



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 334 of 2005

REPUBLICAPPLICANT

VERSUS

THE PERMANENT SECRETARY

MINISTRY OF LANDS & HOUSING.....RESPONDENT

EX-PARTE

JOHN MWANGANGI T/A

DIGITAL EQUIPMENT ENTERPRISES

JUDGEMENT

1. By a Notice of Motion dated 24th March, 2005 filed the same day, the *ex parte* applicant herein, **John Mwangangi**, seeks the following orders:

a. That an order of Certiorari to remove into this Court, quash and set aside the decision of the Permanent Secretary, Ministry of Lands and Housing requiring the applicant herein to pay the purchase price for property titled NAIROBI/BLOCK 26/142 registered in the name of John Mwangangi.

b. That an Order of Prohibition be issued against the Permanent Secretary, Ministry of Lands and Housing his servants and/or agents or anyone acting through him restraining him, his agents and/or servants from evicting, demanding any payment and/or depriving the applicant of his proprietary rights and/or in any other manner dealing with Land Title Nairobi/Block 26/142 and the improvements thereon contrary and/or to the detriment of the applicant's registered proprietary interest.

c. That the costs of this application be provided for.

EX PARTE APPLICANT'S CASE

2. The application is based on the Statutory Statement filed on 8th March 2005 and a verifying affidavit sworn on 4th March 2005 by the applicant. According to the applicant, he is the registered proprietor of the Land Title Number Nairobi/Block/26/142 situated at Kileleshwa within Nairobi and was on 16th December 1998, issued with a letter of allotment reference number 35538/XIV for Nairobi/Block 26/142 which he duly accepted and paid the requisite stand premium of Kshs 30,000 as well as other charges that were levied. Having complied with all the conditions contained in the letter of allotment, he was issued with a certificate of lease for a term of 99 years with effect from 1st January 1999. Since taking up possession, he has never been informed orally, through correspondence or otherwise that the title to my property has been cancelled or varied and up to the time of filing this application the property was and still is registered in his name. However, out of nowhere and to his utter shock, on 6th December 2004, he received a purported letter of offer from the Permanent Secretary, Ministry of Lands & Housing requiring me to pay *inter-alia*, the purchase price for the subject property as well as stamp duty, transfer charges, land rent, rates and service charge purportedly on the basis that the property belongs to the government of Kenya. Prior to the said letter of offer, he was never a party to any deliberations culminating in such a decision and neither was he aware that there were such deliberations which are, according to him, illegal, contrary to law, unconstitutional, null and void for all intents and purposes.

3. According to the applicant, he stands to suffer irreparable loss if adverse orders are made against him in respect of the premises which he legally owns and for which he has put substantial amount of money and time without any justifiable cause or reason and without being afforded a hearing not to mention that these are the premises where he resides with his family up to date. Further, the purported letter of offer is ill motivated, capricious, whimsical and contrary to the rules of natural justice and fair play and the fundamental rights as enshrined in the constitution of the Republic of Kenya and if allowed to be effected, it will render any cause of action open to him in Law subsequent thereto otiose.

4. The Respondent, however, did not file any papers in opposition to the application.

APPLICANT'S SUBMISSIONS

5. On behalf of the ex parte applicant it was submitted under section 28 of the Registered Land Act, Cap 300 Laws of Kenya, that the applicant being the registered proprietor of the suit property, his title and/or interest in the property is indefeasible and that his interest therein is held free from all other interests and claims whatsoever. Therefore, it is submitted that the certificate of lease issued to the applicant cannot be defeated by the respondent's claim as his interest is absolute and therefore the said letter of offer is unlawful and/or not legally enforceable. It is submitted that the principles of natural justice provide that no man should be condemned unheard and given that the applicant had successfully been allotted the suit property after meeting the laid down conditions the respondent's decision was one which substantially prejudiced and adversely affected by him and it was only fair and just that the applicant be heard before the respondent unilaterally imposed the said amount. In support of the applicant's case, the cases of **Republic vs. Municipal Council of Nakuru ex parte Samuel Thuo Kangea Nakuru High Court Miscellaneous Application No. 613 of 2005** and **Onyango vs. Attorney General [1987] KLR**.

6. It is submitted that the respondent did not act judicially in imposing the said amount as it failed to hear the applicant and therefore the decision making process was clearly flawed. Furthermore, the respondents have not bothered to demonstrate how they arrived at the said amount and/or what criterion was used and therefore their action was clearly unreasonable and arbitrary. In the applicant's view, the applicant's application has merit and therefore deserves the orders sought.

DETERMINATION

7. I have considered the foregoing. In the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, the Court citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

8. The ex parte applicant has exhibited a copy of a Certificate of Lease which shows that he was registered as the proprietor of a leasehold in respect of land parcel No. Nairobi/Block 26/142 on 31st December 2002. The effect of that registration was to be found in section 27(b) of the repealed Registered Land Act, Cap 300 pursuant to which that registration was done. The said provision provides that:

the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

9. The registration of a leasehold title therefore confers an interest in the subject parcel of land. Article 40 of the Constitution of Kenya protects the right to property and before that right can be abrogated Article 47(2) thereof provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

10. By a letter dated 6th December 2004, the Permanent Secretary Ministry of Lands and Housing demanded payment of Kshs 2,780,000.00 which in his view was the balance of the purchase price. As already stated hereinabove, the applicant was registered as the proprietor of the subject leasehold on 31st December 2002. Whereas it is not the jurisdiction of this court to make a determination with respect to whether or not the full purchase price for the suit parcel of land was paid, the respondent ought to have given the ex parte applicant an opportunity to explain his position and also ought to have proffered reasons for seeking what was being sought from the applicant. Without offering any reasons for such a steps the action taken by the Respondent had the effect of impinging upon the proprietorship interest of the applicant.

11. An issue that has, however, given me concern is whether the letter dated 6th December 2004 was a decision since under Order 53 rule 7 the applicant is not entitled to question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court. However, in **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998**, it was held that the decision to alienate land or to allocate is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7. The Court further held that in a deserving case the Court can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law. Accordingly, in light of the fact that there is no allegation from the Respondent that there was a decision separate from what was contained in the letter, I will pursue the

issue no further.

ORDER

12. In the foregoing premises as there was no reason adduced for taking the decision that was taken by the respondent and as the applicant was never afforded an opportunity of being heard I am convinced that the first prayer in the Motion is merited. Accordingly, the decision of the Permanent Secretary, Ministry of Lands and Housing contained in the letter dated 6th December 2004 requiring the applicant to pay the purchase price for property titled Nairobi/Block 26/142 registered in the name of **John Mwangangi** is removed into this Court and is hereby quashed.

13. With respect to the second prayer, as already stated herein above, it is not for this Court to make a finding as to whether or not the demand for payment by the applicant is merited since this Court does not, in the exercise of its judicial review powers make decisions on merits. 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. 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 it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide matters 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*.

14. To issue the orders in the manner in which the second prayer is crafted would amount to foreclosing any action that may in future be taken by the Respondent however merited and that is beyond the scope of these proceedings. In any case a reading of the impugned letter does not reveal that the Respondent was intending to take the steps complained of in the second prayer. As was held in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA. No. 1747 of 2004 [2006] 1 EA 47**, once a quashing order is given the decision making body has to act in accordance with the law and the Court cannot make the decision for the challenged body. Since the purpose of certiorari is to bring up and quash the impugned orders, that having been done there is no necessity for an order of prohibition since there is no threat present of an illegal action. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**.

15. The applicants will, however, have the costs of this application.

Dated at Nairobi this 17th day of April 2013

G V ODUNGA

JUDGE

Delivered in the presence of Miss Kiambi for the applicant