



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISC. CIVIL APPLICATION NO. 356 OF 2009**

**IN THE MATTER OF AN APPLICATION BY FRANCIS ARITHI MWORIA FOR JUDICIAL  
REVIEW**

**IN TERMS OF ORDERS OF MANDAMUS AND PROHIBITION DIRECTED**

**TO THE PERMANENT SECRETARY, MINISTRY OF HOUSING**

**AND**

**IN THE MATTER OF LAW REFORM ACT, CAP 26, LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE REGISTRATION OF TITLES ACT, CAP 281**

**AND**

**IN THE MATTER OF SUIT PROPERTIES L.R. NO. 21990, I.R. NO. 72055**

**AND L.R. NO. 21991 I.R. NO. 72054**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PERMANENT SECRETARY MINISTRY OF HOUSING.....RESPONDENT**

**AND**

**FRANCIS ARITHI MWORIA.....EX- PARTE APPLICANT**

**R U L I N G**

1. The **Notice of Motion** dated 2/12/2009 seeks the following orders:-

**1. “THAT by an order of prohibition, the Respondent be prohibited from interfering with the Applicant’s ownership and quiet enjoyment of L.R. No. 21991 and L.R No. 21990.**

**2. THAT by an order of prohibition the Respondent be prohibited from carrying out any**

**development on L.R. No. 21990 and L.R. No. 21991.**

**3. THAT by an order of mandamus the Respondent be compelled to remove the fence that it has erected around L.R. No. 21990 and L.R. No. 21991 that are legally owned by the Applicant.**

**4. The costs of the application be in the cause.”**

2. The application is supported by the affidavit sworn by the *ex parte* Applicant, **Francis Arithi Mworia** (hereinafter Applicant), the statement of facts, the verifying affidavit and further verifying affidavit.

3. The Appellant’s case is that he is the registered proprietor of land parcel LR No. 21990 and 21991 situate within **Mavoko Municipality**. The Applicants complaint is that the Respondent has unlawfully fenced the aforesated properties and has failed to vacate the said land despite repeated requests by the Applicant. The Applicant has exhibited the copies of Title Deeds issued on 1/3/1995.

4. In opposition to the application, the Respondent filed grounds of opposition and a replying affidavit by **Tirop Kosgey** from the Ministry of Housing. According to the Respondent, the Applicants grant is illegal and not valid. It is the Respondent’s contention that the land in question is government land allotted to Permanent Secretary, Treasury for purposes of development of low cost housing units. A letter of allotment dated 9/1/2014 was exhibited. That since the ownership of the land has come into question, the Applicant’s remedy lies in civil proceedings and not Judicial Review.

5. The court gave directions that the application be canvassed by way of written submissions. The Applicants filed their written submissions which I have duly considered together with the authorities cited. The Respondents did not file any written submissions.

There is no doubt that the Applicant is registered as the proprietor of the suit property since the year 1995. There is no doubt that the same property was allocated to the Ministry of Treasury in the year 2004. The real question therefore is who the lawful owner of the suit property is.

6. I bear in mind that Judicial Review is not concerned with the merits of the decision but with the process by which the decision is reached. Judicial Review remedy is discretionary in nature and is to be exercised by the court judiciously. The Judicial Review proceedings herein will leave the issue of the alleged illegality of the title deed unaddressed. At the end of the day, the court will not through these proceedings be able to address and resolve the issue of the letter of allotment that has been exhibited by the Respondent. Judicial Review is therefore not the most efficacious remedy in the circumstances of this case.

7. As stated in **Nairobi H.C.Misc. Application 990/2006 - Shanghani Investments Ltd. –vs- The Officer in Charge Nairobi Remand and allocation Prison Nairobi H.C. Misc. Application 99 of 2006,**

**“Be that as it may, I do agree with the Respondents that the underlying dispute herein is ownership of land. Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be 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.”**

8. Although the availability of an alternative remedy is not a bar to the commencement of Judicial Review proceedings, an Applicant should always go to the most efficacious remedy. Having analyzed the facts of the case at hand, my view is that Judicial Review is not the most efficacious remedy. Consequently, I decline to grant the orders sought. The application is dismissed. Due to the circumstances of this case, each party to bear own costs.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 29<sup>th</sup> day of September 2014.**

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**B. THURANIRA JADEN**

**JUDGE**