held that there is no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly section 80 of the ***Civil Procedure Act*** confers an unfettered right to apply for review.

14. In dealing with the delegated legislation made under the Act **Farrell, J** in **Sardar Mohamed vs. Charan Singh Nand Singh & Another HCCA No. 51 of 1959 [1959] EA 793** was of the following view, with which view, I respectfully associate myself :

> **"In terms section 80 of the Civil Procedure Ordinance confers an unfettered right to apply for review in the circumstances specified and an unfettered discretion in the court to make such order as it thinks fit. The omission of any qualifying words at the beginning of the section appears to have been deliberate, since the section is obviously based on section 114 of the Indian Code, which is qualified, and similar qualifying words appear in a number of the other sections. Under section 81(1) of the Ordinance the Rules Committee has power to make rules "not inconsistent with the provisions of this Ordinance". If a rule is inconsistent it is to that extent *ultra vires;* and if the Ordinance confers unfettered power, a rule which limits the exercise of the power is *prima facie* inconsistent with the Ordinance and *ultra vires.* If, however, a rule is capable of two constructions, one consistent with the provisions of the Ordinance, and one inconsistent, the court should lean to the construction which is consistent on the principle *"út res magis valeat quam pereat*". If the words "or for any other sufficient reason" can be given a liberal construction, there is nothing in Order 44, rule 1(1) in any way inconsistent with section 80 of the Ordinance. The paragraph is perhaps unnecessary, but serves to make it clear that at least the two grounds specified are such as would entitle an aggrieved party to apply for review".**

15. The next issue is whether an order made in an application for judicial review is itself capable of being reviewed. The Court of Appeal in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** held that the superior court in the matter before the court has the residual power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction and not necessarily under section 3A of the ***Civil Procedure Act*** which strictly speaking does not apply to judicial review proceedings. That section in any case does not confer inherent jurisdiction on the Court but only reserves the same.

16. The court, no doubt has inherent powers to make such orders as may be necessary for the ends of justice. Inherent power, it must be stressed, is not donated by Section 3A of the ***Civil Procedure Act***. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the ***Civil Procedure Act*** is not a provision that confers jurisdiction on the court but simply

reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.

17. Dealing with inherent powers of the Court it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.

18. Accordingly, I find that in appropriate cases the Court when properly moved may perfectly grant orders reviewing or setting aside orders made in judicial review proceedings.

19. Whereas strictly speaking the ***Civil Procedure Act*** and the Rules made thereunder do not apply to judicial review proceedings, in light of the provisions of Article 159(2)(d) of the Constitution the mere fact that a party cites the wrong provisions of the law ought not to deprive the Court of a jurisdiction where such jurisdiction exists. As I have demonstrated above jurisdiction to review or set aside orders made in judicial review proceedings exist hence the mere fact that the instant application is expressed to be brought under Order 45 in my view does not render the application fatally defective or incompetent.

20. From the supporting affidavit, it is contended that the failure to respond to the application was due to the inability to secure the Physical Development Plan which in the Respondent's view is crucial to the determination of the issues raised herein.

21. The principles guiding the setting aside *ex parte* orders are trite that the court has wide powers to set aside such *ex parte* orders save that where the discretion is exercised the Court will do so on terms that are just. In **CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173** it was held as follows:

> **"That discretion must be exercised upon reasons and must be exercised judiciously…... In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle...The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate".**

22. In **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, Oder, JSC** stated:

> **"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered".**

23. Apart from the introduction of the said map the Respondent intends to rely on the contents of an affidavit which already forms part of the record of these proceedings. The law is now clear that the Court ought not to ignore documents on record even if irregularly filed unless the filing thereof has prejudiced the other party in material respect. See **Trust Bank Limited vs. Amalo Company Limited Civil Appeal No. 215 of 2000 [2002] 2 KLR 627; [2003] 1 EA 350** and **Central Bank ofKenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998.**

24. In this case, no affidavit evidence has been presented to show the nature of prejudice if any that the

Applicant and Interested Party stand to suffer if the orders herein are granted. As was held in **Abdul Aziz Suleman vs. South British Insurance Co. Ltd. Nairobi HCCC No. 779 of 1964 [1965] EA 66:**

> **"To say that an affidavit filed by the plaintiff cannot be supplemented by further affidavit by the plaintiff, with the leave of the court, is something which startles one, and no case has ever suggested that with the leave of the court the plaintiff's affidavit cannot be supplemented."**

25. In my view, the interest of justice dictates that as far as possible parties ought to be afforded an opportunity to fully present their case unless the conduct of a party has made it difficult for justice to be achieved in a particular case.

26. Having considered the foregoing I am satisfied that the grant of the orders sought herein will not occasion such prejudice to the Applicant and the Interested Party more so as part of what is sought to be considered already forms part of the record.

27. In the premises I grant prayers 3, 4 and 5 of the Motion dated 2nd June, 2015 and direct that the Respondent files a further affidavit limited to exhibiting the said Physical Development Plan within 3 days.

28. The costs of this application are awarded to the Applicant and the Interested Party.

Dated at Nairobi this 21st day of September, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ongaro for Dr Khaminwa for the Applicant

Mr Nyamu for the Respondent

Mr Mutemi for Mr Nzamba Kitonga for the Interested Party

Cc Patricia