



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DEPARTMENT

J.R MISC. APPL. NO. 96 OF 2012

**IN THE MATTER OF: AN APPLICATION BY THE
 APPLICANTS HEREIN FOR JUDICIAL REVIEW UNDER
 ORDER 53 OF THE CIVIL PROCEDURE RULES**

- 1. IGNATIUS KABIRU MWARIRI1ST APPLICANT
- 2. STEPHN KURIA MWANGI.....2ND APPLICANT
- 3. GEDION MUSEMBI3RD APPLICANT
- 4. GEORGE OMONDI4TH APPLICANT
- 5. SAMWEL WAINAINA.....5TH APPLICANT
- 6. FREDRICK OCHIENG.....6TH APPLICANT
- 7. DONALD MAIONA GICHUKI7TH APPLICANT
- 8. GEOFFREY MAINA CHEGE8TH APPLICANT
- 9. JOHN MAINA.....9TH APPLICANT
- 10.CHARLES OTIENO.....10TH APPLICANT
- 11.JOSEPH MBOCHI11TH APPLICANT
- 12.BERNARD ONYANGO12TH APPLICANT
- 13.JOANES OCHIENG MADEDE13TH APPLICANT

**(ABOVE SUING ON THEIR OWN BEHALF AND ON BEHALF OF ALL THE 43
 TRADERS/MEMBERS OF RABAI ROAD MOTOR GARAGE) AND;**

14.ESTHER NYAMBURA T/A

TREASURE PARK ENTERPRISES.....14TH APPLICANT

15.SAMUEL MAINA T/A MWIRERI SCRAP METAL..15TH APPLICANT

-VERSUS -

CITY COUNCIL OF NAIROBIRESPONDENT

NAIROBI CALVARY TEMPLE.....INTERESTED PARTY

JUDGEMENT

1. By a Notice of Motion dated 5th April, 2012 filed on 10th April, 2012 the applicants herein seek

the following orders:

- a. **An order of Certiorari be and is hereby granted to quash the Respondent's decision of 21st March, 2012 or any other date purporting to remove the applicants and other and/or to undertake re-planning, demolition and or interfering with the applicants' occupation and business in respect of the Applicants' premises at Rabai Road in Nairobi.**
- b. **An order of prohibition be and is hereby granted to prevent the Respondent, its servants, agents, employees or any body else whatsoever acting on its behalf from implementing its purported notice of 21st March, 2012 or any other notice purporting to remove the applicants and others and/or to undertaken re-planning, demolition and or interfering with the applicants' occupation and businesses in respect of the Applicants'' premises at Rabai Road in Nairobi.**
- c. **THAT the costs of this application be paid by the Respondents in any event.**

EX PARTE APPLICANT'S CASE

2. The application is based on the Statutory Statement filed on 26th March 2012 and a supporting affidavit sworn the same day by **Ignatius Kabiru Mwariri**, the 1st applicant herein.
3. According to the deponent, Rabai Motor Garage is a registered society undercap.108, Laws of Kenya which was registered on 5th September, 2006. According to him, the 1st to 13th applicants among 30 others have all been traders at Rabai Motor Garage for over 20 years in Nairobi where they have already established the garage among other businesses from where they get income to sustain their families and relatives. According to the deponent the said applicants and their parents/relatives have operated the garage thereat since 1989 when they took possession thereof pursuant to allotment/licence. To him, the applicants and their families have been depending on the income in respect of their business in the said premises for their livelihood.
4. However, by a Seven (7) days notice dated 21st March, 2012 expressed to expire on 28th March, 2012, the respondent illegally, unlawfully, maliciously, unreasonably and without any colour of right purported to issue a notice to the applicants and others to remove themselves from the suit premises within the short period as given by the Respondent despite the fact that the suit premises has motor vehicles worth millions of Kenya Shillings and is therefore impossible to relocate the business premises within a short period as given by the Respondent.
5. It was deposed that respondent illegally, unlawfully, maliciously, unreasonably and without any colour of right purported to remove the applicants and to re-plan and formalize, change ownership and transfer to other people the said premises at Rabai Road in Nairobi. To the applicants, the respondent is purporting and colluding with the applicants' neighbours to take possession of the applicants' premises.
6. It was further deposed that the respondent has failed to inform the applicants of its intended unlawful actions in a legal and proper manner since the purported removal notice is unreasonable and illegal as the respondent has been receiving payments for the said businesses and issuing Single Business permits to the applicants and to that end the said Rabai Road Motor Garage has paid for 2012 Single Business Permit but the same is yet to be released to the applicants while the 14th to 15th Applicants have been issued with the same.
7. The deponent deposes that the applicants' businesses are not on the road and indeed there are other businesses such as a Petrol station that is between the main road and the applicant's premises. The deponent averred that the respondent is not intending to do any public developments on the premises but to unlawfully re-allocate it to the said neighbours hence the respondent's actions are irrational, malicious, illegal, biased, unlawful, capricious, unreasonable and against the rules of natural justice and will render the applicants and their families to suffer great loss and damage.
8. In the submissions filed on behalf of the applicants these submissions were reiterated.

RESPONDENT'S CASE

9. In opposition to the application, the respondent on 21st September, 2012 filed a replying affidavit

- sworn by **Karisa Iha**, the Respondent's Director of Legal Services on 18th September, 2012.
10. According to the deponent, contrary to the Applicants' allegations, they have never been allocated any plots by the Respondent but they have been issued with temporary occupation license following which the Applicants applied and were issued with Single business permit to operate a garage within the said area. According to the deponent, an occupation license does not confer proprietary interest on land to the licensee, and is in fact revocable at the instance of the licensor, the respondent herein.
 11. It is deposed that in accordance with the Respondent's authority with respect to the suit property, a notice was issued to the Applicants to vacate the said premises to pave way for development which notice was duly served on the Applicants and sufficient notice given to facilitate their smooth vacation in order to facilitate the development of the property as captured in the notice annexed to the Applicants Application.
 12. It was averred that the Applicants allegation that they have been operating their business since 1989, is contrary to their annexures showing that they registered their business in the year 2006. To him, it will be greatly prejudicial to the Respondent, unreasonable, irrational and biased for the orders sought herein to be granted since the court will be setting precedence that any TOL holder would be at liberty to hinder the council from carrying out its statutory obligations, an act which would leave most of our councils area of jurisdiction in a dilapidated state. Further, it is irregular and unprocedural to invoke judicial review proceedings to bring private selfish commercial interests to bear on the public writs of certiorari, prohibition and mandamus. To him, once an administrative body as the Respondent herein has complied with the law and arrived at a fair decision, the same is not liable to be unsettled at the behest personal claims as the Applicants herein and courts of law should jealously guard against such an attempt. The deponent therefore was of the view that the entire proceedings herein do not lie, are an abuse of the court process, are unmeritorious, null and void and the same should therefore be dismissed with costs.
 13. It was further submitted that under the **Government Lands Act**, the Respondent had the power to issue Temporary Occupation License to any party and in the same breadth to issue notice of vacation when the period within which the licence is to take effect expires. According to the Respondent the notice can be issued at any time after the expiry of the licence period thus the Respondent was well within its power to issue the said notice. In any case it was submitted based on **Republic vs. Greater Manchester Coroner, exp Tal QB 67 at 83** that where an error of law has occurred and there is a degree of certainty that the decision would have been the same despite the error, the court will refuse to grant judicial review relief.
 14. It was submitted that the Respondent's decision was therefore not irrational or unreasonable or illegal as alleged and that in determining this application the Court ought to apply the proportionality test keeping in mind the fact that the applicants have created a situation which poses a danger to the society as a whole.
 15. In the submissions filed on behalf of the Respondent, it was contended that the application is incompetent on the ground that the application is brought in the name of the applicants rather than the Republic and reliance for this point was placed on **Republic vs. Chairman Electoral Commission of Kenya ex parte Welamondi [2008] 2 KLR 393** and **Republic vs. Secretary, Public Service Commission & Others ex parte Peter Gitahi Kamaita [2010] eKLR**.

INTERESTED PARTY'S CASE

16. On the part of the interested party, they filed a replying affidavit sworn by **Dr Patrick Gregory Marai Munga**, the General Overseer of Gospel Evangelistic Churches of Kenya and a senior pastor Nairobi Calvary Temple one of the Churches under the said Gospel Evangelistic Churches of Kenya on 24th September, 2012.
17. According to him, the interested party was granted the property on which it stands 20 years ago being plot No. LR No. 16667 on which a permanent church structure had been constructed. At the time of acquiring the said property, its frontage touching the main road was an open space under a power line and was not available for alienation. Despite this the Respondent granted the applicants temporary licences to operate their businesses despite the interested party's protests on the ground that the said structures constituted safety and security risks and were on riparian land hence the applicants' activities were a source of pollution of the Nairobi River. According to the deponent,

- the licence given to the Church to run a commercial TV Station and several public amenities cannot be realised in the face of these unplanned structures fronting the Church's premises.
18. According to him the applicants were legally issued with notices to vacate for their own safety since they were operating under high voltage powerline.
19. These averments were reiterated in the submissions.

DETERMINATIONS

20. The first issue for determination is the competency of the application. It is clear that the applicants in the present Notice of Motion are indicated as the individuals rather than the Republic. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**

21. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellant’s advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intitled and served accordingly. The Crown cannot be both applicant and respondent in the same matter”.

22. However in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.

23. It is therefore my view that whereas the failure by a party to properly intitle the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed.

24. I have considered the foregoing. The purview of judicial review was clearly set by **Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** when he stated that:-

“Judicial review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’.....By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to itBy ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’.....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at itI have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

25. In this case it is not in doubt that the applicants’ occupation of the suit parcel of land was by way

of a Temporary Occupation Licence, also known as TOL. That such document does not create an interest in land in question was the subject of the Court of Appeal decision in **Faraj Maharus vs. J. B. Martin Glass Industries & Others Civil Appeal No. 130 Of 2003 [2005] 2 KLR 289** in which it was held that The Temporary Occupation Licence cannot oust the certificate of title under the *Registration of Titles Act* as it is settled law in Kenya that a Temporary Occupation Licence to occupy Government Land is not sufficient to create or transfer title to the grantee or his personal representative.

26. Although the applicants contend that they were allocated the suit parcel of land, there is no document annexed to support that position. However, it is clear from copies of the documents exhibited that the Respondents did authorise the applicants to occupy the suit parcel of land and that the applicants were paying some form of consideration for the use of and occupation of the said land.
27. The law as I understand it is that a licensee as opposed to a trespasser is entitled to a notice before the licence is terminated. This position is supported by the decision of **Waki, J** (as he then was) in the case of **Omar & 8 Others vs. Murania & Another [2006] 1 KLR (E&L) 206** in which he stated as follows:

“The applicants do not deny that they are licensees of the Municipal Council on the plots they occupy and have constructed kiosks therein. The council has power under section 144(5) of the Local Government Act to grant something upon the immovable property of the grantor and does not amount to the creation of the interest in the property itself. It is permissive right and personal to the grantee and since the licence has no interest or estate in the property such possession as he might have for enjoyment of the right is no judicial possession but only an occupation. Indeed the applicants concede to this position in law and did not understand their counsel to contend that they are claiming an interest in the property in the property itself....On that premise the only issue would be whether the notice given to them by the grantor to vacate the property was reasonable. For there is no doubt that even licensees are entitled to reasonable notice before their licences are determined, particularly where valuable consideration is being paid to the grantor. In as much as the grantor permitted the grantee the premises in question to carry on its business pending an agreement in return for valuable consideration the legal relationship of licensor and licensee was established between the parties and it was a contractual licence of indefinite duration and was only revocable upon reasonable notice.”

28. Although it is contended that the notices to vacate which were issued to the applicants were issued after the lapse of the licence period none of the parties has exhibited a copy of the said licence in order for the Court to make a determination with respect to the period of the said licence. Article 47 of the Constitution provides as follows:

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

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

29. There is no doubt at all that the Respondent's action was administrative. It was therefore under a Constitutional duty to ensure that its action was efficient, lawful, reasonable and procedurally fair.
30. According to the notice seeking vacation of the suit land, the Respondent required the land for the purposes of development. However, it is alleged that the disputed portion of land lies along a power line and is partly riparian land hence not suitable for development. However, it is clear that it is the Respondent which licensed the applicants to use the said land and has been deriving revenue from the use thereof. A local authority ought to know that the consequences of permitting citizens to operate in areas in which such persons ought not to operate will invite consequences not only for the licensees but also to the local authority. Under Article 232 of the Constitution one of the values and principles of public service which bind all State organs in both levels of government is accountability for administrative acts. Before County Governments issue licences

- to citizens or any other person, they ought to ensure that such licences from which they intend to derive revenue are issued in respect of designated areas which areas are suitable for the purposes for which the licences are issued.
31. Taking into account the 7 days notice given which in my view was not reasonable as well as the reasons given for the repossession of the disputed land which reasons based on the material on record are not convincing, it is my considered view that the Respondent's action was unreasonable.
32. The Court however appreciates that the applicants' contention is not that they have an interest in the suit land. What they have is licence which can be terminated on the giving of a reasonable notice. These proceedings were instituted on 26th March, 2012 which is now more than 1 year ago. Ordinarily that would have been more than sufficient notice to enable the applicants relocate from the suit premises. The court recognises that the decision whether or not to grant remedies of judicial review is an exercise of judicial discretion. In deciding whether or not to grant the discretionary judicial review remedies the Court must take into account whether or not the grant thereof is efficacious in the circumstances obtaining. In **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised, the court would not grant the order sought even if merited. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**
33. One may argue that in the instant case, the object for which application is made has already been realised as the applicants have had more than enough time to relocate from the disputed land. That however does not derogate from the fact that the Respondent's action was unreasonable.

ORDERS

34. In the circumstances of this case:

- 1. I grant an order of Certiorari removing into this court for the purposes of being quashed the Respondent's decision of 21st March, 2012 giving the applicants seven days within which to vacate the disputed property which decision is hereby quashed.**
- 2. I further grant an order prohibiting the Respondent from removing the applicants' from the said property unless a reasonable notice is duly given.**
- 3. As the application was not properly intitled, each party will bear own costs.**

Dated at Nairobi this 29th day of January 2014

G V ODUNGA

JUDGE

Delivered in the presence of Mr Kurauka for the applicant and Mr Wanyonyi for the interested party and the Respondent