



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 35 OF 2017

REPUBLIC.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

KIAMBU DANDORA FARMERS LIMITED.....INTERESTED PARTY

EX PARTE: PROF. KIHUMBU THAIRU

JUDGMENT

1. Pursuant to the leave that was granted on 20th December 2017, the ex parte applicant, Prof. Kihumbu Thairu (hereinafter referred to only as “the applicant”) brought this application by way of Notice of Motion dated 3rd January 2018, seeking the following orders;

a) That this Honourable Court be pleased to grant an order of Certiorari to remove to this Honourable Court and quash the decision of the Respondent to allocate the Applicant’s parcel of land known as L.R No.209/9459 (I.R No. 63446) (hereinafter referred to only as “the suit property”) to the Interested Party.

b) That this Honourable Court be pleased to grant an order of Prohibition to prohibit the Respondent, its agents, employees, servants or whosoever from allocating the suit property to the interested party or doing any other thing to interfere with the Applicant’s possessory rights over the suit property.

c) That the costs of this application be awarded to the Applicant.

The Applicant’s case:

2. The Applicant’s application was based on a Statutory Statement dated 22nd September 2017 and a Verifying Affidavit and a Supporting affidavit sworn by the Applicant on 22nd September 2017 and 3rd January 2018 respectively.

3. The Applicant averred that he was the registered proprietor of the suit property and that the Respondent had on several occasions confirmed his undisputed ownership of the same.

4. The Applicant averred that the Respondent purported to allocate the suit property to the Interested Party through an out of court settlement in Constitutional Petition No. 47 of 2011 and a subsequent letter of allotment dated 5th January 2015.

5. The Applicant averred that the suit property was private land and that his title to the property had never been revoked and as such the Respondent had no power to allocate the same to the Interested Party.

6. The Applicant averred that by a letter dated 19th July 2016 the Respondent sought the assistance of the Kenya Police Service to evict the Applicant from the suit property.

Interested Party’s case:

7. I have not seen on record any response to the application by the Respondent. The Interested Party opposed the application through a Preliminary Objection dated 22nd September 2020 and a replying affidavit sworn by Joseph Mwangi Karanja on 22nd September 2020. In its preliminary objection, the Interested Party contended that the Applicant’s application is sub judice in that there is a matter pending before this court namely, ELC Constitution Petition No. 47 of 2011, Abdilahi Muiruri Muigai v The National Land Commission and others over the

same subject matter and as such the court has no power to entertain this suit. The Interested Party contended further that the application is defective in that the Applicant did not lodge in court the decision sought to be quashed.

8. In its replying affidavit, the Interested party averred that the suit property falls within L.R. No. 11379/3 (hereinafter referred to as "Plot No. 11379/3") which is registered in the name of the Interested Party. The Interested Party averred that it purchased Plot No. 11379/3 from Khan Nawaz, Khan Abbas and Mehdi Khan and were issued with a title dated 8th April 1970.

9. The Interested party averred that in 1974, the government attempted to compulsorily acquire 818 acres of Plot No. 11379/3 but the acquisition was not completed.

10. The Interested Party averred that during that period, Plot No. 11379/3 was encroached on and some unlawful allocations made on the larger part thereof occasioning their complaint to the Respondent and subsequent settlement agreement that was made on 18th August 2015.

11. The Interested Party averred further that it was part of the settlement agreement that it was to take up all the unoccupied space on Plot No.11379/3 and that the Respondent was to review all grants and dispositions that had been carried out in respect of that property under section 14 of the National Land Commission Act, 2013 including the title held by the Applicant herein.

12. The Interested party averred that the Respondent caused to be published a notice in the daily newspapers on 2nd December 2015 requiring all parties interested in Plot No.11379/3 to submit written submissions on how they acquired their various interests and the Applicant obliged.

13. The Interested Party averred that the Respondent was yet to render a decision on the review it had undertaken on grants and dispositions affecting Plot No.11379/3.

14. The Interested party averred that the dispute brought to court by the Applicant concerns ownership of land and should be determined in a substantive suit rather than through judicial review application.

The submissions:

15. The Applicant filed his submissions dated 7th December 2020 while the Interested Party filed submissions dated 29th June 2021.

16. On the Interested Party's preliminary objection, the Applicant submitted the sub judice rule is not applicable in Judicial Review matters which are neither civil nor criminal in nature. In support of this submission, the Applicant cited Commissioner of Lands v Kunste Hostels Ltd. [1997] eKLR and Sanghani Investment Limited v Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.

17. The Applicant submitted further that in any event, the Interested Party had not satisfied the conditions required for sub judice rule to apply. In support of this submission, the Applicant cited Republic v Registrar of Societies –Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR. The Applicant submitted that the issue before this court is the propriety of and the procedure that was adopted by the Respondent in allocating the suit property to the Interested Party. The Applicant submitted that this is not the same issue in contention in Nairobi ELC Constitution Petition No.47 of 2011, Abdilahi Muiruri Muigai v The National Land Commission and Others in which he is not even a party.

18. The Applicant submitted that he has met the conditions for the grant of the orders sought. In support of this submission, he cited Municipal Council of Mombasa v Republic & another [2002] eKLR and Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR.

19. The Applicant submitted further that the Respondent had no jurisdiction to review grants and dispositions of private land and to determine that the Interested Party was the owner of the suit property. In support of this submission, the Applicant relied on Republic v Chairman Business Premises Rent Tribunal & 2 others Ex-Parte Abdulkadir Hubess [2017] eKLR.

20. The Applicant submitted further that he was not accorded procedural fairness embodied in Article 47 of the Constitution and cited Republic v Kenya Revenue Authority Ex Parte Yaya Towers Limited [2008] eKLR in support of this submission.

21. On its part, the Interested Party submitted that the substantive dispute is before this court in Nairobi ELC Constitutional Petition No. 47 of 2011, Abdilahi Muiruri Muigai v The National Land Commission and Others (hereinafter referred to only as "the Petition") where the court has been called upon to determine the ownership of Plot No.11379/3 which the suit property forms part. The Interested Party submitted that in the circumstances, the present application is sub judice. In support of this submission, the Interested Party cited Edward R. Ouko v Speaker of the National Assembly & 4 others [2017]eKLR and Republic v Commissioner of Domestic Taxes; Panalpina Airflo Limited (Ex-parte)[2019]eKLR.

22. The Interested Party submitted further that the Applicant has not filed the Respondent's decision sought to be reviewed hence the court cannot grant an order for judicial review. In support of this submission the Interested Party cited Republic v Secretary of the Firearms Licensing Board & 2 others Ex -parte:Senator Johnson Muthama [2018]eKLR.

Issues for determination:

23. I have considered the application together with the statutory statement and affidavits filed in support thereof. I have also considered the Notice of Preliminary Objection and the replying affidavit filed by the Interested Party in opposition to the application. In my view, two

issues arise for determination in the application namely; whether the application is sub judice and secondly, whether a case has been made out for the grant of the orders sought by the applicant. On the first issue, the sub judice rule has its basis in section 6 of the Civil Procedure Act which provides as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

24. In Edward R. Ouko v Speaker of the National Assembly & 4 others [2017] eKLR the court stated as follows on the principle of sub judice:

“5. This, however, does not take away the Court’s inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the its process. Whereas sub judice may not, pursuant to section 6 aforesaid, be invoked in judicial review proceedings, the Court retains an inherent jurisdiction to make such orders as necessary for the ends of justice including termination of proceedings or stay of the same. One of the principles guiding the exercise of judicial authority as enunciated in Article 159(2)(b) of the Constitution is that justice delayed is justice denied. The effect of filing several proceedings seeking the same or substantially the same orders would be to delay the course of justice and the Court is constitutionally obliged to take actions that would expedite the disposal of matters before it including termination of unnecessary proceedings and staying multiple suits filed by the same partes seeking the same or substantially the same orders. Accordingly, the principle of sub judice may well be achieved by applying the constitutional principles.”

25. In Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties [2020] eKLR) the Supreme Court stated as follows:

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

26. From the foregoing, in order for the Interested Party’s sub judice objection to succeed, he had to satisfy the following conditions;

- a) There is in existence two or more suits filed consecutively.
- b) The matter in issue in the suits or proceedings are directly or substantially the same.
- c) The parties in the suits or proceedings are the same or are parties under whom they or any of them claim and they are litigating under the same title.
- d) The suits are pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

27. It is my finding that the Interested Party did not satisfy the foregoing conditions. The Interested Party has not demonstrated that the issues raised in the Petition are the same issues raised before this court and that the Applicant herein is a party to the Petition. Since this was the main issue raised in the Interested Party’s preliminary objection, the said objection fails.

28. On whether the Applicant should be granted the reliefs sought in the application, the following is my view: Judicial review is now a constitutional, statutory and common law remedy. Section 4 of the Fair Administrative Action Act, 2015 provides as follows:

“4. (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
- (b) an opportunity to be heard and to make representations in that regard;**
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**

- (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;
 - (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-
- (a) attend proceedings, in person or in the company of an expert of his choice;
 - (b) be heard;
 - (c) cross-examine persons who give adverse evidence against him; and
 - (d) request for an adjournment of the proceedings, where necessary to **ensure a fair hearing.**”

29. Section 7 of the Act provides as follows:

“7. (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-

- (a) a court in accordance with section 8; or
 - (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.
- (2) A court or tribunal under subsection (1) may review an administrative action or decision, if-
- (a) the person who made the decision-
 - (i) was not authorized to do so by the empowering provision;
 - (ii) acted in excess of jurisdiction or power conferred under any **written law**;
 - (iii) acted pursuant to delegated power in contravention of any law **prohibiting such delegation**;
 - (iv) was biased or may reasonably be suspected of bias; or
 - (v) denied the person to whom the administrative action or decision **relates, a reasonable opportunity to state the person's case**;
 - (b) a mandatory and material procedure or condition prescribed by an **empowering provision was not complied with**;
 - (c) the action or decision was procedurally unfair;
 - (d) the action or decision was materially influenced by an error of law;
 - (e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
 - (f) the administrator failed to take into account relevant considerations;
 - (g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
 - (h) the administrative action or decision was made in bad faith;
 - (i) the administrative action or decision is not rationally connected to-

- i. the purpose for which it was taken;
 - ii. the purpose of the empowering provision;
 - iii. the information before the administrator; or
 - iv. the reasons given for it by the administrator;
- (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
- (k) the administrative action or decision is unreasonable;
- (l) the administrative action or decision is not proportionate to the interests or rights affected;
- (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;
- (n) the administrative action or decision is unfair; or
- (o) the administrative action or decision is taken or made in abuse of power.”

30. Section 11 of the Act provides as follows:

“11(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order-

- (a) declaring the rights of the parties in respect of any matter to which the administrative action relates;
- (b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;
- (c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;
- (d) prohibiting the administrator from acting in particular manner;
- (e) setting aside the administrative action or decision and remitting **the matter for reconsideration by the administrator, with or without directions;**
- (f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;
- (g) prohibiting the administrator from acting in a particular manner;
- (h) setting aside the administrative action and remitting the matter for **reconsideration by the administrator, with or without directions;**
- (i) granting a temporary interdict or other temporary relief; or
- (j) for the award of costs or other pecuniary compensation in appropriate **CASES.**

(2) In proceedings for judicial review relating to failure to take an administrative action, the court may grant any order that is just and equitable, including an order-

- (a) directing the taking of the decision;
- (b) declaring the rights of the parties in relation to the taking of the **decision;**
- (c) directing any of the parties to do, or to refrain from doing, any act or **thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or**

(d) as to costs and other monetary compensation.”

31. Section 12 of the Act provides that:

“This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.”

32. As mentioned earlier in this judgment, the applicant has sought orders of Prohibition and Certiorari. In the book, H. W. Wade and C. F. Forsyth, Administrative Law, 10th Edition, the authors have stated as follows at page 509 on the remedies of Certiorari and Prohibition:

“The quashing order and prohibiting order are complementing remedies, based upon common law principlesA quashing order issues to quash a decision which is ultravires. A prohibiting order issues to forbid some act or decision which will be ultravires. A quashing order looks to the past, a prohibiting order to the future.”

33. In Kenya National Examination Council v Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the court stated as follows on the scope and efficacy of remedies of Prohibition and Certiorari:

“... prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land.... Only an order of Certiorari can quash a decision already made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.”

It is on the foregoing principles and statutory provisions that the issue as to whether or not the Applicant is entitled to the orders sought would be considered.

34. The Applicant’s application was brought on the ground that the Respondent had allocated the suit property to the Interested Party. An order of certiorari was sought to quash the said decision. As rightly pointed out by the Interested Party, the Applicant did not place before the court the alleged decision by the Respondent. I went through all the documents attached to the two affidavits in support of the application. I was unable to lay my hands on the alleged decision to allocate the suit property to the Interested Party or the letters of allotment of the suit property to the Interested Party. The letters of allotment and correspondence between the Respondent, the Interested Party and other parties annexed to the Applicant’s affidavit do not refer to the suit property.

35. The said correspondence refer to Plot No. 11379/3. The Applicant has not brought out the connection if any between the suit property and Plot No. 11379/3. Whether or not the suit property is part of Plot No. 11379/3 as claimed by the Interested Party is beyond the scope of these proceedings as the determination of the issue would require evidence. Even if it is assumed for argument sake that the suit property is within Plot No. 11379/3 which was the subject of the settlement negotiations between the Respondent and the Interested Party, there is no evidence that the suit property which measures 0.7513 of a hectare was allocated by the Respondent to the Interested Party. The land that was allocated by the Respondent to the Interested Party according to the letters allotment exhibited by the Applicant does not measure 0.7513 of a hectare.

36. The Applicant placed evidence before the court showing that he is still the registered owner of the suit property. It is also common ground that the review proceedings that was initiated by the Respondent against among others, the title of the suit property pursuant to the purported settlement agreement between the Respondent and the Interested Party did not yield any result. No determination was made by the Respondent following representations by the parties concerned, the Applicant included. Since the Applicant is still the registered owner of the suit property, I find no basis for his claim that the Respondent had allocated the property to the Interested Party.

37. In the absence of evidence that a decision was made by the Respondent to allocate the suit property to the interested party, there is nothing for this court to review. The court is unable to determine whether the rules of natural justice were followed or if there was any other procedural impropriety in the alleged decision. In case the Interested Party has invaded the suit property on the basis that the same was allocated to it by the Respondent, that in my view would constitute a dispute over title to land between the Interested Party and the Applicant which should be determined as civil dispute and not by way of judicial review.

38. In Republic v Zacharia Kahuthu & another (Sued as Trustees and on Behalf of and as Officials of the Kenya Evangelical Lutheran Church); Johanness Kutuk Ole Meliyio & 2 others (Interested Parties) Ex parte Benjamin Kamala & another [2020] eKLR the court stated as follows:

“56. It is elementary law that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. For the above facts to be proved or disapproved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make conclusions. This position has been upheld by our superior courts on numerous occasions. In Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo (2015) eKLR it was held: -

“55. ... where the resolution 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. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine 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.” (Emphasis supplied)

57. Judicial review looks into the legality of the dispute not contested matters of evidence. To reconcile the diametrically opposed positions presented in this case, it is necessary for the court to hear oral evidence, which is outside the scope of judicial review jurisdiction. Further, as stated later, determining the said issues will involve a merit review, a function that is outside the purview of Judicial Review jurisdiction.

59. I am fortified by *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry Of Nairobi Metropolitan Development & another* [2014]eKLR which held that: -

“...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 since 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....” (Emphasis added)

60. Also relevant is *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji* [2014] eKLR which held that: -**“...where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the court to determine the merits of two or more different versions presented by the parties the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process....”** (Emphasis added)

61. The above excerpts illuminate the legal position with sufficient clarity and settle the issue at hand. In *Republic v Registrar of Societies & 3 others ex parte Lydia Cherubet & 2 others* [2016] the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact. On this ground alone, the applicant’s case collapses.”

39. It is my finding that the issues raised in the Applicant’s application are not suitable for resolution through judicial review. In addition to an order for certiorari to quash the purported allocation of the suit property to the Interested Party, the Applicant also sought an order of prohibition to prohibit the Respondent from allocating the suit property to the Interested Party or doing any other thing to interfere with the Applicant’s legal or possessory rights over the suit property. If the Respondent had already allocated the suit property to the Interested Party as claimed by the Applicant which is the basis for an order of Certiorari sought, I wonder why it is again necessary to issue an order prohibiting such allocation.

Conclusion:

40. Due to the foregoing, it is my finding that a case has not been made out for the orders of judicial review sought by the Applicant. The Applicant’s Notice of Motion application dated 3rd January 2018 fails wholly. The same is dismissed with each party bearing its own costs.

DELIVERED AND DATED AT NAIROBI THIS 10TH DAY OF FEBRUARY 2022

S. OKONG’O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Maina h/b for Mr. Juma for the Applicant

Ms. Kamau h/b for Mr. Murunga for the Interested Party

N/A for the Respondent

Ms. C.Nyokabi-Court Assistant