



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION JR NO. 294 OF 2011

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CETIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300 OF THE LAWS OF KENYA

BETWEEN

JITESH SHAH & HIGHLAND TEXTILES LIMITED ...APPLICANTS

AND

NAIROBI DISTRICT LANDS REGISTRARRESPONDENT

RULING

1. On 12th June 2013, I delivered a judgement in this case in which I, relying on **Maraga, J's** (as he then was) in **Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006**, I dismissed the Notice of Motion dated 28th May 2012. Although the Motion was otherwise merited, I found that the same was filed on 22nd November 2011 which was more than a year after the registration of the impugned restrictions contrary to the provisions of section 9(3) the **Law Reform Act**, Cap 26 Laws of Kenya.
2. The applicant has now moved this Court by way of a Notice of Motion dated 21st June 2013 seeking in the main an order that the said decision be reviewed and that the said Motion be re-instated and determined on merits.
3. The Motion is based on the following grounds:

1 The Applicants are the registered proprietors of the parcels of land registered as Nairobi/Block 92/299, Nairobi/Block 92/300, Nairobi/92/301, Nairobi/92/302, Nairobi/92/303, Nairobi/92/304, situate in Nairobi city.

2 The said parcels of land were curved out of parcel Numbers Nairobi Block 92/293, 92/294, and 92/296 pursuant to a proper subdivision and consolidation approvals of the Nairobi City Council and the Commissioner of Lands.

3. **The Applicants have complied with statutory legal requirements relating to payment of land rent and rates of the said parcels hold proper titles.**
4. **The Applicants are innocent purchasers for value having purchased the said parcels from Geoffrey Koskey, Peter Koskey and J.K. Chpekony for the sum of Kshs.5,100,000/= on or about 15th July 1995.**
5. **In August 2011 the Applicants discovered that the Respondent had without cause or notice registered restrictions against the titles therefore effectively encumbering the titles.**
6. **The Respondent's act of restricting the Applicants' titles was arbitrary, irregular and illegal. The restrictions are a nullity.**
7. **The Respondent's claims or assertions that the suit properties are public land contradicts existing reality. The land is designated and registered as private having been registered by the Respondent pursuant to the provisions of the Registered of Land Act, Cap 300.**
8. **The Applicants have tried to no avail to seek an explanation from the Respondent who has consistently ignored the Applicants letter.**
9. **The Respondent's illegal act of restricting the title contravenes the provisions of the Constitution and the Registered Land Act Chapter 300 laws of Kenya.**
10. **The Applicants' Constitutional right to protection of property and the right to property have been contravened by the Respondent's arbitrarily actions.**
11. **The Applicants right to administrative action that is lawful and procedurally fair has been violated.**

4. In the applicants' submissions, section 9(3) of the said Act cannot be read in isolation of the preceding provisions, which are sections 9(1) and (2) of the same Act. According to the applicant certain cases appearing in Order 53 rule (1) of the Civil Procedure Rules are those related to the quashing of orders, decrees, convictions, or other court proceedings given the word certain is used in this context in reference to a particular thing. In its view, the illegal, irregular, unprocedural and arbitrary administrative decision by the Respondent cannot be categorized as an order, decree, conviction, judgement or other proceedings hence there are sufficient grounds for the court to review its own judgement for the purpose of ensuring order for the ends of justice to be realized. According to the applicant, its case does not fall within the ambit of "specified proceedings" as set out in sections 9(2) and (3) of the **Law Reform Act**, which provides that the six month limitation period for applying for orders of certiorari, mandamus and prohibition only applies in specified proceedings. To the applicant, the proceedings the subject matter of this review are not those contemplated for the six month timeline restriction as provided in Order 53 rule (2) and hence the reason why leave to commence these proceedings was granted. According to the applicant the said leave was granted after the applicant withdrew the prayer seeking extension of time after having convinced the Court that the irregular and illegal decision of the Respondent restricting the titles the subject matter of these proceedings did not fall under the ambit of Order 53 rule (2) of the **Civil Procedure Rules** and section 9(2) of the **Law Reform Act** but were governed by Order 53(1) of the **Civil Procedure Rules**. According to the applicant the Court ought to correctly interpret the law as argued herein.
5. The applicant has also submitted extensively on the rules of statutory interpretation and quoted heavily from decision from the Supreme Court of the United States as well as other jurisdictions which I have considered. The applicant also relied on Articles 1, 2(4), 22(1), 23, 24, 40, 47, 165, 159 and 258 of the Constitution. According to the applicant the six month period amounts to mere technicality hence the orders sought ought to be granted.
6. I have considered the foregoing. The application is expressed to be brought under the provisions of Order 45 Rules 1 & 2 & 51(1) of the **Civil Procedure Rules**, Sections 1A and 3A of the **Civil Procedure Act**, and all other enabling provisions of the law. Section 3 of the **Civil Procedure Act** on the other hand provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

7. It follows that where there is a special jurisdiction or power conferred, or any form or procedure

prescribed, by or under any other law, the provisions of the **Civil Procedure Act** are inapplicable. It must be remembered that apart from Order 53 of the Civil Procedure Rules, the provisions of the **Civil Procedure Act** and the Rules made thereunder do not apply to judicial review proceedings. Accordingly Order 45 and Order 51 of the Civil Procedure Rules do not apply to these type of proceedings. Section 1A on the other hand does not give the Court jurisdiction but is a case management tool meant to ensure that justice is staid by the Court in the process of determining the proceedings before the Court. In any case that section only applies to strictly civil proceedings pursuant to the preamble to the Act which provides that it is “**An Act of Parliament to make provision for procedure in civil courts**”. In **Kuria Mbae vs. The Land Adjudication Officer, Chuka & Another Nairobi HCMCA No. 257 of 1983** the court held that where proceedings are governed by a special Act of Parliament, the provisions of such an Act must be strictly construed and applied and therefore the provisions of the **Civil Procedure Act** and Rules do not apply unless expressly provided by such an Act and the provisions of the **Civil Procedure Act** and rules cannot be applied merely because the special procedure does not exclude them. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, the Court held that Judicial review is a special procedure and as the Court is exercising neither a civil or criminal jurisdiction in the strict sense of the word, the invocation of the provisions of section 3A and order 1 rule 8 of the **Civil Procedure Rules** render the application wholly incompetent. Similarly in **Kuria Mbae vs. The Land Adjudication Officer, Chuka & Another Nairobi HCMCA No. 257 Of 1983** it was held that where proceedings are governed by a special Act of Parliament, the provisions of such an Act must be strictly construed and applied and the provisions of the Civil Procedure Act and Rules do not apply unless expressly provided by such an Act and the provisions of the **Civil Procedure Act** and rules cannot be applied merely because the special procedure does not exclude them. In fact in **Paul Kipkemoi Melly vs. The Capital Markets Authority Nairobi HCMA No. 1523 of 2003**, it was held that the Court has no powers to vary, review or set aside the *ex parte* order firstly because under Section 9 the procedure has been prescribed and Order 53 does not give any such powers and secondly because the purpose of the special jurisdiction has not been said to have been defeated by lack of such powers to enable the Court invent any such procedure the only relief being the statutory right of appeal against the judicial orders and thirdly the **Civil Procedure Rules** do not apply to judicial review in view of the clear provisions of section 3 of the **Civil Procedure Act** concerning special jurisdiction. Similarly in **Republic vs. Lutta Kasamani Ex Parte United Insurance Company Limited Nairobi HCMCA No. 1047 of 2004**, it was held that in exercising its powers under section 8(2) the High Court is exercising its Civil jurisdiction though the jurisdiction is undoubtedly special in the sense that it is created pursuant to section 8 of the Act. The Court further held that although the Court in judicial review proceedings would be exercising Civil jurisdiction, it is a special jurisdiction which in itself does not mean that the **Civil Procedure Act** and the rules made thereunder are applicable as where an Act of Parliament confers special jurisdiction, **Civil Procedure Act** and the Rules made thereunder do not apply.

8. However, the mere fact that a party cites the wrong provisions of the law ought not to deprive the Court of a jurisdiction where such jurisdiction exists. The Court of Appeal in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** held that the superior court in the matter before the court has the residual power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction and not necessarily under section 3A of the **Civil Procedure Act** which strictly speaking does not apply to judicial review proceedings. That section in any case does not confer inherent jurisdiction on the Court but only reserves the same.
9. The applicant’s case is that section 9(3) of the **Law Reform Act** should be read together with section 9(1) and (2) of the Act and that if so read then the conclusion would be that the limitation of six months does not apply to the present proceedings. Section 9 of the **Law Reform Act** provides;

9. (1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court—

(a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;

(b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;

(c) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.

(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

10. If I understand the applicant correctly, section 9(2) empowers the Rules Committee to make rules prescribing the time limit within which applications for certiorari, prohibition and mandamus can be made in specified cases. Since Order 53 rule 2 of the **Civil Procedure Rules** specifically deals with judgment, order, decree, conviction or other proceeding, it is the applicant's contention that the six months limitation only applies to judgements, orders, decrees and convictions, other proceedings similarly ought to be read ejusdem generis. Since the impugned decision does not fall within that category, it is contended that the said limitation is inapplicable. It is therefore contended that the six months only apply to judgements, orders, decrees, convictions and proceedings falling in that category.
11. In the judgement under review, I relied on **Republic vs. The Minister for Lands & Settlement & Others (supra)**.
12. At the time of the said decision I did not address myself to the decision of the three judge bench in the case of **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 [2004] eKLR** as well as **Republic vs. The Commissioner Of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 Of 1998**. In these cases it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned in Order 53 rules 2 and 7 and to nothing else. A decision to alienate or to allocate land, it was held, 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. Further Order 53 rule 2 and 7 only applies to the formal orders and proceedings mentioned therein and matters not mentioned are not barred by the 6 months limitation.
13. In **Republic vs. Kajiado Lands Disputes Tribunal & Others Ex Parte Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318**, the Court found that despite the irregularities the Court cannot countenance nullities under any guise since the High court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities.
14. It is further however contended that the aforesaid limitation is a technicality which ought to be ignored in light of the provisions of Article 159(2)(d) of the Constitution. However, in my view, limitation statute is not a procedural law. Rather it is a substantive law. Limitation is therefore not

- a technicality but a substantive issue and it has been held that an abandonment of a plea of limitation cannot relieve the Court from taking notice of it. See **Tzamburakis and Another vs. Rodoussakis Civil Appeal No. 5 of 1957 (PC) [1958] EA 400.**
15. I am however of the view that a Court of law ought not to drive a litigant from the seat of justice unless the law is clear that the cause of action is time bared under the relevant limitation statute. The phrase “or other proceedings” for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199,** in which case the said Court held that the phrase “or other proceedings” has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for.
16. In the premises it is my view and I so hold that the six months limitation period was inapplicable to the present proceedings and the Notice of Motion which led to the ruling the subject of the review ought not to have been disallowed on the said ground.
17. As the application was not opposed and as it is clear that the restriction was placed without affording the applicant an opportunity of being heard, the said action was clearly an affront to the rules of natural justice as well as the provisions of Article 47 of the Constitution.
18. In the premises, the decision made herein on 12th June 2013 is hereby reviewed and set aside and is substituted therefor an order allowing the Notice of Motion dated 28th May 2012. However it must be noted that judicial review remedies are only available where the process rather than the merits of the decision is under challenge hence prohibition in the manner sought in prayer 3 of the Motion cannot be granted. Similarly as once the decision is quashed and an order of mandamus issued compelling the authority concerned to rectify the situation, it is no longer necessary for the Court to give an order cancelling the offending action as the failure to comply with the Court order would invite contempt of court proceedings with the attendant consequences.
19. Accordingly I make the following orders:
1. **That an order of certiorari is hereby issued bringing into this Court the Respondent’s decision of registering restrictions in relation to title Numbers Nairobi/Block 92/299, Nairobi/Block 92/300, Nairobi/Block 92/301, Nairobi/Block 92/302, Nairobi/Block 92/302, Nairobi/Block 92/303, and Nairobi/Block 92/304 on the 28th of August, 2010 which decision is hereby quashed.**
 2. **That order of mandamus is hereby issued compelling the Respondent to remove the restrictions registered on the 26th of August, 2010 in relation to parcels Numbers Nairobi/Block 92/299, Nairobi/Block 92/300, Nairobi/Block 92/301, Nairobi/Block 92/302, Nairobi/Block 92/302, Nairobi/Block 92/303, and Nairobi/Block 92/304.**
 3. **As the application was not opposed there will be no order as to costs.**

Dated at Nairobi this 2nd day of August 2013

G V ODUNGA

JUDGE

Delivered in the absence of the parties