



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

MISCELLANEOUS APPLICATION ELC NO. 110 OF 2013

IN THE MATTER OF AN APPLICATION SEEKING JUDICIAL REVIEW ORDERS OF MANDAMUS PROHIBITION CERITORARI

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP 265 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KAJIADO.... RESPONDENT

AND

SAMUEL G. KIMANI.....1ST INTERESTED PARTY

JOHNSON GATAUMA JAMES.....2ND INTERESTED PARTY

LEAH WANJIRU MBURU.....EX-PARTE APPLICANT

RULING

The Preliminary Objection

The 2nd Interested Party herein filed a Notice of Motion dated 11th November 2013 in which he sought orders of a temporary injunction restraining the ex-parte Applicant from trespassing onto, building on, alienating, charging or dealing with the suit premises in whatsoever manner. The suit premises in the said Notice of Motion were Plot No 220 Residential Ongata Rongai Trading Centre, Kajiado North District.

The main grounds for the Notice of Motion were that the 2nd Interested Party is the registered owner of the suit premises, and that the Ex Parte Applicant had trespassed on the said premises and erected a structure thereon.

The Ex parte Applicant thereupon filed a Notice of Preliminary Objection dated 2nd December 2013,

wherein he objected to the 2nd Interested Party's application on the following grounds:

1. The application is incompetent and/or bad in law as the orders sought cannot be granted under the realm of proceedings under Order 53 of the Civil Procedure Rules which exclusively deals with prerogative writs.
2. No orders of injunction can issue vide a miscellaneous application and the present application is in the circumstances misconceived and untenable in law.
3. The original suit the subject of this proceedings (Nairobi HC Misc. 96 of 2008) is already spent vide a withdrawal notice dated 28th April 2011. An injunction cannot in the circumstances issue *in vacuo*.

The Submissions

The court directed the parties to file written submissions on the Ex Parte Applicant's preliminary objection. The Ex Parte Applicant's counsel in submissions dated 8th January 2014 and filed in court on 9th January 2014 argued that judicial review proceedings are a special jurisdiction, where the only orders awardable are certiorari, prohibition and mandamus. Further, that the order of injunction sought cannot lie at all as injunctions are civil law remedies obtained by way of ordinary plaint, and there must be a prayer in the main suit. The counsel submitted that the present application dated 11th November 2013 for interlocutory injunctions is not founded in any suit where injunctive relief is sought, and that an injunction cannot issue *in vacuo*.

The Ex Parte Applicant further submitted that a miscellaneous cause such as the present one cannot institute a suit and cannot therefore found the action for injunction. It was her contention that a suit can only be instituted by way of plaint, petition, originating summons or judicial review application.

The Respondent's counsel filed submissions on 12th March 2014 in support of the preliminary objection. The counsel submitted that the 2nd Interested Party's application is one for injunctive orders under Order 40 of the Civil Procedures Rules, and that it is trite law that the Civil Procedure Rules are not applicable to judicial review proceedings outside Order 53 of the Rules. Further, that it is also trite law that a judicial review court exercises a special jurisdiction described by the Court of Appeal in the case of **Commissioner of Lands –vs- Hotel Kunste Ltd, Civil Appeal No. 234 of 1995** as a jurisdiction *sui generis* in which the Civil Procedure Act and Rules do not apply.

The Respondent also relied on the decision in the cases of **Welamondi v The Chairman, Electoral Commission of Kenya, Miscellaneous Application No. 81 of 2002, Republic v Marakwet Land Disputes Tribunal & 3 others ex parte Joel K. Limo (2011) eKLR, Republic v. Attorney General & 2 others ex parte Onesmus Wambua Kasivo (2014) eKLR**, in this respect.

The 2nd Interested Party's counsel in submissions filed on 14th January 2014 argued that the Court in exercising its authority is guided by Article 159(2) (d) of the Constitution which states that justice shall be administered without undue regard to procedural technicalities. Further, that Order 53 Rule 1(3) of the Civil Procedure Rules provides that a Judge may in granting leave, impose such terms as to costs as to giving security as he thinks fit, including cash deposit, bank guarantees or an insurance bond from a reputable institution. The counsel also submitted that the Order 53 further provides in Rule (4) that the grant of leave under the rule shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application.

Lastly, the counsel submitted that there is no specific provision of the law that ousts the jurisdiction of the Court in issuing injunctive orders under Order 53 of the Civil Procedure Rules, and that the Civil Procedure Act gives the Court unfettered jurisdiction in Sections 1A, 1B, 3, 3A & 63 (e) of the Civil Procedure Act 2010 to prevent the ends of justice from being defeated.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issues to be decided in this preliminary objection are firstly, whether the 1st Defendant's preliminary objection raises a pure point of law, and if so, whether the said preliminary objection has merit and should be upheld. The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. The circumstance in which a preliminary objection may be raised was also explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In the present objection, the main question before the court is whether an application for a temporary injunction can be made in an application for judicial review orders. This is an issue which does not require the ascertainment of any facts or exercise of any judicial discretion, as it is one that can only be determined by the application of the relevant legal provisions. The preliminary objection therefore raises a pure point of law.

As to whether the said preliminary objection has merit, I accept the Responden's submissions and it has been held in various judicial decisions that judicial review proceedings are *sui generis* proceedings exclusively brought under Order 53 of the Civil Procedure Rules, and that the other provisions of the Civil Procedure Act and Rules are inapplicable. The Court of Appeal in **Commissioner of Lands v Kunste Hotel Limited KLR (E&L) 1 249** stated as follows in this regard at page 256 that a court in judicial review proceedings it is exercising neither a civil or criminal jurisdiction. Also see the decision in **R vs Communication Commission of Kenya & Another, (2001) 1 E.A 199**. In **Wellamondi vs The Chairman, Electoral Commission of Kenya, (2002)1 KLR 286**, Ringera J. (as he then was) explained the legal position to be as follows:

“I agree that Judicial Review Proceedings under Order 53 of the Civil Procedure Rules are a special procedure. The provisions of the order are invoked whenever orders of certiorari, mandamus, or prohibition are sought. That may be so in either civil or criminal proceedings. So in the exercise of its power under the order, the court is exercising neither a civil nor a criminal jurisdiction in the strict sense of the word. It is exercising a jurisdiction sui generis. It follows therefore that it is incompetent to invoke the provisions of section 3A and order 1 rule 8 of the Civil Procedure rules. It is equally incompetent to invoke section 42.”

The 2nd Interested Party cannot therefore for the foregoing reasons competently bring the Notice of Motion dated 11th November 2013 in the judicial review proceedings herein, as he relies on the substantive provisions of sections 3, 3A, and 63(e) of the Civil Procedure Act, and Order 40 of the Civil Procedure Rules for the orders sought.

The Ex Parte Applicant's preliminary objection dated 2nd December 2013 is therefore upheld for the foregoing reasons, and the 2nd Interested Party's Notice of Motion dated 11th November 2013 is hereby struck out. The 2nd Interested Party shall bear the costs of the said Notice of Motion and Preliminary Objection.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 19th day of May, 2014.

P. NYAMWEYA

JUDGE