



REPUBLIC OF KENYA

High Court at Nakuru

Judicial Review 46 of 2009

**IN THE MATTER OF AN APPLICATION BY MARALAL VILLAGE POLYTECHNIC FOR
JUDICIAL REVIEW ORDERS OF PROHIBITION**

BETWEEN

REPUBLIC APPLICANT

VERSUS

ANDREW K. MIBEI 1ST RESPONDENT

H.S. MWANGU 2ND RESPONDENT

TOWN COUNCIL OF MARALAL 3RD RESPONDENT

ALEX LESEKETETI 4TH RESPONDENT

MUSA ABDILE 5TH RESPONDENT

PAUL LEKAJA 6TH RESPONDENT

EX-PARTE:

**MARALAL VILLAGE POLYTECHNIC SUING THROUGH ITS CHAIRMAN, SECRETARY
GENERAL AND TREASURER NAMELY JOHN K. CHEGE, CHARLES MUNYIRI
GACHINGIRI AND PAUL WACHIRA NDERITU RESPECTIVELY**

JUDGMENT

By the Notice of Motion dated 14/5/2009, Maralal Village Polytechnic through its chairman, John K. Chege, Secretary, Charles Munyiri and Treasurer, Paul Wachira (hereinafter referred as “the ex-parte applicants”) sought an order for prohibition to prohibit Andrew K. Mibie - The District Education Officer Samburu Central, H.S. Mwangi - The District Youth Officer Samburu Central, Town Council of Maralal, Alex Leseketeti, Musa Abdile and Paul Lekaja from interfering in any way with plot known as unsurveyed plot no. 181/Maralal.

The motion was premised upon the grounds on the face of it and the Verifying Affidavit dated 14/05/2009, sworn by the applicant, John K. Chege. He deponed that he is the chairman of the applicant, Maralal Village Polytechnic. The polytechnic is the owner of the plot, known as, unsurveyed plot no. 181/Maralal, through an allotment by the Commissioner of Lands dated 15/8/1979. It has caused

developments on the suit land including a polytechnic and an academy; that in 2008, the 1st, 2nd and 3rd respondents in connivance with the 4th, 5th and 6th respondents who are purported to be developers, started laying claim on the suit land. He avers that the respondents have no claim over the suit land and therefore prays to this court to prohibit them from further interference.

The application was opposed. Anthony Leaduma, the Town Clerk of the 3rd Respondent swore the replying affidavit dated 10/6/2009. He avers that he is a member of the Board of Governors of the applicant. Through a letter dated 15/8/1979, the Commissioner of Lands allotted unsurveyed plot to Maralal Village Polytechnic. The said plot is distinct from plot number 181 where PCEA church is situated and the rates paid by PCEA Church to the 3rd Respondent are in respect to plot number 181 and not the suit land occupied by the applicant. The applicant's unsurveyed plot is not an extension of the PCEA church plot 181. The polytechnic is a Government Institution, constructed and run by the Government through its Provincial Technical Training Office. PCEA Church is a sponsor of the applicant but does not own or manage the suit land or the polytechnic. He further deponed that the persons suing on behalf of the applicant are not members of the Board of Governors are using the proceedings to continue operating an unregistered academy on the suit land. Lastly, the deponent avers that this is a claim of ownership of land and should have been brought by way of normal suit.

The 4th, 5th and 6th Respondents also opposed the application and each filed a replying affidavit dated 10/6/2009. The affidavits were all similar in content and the only variation is how each became the owner of his respective plot. The 4th respondent through a letter of allotment dated 19/12/1998 from the Commissioner of Lands; The 5th respondent was allocated plot number 2 by the 3rd respondent (Town Council of Maralal) on 27/3/2008; The 6th respondent became the owner through a transfer from Dorris Lenkokwai on 27/3/2008. They all deponed that they had paid the requisite rates for the plots, developed them and have been enjoying quiet possession. They denied encroaching on any land belonging to PCEA CHURCH.

By a supplementary affidavit sworn by John K. Chege on 25/6/2009, he deponed that the applicant was managed by a committee which he chairs and that there has never been a board set up to govern it. That Maralal Village Polytechnic is situated on the unsurveyed plot which is numbered 181. The 4th, 5th and 6th respondents' plots are adjacent to the suit land and they were using the letters of allotment to encroach onto the applicant's land.

The 1st and 2nd respondents through the Attorney General, filed a Notice of Preliminary Objection dated 15/6/2009. They raised 8 grounds which I have summarized into the following:-

1. That this court does not have jurisdiction to hear and determine a civil claim for ownership to land as between private entities;
2. That the Chairman, Secretary and Treasurer of the applicant do not have the *locus standi* to institute these proceedings on its behalf;
3. That a judicial review application only lies against public officers and public bodies;

From the onset, it is worth noting that Alex Leseketeti, Musa Abdile and Paul Lekaja can not be respondents in a judicial review application in their personal capacity because judicial review orders can only issue against public bodies and officers. The three can only be joined to these proceedings as interested parties.

The respondents submitted that judicial review is not concerned with private rights which was the case here. Counsel for the applicant however argued that the matter before the court was under public law for the reason that the 1st, 2nd and 3rd Respondents are abusing their public offices in assisting the 4th, 5th and 6th respondents to wrestle the suit land from the applicant. The letter dated 17/3/2009 ordering the closure of the applicant's school by the 1st respondent in his capacity as Secretary, District Education Board, Samburu District, sufficiently proves that this matter falls under public law. Judicial review is the vehicle by which the state checks on the excesses of its officers and public bodies in the performance of

their administrative duties. In **Daniel Nyongesa & Others v Egerton University, CA 90/1989**, the court said:-

“It is the duty of the court to curb the excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people whatever the status....”

On whether or not the applicants have the *locus standi* to bring these judicial review proceedings, they described themselves as chairman, secretary and treasurer of Maralal Village Polytechnic and belong to PCEA Church which claims to own and manage the suit land. Though there is nothing exhibited to show they are duly appointed to manage the school, they are persons whose rights are affected, they have the necessary standing to bring this application.

The regime of judicial review is concerned not with private rights neither the merits of the impugned decision but it is concerned with the decision making process which ensures that an individual is given fair treatment by the decision maker. The applicants are complaining that they were not given a chance to be heard by the respondents and in particular the 1st respondent who is the secretary, District Education Board, Samburu. In exercise of his powers to order the school to relocate or close, affected the rights of the applicants. The notice was issued without giving the applicants a hearing despite the applicants, through PCEA Foundation inviting all stakeholders for a meeting to sort out the issue of ownership of the polytechnic land. All that is fundamentally demanded of the decision maker is that his decision in its own context be made with due regard to the affected parties' interests and accordingly, reached without bias and after giving the parties a chance to put forward their own case. The 1st, 2nd and 3rd respondents in this case have a duty to act fairly and within the mandate as conferred by statute. I am satisfied that the respondents acted capriciously in this matter.

Can this court grant an order of prohibition:

Judicial Review orders are discretionary. The court can decline to grant them even if deserved, all depending on the circumstances of each case. The Supreme Court Practice Vol. LIII paragraph 53/1-14/14 states:-

“Even if a case falls into one of the categories where judicial review will lie, the Court is not bound to grant it; the jurisdiction to make any of the various orders available in judicial review proceedings is discretionary. What order or orders the Court will make depends upon the circumstances of the particular case.”

In **Kenya National Examination Council v Rep. Ex-parte Geoffrey Gathenji and Others, CA 266/1996**, The Court of Appeal in considering the nature and scope of an order of prohibition had this to say:-

“What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice.”

The applicants seek to prohibit the respondents from interfering with the suit land. Although I have found that the respondents did not comply with the rules of natural justice, it is obvious that the underlying issue herein is the ownership of the suit land. As stated earlier, judicial review proceedings are not concerned with the merits of the decision. This court cannot determine who the owner of the land in issue is because it would involve calling of viva voce evidence and going into the merits of the case. That is not the purview of judicial review. If the court were to grant the order sought, it would in effect be conferring ownership of the disputed land on the applicants which is outside its jurisdiction. Consequently I decline to grant the prayer sought.

For all the above reasons, I decline to grant the application because it will not be the most efficacious

remedy in the circumstances. The application is hereby dismissed with each party bearing its own costs.

DATED and DELIVERED this 30th day of January, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Mureithi for the applicant
Mr. Kamau for the respondents
Kennedy – Court Clerk