



REPUBLIC OF KENYA

High Court at Nakuru

Judicial Review 123 of 2010

DR. MECHACK ALUVAALA.....APPLICANT
VERSUS
THE ATTORNEY GENERAL.....1ST RESPONDENT
THE DISTRICT LAND REGISTRAR.....2ND RESPONDENT
JOSEPHINE E. MUNYAO.....3RD RESPONDENT
MUNICIPAL COUNCIL OF NAKURU.....4TH RESPONDENT

JUDGMENT

The Notice of Motion dated 12/1/2011 is a Judicial Review application brought by Dr. Meshack Aluvaala, the ex-parte applicant herein, against the four respondents namely; The Hon. The Attorney General, The District Land Registrar, Josephine E. Munyao and the Municipal Council of Nakuru. The applicant seeks the following orders:-

- 1. That an order of certiorari do issue to bring to court and quash the Gazette Notice 15574 dated 26/1/2010, by which the District Land Registrar declared that the Government had revoked the tile to title number Nakuru Municipality/Block 12/276;**
- 2. That the court do issue an order prohibiting the Government of Kenya and the District Land Registrar Nakuru from issuing a title deed to the Board of Governors of Moi Primary School which is under the management of the Municipal Council of Nakuru;**
- 3. In the alternative, an order of mandamus do issue to compel the Government of Kenya to compensate the applicant for the loss of his investment in the suit property Block 12/276, which should be equivalent to the open market;**
- 4. Costs of this application be borne by the respondent.**

The application is supported by a verifying affidavit sworn by the applicant on 12/1/2011 an amended statement of facts dated 17/11/2011 and affidavit sworn on 17/11/2011. Ms Omwenyo, counsel for the applicant also filed three sets of submissions dated 15/3/2011, supplementary submissions dated 30/9/2011 and further supplementary arguments dated 28/11/2011.

Ms Khatambi, counsel for the 1st and 2nd respondents filed grounds of opposition dated 16/11/2011 and submissions of the same date.

Mr. Mutonyi appeared for the 3rd respondent and relied on a replying affidavit sworn by Josephine Esther Munyao dated 25/2/2011, grounds of opposition of the same date, submissions filed in court on 12/4/2011 and a list of authorities.

The 4th respondent too opposed the application and the then Town Clerk, Kiao Kathuu Mbulusi swore an affidavit dated 7/2/2011 and Mr. Kipkoech, counsel for the 4th respondent filed submissions on 15/3/2011.

The brief background of the applicant's case is that he purchased the suit land Block 12/277, from the 3rd respondent; that there was an error but it was corrected to become Block 12/276, the title was clean and without any encumbrances and that he was protected by **Section 39(1)** of the **Registered Land Act Cap 300 Laws of Kenya** because he was only required to do a search to ascertain whether the title was clear and not go into the history of the title. Ms Omwenyo submitted that the Government could only compulsorily acquire the land from the applicant. Counsel relied on the decision of **NKU 260/2004**, the **Attorney General v KCR and Afraha Educational Development Company Ltd & Others** and urged that there is an equitable estoppel and that because of their conduct, the 1st, 2nd and 4th respondents cannot deny the legality of the sale transactions which is legal; that the 4th respondent needed to pay off a loan, it identified some of its properties for sale and it identified the suit land as available for sale; that under **Section 144(1)** and **145(g)(2) Local Government Act**, the 4th respondent has power to acquire and dispose of land and that is what it did and the suit land cannot be said to be public land. As to the arguments that this is public land belonging to a school, counsel urged that the property is situated next to a school and the school has not complained of any loss.

Ms Khatambi, counsel for the 1st and 2nd respondents urged that the suit land was set aside for expansion of Moi Primary School and being public land, it cannot be alienated to private individuals. Counsel blamed the applicant for not following the proper procedure when acquiring the land and the Attorney General has to step in to protect the public interest. Counsel also urged that the right to own land is subject to public interest which is set out in **Article 166(1)** of the **Constitution**. Counsel relied on several authorities:-

1. **John Peter Murethi Misc.158/05;**
2. **Joram Nyaaga v A.G., 1332/2004;**
3. **Dennis Kuria v Rep. 663/2006.**

Lastly counsel argued that this matter should not have been brought by way of Judicial Review because the two competing interests are over right to and ownership of land and should have been brought by way of a plaint to allow for the parties to give evidence and allow for cross examination. He urged the court to dismiss the application.

Mr. Mutonyi submitted that the application is defective because in Judicial Review, the evidence should be contained in the verifying affidavit but in this case, all the facts and annexures are contained in the statement of facts, that the verifying affidavit consists only four paragraphs and should be struck off for want of evidence. Counsel relied on the decisions of **KANU v Kibaki & Others (2005)2 KLR 435** and **Silvano Onema Owaki CA 45/2000** where the courts declared that in a judicial review application, the facts should be in the verifying affidavit. Mr. Mutonyi submitted that the applicant had filed an amended notice of motion dated 13/10/2011 but withdrew it on 14/11/2011 and parties were allowed to file further affidavits but instead, the applicant purported to file a verifying affidavit on 15/11/2011. It is his contention that the court has no jurisdiction to allow an applicant to file a verifying affidavit at submissions stage. He urged the court to expunge the said verifying affidavit. Counsel urged that it is not a mere technicality which can be cured by **Section 1A** and **1B** of the **Civil Procedure Act**. For that proposition counsel relied on **James Njuguna v Francis Mgambi Rukumia 24/2008** and **Yose Mguzi v ADM Ltd CA 171/2010**, where the courts said that the new rules of procedure have not come to uproot well established principles and procedures in the exercise of discretion by the court. Lastly, it was urged on behalf of the 3rd respondent that she is wrongly sued because she sold Plot No.277 to the applicant but the applicant exchanged it with Plot 276 which is the subject of these proceedings.

On behalf of the 4th respondent, Mr. Kipkoech submitted that there is no cause of action against the 4th

respondent because the 4th respondent never sold any land to the applicant and there was no transaction between them. Mr. Mbulusi, the Clerk to the 4th respondent denied that the 4th respondent had any authority to sell public land, that there is no evidence that the proper procedures were followed in the sale transaction and the court cannot be used to stamp an illegality and that the application is overtaken by events. Mr. Kipkoech also adopted submissions by other counsel.

Having heard all counsel on the application the submissions and case law relied upon, I think that the issues for determination are:-

1. **Whether the application is competent;**
2. **Whether the 3rd and 4th respondents are properly sued;**
3.
4.

Order 53 Rule (1)(2), Civil Procedure Rules prescribes how an application for judicial review will be brought. The rule states as follows:-

“O.53 r.1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit.”

From a reading of the above provision it is clear the evidence in support of the application must be contained in the verifying affidavit or affidavit filed with the chamber summons. The statement of facts should only contain the name and description of the applicant, the relief sought and the grounds upon which the application is sought. There is a wealth of authority on this point. In **Silvano Onema Owaki** (supra), the Court of Appeal said:-

“We would observe that it is the verifying affidavit, not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be meaning of Rule 1(2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1996 Vol.1 at paragraph 53/1/7.”

“The application for leave ‘By a statement’, the facts relied on should be stated in the affidavit (see *R v Wandsworth JJ, ex-parte Read (1942)1 KB 281*) ‘The statement’ should contain nothing more than the name and the description of the applicant, the relief sought and the grounds on which it is sought, it is not correct to lodge a statement of all the facts, verified by an affidavit.”

In a judicial review application, it is the affidavit that is of circumstantial value but not the statement of facts. In the instant case, the verifying affidavit comprises only three short paragraphs which are introductory in nature. The facts and annexures relevant to the application are all contained in the statement of facts which is offensive to **Order 53 Rule (1)(2), Civil Procedure Rules**. After the court gave directions and the court allowed the parties to file further affidavits and submissions, on 14/11/2011, counsel for the applicant withdrew the amended notice of motion that she had filed and sought leave to file an amended statement of facts and a further affidavit. They were filed on 18/11/2011. In the verifying affidavit introduced at that stage the applicant purported to amend the content of the verifying affidavit filed with the chamber summons when the applicant sought leave of the court to commence judicial review proceedings on 12/1/2011. Under **Order 53 Rule (4)(2), Civil Procedure Rules**, an applicant with leave of the court, can amend the statement of facts and file further affidavits. The further affidavits

must only reply to new matters raised in the affidavits filed by the other parties. The applicant's affidavits did not contain any evidence. However, what the applicant is doing is attempting to amend the verifying affidavit by introducing new evidence which should have been in the verifying affidavit filed with the chamber summons which cannot be allowed in law. An affidavit is a party's evidence on oath. It cannot be amended. Ms Omwenyo sought to seek shelter in the 'oxygen rules' to the effect that if the court were to grant the respondent's objection to reject verifying affidavit filed on 14/11/2012, the court would be determining the matter on technicality but that the court should do substantive justice to the parties under **Article 259** of the **Constitution** and **Section 1A** and **1B** of the **Civil Procedure Act**. Judicial Review jurisdiction has been said to be '**sui generis**', a special jurisdiction whose provisions are confined to the Law Reform Act being the substantive law and **Order 53** of the **Civil Procedure Rules** being the procedure. The courts have said this in a host of authorities to that effect, one being **Hotel Kunste Ltd v Commissioner of Lands 45 of 1995** where the Court of Appeal said:-

"...matters of judicial review, the court exercises a special jurisdiction which is neither civil nor criminal."

Sections 1A & 1B of the **Civil Procedure Act** will not necessarily apply to judicial review application.

See also **KANU v Kibaki**(supra) page 435, the court said:-

In our view, the statement of facts is not unlike a plaint, a statement of claim when the verifying affidavit confirms in a very few lines. The verifying affidavit in judicial review proceedings is the evidence upon which the application is founded. It must consequently contain these facts and exhibits. It cannot merely say as Hon. Sunkuli's affidavit purports to say, I confirm the statement."

No doubt **Article 259** of the **Constitution** enjoins the court to do substitute justice to the parties before it without res. However, in this case, filing a verifying affidavit after the close of pleadings is prejudicial to the other parties and I would be guided by the decision of the Court of Appeal in **City Chemist (NRB) & Another v Oriental Commercial Bank CA 302/08** "the new thinking brought by **Sections 3A** and **3B** does not... totally uproot well established principles or precedents in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in running with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application." The Court of Appeal applied the same principle in the case of **James Njuguna v Francis Ngambi & Others CA 24/08** and **Joseph Guzi v ADM Ltd & Others CA 171/2011 (Sections 3A & 3B** of the **Appellate Jurisdiction Act** are similar to **Sections 1A & 1B** of the **Civil Procedure Act**). In an earlier case the Court of Appeal had said that when the **Constitution** or **Statute** lays claim a practice procedure to be followed by a litigant in approaching that court, that procedure should be followed. In **Njenga Karume (2009) KLR**, the court said:-

"There was considerable merit in the submission that where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of parliament, that procedure should have been strictly followed."

As pointed out earlier the applicant chose to approach this court by way of judicial review and is therefore bound by this special procedure laid down under **Order 53** of the **Civil Procedure Rules**. At attempt to amend the verifying affidavit after close of pleadings is prejudicial to the other parties. They cannot be able to respond to the averments made in the further verifying affidavit. I believe **Order 53, Civil Procedure Rules** was meant to expedite process in cases which are clear and facts are not in dispute complied with procedure as much as possible. As early as 15/3/2011 when the 4th respondent filed their affidavit and submissions, the defect in the verifying affidavit was pointed out and the applicant should have taken action to correct the anomalously. As noted above, an affidavit, being evidence on oath cannot be amended and what the respondents have raised is not a mere technicality that the court can overlook but goes to the root of the application. I agree with my brother Justice Emukule's observation in the

Municipal Council of Thika ex-parte Kenya Medical Association Misc. 782/00 when he observed:-

“The affidavit verifying the facts is however, a different document. It is documentary evidence upon which the judicial review application will be determined.”

Without facts in the verifying affidavit which is filed with the chamber summons, the judicial review application is naked and cannot be sustained. I do agree with the respondent that without evidence in support of the application, the same is incompetent and fatally defective and must be struck out.

It is trite law that judicial review is a public law remedy and cannot lie against private individuals unless they are joined in their official capacity. In that respect, the 3rd respondent who allegedly sold the suit land to the applicant is wrongly joined to these proceedings. In **R. v JSC Ex-parte Pareto**, J Nyamu relied on the Halsburys principle at page 212 which states:-

“Decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision (see Associated Provincial Picture Houses v Wednesbury Cooperation (1948) 1 KB 223.”

It is clear from the above passage that judicial review orders can only issue against public bodies or public offices. A public law remedy cannot be against the 3rd respondent in her private capacity.

The 3rd respondent in her affidavit in reply explained the relationship between her and the applicant. She was allocated Plot Nakuru Municipality Block 12/277 by the 4th respondent. She later sold it to the applicant. However, the applicant exchanged this plot with another Plot 12/276 which belonged to Amos Kibe Njogu. The land that is the subject of these proceedings is Plot No. 12/276 and the applicant has not demonstrated the connection of these proceedings with the 3rd respondent.

Plot 12/277 was sold to the 3rd respondent by the 4th respondent. The 3rd respondent then sold it to the applicant. There was no direct transaction or privity of contract between the applicant and the 4th respondent. This being a judicial review application the court is not concerned with determining the rights of the individuals on the merits but it is concerned with the decision making process. J. Nyamu considered the scope of judicial review remedy in the **Pareno** case (supra) when he held:-

“The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself.”

I have seen the prayers sought against the respondents herein. Though the 4th respondent is public body and is the lessor as respects the disputed land, there is no prayer sought against it. Prayer 1 seeks an order of certiorari to quash the Gazette Notice No. 15574 of 26/1/2010. That Gazette Notice was made by the District Land Registrar Nakuru, the 2nd respondent. Similarly, the 2nd prayer of prohibition seeks to bar the same District Land Registrar from issuing a title deed to Moi Primary School. It is not directed at the 4th respondent. The third prayer for mandamus is also directed at the Government of Kenya to compensate the applicant. None is directed at the 3rd or 4th respondents. Apart from the defects noted above, this application was a none starter as respects both the 3rd and 4th respondents.

It is clear from the affidavits on record that the dispute herein relates to rights and ownership of property. The 1st and 2nd respondents seem to be claiming to have a reversionary interest in the property whilst the applicant claims to be the legal owner having purchased it. It has also emerged that in fact the land in question is not what the applicant purchased from the 3rd respondent. There is a dispute as to who owns it and whether the person who transferred the land to him acquired it legally. For that reason my view is that this is a civil dispute that would be adjudicated in a civil case where evidence will be called and witnesses cross examined. The facts are not clear as is expected in a judicial review case. In a civil

case, the court will need to go into the merits of the case. The ambit of judicial review has been defined as summarized in the **Kunste** case (supra).

“A declaration does not fall under the provision of the judicial review for the single reason that the court would require viva voce evidence to be added for the court to decide the case on the merits before declaring who the owner of the land is. Judicial Review, on the other hand is concerned with the running of decision making process and the evidence is found in affidavits filed in support in this application.”

Further to my observation that the applicant should have filed a civil suit, Ms. Omwenyo relied on the case of **Attorney General v KCB & Afraha Educational Development Co. Ltd, 260/2004** where the defendants were alleged to hold some property in trust for the plaintiff and there were two public schools on the land. The suit was by way of plaint not judicial review. To buttress this point further, the applicant seeks an order of mandamus to compel the payment of damages. So far there is evidence that the applicant is entitled to damages. A prayer for damages could only have been made in a civil suit.

Having made the above finding as respects the incompetence of this application, I find it unnecessary to delve into the merits of the application. For that reason I hereby strike it out with the applicant bearing the costs.

DATED and DELIVERED this 28th day of March, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Chege holding brief for Ms Omwenyo for the applicant

Ms Koina for the 3rd respondents

Mr. Kipkoech for the 4th respondent

Kennedy – Court Clerk