



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 104 OF 2014

REPUBLIC.....REPUBLIC

VERSUS

FIRST CLASS MAGISTRATE NAIROBI CITY
COURT.....RESPONDENT

AND

NAIROBI CITY COUNTY (COUNTY GOVERNMENT OF NAIROBI).....INTERESTED
PARTY

EX-PARTE

ANN HERON GLOAG

JUDGEMENT

In these proceedings the ex-parte Applicant is Ann Heron Gloag. The Respondent is the First Class Magistrate, Nairobi City Court whereas Nairobi City County is the Interested Party. After obtaining the leave of the Court, the Applicant proceeded to file the substantive notice of motion dated 26th March, 2014 in which she seeks orders as follows:

1. **THAT** An order of prohibition do issue prohibiting the Respondent or any other Subordinate Court from entertaining, hearing or determining the proceedings in the First Class Magistrate – Nairobi City Court in CIVIL SUIT NO. 22/2013 (CITY COURT) between the interested party and the Ex-parte Applicant herein and or any other proceedings against the ex-parte Applicant herein and or any other proceedings against the ex-parte applicant, in relation to land rates relating to L.R. No 209/9366 – Dandora in Nairobi in respect of the rates due for the period covered by the said suit and or until the ex-parte applicant regains quiet possession of the suit property from the illegal occupants.
2. **THAT** An order of Certiorari do issue quashing any order that the Respondent or any other Subordinate Court may issue arising out of the proceedings in the First Class Magistrate – Nairobi City Court in CIVIL SUIT NO. 22/2013 (CITY COURT) between the interested party and the Ex-parte Applicant herein and or any other proceedings against the ex-parte

applicant, in relation to land rates relating to L.R. No. 209/9366 – Dandora in Nairobi in respect of the rates due for the period covered by the said suit and or until the ex-parte applicant regains quiet possession of the suit property from the illegal occupants.

3. **THAT the costs of this application be borne by the respondent and the interested party.**

The application is supported by the statutory statement and the verifying affidavit of the Applicant filed together with the chamber summons application for leave on 18th March, 2014.

What emerges from the papers filed in Court is that the Applicant is the registered owner of Land Reference No. 209/9366 situated in Dandora in Nairobi. She purchased the property in 1997 in vacant possession and had it registered in her name on 4th July, 1997 upon which she was issued with a certificate of title. Before the Applicant could commence development on the land, the same was without her knowledge invaded by illegal occupants. The invasion started around 2003 to 2004. The occupiers sub-divided the land and put up temporary and permanent structures. In order to secure her land, the Applicant moved to Court in **Nairobi High Court ELC Case No. 38 of 2009** seeking the eviction of Moses Githinji and 121 others.

In a judgement delivered on 19th July, 2013 Mary M Gitumbi, J held that:

“In light of the foregoing, I find that the Defendants have failed to establish any proprietary rights over the Suit Property which can extinguish the Plaintiff’s title thereto embodied in her Title Deed. Accordingly, I hereby enter Judgement against the Defendants as prayed by the Plaintiff in her plaint. Each party shall bear their own costs.”

On 1st October, 2013 the Interested Party instituted City Court Civil Suit No. 22 of 2013 in the First Class Magistrate’s Court at Nairobi against the Applicant claiming Kshs.73,857,804/= being rates and arrears due and payable as at 22nd May, 2013. The Applicant seeks to quash the said suit on several grounds.

It is the Applicant’s case that the period which the rates relate to is not specified thereby making the claim ambiguous and untenable. It is her case that she was never served with a demand notice as required by Section 17(1) and (2) of the Rating Act, Cap 267. She contends that the rates ought to have been recovered from the illegal occupiers as provided by Section 18(1) and (2) of the Rating Act as read together with the Valuation for Rating Act, Cap 266. She asserts that by filing the suit against her and not the illegal occupiers the Interested Party is acting mischievously and unlawfully.

It is her case that the Interested Party was fully aware of the decision of the Court in H.C. ELC No. 384 of 2009. The Applicant asserts that the suit commenced against her by the Interested Party is bad in law as Section 20(1) and (2) of the Rating Act provides that where the registered owner and therefore the rateable owner is absent from Kenya, any person receiving the rent or being in charge or control of such land shall be liable for the rates. It is her case therefore that these proceedings before the Respondent are illegal, biased, unprocedural and malicious as she has not been in occupation of the suit land. She asserts that the illegal occupiers ought to be sued for the rates. It is her case that the institution of the civil suit before the magistrate’s court is collusion between the illegal occupiers and the Interested Party calculated to frustrate, harass and intimidate her so that she can abandon the execution of the judgement in **H.C. ELC NO. 384 OF 2009**. It is her position that the Interested Party’s action is an abuse of power and mandate as well as selective and improper exercise of discretion. The Applicant asserts that because of the improper motive behind the proceedings before the Respondent, judicial review is her only salvation.

The Respondent and the Interested Party did not file any papers and the application is therefore not opposed. The question to be answered is whether judicial review orders are available in light of the facts presented to the Court.

The Applicant faults the Respondent for entertaining a suit that is malicious, biased, irrational, unfounded, premature, mischievous and unprocedural. It is the Applicant’s case that it is unreasonable in

the **Wednesbury** sense for the Respondent to entertain a suit in which no demand notice of the rates due had been issued by the Interested Party. She asserts that the Respondent failed to conduct sufficient enquiry as such an enquiry would have revealed that she is not in occupation of the suit property. She concludes that the proceedings before the Respondent are improper and arbitrary.

In his submission, the Applicant's counsel submitted that the Interested Party's claim before the Respondent cannot succeed as the same was instituted before a demand notice was issued to the Applicant. Further that the Interested Party ought to have sued the illegal occupiers for the rates since the law provides that an occupier of a property, which includes any person in actual possession of rateable property without regard to the title under which the person occupies the property, is supposed to pay rates. The learned counsel is of the view that the Interested Party ought to have demanded the rates from the actual occupiers of the property. In support of his arguments counsel cited sections 17, 18 and 20 of the Rating Act.

Another argument put forward in support of the application is premised on Article 40 of the Constitution. Counsel submits that Article 40 (1) confers upon every person the right either individually or in association with others to acquire and own property of any description in any part of Kenya. Article 40(2) forbids arbitrary deprivation of property by the state. Counsel for the Applicant therefore urges this Court to find that the rates ought to have been demanded from the actual occupiers which would result in the protection of the vested interests of the Applicant as an owner of property.

At this stage it is important to briefly state what judicial review is all about. Broadly speaking, judicial review is a tool used by the judiciary to check legislative and executive action. It is used by the courts to verify if a process to which an applicant has been subjected to is legal, fair, rational and proportionate. Judicial review is largely not concerned with the merits of the decision of the public body but the process used to reach the decision. The right to an expeditious, efficient, lawful reasonable and procedurally fair administrative action is guaranteed by Article 47 of the Constitution. The courts use judicial review to ensure that other branches of government abide by the Constitution and the law.

As concerns administrative functions, judicial review is available against the decision, action or failure to act by a public body exercising a public law function. Judicial review is also available against actions of subordinate courts. In order to succeed, an applicant needs to demonstrate that the public body is under a legal duty to act or make a decision in a certain way but has unlawfully refused to do so. An applicant can also succeed if he shows that a decision or action has been taken outside the jurisdiction of the public body, subordinate court or tribunal. In order to be satisfied that a decision is lawful, the court must find that it is legal, fair, rational and proportionate. In doing this, the court does not seek to impose its opinion on the deciding authority.

Has the Respondent acted in any manner to attract judicial review orders? I do not think so. The Respondent is being faulted for entertaining a case filed by the Interested Party. It is the Respondent's legal duty to hear the case and make a decision based on the facts presented to the Court. All the allegations made by the Applicant will form its defence in the case before the Respondent.

The Interested Party is amenable to judicial review as it is a public body. It has been accused of abusing its powers. I will briefly look at the law that the Interested Party is said to have breached. The Interested Party is alleged to have failed to issue a demand notice as required by Section 17 of the Rating Act. That is a defence which ought to be presented before the Respondent. Whether or not a demand notice was issued is a matter to be determined after the production of evidence by the parties before the Respondent. If the demand notice was not issued, the Respondent will determine the consequences of such failure.

Section 20(1) of the Rating Act provides that a rateable owner is liable for rates. According to Section 20(2), if the rateable owner is absent from Kenya then the person receiving rent or who is in charge or control of the property is liable to pay rates. A rateable owner as defined by Section 7 of the Valuation for Rating Act includes a registered owner. In this case therefore the Interested Party acted within the law in suing the Applicant.

Section 18 of the Rating Act which the Applicant's counsel emphasized simply gives the rating authority the option of recovering rates from tenants or occupiers. Whether it is proper to recover rates from a registered owner whose property has been under illegal occupation is a question to be determined by the Respondent. It is important to remember that magistrates are lawyers capable of interpreting the law and applying the law to the facts of each case.

The Applicant has therefore failed to show that the Interested Party abused its powers. The Interested Party acted within the law. The fact that the Interested Party instituted its case immediately after the determination of **H.C. ELC 384 OF 2009** cannot be used to deny the Interested Party its right to recover the rates, arrears and interest. One of the questions that will face the Respondent is whether the Applicant ought to pay any rates for the period that her land was under illegal occupation.

As already stated, the Applicant's case does not merit issuance of judicial review orders. The case is therefore dismissed. As the case was not defended, there will be no order as to costs.

Date, signed and delivered at Nairobi this 9th day of December, 2014

W. KORIR,

JUDGE OF THE HIGH COURT