



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**CASE NO. 291 OF 2013**

**REPUBLIC .....APPLICANT**

**VERSUS**

**COUNTY POLICE COMMANDER – NAIROBI.....1<sup>ST</sup> RESPONDENT**

**COUNTY COMMISSIONER – NAIROBI.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**AND**

**SAUTI SACCO LIMITED .....1<sup>ST</sup> INTERESTED PARTY**

**NAIROBI CITY COUNTY .....2<sup>ND</sup> INTERESTED PARTY**

**EX-PARTE**

**SAMWELL MBATA & 1497 OTHERS**

**(Suing As Members of ALFAJIRI SELF HELP GROUP)**

**RULING**

Through a chamber summons application amended on 27<sup>th</sup> August, 2013 Samuel Mbata leads 1497 other ex-parte applicants in seeking orders as follows:

- “1. THAT this application be heard urgently and *ex-parte* during the current high court vacation.**
- 2. THAT this honorable court be pleased to grant the applicants leave to apply for an Order of Prohibition, prohibiting the Nairobi County Police Commander, his agents and/or any other person acting under his instruction from invading, evicting, trespassing and/or interfering with the applicant’s ownership, peaceful possession, user, occupation and/or evicting the applicants from the land parcel L. R. NO. NAIROBI/BLOCK/82/8760 (Sub-division of Original Number 82/4264 NAIROBI).**
- 3. THAT this Honorable Court be pleased to grant the applicant leave to apply for an order of certiorari to remove into this Honorable Court and quash the verbal eviction order/notice**

**made by the Nairobi County Police Commander through its agents being both the officers-in-charge of police divisions Buru Buru and Kayole respectively from land parcel NO. NAIROBI/BLOCK/82/8760 (Sub-division of Original Number 82/4264 NAIROBI) situated within Nairobi County.**

**4. THAT the leave granted pursuant to prayers hereinabove do operate as a stay of the verbal order of eviction issued on the 15<sup>th</sup> day of June 2013 by the Nairobi County Commissioner and Nairobi Police Commander against the applicants herein from land parcel L. R. NO. NAIROBI/BLOCK/82/8760 (Sub-division of Original Number 82/4264 NAIROBI) until the determination of the application herein and/or until further orders of this court.**

**5. Cost be in the cause.”**

The application is supported by the verifying affidavit of Samuel Mbata sworn on 27<sup>th</sup> August, 2014 and a statutory statement dated 6<sup>th</sup> August, 2013 amended on the 27<sup>th</sup> August, 2013.

From the papers filed by the applicants in court, it emerges that applicants are members of Alfajiri Self-Help Group whose chairman is Samuel Mbata. It is the applicants' case that the Nairobi County Police Commander (the 1<sup>st</sup> Respondent), the Nairobi County Commissioner (the 2<sup>nd</sup> Respondent) and the Attorney General (the 3<sup>rd</sup> Respondent) have issued verbal eviction notices against the applicants threatening to evict them from L.R NAIROBI BLOCK/82/8760 being a sub-division of L. R. No. 82/4264. The applicants averred that the respondents have gone ahead to demolish part of their premises erected on the suit property. Further that they are the lawful owners, allottees or licensees of the premises having been allocated the same by the former City Council of Nairobi now the County Government of Nairobi (the 2<sup>nd</sup> Interested Party). The applicants assert that any claim over the property by the respondents ought to be submitted to the court for determination but the respondents have not done so.

The applicants contend that the respondents are acting at the behest of the 1<sup>st</sup> Interested Party, Sauti Sacco Limited. It is the applicants' case that the respondents are acting in excess of jurisdiction and in breach of the rules of natural justice as they were not given an opportunity to be heard prior to the issuance of the verbal eviction orders. Further, that the respondents are acting in excess of jurisdiction as no orders have been issued by the Court which is seized of the matter in **Nairobi High Court ELC No. 313 of 2014**. The applicants assert that the dispute is civil in nature and any eviction ought to issue through an order of a competent court of law. The applicants contend that the suit property was surrendered to the former City Council of Nairobi which authorized and licensed their developments on the suit property.

It is the applicants' case that the 1<sup>st</sup> Interested Party therefore has no interest in the suit property despite illegally selling part of the suit property measuring 20.216 hectares to an entity called Greenspan Investments Ltd. It is the applicants' case that if they are evicted the remaining portion of the property will be given to the 1<sup>st</sup> Interested Party by the respondents. It is the applicants' contention that the 1<sup>st</sup> Interested Party has no proprietary interest over the parcel of land in question and the respondents' decision to evict them at the behest of the 1<sup>st</sup> Interested Party is therefore unreasonable.

The respondents opposed the application by way of grounds of opposition dated 7<sup>th</sup> April, 2014. The grounds of opposition are:

**“1. The application is unmerited, incompetent and amounts to abuse of court process in view of the fact that two suits are pending touching on the same subject matter and same parties in HCC ELC 313/2008 AND HCC MISC 239 OF 2002.**

- 2. That the orders intended to be sought are against wrong parties and on non-existent decision.**
- 3. That the issues raised, facts relied upon and grounds thereto do not meet the judicial review threshold.**
- 4. That the alleged dispute is civil in nature, as it touches on ownership of the suit land as between the applicants and the 1<sup>st</sup> interested party.**

**5. The court cannot issue orders as sought for they are intended to prohibit what is lawfully authorised by law.”**

The Interested Party opposed the application through the affidavit of its National Chairman, Mr. David Elly Ndwigah sworn on 11<sup>th</sup> September, 2013. From the affidavit of Mr. Ndwigah, the Interested Party's case is that it was the *bona fide* legal registered owner of the property known as NAIROBI/BLOCK 82/4264 (the original plot) which was transferred to it on 19<sup>th</sup> May, 1995 from the previous owner Continental Developers Limited. The 1<sup>st</sup> Interested Party states that it proceeded to subdivide the plot into two namely NAIROBI/BLOCK 82/8759 which it sold to Greenspan Investments Limited and NAIROBI BLOCK 82/8760 which it still owns. The 1<sup>st</sup> Interested Party therefore asserts that the applicants have no legal claim or interest over the original plot or its subdivisions.

The 1<sup>st</sup> Interested Party submits that the 2<sup>nd</sup> Interested Party has also confirmed that it was indeed the owner of the said plot at all material times. Further, that the High Court in **Miscellaneous Civil Application No. 239 of 2002** had issued orders confirming its rights over the original plot and directing the 1<sup>st</sup> and 2<sup>nd</sup> respondents to safeguard the same including taking measures to evict trespassers and strangers.

The 1<sup>st</sup> Interested Party also reveals that the applicants had filed **Nairobi High Court ELC Civil Case No. 313 of 2008** against the interested parties herein claiming ownership of the original plot and on 17<sup>th</sup> September, 2008 a consent was recorded in which the parties to the case, including the applicants, were to keep away from the plot until further court orders. The 1<sup>st</sup> Interested Party therefore submits that any occupation of the plot by the applicants is in contravention of the said consent order. It is the case of the 1<sup>st</sup> Interested Party that any eviction that may have been carried out was done in compliance with the order issued by the court in 2002.

The 2<sup>nd</sup> Interested Party opposed the application through the affidavit sworn on 21<sup>st</sup> March, 2014 by its Director of Legal Affairs, Karisa Iha. The case of the 2<sup>nd</sup> Interested Party is that the parcel of land in question does not belong to the applicants and that the applicants were in 2007 only allowed to use the land on a temporary basis. The 2<sup>nd</sup> Interested Party denies allocating L. R. NO. NAIROBI/BLOCK/82/8760 to the applicants.

The 2<sup>nd</sup> Interested Party points out the existence of an order in **Nairobi High Court ELC Case No. 313 of 2008** directing all the parties to keep off the property. Further, that the alleged verbal eviction by the 1<sup>st</sup> and 2<sup>nd</sup> respondents cannot be substantiated, is incapable of ascertainment and cannot support the grant of the orders sought herein.

The 1<sup>st</sup> ex-parte Applicant Mr. Samuel Mbata swore a further affidavit on 8<sup>th</sup> May, 2014 and annexed documents to support the applicants' claim that they had been allocated the suit property. He further averred that the respondents cannot purport to enforce orders issued in **Nairobi HCCC No. 239 of 2002** as consent had been entered in **Nairobi ELC Civil Case No. 313 of 2008** thereby invalidating the earlier case. He admitted the existence of the consent in 2008 case directing all the parties to keep off the suit property.

The only issue for the consideration of the court at this stage is whether the ex-parte applicants have met the threshold for the grant of leave to commence judicial review proceedings.

The test for grant of leave is as established by the authors of **Halsbury's Laws of England 4<sup>th</sup> Edition, 2001 Reissue** where it is stated at **Paragraph 161 (Page 305)** that:

**“Permission should be granted if on the material then available the court considers, without going into the matter in depth, that there is an arguable case for granting the relief sought by the claimant. The grant of permission is nevertheless, a matter within the**

**discretion of the court. For example, when considering whether to grant permission to apply for judicial review, the court must take account of any alternative remedies available to the applicant, since where any alternative remedy has not been exhausted judicial review will not normally lie.”**

Looking at the papers filed in Court, it is clear that the dispute between the parties herein relate to the suit property. The parties have submitted that dispute to the Court vide **Nairobi ELC Civil Case No. 313 of 2008**. That is the best form to litigate this matter.

The applicants appear to be saying that the respondents at the behest of the 1<sup>st</sup> Interested Party are trying to evict them in violation of the orders of the Court in the ELC case. If that is so, then the best Court to deal with the violation of the orders is the Court that issued those orders.

The facts in this case are not straight forward as can be seen from the affidavits filed in Court. What is required is an interrogation of facts which can only be done through cross-examination of witnesses. This can only happen in a Court with the requisite tools to conduct a full-fledged trial. A judicial review court is not an appropriate forum for the issues raised by the applicants. The ownership of the parcel of land in question will be determined through the ELC case.

Secondly, it is apparent that the decision the applicants allege to have been issued by the respondents is vague. No evidence has been placed before the Court to confirm the issuance of such an order. In judicial review, the decision which an applicant seeks to quash must be clearly identified.

As already stated the applicants have an adequate remedy through the matter they filed in 2008. I am therefore not convinced that judicial review is an appropriate remedy in the circumstances of this case. The applicants have no arguable case and the application for leave is therefore dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of October, 2014

**W. KORIR,**

**JUDGE OF THE HIGH COURT**