



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 80 of 2010

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF PROHIBITION AND MANDAMUS

IN THE MATTER OF: THE REGISTRATION OF TITLES ACT

(CHAPTER 281 OF THE LAWS OF KENYA)

REPUBLICAPPLICANT

VERSUS

COMMANDER OF THE KENYA AIR FORCE.....1ST RESPONDENT

THE CHIEF OF GENERAL STAFF OF

THE ARMED FORCES.....2ND RESPONDENT

THE P S MINISTRY OF STATE FOR DEFENCE...3RD RESPONDENT

EX PARTE

SUPANOVA INVESTMENTS LIMITED

JUDGEMENT

1. By a Notice of Motion dated 18th October 2010 filed on 22nd October, 2010, the *ex parte* applicant herein, **Supanova Investments Limited**, seeks the following orders:

(i) **THAT an order of PROHIBITION do issue against the respondents forbidding and or restraining the Armed Forces, their servants or agents from constructing any structure on, digging, developing and or otherwise using the land known as Land Reference Number 209/12904.**

(ii) **THAT an order of PROHIBITION do issue against the respondents forbidding and or restraining the Armed Forces, their servants or agents from trespassing on the applicant's land known as Land Reference Number 209/12904.**

- (iii) **THAT an order of MANDAMUS do issue compelling the Armed Forces, their servants or agents to refill the ditches, trenches and holes dug by them on the applicants' land and to demolish the perimeter wall and any other structure constructed by them on the applicant's land known as Land Reference Number 209/12904.**
- (iv) **THAT the costs of this application be awarded to the applicants.**

EX PARTE APPLICANT'S CASE

2. The application is based on the Statement filed on 30th November, 2012 and a verifying affidavit sworn and filed the same day by **Adan Abdi Adan**, a Director of the Applicant herein.
3. According to the deponent, on or about the 10th May 2010 the applicant purchased property known as Land Reference Number 209/12904 (hereinafter referred to as the suit property), which is adjacent to Moi Air Base, Eastleigh, Nairobi for Kshs 35,000,000.00 and caused the same to be registered in its name. However, on or about 15th September 2010 officers, soldiers, employees, servants or agents of the Armed Forces attached to the said Air Base entered into the suit property and commenced digging ditches, trenches and holes without the applicant's knowledge and in addition commenced construction of perimeter wall around the applicant's land evincing purported ownership thereof by the Armed Forces. Despite a demand of cessation of the said activities, it is deposed that no response was received. It is the applicant's apprehension that unless the Armed Forces are stopped from the said actions they will continue therewith and thereafter lay claim over the suit property effectively denying the applicant access to its property.
4. According to the deponent, the said actions are unlawful, illegal, evince impunity and is a clear affront to the sanctity of the applicant's title over the said land.

RESPONDENTS' CASE

5. In opposition to the application, the Respondents filed a replying affidavit on 7th February 2011 sworn by Col. **Moses Onyango Adol**, an officer in Charge of the Works Branch in the Ministry of State for Defence, in the office of the 3RD Respondent on 4th February 2011. According to him, the original boundary of the **Moi Air Base Eastleigh (MAB)** was delineated by the 1940 Survey Plan No. 36/3, which was subsequently reviewed and a Survey Plan produced in 2004 pursuant to a Part Plan Development Plan undertaken in 2001 and a letter of allotment in respect of the said review issued in 2002. According to him the suit property cannot be identified on the ground and efforts to identify it from the Survey Plans have been fruitless since the annexed Land Survey Plan No. 206316 could not be traced at the records of the Director of Surveys. In 2008, as part of wider security measures, MAB began an on-going process of upgrading its chain link fence to a Masonry wall along its said boundary in the course of which encroachments and jut-ins distorting the boundary from Eastleigh side of the fence emerged. According to him since the *ex parte* applicant's title appears to have been issued in 1998 by which time MAB's boundaries had been identified and Gazetted, the said boundaries remain as was/is, as a matter of law, in the absence of degazettement. Based on legal advice, he deposes that the encroachment of a clearly delineated and gazetted security zone does not just pose a threat to National Security but offends the doctrine of public policy and morality, and fosters the culture of land grabbing which has thus far threatened to decimate chunks of public utility land.

6. It is his view that the jurisdiction of the Court herein is discretionary and does not and cannot avail to defeat Public Interest, National Security and Morality. Further, it is deposed that the substratum of these proceedings being disputed ownership of the subject parcel of land can only be efficaciously resolved through a civil action and not through the Superior Court's Public Law jurisdiction of judicial review.

APPLICANT'S SUBMISSIONS

7. On behalf of the *ex parte* applicant it was submitted section 23(1) of the Registration of Titles Act

(hereinafter referred to as the Act) confers on the registered proprietor of land absolute and indefeasible title which can only be challenged on the grounds of fraud and misrepresentation to which he is proved to be a party and that the said Act is meant to give such sanctity of title. In support of this submission, the *ex parte* applicant relies on **Joseph Arap Ng'ok vs. Moiwo Ole Keiwua Civil Application No. 60 of 1997** and **Wreck Motors Enterprises vs. The Commissioner of Lands & Others Civil Appeal No. 71 of 1997**.

8. It is the *ex parte* applicant's position that the 1st respondent's intention is to forcefully extend its base's boundary by encroaching into the applicant's land based on the claim that it has been allocated the land and relies on **Michael Githinji vs. Nicholas Muratha Mugo Civil Appeal No. 53 Of 1995 (CAK) [1997] eKLR**.

9. On the authority of **Joseph Arap Ng'ok vs. Moiwo Ole Keiwua** (supra), it is submitted that since the applicant has a title while the respondent only has a letter of allotment, the respondent's actions violate Article 40 of the Constitution of Kenya, 2010. It is further submitted that the deed plan referred to by the respondent, being deed plan no. 205319, which is dissimilar to the one referred to by the respondent being No. 206316 while Legal Notice No. 309 of 1961 was repealed by Legal Notice No. 322 of 1965. Further subsidiary legislation cannot defeat the provisions of an Act of Parliament, the Registration of Titles Act Cap 281 Laws of Kenya.

RESPONDENT'S SUBMISSIONS

10. On behalf of the respondent, since the substratum of the applicant's case is an alleged trespass which is denied, the motion raises issues of ownership of land and extends to ownership, on the basis of the material before court the orders sought cannot be granted since judicial review is a special jurisdiction reposed in the courts by law to check exercise of power by public authorities. It is, on the authority of **Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995**, neither civil nor criminal.

11. In the respondent's view, the applicant has couched the prayers for prohibition as if it were one of prohibitory injunction in ordinary suit while the prayer for *mandamus* is crafted as if it were one for mandatory injunction contrary to the decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996**. Accordingly, it is submitted that the Motion is incompetent for seeking reliefs which are not available in the circumstances for which they are being sought since section 8 of the Law Reform Act specifically forbids the High Court from granting Judicial Review remedies in civil suits and/or granting civil remedies in Judicial Review applications. Judicial review, being a public law remedy, it is submitted that claims in private law cannot be competently urged as if they were public law reliefs. In support of this line of submission, the case of **Earle Alphayo Ng'ani vs. Permanent Secretary Ministry of Labour High Court Miscellaneous Application No. 23 of 2009**, **Republic vs. Officer in Charge Eldoret G K Prison ex parte David Kibet Achikwa Eldoret High Court Miscellaneous Application No. 65 of 2006** and **Lilian Nkirote vs. Permanent Secretary Ministry of Housing Nairobi High Court Miscellaneous Application No. 433 of 2005** are cited as authorities. In the respondents view the issues such as the allegation of encroachment on the applicant's land, non-existence of the applicant's plot on the ground, non-existence of the applicant's land at the surveys office and claim to trespass are issues which cannot be determined in these proceedings.

DETERMINATION

12. Having considered the above matters this is the view I form of the matter.

13. It is clear that the main cause of action here is the allegation of the encroachment by the respondent onto the *ex parte* applicant's parcel of land. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others** (supra) in which the said Court held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition 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. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

14. However judicial review proceedings do not deal with the merits of the decision but by the decision making process. In Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 the Court of Appeal held:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

15. In Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See

Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.

16. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

17. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) 1 WLR 1155.

18. In my view for the Court to find that the respondent has encroached upon the *ex parte* applicant's parcel of land, the Court would require to make a determination of the boundaries between the two adjacent parcels of land. That determination necessarily requires that oral and/or documentary evidence be adduced more so the evidence of the surveyors. In the absence of such evidence, it would be an exercise in futility for this Court to attempt a resolution of the dispute between the parties herein. However, that is not the jurisdiction of a Court exercising judicial review jurisdiction under sections 8 and 9 of the **Law Reform Act** Cap 26 Laws of Kenya.

19. It follows therefore that where the determination of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply. It is governed by sections 8 and 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, *mandamus*, *certiorari* and prohibition. In order to determine the questions in this dispute, it is my view, that it would be necessary to make certain findings in the nature of declarations yet declarations do not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring where the boundaries of the two adjacent parcels of lands are leave alone their existence on the ground. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. Here, there are serious factual issues which require to be resolved and which go beyond the Court's jurisdiction in judicial review proceedings. See **Commissioner of Lands vs. Hotel Kunste Ltd** (supra).

20. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354:**

“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, *mandamus*, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.....Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a 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. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce evidence* and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.....It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not

in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce evidence* at another forum preferably the Civil Courts.”

21. To grant the orders sought herein will leave the serious conflicting issues of fact raised in these proceedings unresolved hence will be a source of future conflicts since as already stated judicial review applications do not deal with the merits of the case but only with the process. In other words in judicial review applications the Court’s jurisdiction is to determine whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.

ORDER

22. The issues in this suit, not being proper candidates for determination by judicial review proceedings, the order that commends itself to me is that the Notice of Motion dated 18th October 2010 fails and is dismissed with costs to the Respondents.

Dated at Nairobi this 30th day of April 2013

**G V ODUNGA
JUDGE**

Delivered in the presence of Mr Mahinda for Owino for the applicant and Ms Mbilo for the Respondent