



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO 207 OF 2004

EVANS KAFUSI MCHAROPETITIONER

VERSUS

THE PERMANENT SECRETARY, MINISTRY OF ROADS,

PUBLIC WORKS AND HOUSING1ST RESPONDENT

THE COMMISSIONER FOR LANDS2ND RESPONDENT

JUDGMENT

1. The application before me seeks orders of judicial review against the respondents in respect of a house occupied by the applicant, a former civil servant, situate on L.R. No. L.R. No 209/14081.
2. The matter was first placed before the Court on 27th February 2004 but for various reasons, including what appear to have been attempts at resolving the dispute amicably, did not proceed to hearing until September 2013 when the matter was heard before me.
3. The applicant, Evans Kafusi Mcharo, died before the matter could be heard, and an application dated 17th June 2011 was filed to substitute the deceased applicant with his widow and personal representative, **Mrs Stella Kiumbi Mcharo**, and orders granted accordingly. In this judgment, I shall for the sake of convenience refer to the deceased applicant or his personal representative as **'the applicant.'**
4. In the Notice of Motion dated 18th March 2004 filed pursuant to leave granted on 27th February 2004, the applicant seeks the following orders:
 - a. *An order of Prohibition do issue against the 1st Respondent prohibiting him, his agents and/ or servants from demanding payment of rent of Ksh838,000 and any sum at all, and/ or in default carrying out eviction of the subject from his premises comprised in L.R No 209/14081 known as house No HG 699B in execution of the 1st Respondents "final Eviction Notice" dated 10th February 2004 or at all and of, otherwise however from interfering with the subject's quiet possession, use and enjoyment of the said immovable property and all improvements erected and being thereon.*
 - b. *An Order of Certiorari to remove to the High Court, for the purposes of the same being*

quashed, the decision and Eviction Notice entailed in the letter ref. A 86.01 Vol V1/57 of 10th February 2004, by the 1st Respondent, demanding from the subject payment of Kshs838,000 and or any sum a t all and/ or ordering, directing and/ or authorizing the eviction of the subject from his property comprised in L.R No 209/14081 known as h9ouse No HG 699B.

- c. *An Order of mandamus do issue against the 2nd respondent commanding him or her to issue the subject with title documents in his name relating to the subject's property comprised in L.R No 209/14081 known as house No. HG699B.*
- d. *The costs of this application be borne by the Respondents.*

The Applicant's Case

5. The applicant's case is set out in the statement dated 25th February 2004, the verifying affidavit sworn by the applicant on the same date, and a further affidavit sworn by the applicant on 15th October 2007 in response to the respondent's affidavit sworn in opposition to the application.
6. In his affidavit in support of the application, the applicant deponed that he was employed by the Government of Kenya as an Assistant Auditor, Ministry of Cooperative Development on 2nd November 1970. He rose through the ranks to the position of the Principal, Government Training Institute, Mombasa, and he retired from this position on 31st December 1998. At the time of his retirement, the applicant deposed that he was living in a government house, House No. HG 699B, situated at Kandara Court Kileleshwa, Nairobi (hereafter the **property**).
7. The applicant avers that around April 1994, he made an application to the 2nd respondent to purchase the property; that the application was approved around 1998 and he was granted an offer to purchase the house. He has annexed to his affidavit a copy of his offer to purchase the property in the bundle marked "E.K. M."
8. According to the applicant, around November 1997, agents of the 2nd respondent carried out a survey and valuation of the property and the 2nd respondent then informed him that he would be required to pay the stand premium and purchase price of the property to the government; that he received a letter of allotment on or around 19th March 1998 from the 2nd respondent offering him a grant of the property subject to payment of the sum of Kshs500,770/- comprising the stand premiums and the development costs; and that he paid the amount demanded and was issued with a receipt. The applicant avers that thereafter a file particularized as "J. 1999986" at the Department of Lands was opened by the 2nd respondent and the property was in his words, **'registered as L.R. No 209/14081 which said land with the abuttal's dimensions and boundaries thereof is more particularly delineated on the plan annexed to the Grant and more particularly Land Surveys Plan Number 223212 measuring 0.0366 ha. Deposited in the surveys Records Office at Nairobi to hold for the term of ninety nine (99) years from 1st April 1998.'** He avers, however, that the Grant of the property was not released to him by the 2nd respondent despite numerous promises to do so.
9. The applicant avers that he was therefore surprised when the 1st respondent demanded payment of rent in respect of the property of which he was the sole proprietor as he had purchased it from the Government. He thereafter received a "Final Eviction Notice" dated 10th February 2004 from the 1st respondent demanding rent payment of Kshs838,00/- failing which he would be evicted from the property.
10. In his submissions on behalf of the applicant, Learned Counsel, Mr. Sentu, submitted that the applicant is seeking an order of Mandamus to compel the Commissioner of Lands to issue a title to the applicant over the subject property, L.R. No 209/14081; an order of Certiorari to quash the

decision of the respondent to issue an eviction notice to the applicant; as well as an order of Prohibition to prevent the respondent from demanding rent of Ksh838,000 or any other amount from the applicant.

11. The basis of the applicant's claim, according to his Counsel, is that the applicant was a civil servant who was given a chance to be allocated the subject property; that he got a letter of allotment in respect of the property; that the property was allocated an L.R number and a file opened; and that he paid land rent, stand premium and development costs amounting to Kshs500,770.
12. The applicant states that he was therefore seeking to stop the respondent from demanding rent and carrying out the eviction of the applicant from the subject property; and to compel them to issue a title to the applicant. Mr. Senteu submitted that the applicant was seeking orders of judicial review because of the decision made by the respondent to issue an eviction notice without following due process; and for an order of Mandamus to compel the respondent to issue a title as a letter of allotment, which the applicant had been given and is dated 19th March 1998, does not confer title.
13. Counsel for the applicant relied on the case of **R –vs- P.S, Ministry of Lands and Housing, ex parte James Cheruiyot Boit Misc. Appl No 251 of 2004** in which the court found that due process was not followed and quashed the notice issued to the applicant in the matter. It was submitted on behalf of the applicant that this Court should deal with this matter in a similar manner as the Boit decision tackles the same issues and has similar facts as the present application.
14. Mr. Senteu submitted that it would be unfair for one department of government to allocate the property and the other to take it back, and he asked the court to grant the orders sought by the applicant.

The Respondent's Case

15. The position taken by the respondents as presented by Learned State Counsel, Ms. Maina, is that judicial review does not lie as the matter before the Court pertains to issues of ownership of property which cannot be adjudicated by way of judicial review but are matters for civil courts. Further, that the applicant was relying on a letter of allotment which is not proof of ownership; and as the applicant was required under the letter of allotment to make payment within 30 days but he made payment after 38 days, the offer had lapsed. Ms Maina relied on the replying affidavit sworn by Mr. Kirinya Mukiira on 25th September 2007, written submissions dated 16th October 2007, and further submissions dated 11th September 2013.
16. In the said affidavit, Mr. Mukiira, then the Permanent Secretary, Ministry of Roads and Public Works, deponed that the subject property, House Number HG 699B situated on plot number 209/14081 is registered as a government house in the Ministry of Roads and Public Works building register; that this register is the authority record of all government owned houses; that there is no provision in law for alienation of government houses to individuals or companies nor is there provision in the government financial regulations nor in the Board of Survey Procedures for the government that allows alienation of government houses.
17. Ms. Maina submitted that judicial review does not lie in the present circumstances as it is a public law remedy that issues to supervise public officers and bodies in the performance of their administrative duties. She contended that judicial review was not concerned with whether the decision was right or wrong or the substantive merits of a case; that a judicial review court has no jurisdiction to entertain a case where issues of ownership arise; and that the applicant was raising issues of ownership while he was not the owner of the property in question.
18. According to the respondents, the applicant has relied on a letter of allotment issued on 19th March 1998; that there was a requirement in that letter that he complies within 30 days; that he

complied after 39 days by which time the offer had lapsed.

19. Ms. Maina placed reliance on the decision of the Court in **Zakhem Construction (Kenya) Limited –vs- Permanent Secretary, Ministry of Roads & Public Works & Another [2007] eKLR**; **Sanghani Investment Limited –vs- The Officer in Charge Nairobi Remand & Allocation Prison (2006) eKLR** and **Republic –vs- the Chief Land Registrar, Murang'a & Another ex parte Geoffrey Wanyatura Mwangi (2010) eKLR** with regard to the application of judicial review orders. She also distinguished the decision in **James Cheruiyot Boit** relied on by the applicant in that the applicant in that case was already the holder of a lawful and indefeasible title while the applicant in this case had no title document.
20. With regard to the orders sought, Ms Maina submitted that the applicant was seeking an order of Certiorari to quash the decision contained in the eviction notice of 20th February 2004 on the grounds that the 2nd respondent had not rescinded the sale agreement. She contended in reference to the **Zachem** case that matters of contract cannot be adjudicated by way of judicial review, and there were therefore no grounds to support the prayer for Certiorari.
21. Ms. Maina submitted with regard to the order of Prohibition that in offering for sale the government house in question, the government was not performing a public law function but was exercising its private law right to enter into contract. Consequently, the order of Prohibition could not issue. The respondents relied in this regard on the decision of **Morris Okello –vs- P.S Ministry of Lands and Housing (2008) eKLR**.
22. As to the orders of Mandamus to compel the respondent to issue a title document to the applicant, it was the respondent's case that since the issue of sale of a government house is not in the nature of a public function, an order of Mandamus cannot issue. Ms. Maina therefore asked that the application be dismissed with costs as the court has no jurisdiction to entertain an application for judicial review in which the claim is premised on ownership of land or a contract of sale.

Rejoinder

23. In his reply to the submissions on behalf of the respondent, Mr. Senteu pointed out that if the applicant had accepted the allotment letter after 30 days, the respondent had accepted the payment and could therefore not say that the applicant accepted the allotment late.
24. With regard to the orders sought, it was Mr. Senteu's submission that the applicant is seeking an order of Mandamus as the 2nd respondent had refused to issue the applicant with a title; and the order of Prohibition and Certiorari was to quash the eviction notice.

Determination

25. From the pleadings and submissions in this matter, the Court takes the view that the sole issue for determination is whether the demand for rent and threat of eviction of the applicant contained in the letter dated 10th February 2004 is arbitrary and unlawful, and if so, whether the applicant is entitled to orders of judicial review as prayed.
26. In determining this issue, it is important to consider the circumstances of the applicant in relation to the subject property. From the bundle of documents annexed to the applicant's verifying affidavit, the Court notes that the applicant made an application by way of an undated letter to the Commissioner of Lands for allocation of the subject property. A letter of allotment dated 19th March 1998 addressed to the applicant, and one Enock Tuitoek was apparently issued by the Commissioner of Lands. It required acceptance of the offer and payment of a sum of Kshs 500,770 within 30 days of the offer. It appears that a payment of Kshs 500,770 was made on 28th April, 1998, by the deceased applicant.
27. By a letter dated 15th August 2001, the Ministry of Roads and Public Works wrote to the applicant

demanding rent for the house No. HG 699 B. This set off a series of correspondence between the applicant and the Ministry, with the Ministry insisting on payment of rent and the applicant maintaining that he had been allocated the house.

28. The first observation to be made is that it appears that the Ministry to which the property in question belongs was not aware that an allocation had been made by the Commissioner of Lands. The letter applying for the allocation was addressed to the Commissioner of Lands, but was not copied to the Ministry. Secondly, the letter of allotment required acceptance of the offer within 30 days. As submitted by the respondent, the offer was not accepted until 28th April 1998, by which time the offer had lapsed.
29. More importantly, however, no title was ever issued to the applicant. What he relies on is an allotment letter issued to two people, but whose conditions were not met as required.
30. What is the legal position of a letter of allotment? In making a distinction between petitioners who held letters of allotment and those who were registered proprietors of the land in question, this Court in the case of **John Mukora Wachihhi & Others –vs- Minister For Lands & Others High Court Petition No. 82 of 2010** observed that the distinction is based on the fact that the right to property protected under the law and the Constitution is afforded to registered owners of land; that a letter of allotment is not proof of title as it is only a step in the process of allocation of land. The Court relied in that regard on the position enunciated by the Court of Appeal in the case of **Wreck Motors Enterprises –vs- The Commissioner of Lands and 3 Others Nairobi Civil Appeal No. 71 of 1997 (Unreported)**, where the Court of Appeal stated as follows:

‘Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to provisions held.’ (Emphasis added)

31. A similar finding was made in the case of **Joseph Arap Ng’ok –vs- Justice Moiwo Ole Keiwua NAI Civil Application No. 60 of 1997** in which the Court of Appeal observed as follows:

‘It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.’

32. The applicant in this case thus had no title to the property in question, a fact that is readily admitted. In his submissions before the Court, Counsel for the applicant conceded that an allotment letter confers no title, hence the application for an order of Mandamus to compel the respondents to issue the applicant with a title. The applicant could therefore not claim to be the registered owner of the subject property.
33. The question then is whether, in the circumstances of this case, the orders of Certiorari, Prohibition and Mandamus can issue against the respondent.
34. The applicant has relied on the decision of Majanja, J in the case of **R –vs- The Permanent Secretary, Ministry of Lands and Housing Ex Parte James Cheruiyot Boit High Court Misc. Appl. No 251 of 2004**. In that case, the Learned Judge observed as follows at paragraph 16 of his judgment:

In this case the applicant is the holder of lawful and indefeasible title under the provisions of the Registration of Titles Act. The title cannot be taken away without following the due process. Furthermore the demand for rent and threat of eviction are inconsistent with the provisions of the Act which provide for indefeasibility of title. The action of the respondent must therefore be declared arbitrary, unreasonable and unlawful.

35. It is this paragraph that captures the fundamental distinction between the Boit case and the one now before me. The applicant in the Boit case had a title to the property in question issued under the provisions of the Registration of Titles Act. Whether issued lawfully or not, whether the property was legally or illegally acquired, it could not be taken away without following due process, as the applicant in that case had an indefeasible title as provided under Section 23 of the Registration of Titles Act (now repealed). This section provided as follows:

(1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

36. That is not the case in the proceedings before me now. The applicant has a letter of allotment, but has no title to the land. He does not have an indefeasible title to the land, and so the protection offered by section 23 does not extend to him.

37. The respondents has argued strenuously that the orders of Certiorari, Prohibition and Mandamus cannot issue in the present case. They submit that the orders are issued in cases where an administrative body is performing a public function, while in the present case, the applicant is contesting the ownership of the subject property, which is a civil dispute which would need to be heard and evidence adduced in support of the respective positions of the parties. Ms. Maina relied in her submissions on the decision of the Court in **Zakhem Construction (Kenya) Limited versus Permanent Secretary, Ministry of Roads & Public Works & Another [2007] eKLR** for the proposition that the remedy for breach of contract does not lie in the process of judicial review. She further cited the words of the Court in **Maurice Okello –vs- Permanent Secretary, Ministry of Lands and Housing [2008] eKLR** in which the Court observed as follows:

The right sought to be enforced is a private contractual right of sale of a house, between two parties. If this court were to intervene, it would be seeking to create a contract, that the Respondent do allocate the house to the applicant. In my view, that would be forcing the Respondent to enter into contract, thus forcing an unwilling party to enter into a contract of sale. This is a matter of contract which is in the private law realm and cannot be subject to judicial review and therefore even if the applicant were qualified to get the house this court would not intervene.

38. I am constrained to agree with the respondents in this regard. The applicant relies on a letter of allotment issued to him by the Commissioner of Lands. He did not obtain a grant to the property, and there was never a contract of sale between him and the owner of the property, the Ministry of Roads and Public Works. The question whether the Commissioner of Lands could properly allocate a government house in the circumstances of this case is one that lingers. At any rate, in my view, the 1st respondent was entitled to demand rent from the applicant, and if the applicant was unhappy with the demand and was convinced that he had a lawful claim to the property, his remedy lay in a civil claim in which he could establish his entitlement to the property. An order of Certiorari and Prohibition cannot therefore issue.

39. Similarly, the Court cannot issue an order of Mandamus in this matter. It appears to me that what the applicant was seeking in praying for an order of Mandamus was, in effect, what would amount to an order of specific performance in private law contracts for sale of land. However, such an order can only be made where there was a valid contract between parties. If, as in this case, there was no contract between the applicant and the respondent, and even assuming, which is not the case, that a court can issue an order of Mandamus in respect to issuance of a title to land, such an order cannot issue in the circumstances of this case. This Court is therefore not in a position to issue the order of Mandamus as prayed by the applicant to compel the respondent to issue a grant

in respect of the subject property.

40. In the circumstances, this application must fail. It is hereby dismissed but with no order as to costs.

41. I am indebted to Counsel for the applicant and the State for their well researched arguments and submissions. If I did not refer to all the cases cited, it is not because they were not of assistance to the Court.

Dated Delivered and Signed at Nairobi this 19th day of December 2013

MUMBI NGUGI

JUDGE

Mr. Senteu instructed by the firm of Migos Ogwamba & co. Advocates for the applicant

Ms. Joy Maina instructed by the State Law Office for the respondent