REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS APPLICATION NUMBER OF 65 OF 2010

REPUBLIC..... APPLICANT

VERSUS

MATUNGULU DISTRICT PHYSICAL PLANNING LIAISON COMMITTEE...1ST RESPONDENT

TOWN COUNCIL OF KANGUNDO ..... 2ND RESPONDENT

AND

AMOS MUTINDA KALUNGU..... 1ST INTERESTED PARTY

SAMUEL MUNGUTI MWANGANGI..... 2ND INTERESTED PARTY

STEPHEN MUTHOKA MAKAU..... 3RD INTERESTED PARTY

ELASTO MBUVI MUTETI ..... 4TH INTERESTED PARTY

JOEL MUTUA NDUNGI .....5TH INTERESTED PARTY

EX-PARTE: ..... JULIUS MUSEMBI MATIVO

RULING

On the 4th March, 2010 the ex-parte applicant commenced these Judicial review proceedings in the nature of certiorari and prohibition. Certiorari was to bring into this court for purposes of being quashed the decision and or resolution by the 1st respondent contained in its minutes dated 12th November, 2009 and confirmed on 20th January, 2010 in so far as the decision sought to interfere with the applicant's land parcel number, **L.R. 11800/93/9** situate at Tala Market "**the suit premises**".

On the other hand, the ex-parte applicant sought orders of prohibition directed at the 1st and 2nd respondents prohibiting them or their agents from executing the decision of 12th November, 2009 reached by the 1st respondent and from continuing to make decisions against the ex-parte applicant's interest in the suit premises or alienating its boundaries or in any other manner interfering with the ex-parte

applicant's suit premises.

The ex-parte applicant also prayed that should leave be granted, the same should operate as stay of execution, performance, application, enforcement or implementation of the decision dated 12th November, 2009 and from continuing to make decisions adverse to the ex-parte applicant's interest in the suit premises or alienating its boundaries or in any other manner interfering with the ex-parte applicant's suit premises.

Apparently, the application was informed by the following uncontested facts; the ex-parte applicant is the proprietor of the suit premises. In January, 2008, the ex-parte applicant presented his proposed development plan of the suit premises to the respondents for approval. A dispute then arose between the surveyor from the 2nd respondent and the ex-parte applicant concerning the actual boundary of the suit premises. The dispute was taken up by the 1st respondent without the ex-parte applicant's knowledge and only learnt of it when he received a letter dated 26th October, 2009 from the 1st respondent inviting him for the meeting on 12th November, 2009. He attended the meeting only to be informed of the decision by the 1st respondent to excise a portion of the suit premises to create a public road. When the decision was read, the ex-parte applicant requested to be allowed to state his case but was denied the opportunity and ordered to wait at the suit premises for the new boundary to be marked. The respondents proceeded to mark the boundary without the ex-parte applicant's consent. When he raised the complaint, the 1st respondent advised him to appeal to the National Liaison Committee. When he subsequently obtained and read through the proceedings he noted that the 1st respondent had initially sent a surveyor who was also one of her members who filed a report which favoured him and blamed the interested parties for blocking a public road by putting up a Petrol Station. From the manner in which the proceedings were conducted by the 1st respondent, it was clear that there was open bias against the ex-parte applicant, in favour of the interested parties who were the one's encroaching on public road. The ex-parte applicant takes the view that he was condemned unheard by a biased tribunal which was improperly constituted in that his accusers, investigators were also his judges.

On 8th March, 2010, the ex-parte application came before **Waweru J.**, who proceeded to grant leave sought. He also directed that leave so granted do operate as stay.

On 16th March, 2010, the ex-parte applicant filed the substantive Notice of Motion. When served on the parties, the Attorney General filed grounds of opposition on behalf of the respondents. In his view, the respondents acted within the laid down procedure and law, the orders sought were not available to the ex-parte applicant and the ex-parte applicant's claim ought to be dealt with by a civil action. Accordingly, the application lacked merit, was incompetent and it ought to be dismissed with costs to therefor.

For the interested parties, on **Samuel Munguti Mwangangi**, the 2nd interested party swore a replying affidavit on their and his own behalf. Where pertinent, he swore that the application was bad in law, grossly contravened the provisions of order 53 at the Civil Procedure rules, was incompetent, an abuse of the court process and was filed in bad faith. That they were not parties to the dispute between the ex-parte applicant and the respondents. In the premises, they had unfairly been brought into these proceedings notwithstanding their constant protests. They were not in any manner, in charge of identifying and or marking boundaries. In any event, the subject in issue is not for blocking and or encroaching on a public road. The interested parties do not have jurisdiction and or mandate to register land or even to alter and endorse any documents under the Registered Land Act. They had not in any way interfered or breached the ex-parte applicant's rules of Natural Justice. Thus the application had been made to frustrate the interested parties who are strangers to the proceedings and prayers sought and the act by the ex-parte applicant to enjoin them smacks of malice.

As for the 1st respondent, its case was that the application as filed was inept, misplaced and a gross abuse of the process of the court. The application was fatally defective too as the 1st respondent had no locus standi do be enjoined in these proceedings. The ex-parte applicant presented his development plans before the 2nd respondent. However, upon site inspection, the District Surveyor discovered that there was

a boundary dispute between ex-parte applicant and the interested parties necessitating a meeting to iron out the issue before the plans could be approved. Contrary to the disposition by the ex-parte applicant, that he was condemned unheard, he was duly informed of the said meeting and after deliberations in the presence and with the participation of both parties, the committee moved to implement what had been agreed upon. In any event, if the ex-parte applicant felt aggrieved by the decision of the 1st respondent, recourse should have been to the National Liaison Committee as provided for by section 15 of the Physical Planning Act.

When the application came up for interpartes hearing before me on 9th November, 2011, parties agreed to canvass the same by way of written submissions. Subsequently, they filed and exchanged written submissions which I have carefully read and considered.

My take on the application is this. Generally, where a matter involves public law as distinct from private law, judicial review will be available to the aggrieved party. Judicial Review, however, is not concerned with the merits of decisions of statutory bodies or tribunals but rather with public rights and decision making process. Where the decision is wrong, the manner of challenging it is through an appeal. This court does not in judicial review exercise or usurp the function or power of an appellate court in that regard. Rather it exercises its original supervisory jurisdiction conferred on it by section 8 of the Law Reform Act. The rationale behind this principle is that the High Court is entrusted by law with the task of ensuring that an individual does receive fair treatment and that the authority concerned acts within the law. This court will not be concerned whether the authority involved made a good decision or not providing that the decision was authorized by law and the individual was given fair treatment and the rules of fair play and natural justice were adhered to. In determining whether or not the decision making process was conducted in accordance with the law, the court will inter alia, ascertain if there was principles relating to bias, bad faith, irrational decision which may amount to unreasonable decision, or whether the concerned authority took irrelevant consideration into account or failed to take into account relevant considerations thus making the decision making process wanting and therefore amenable to judicial review. See **Colletta Osyambu Khaemba vs. Kakamega H.C. Misc. Civil Application No.21 of 2005 (UR)**. This then is the essence of judicial review.

What in particular is an order of certiorari in aid of? Such an order will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with, or there is an error apparent on the face of the record or for such like reason. I may also add that judicial review is a public law remedy and cannot issue against an individual in his private capacity.

How about prohibition? It is an order from this court directed to an inferior tribunal forbidding such tribunal from continuing with proceedings in excess of its jurisdiction or in contravention of the law. 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 and procedure of the inferior tribunal or a wrong decision on the merits. See **Kenya National Examination Council Vs. Republic Ex-parte Geoffrey Gathenji Njoroge & others (1997) eKL**R. I may also add that prohibition looks to the future as opposed to the past. As stated in the case of **Stanley Munga Githunguri Vs. Republic Criminal Application Number 271 of 1985** (**UR**) so that if the tribunal were to announce in advance that it would not consider itself 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.

I have spent a bit of time on the scope and purport of judicial review and in particular orders of certiorari and prohibition because these are the orders that the ex-parte applicant has sought in the application. However, in the circumstances of this case, are those orders available to him?

It is common ground that there were proceedings on 12th November, 2009 at the offices of the 2nd respondent which touched on proprietary rights of the ex-parte applicant. The proceedings involved alleged encroachment of the ex-parte applicant's suit premises on the road reserve and the wish of the 2nd

respondent to widen such a public road. The ex-parte applicant and interested parties were invited to the said meeting by a letter dated 26th October, 2009. The ex-parte applicant has deponed that the duo arrived at the 2nd respondent's offices at 10.30 a.m. but were not allowed into the meeting room to participate in the proceedings as they were kept waiting outside until about 12.55 p.m. when they were ushered in. And when eventually they were let in, a verdict had already been made without any presentation by him and or interested parties. That the verdict was then read over to them and they were directed to assemble at the suit premises for execution of the ex-parte decision. The ex-parte applicant apparently protested the decision to no avail.

It is instructive that the foregoing has not been discounted at all by either the respondents and or interested parties. If anything the respondent and interested parties have given the issue a wide berth. One, would imagine that if indeed what the ex-parte applicant has deponed to as aforesaid, was untrue, the respondents and interested party would have seen the need to discount the same. That they did not, can only mean that what the ex-parte deponed to must be the truth and accordingly that is what transpired. In deed the proceedings and or minutes of the day seem to bear out and support the ex-parte applicant's complaint. Looking at the 1st item of the minutes dealing with those in attendance, there is no mention of the presence of the ex-parte applicant and or interested parties. It would appear that the meeting commenced at 11.50 a.m. minus the ex-parte applicant and interested parties though they had been summoned and were present. Then there is this rather curious part of the minute 2:

"...At about 12.55 p.m. both Mr. Musembi and the proprietor of Pentagon Petrol Station were ushered into the meeting and welcomed by the chair. They were briefed on the issues and subsequently reminded that they were officially invited to the meeting through letters of 26th October, 2009 addressed to them by the secretary..... Through authority from the chairman, the DPLO explained to them that the committee had carefully considered the issues revolving around the dispute. A resolution had been made that each party surrender 3 meter each side for the road reserve..... The developers were further enlightened that if they felt aggrieved by the decision, there was avenue of seeking remedy through the National Liaison Committee. At 1.20 p.m. the developers were released from the meeting and advised to assemble at the site of the disputes for the committee further action as resolved..."

From the foregoing, can it be really said that the ex-parte applicant was heard before the decision to excise 3 meters of his suit premises to pave way for the road expansion was reached. The answer must be obvious; an emphatic No! I want to imagine that the purpose of inviting the ex-parte applicant to the meeting was to enable him show cause why 3 metres of his suit premises should not be taken away. This did not happen. Instead, the respondents locked themselves in a room, deliberated on the matter, reached a verdict without the input of the ex-parte applicant, though present and imposed it on him. This was clearly a breach of the rules of natural justice in so far as the ex-parte applicant was not given a hearing before a decision prejudicial to him was arrived at. As it were, the respondents condemned the ex-parte applicant unheard. A prejudicial decision to the ex-arte applicant was made before the ex-parte applicant was given a chance to make his representations. To my mind therefore, the decision was capricious and manifestly unfair and resulted in an injustice. It was, as correctly submitted by counsel for the ex-parte applicant, a deviation from the cardinal principles and norms of law.

I do not agree with the submissions by the respondents that the ex-parte applicant was accorded a chance to be heard and that is why he was summoned to appear before the 1st respondent. I think that the minutes of that meeting speak for themselves. Nowhere in those minutes is the ex-parte applicant called upon to say anything. I also do not agree with their submissions that the ex-parte applicant was condemned unheard is being economical with the truth as all procedures were adhered to before the said decision was arrived at. I want to assume that the respondents are not really serious with this submission. If indeed the ex-parte applicant had been allowed to put his case before the verdict, nothing stopped them from expressly saying so, rather than beating around the bush. One cannot be said to have been given audience or right of hearing when on being summoned in the meeting, you are suddenly confronted with a verdict.

The respondents and interested parties have also advanced the argument that if the ex-parte

applicant felt aggrieved by the decision of the 1st respondent, the recourse should have been had to the National Liaison Committee as provided for by section 15 of the Physical Planning Act. It is trite law that the existence of an appellate process is no bar to a litigant who would otherwise have invoked the appellate process to nonetheless mount judicial review proceedings.

I have said enough to show that the application is merited. Accordingly, I allow it in terms of prayers 1 and 2 on the face of the application. The ex-parte applicant shall also have the costs of the application to be paid by the respondents.

Ruling dated, signed and **delivered** at **Machakos** this **31st** day of **January**, 20**12**.

ASIKE-MAKHANDIA
JUDGE