REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 77 OF 2011

REPUBLIC...APPLICANT

VERSUS

PROVINCIAL COMMISSIONER NAIROBI...........1ST RESPONDENT

DISTRICT COMMISSIONER NJIRU ....2ND RESPONDENT

DISTRICT COMMISSIONER KASARANI.............3RD RESPONDENT

ATTORNEY GENERAL ....4TH RESPONDENT

NJIRU AGERIA DEV. CO LTD ....1ST INTERESTED PARTY

GATHIEKO FARMERS LTD ....2ND INTERESTED PARTY

EX-PARTE

HESBON ONGORO ADIKA

JOSEPH OTIENO MILANDO

SUSAN MBEKE KASOME

(Suing for and on behalf of SAHAKIAN

DEVELOPMENT YOUTH GROUP)

JUDGEMENT

Hesbon Ongoro Adika, Joseph Otieno Milando and Susan Mbeke Kasome have filed these proceedings on behalf of Sahakian Development Youth Group. The 1st to 4th respondents are Provincial Commissioner, Nairobi, District Commissioner-Njiru, District Commissioner-Kasarani and the Attorney General respectively. Njiru Ageria Development Company Ltd and Gathieko Farmers Ltd are the 1st and 2nd interested parties respectively. Through a notice of motion application dated 21st September, 2011 the ex-parte Applicant (the Applicant) prays for orders that:-

1. **An order of Prohibition do issue to prohibit the Nairobi Provincial Commissioner, his agents and/or any other person acting under his instruction from invading, evicting, trespassing, and/or interfering with the applicant's ownership, peaceful possession, user, occupation and/or closing down the applicants' quarries on the land parcels L.R. No. 13468/R, 9363/48, 9363/62 and 9363/63.**
2. **An order of certiorari do issue to quash the decision, directive or order communicated to the applicants through the main print media Daily Nation newspaper dated 11th August, 2011 at page 16 by the Nairobi Provincial Commissioner to close down the quarries operated on land parcel L.R Plots Nos 13468/R, 9363/48, 9363/62 and 9363/63 situated within Njiru, Embakasi and Kasarani Districts.**
3. **Any other relief or order that the Honourable court may deem fit to grant.**
4. **The costs of this application be awarded to the applicants.**

The application is supported by the chamber summons application for leave, the statutory statement and the verifying affidavit of Susan Kasome Mbeke all dated 7th September, 2011. The application is also supported by the annexures to the verifying affidavit. From the pleadings, Hesbon Ongoro Andika, Joseph Otieno Milando and Susan Mbeke Kasome are the registered officials of the Sahakian Development Youth Group. It is the Applicant's case that it was allocated the parcels of land in question by the City Council of Nairobi on or about 8th January, 2008 and 24th March, 2008 for the purpose of carrying out quarrying activities. The Applicant was licensed by the City Council of Nairobi and issued with a single business permit. On 11th August, 2011, the respondents allegedly instigated by the interested parties issued an eviction notice, directive or order through the Daily Nation Newspaper directing the Applicant to vacate the parcels of land in question and close down its activities,. That is when the Applicant commenced these proceedings. The Applicant alleges that the eviction notice was unlawful since it was condemned unheard and this is in breach of the provisions of the Constitution and the rules of natural justice. The Applicant avers that the respondents had no powers to order its evicted from the plots in question.

The respondents opposed the application through grounds of opposition dated 12th January, 2012 as reproduced hereunder:-

> **"1. That the application is fatally defective, misconceived and an abuse of the court process.**
>
> **2. The applicant is guilty of material non-disclosure and has deliberately misled this Honourable Court.**
>
> **3. The application does not stand in law and the same lacks merit.**
>
> **4. The applicant has come to court with unclean hands and hence not entitled to an order of prohibition.**
>
> **5. To grant the orders sought by the applicant will visit a grave injustice upon the respondent and the public at large."**

The 1st Interested Party opposed the application by way of a replying affidavit sworn on 21st May, 2012 by its Secretary Mr. Alexander Onon. It is the 1st Interested Party's case that it was granted L.R. No 13468 to hold for a term of 99 years from 1st February, 1999. Thereafter the parcel of land was subdivided among its shareholders. The 1st Interested Party state that the Applicant later invaded their land and they have had running disputes over this invasion. The 1st Interested Party argues that it has sought intervention from the provincial administration and the City Council of Nairobi without success. The 1st Interested Party contends that the application before this court is defective in that the City Council of Nairobi has not been enjoined as a party yet the Applicant alleges the letters of allotment were issued by the said Council. The 1st Interested Party asserts that the letters of allotment are not valid since the

Applicant did not accept the allotment or make payment within 30 days as directed and in the letters of allotment.

The 2nd Interested Party opposed the application through a replying affidavit sworn on 20th November, 2012 by its Chairman Mr. James Mbugua. The 2nd Interested Party stated that it was granted L.R. No. 9363/48, 9363/62 and 9363/63 and it subsequently subdivided these parcels of land and transferred the plots to its members. The 2nd Interested Party submitted that the Applicant has no legal proprietary rights to the parcels of land in question and does not therefore have locus standi to commence these proceedings. The 2nd Interested Party informed the court that there has been a running dispute between it and the Applicant and the matter has been reported to the City Council of Nairobi and the provincial administration. Finally the 2nd Interested Party argued that the issuance of allotment letters to the Applicant was irregular since there are individuals with title deeds to the same parcels of land and letters of allotment cannot supersede title deeds.

Considering the pleadings before this court, I find that the first issue is whether the application before this court is defective. It is said that the Applicant has no capacity to sue since it is not the legal owner of the plots in question. The Applicant has exhibited letters of allotment. The interested parties admit that there was indeed a dispute between them and the Applicant. This court, cannot through these proceedings, determine the issue of ownership of the parcels of land in question. The evidence adduced before this court is so limited that it cannot form a basis for determining ownership. From the documents placed before this court, the Applicant has an interest in the parcels of land in question and it therefore had the capacity to bring these proceedings.

Secondly, it was argued by the 1st Interested Party that the application is defective because the Applicant did not enjoin the City Council of Nairobi which allegedly allocated the plots. Looking at the application, it is clear that the Applicant is challenging the decision of the respondents. There was no need to enjoin the City Council of Nairobi in these proceedings. If the respondents and the interested parties believed that the City Council of Nairobi was a necessary party then they ought to have applied for the Council to be made a party to these proceedings. I find that the necessary parties are before this court and this cause not defective.

The question of the day is whether the respondents made a decision that can be impugned. The decision is said to be contained in the Daily Nation of 11th August, 2011. Looking at the annexture it is clear that the alleged directive was made by the Provincial Commissioner when addressing journalists. In fact the directive is carried as a news item. This cannot amount to a decision. There is no evidence that the Provincial Commissioner directed the Applicant to close the quarries. There is neither a verbal or written decision. There is no decision made that can be challenged by the Applicant through judicial review proceedings. No decision worth being challenged has been exhibited by the Applicant and neither has such a decision been identified. In the case of **REPUBLIC v PROFESSOR MWANGI S. KAIMENYI EX-PARTE KIPPRA, CIVIL APPEAL NO. 160 OF 2008** the Court of Appeal held:-

> **"The learned judge in his judgment was correct in stating that the court cannot act in vain against a non-existent decision. There was no decision or letter dated 24th August 2004 that could be called and removed into the High Court to be quashed. This being so, the learned judge erred in quashing the alleged decision of 24th August 2004 when the said decision is non-existent. Further, the learned judge erred in issuing orders to quash the letter of 16th December 2004 when the court had not determined that the decision made on 3rd December 2004 was in existence. A court of law should not descend into the realm of speculation. The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into court a decision to be quashed."**

I agree with the Court of Appeal that this court cannot act in a vacuum. There must be an identifiable decision which can be quashed before the court can engage its judicial review tools. For the reason that

there is no decision to be quashed, this application fails. The same is dismissed with costs to the respondents and the interested parties.

Dated, signed and delivered at Nairobi this 28th day of August, 2013

W. K. KORIR,

JUDGE