



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. 324 OF 2014

IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CS, MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT...1ST RESPONDENT

THE NAIROBI COUNTY COMMISSIONER.....2ND RESPONDENT

THE CHIEF KAREN LOCATION.....3RD RESPONDENT

EX-PARTE: KISIMANI HOLDINGS LTD

JUDGEMENT

Introduction

1. By a Notice of Motion dated 11th September, 2014, the ex parte applicant herein, **Kisimani Holdings**

Ltd, seeks the following orders:

1. **Certiorari to remove into this court for the purposes of being quashed the decision of the Respondents made in or about the month of August, 2014 to trespass onto the Applicant's suit property known as LR No. 13544/99, situate in Karen are of Nairobi County and purporting to set the said suit property aside for the construction of the Chief's camp.**
2. **Certiorari to remove into this court for the purpose of being quashed the decision of the Respondents made in or about the month of August, 2014 to settle and/or allow some private citizens to settle and keep livestock on the suit property or part thereof.**
3. **Prohibition to prevent the Respondents either by themselves or persons acting for or under them from commencing, continuing or completing any constructions whether of buildings, fences, or whatever structures on the Applicant's property without the express authority of the Applicant.**
4. **Mandamus to compel the Respondents to demolish and remove from cite, the barbed wire fence, the makeshift housing structure and the sign post erected/placed thereon by themselves and/or by persons acting under them.**
5. **Mandamus to compel the Respondents to restore the perimeter wall demolished by them or by persons acting under them from the suit property in breach of the Applicant's constitutional right to private property.**
6. **The costs of this application be awarded to the Applicant.**

Ex Parte Applicant's Case

2. The application was supported by a verifying affidavit sworn by **Azhar Kamal Chaudry**, one of the Directors of the applicant on 11th September, 2014.

3. According to the deponent, the Applicant is the registered proprietor of all that piece of land situate in Karen location within the County of Nairobi and more particularly described as LR No. 13544/99 containing by measurements 0.3501Ha or thereabouts (hereinafter, "the suit property") which suit property was initially granted by the President of the Republic of Kenya to Shalfa Holdings Limited, a leasehold interest for a term of 99 years commencing 1st September, 1985.

4. It was deposed that on 16th November 2009 a transfer of lease was registered in favour the Applicants herein, having acquired the said interest thereon from Shalfa Holdings Limited and on 31st May 2011, the Applicant paid the sum of Kshs. 372, 495.00 to the City Council of Nairobi, (now City County of Nairobi) being an approval fees for erecting a construction board, fee for building plan approval, infrastructure levy fee and occupation certificate fee. It was explained that the Applicant had intended and indeed had obtained approval from the City Authorities for the construction of a commercial complex on the suit property.

5. However, sometime in or around March 2014, the Applicant discovered a sign post erected on the suit property, purporting that the suit property had been set aside for the construction of the 3rd Respondent's offices. On 31st March 2014, the Applicant, through their then advocates, wrote to the Respondents complaining and protesting the said conduct of the Respondents attempting to illegally acquire the Applicant's property and in response thereto, on 14th April 2014, the 2nd Respondent wrote to the Applicant indicating that they had warned the 3rd Respondent to stop such act and to remove the sign post complained of. To the Applicant's surprise, the Respondents have now resumed their earlier plan of grabbing the Applicant's land with more vigour and not only have the Respondents erected another sign post on the suit property indicating that it is to be used for construction of the 3rd Respondent's offices, but have also demolished the Applicant's perimeter wall and also erected a makeshift dwelling structure, in which they have now accommodated some private persons who keep livestock thereon.

6. According to the deponent, unless this Court intervenes to stop the Respondents from continued violation of the Applicant's proprietary rights in the suit property, the Applicant stands to suffer irreparable harm for which no amount of compensation with suffice.

7. Citing sections 24 of the **Land Registration Act** (“the Act”), it was submitted that alienation of proprietary rights in land must be in accordance with the Act and section 26 thereof enjoins all Courts to take all certificates of registration of land as prima facie evidence that the person registered is the actual owner and only a court of law has the jurisdiction to cancel and/or revoke a registered title, is sufficient cause shown.

8. It was submitted that the respondents’ action amounts to revocation of the applicant’s title in violation of the aforesaid provisions hence should be declared null and void. In support of the application the applicant relied on **Kuria Greens Ltd vs. Registrar of Titles & Another [2011] eKLR**. The applicant also relied on Article 47 of the Constitution and urged the Court to find that the applicant was entitled to reasons for the impugned action failure to do which contravenes the Constitution and renders the action a nullity. Pursuant to Article 50 of the Constitution the applicant submitted that it ought to have been afforded an opportunity to state its case before the decision was reached.

9. To the applicant the decision was not only unconstitutional but also unreasonable and contrary to legitimate expectation. In support of this submission the applicant relied on **R vs. Devon County Council ex parte P Baker [1955] 1 All ER** where it was held:

“...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision.”

10. According to the applicant, Article 40 of the Constitution guarantees the applicant the right to acquire and own property and entitles it to adequate compensation in the event of compulsory acquisition hence the respondents’ action amounted to state taking its property without compensation contrary to Article 40(3).

Respondents’ Case

11. The application was opposed by a replying affidavit sworn by **Francis Waneno**, a Senior Chief in charge of Karen Location, the 3rd Respondent herein.

12. According to the deponent, there is no decision capable of being quashed by this Court. According to the deponent, contrary to the applicant’s allegations, the parcel of land on which the 3rd respondent’s office is to be constructed is parcel ref no. 10130/2 which is completely different from the applicant’s alleged land reference No. 13544/99 and from the applicant’s deed plan and the area maps the two are completely distinct hence the applicant cannot claim what does not belong to it.

13. It was deposed that Land Ref. No. 10130 was set aside as public land by the government to be utilised for public purposes and deriving therefrom in Land Ref. No. 10130/1 which is carved out as a road reserve while land ref. 10130/2 is earmarked for construction of the Chief Camp and other public amenities. To the deponent, the applicant is not aware of the position of its land on the ground and this is not the proper forum to resolve boundary disputes as the applicant ought to have engaged the services of a surveyor to point out the beacons hence the application ought to be dismissed with costs to the 3rd respondent.

14. The 3rd respondent therefore submitted that the dispute herein cannot be determined based on affidavit evidence only since the facts are materially at variance and disputes relating to land are now within the province of the Environment and Land Court. In order to determine the dispute herein, it was submitted that the Court would have to interrogate not only the title documents to the two parcels but also their respective boundaries, an action which calls for evaluation of evidence by witness a course for the trial court. In support of its submissions the applicant relied on **Peter Malonza & 24 Others vs. Minister in the Ministry of Youth Affairs and Sports and Others**, **Republic vs. Tanathi Water Services Board and 2 Others ex parte Muthama [2014] KLR**, **Sanghani Investments Ltd vs. The Officer in**

Charge Nairobi Remand and Allocation Prison Nairobi HC Misc. Appl. No. 99 of 2006, Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary and Ministry of Nairobi Metropolitan Development & Another [2014] KLR.

15. It was therefore submitted that this Court lacks jurisdiction to determine this application.

16. According to the respondent, contrary to Order 53 rule 7(1) of the *Civil Procedure Rules*, the applicant does not specify the decision it seeks to quash and its date and nor is the decision itself exhibited. In support of this submission the respondent cited **Republic vs. Chairman District Alcoholic Drinks Regulation Committee & 4 Others exp Detleft Heier & Another [2013] eKLR** and **Republic vs. City Council of Nairobi & 2 Others exp Richard Bell & Another [2014] KLR.**

17. Since the two parcels in contention are different, it was submitted that the Court is being urged to grant orders in vain and a challenge will arise as to its enforceability and reliance was placed on **Kenya National Examination Council vs. Republic ex parte Gathenji [1997] KLR.**

Determination

18. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others** (supra) in which the said Court held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition 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 laws 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...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if

the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

19. However judicial review proceedings do not deal with the merits of the decision but by the decision making process. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

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

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

22. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) 1 WLR 1155.

23. In this case whereas the applicant contends that the respondents are attempting to acquire its land without following the due process, the 3rd respondent’s position is that the applicant’s parcel of land is not the same as the one on which the Chief’s Camp is earmarked for construction. There is clearly a conflict on the factual position of the applicant’s parcel on the ground and whether it is the same property on which the Chief’s camp is being constructed. In my view for the Court to find that the respondents are constructing on the applicant’s parcel of land, the Court would have to determine that the respondents’ contention is incorrect. That determination necessarily requires that oral and/or documentary evidence be adduced more so the evidence of the surveyors. In the absence of such evidence, it would be an exercise in futility for this Court to attempt a resolution of the dispute between the parties herein. However, that is not the jurisdiction of a Court exercising judicial review jurisdiction under sections 8 and 9 of the ***Law Reform Act*** Cap 26 Laws of Kenya. To finally and conclusively determine this dispute this Court would have to make determinations on merit as this is not a matter which is merely a process review. That is a task which I cannot perform in these proceedings even if I was possessed of the jurisdiction which I do not in light of the provisions of Article 165(5)(b) as read with 162(2) of the Constitution.

24. Where the determination of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply. It is

governed by sections 8 and 9 of the **Law Reform Act** being the substantive law and Order 53 of the **Civil Procedure Rules** being the procedural law. Section 8 of the **Law Reform Act** specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, *mandamus*, *certiorari* and *prohibition*. Whereas, Parliament has enacted the **Fair Administrative Action Act, 2015** pursuant to Article 47 of the Constitution and which Act now confers on the Court the powers to grant other orders apart from the traditional judicial review reliefs of *certiorari*, *mandamus* and *prohibition*, a striking feature of the said legislation however is that it does not purport to repeal sections 8 and 9 of the **Law Reform Act**. As to whether that repeal is implied by virtue of the **Fair Administrative Action Act** being latter in time is a matter for determination another day. Suffice it to say that sections 8 and 9 of the **Law Reform Act** only recognise the three traditional reliefs.

25. In order to determine the questions in this dispute, the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring where the boundaries of the two adjacent parcels of lands are leave alone their existence on the ground. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. Here, there are serious factual issues which require to be resolved and which go beyond the Court's jurisdiction in judicial review proceedings.

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

“Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.....Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce evidence* and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.....It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce evidence* at another forum preferably the Civil Courts.”

27. To grant the orders sought herein will leave the serious conflicting issues of fact raised in these proceedings unresolved hence will be a source of future conflicts since as already stated judicial review applications do not deal with the merits of the case but only with the process. In other words in judicial review applications the Court's jurisdiction is to determine whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the

dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.

28. To grant the orders sought herein in light of diametrically opposed positions taken by the parties would leave the parties in a situation where they would continue with their activities unabated since they believe they are in their rightful parcels of land and prohibiting the respondents from developing the applicant's suit land would not be of any effect to the actions of the respondents. In other words the orders sought herein if granted will not be efficacious and will in fact be in vain.

Order

29. Consequently, I find no merit in the Notice of Motion dated 11th September, 2014, but as the merits of the dispute remain unresolved, there will be no order as to costs.

Dated at Nairobi this 29th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Khaseke for the 3rd Respondent

Cc Patricia