



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
JR ELC CIVIL APPLICATION NO. 72 OF 2008

BETWEEN

AFRISON EXPORT IMPORT LIMITED..... 1ST APPLICANT

HUELANDS LIMITED 2ND APPLICANT

AND

CITY COUNCIL OF NAIROBI 1ST RESPONDENT

COMMISSIONER OF POLICE THROUGH

THE DCIO KASARANI POLICE DIVISION.....2ND RESPONDENT

ATTORNEY GENERAL3RD RESPONDENT

AND

THE COMMANDANT GENERAL SERVICE UNIT & OTHERS.....INTERESTED PARTIES

RULING

Introduction

1. The subject of this ruling is whether this Court should set aside the consent order recorded in Court on 24th November 2011. The terms of the consent between the *ex-parte* applicants and the 1st respondent was as follows;

IT IS HEREBY ORDERED BY CONSENT:-

(1) *That the notice of motion application dated 3rd October 2008 be and is hereby settled between Afrison Export Import Limited and Huelands Limited (Applicants) and the City Council of Nairobi (1st Respondent) in the following terms:*

(a) *That the applicants herein are the registered proprietors of all that parcel of land known as LR No. 7879/4 Drive In Estate Thika Road Outering Road.*

(b) *That the 1st respondent has at no time allocated any land and approved any architectural or*

development plans and the developments on the parcel of land known as L R No. 7879/4 Drive In Estate Thika Outering Road are not authorised.

(c) That the 1st respondent undertakes to issue Enforcement notices under the Physical Planning Act Cap 286 Laws of Kenya against all the unauthorised developments on the parcel of land known as LR 7879/4 Drive In Estate Thika Road Outering Road within 30 days of the filing of this consent.

(d) That upon expiry of the enforcement notices 1st respondent shall demolish all unauthorised structures erected/constructed and or developed on L R 7879/4 Drive In Estate Thika Road Outering Road within 30 days without any further notices.

(2) That the matter be and is hereby settled.

2. The consent (hereinafter “the consent order”) was recorded pursuant to a consent letter dated 23rd November 2011 executed by counsel for the *ex-parte* applicants and counsel for the 1st respondent.

Facts

3. By way of background, the proceedings before the court are judicial review proceedings and the facts necessary for the determination of this application are fairly simple and are as follows.

4. The *ex-parte* applicants, as the registered owners of LR No. 7879/4 (hereinafter “the suit property”), seek the following orders in the Notice of Motion dated 3rd October 2008;

(1) That prohibition do issue to prohibit the 1st respondent whether by itself, or through its departments, officers, councillors or others whomsoever from settling people or facilitating the purported allotment of plots in the applicants’ land parcel LR No. 7879/4 whether by approving and or acquiescing in the illegal development and construction of permanent buildings or other structures thereon or in any other manner howsoever from assuming authority, to alienate the applicants’ land parcel L R No. 7879/4 either wholly or partly or at all; and

(2) That mandamus do issue to compel the 1st respondent to unconditionally withdraw any approval of architectural plans or consents that it may have issued thereby facilitating the developments and constructions to be carried out on the applicants’ property and to fully apply its by-laws and all machinery available to it in order to reinstate the status quo on LR No. 7879/4 as at the date immediately preceding the illegal allotments complained of; an

(3) That mandamus do issue to compel the 2nd respondent to unreservedly accord the necessary protection to the applicants’ in compliance with the provisions of Section 75 of the Constitution and pursuant to section 14(1) of the Police Act (Cap 84) and to evict the purported allottees from the applicants’ property.

(4) That may be appropriate in the circumstances of the case and necessary to serve the ends of justice.

(5) That the respondents do pay to the applicants their costs of this application.

5. The motion is supported by a verifying affidavit and statutory statement. The complaint by the *ex-parte* applicant is that certain persons entered their land forcefully, occupied it and constructed permanent buildings. It is alleged that the 2nd and 3rd respondents have failed in their duty to evict or cause to be evicted trespassers from the property.

6. The effect of the consent order was to cause the 1st respondent to issue enforcement notices. The enforcement notices would entitle the 1st respondent to demolish the interested parties’ structures on the

suit property. The interested parties learnt of the consent order in the daily press and were, upon application, allowed to join this suit. In addition they applied to set aside the consent order.

The applications

7. The 6th to 4th interested parties have filed a Notice of Motion dated 21st December 2011 under the provisions of **Order 53 rule 3(2), 3(4), 4(1) and 6** of the **Civil Procedure Rules, 2010** and the inherent jurisdiction of the court. The application seeks an order that ***“[T]he order issued herein on 24th November 2011 pursuant to (the) consent letter filed on 23rd November 2011 be set aside.”***

8. The application is supported by the affidavit of Stephen Njoroge Waweru sworn on 21st December 2011. The deponent is the chairman of Mathare Area 1 Outering Road Self Help Group. Members of the Group occupy the suit property.

9. The 42nd to 67th interested parties have also filed a Notice of Motion dated 22nd November 2011 made under **Order 51 rule 1, Order 53 rule 3(2) of the Civil Procedure Rules, Order 45 Rule 1(1) (b) and section 3A** of the **Civil Procedure Act**. The Motion prays for an order, ***“That the consent orders entered and filed in this court on 23rd November 2011 between the ex-parte applicants and the 1st respondent and which was recorded or adopted by this Honourable Court on 24th November 2011 be reviewed and or set aside consequently the Notice of Motion dated 3rd October 2008 be heard on merits.”***

10. The application is supported by the affidavit of Stephen Mwari Karuga sworn on 22nd December 2011. He is one of the occupants of the suit property and he has authority of the other interested parties to swear the affidavit in support of the application.

11. Counsel for the 1st to 15th interested parties relied on the written submissions filed. The applicants' contention was that the *ex-parte* applicants were always aware of the interested parties' interest in the suit property by virtue of the fact that they are in actual occupation of the suit property. They contend that under **Order 53, 3(1) and (2)** of the **Civil Procedure Rules**, the *ex-parte* applicants were obliged to serve them with court process. It is their position that the consent order cannot be sustained as it was entered in their absence and had the effect of directly affecting their interests.

12. The interested parties rely on the case of ***Punda Milia Farmers Cooperative Society Ltd and Others v The Commissioner of Cooperative Development Nairobi HC Misc. Appl. 764 of 2005 (Unreported)***. In that case the Court held that interested parties cannot be shut out of proceedings and they must be served in order to participate in proceedings thus a consent order could be set aside. The Court was also referred to the case of ***Republic v Registrar of Societies ex-parte Justus Nyangaya Nairobi HC Misc. No. 1333 of 2002 (Unreported)*** where the Court came to a similar conclusion. The interested parties contended that their rights to natural justice were infringed and the court must set aside the consent orders (See ***James Ndinga Wa Wambui v Republic and Others Nairobi Civil Appeal No. 85 of 1992 (Unreported)***).

13. The 3rd up to 42 interested parties also filed written submissions in which they argued that consent order was obtained by failing to disclose the existence of material facts particularly that there was pending litigation in respect of the subject matter and the interested parties were not served or party to the consent.

14. The Attorney General supports the applications to set aside the consent order and has filed written submissions dated 2nd March 2012. The Attorney General contended that a party to these proceedings and as counsel for the 2nd and 3rd respondents it ought to have been notified of the consent and in fact, it ought to have been involved particularly where the suit involved third parties who were directly affected by the consent which had the effect of finalising the suit.

The ex-parte applicants case

15. The *ex-parte* applicants oppose the applications. Two replying affidavits sworn by Francis Mburu Munga have been filed in opposition. The first one sworn on 11th January 2012 and the other one on 7th February 2012. They also rely on the written submissions dated 5th February 2012.

16. The *ex-parte* applicants contended that the consent is culmination of negotiations between them and the 1st respondent. These negotiations, they contend, had the tacit consent of the 2nd and 3rd respondents who did not file any response to these proceedings.

17. They also argue that the interested parties have no *locus standi* on the ground that they are trespassers and this court cannot give persons who are in illegal occupation of the suit property any relief. The case of ***Thomson v Park (1944) 2 All ER 477*** was relied upon to support this proposition.

18. The *ex-parte* applicants also relied upon the decision of ***Flora Wasike v Destimo Wamboko (1988) KLR 429*** where the Court of Appeal stated that a consent order could only be set aside on grounds which would justify setting aside a contract by the parties to the contract. In this case, the *ex-parte* applicants argue, the interested parties were not party to the consent nor have they shown there was fraud, mistake or any other grounds that would entitle them to set aside the consent.

19. The *ex-parte* applicants maintain that related suits in this matter were either dismissed or withdrawn and have no effect on the proceedings herein. Moreover, the advocate who recorded the consent had full authority of the 1st respondent. The *ex-parte* applicants urge the Court to dismiss the application.

Whether the consent should be set aside

20. I have considered the applications, depositions and arguments and I take the following view of the matter. These proceedings before the court are judicial review proceedings. According to the case of ***Kunste Hotel v Commissioner of Land*** such proceedings are *sui generis* and are of a public law proceedings. That is why under **Order 53** of the ***Civil Procedure Rules*** there is a requirement to serve interested parties.

21. At all material times to this case, the *ex-parte* applicant knew that there were interested parties or at any rate parties who would be directly affected by these proceedings. The orders sought in the motion before the court directed at removing the interested parties from the suit property.

22. I would highlight the sentiments of the court in the case of ***Punda Milia Cooperative Society & Others v The Commissioner of Co-operatives (Supra)*** where the Court stated; ***“Justice demands that interested parties, especially in judicial review proceedings, are served and participate in proceedings, so that a fair decision in the circumstance of a case can be made by the Courts. It will not be lost for me to restate that the judicial review remedies are basically equitable remedies. One cannot shut out interested parties.”***

23. Apart from the provisions of the **Order 53** of the ***Civil Procedure Rules***, the rules of natural justice are so fundamental in our jurisprudence. Any order made affecting a third party must be set aside, if the party thereby affected is not given the opportunity to be heard. Such a fundamental rule cannot be ignored on the basis of expediency and is underpinned by the provisions of **Articles 47** and **50(1)** of the Constitution.

24. The rule stated by the Court of Appeal in the case of ***Flora Wasike v Destimo Wamboko (Supra)*** must considered in light of judicial review and public law proceedings. In public law or judicial review proceedings the greater public interest is at stake and two parties cannot consent to deprive third parties of their rights. A third party so affected by such a consent order is in law entitled to set it aside *ex debito justitiae*.

25. The proceedings of judicial review are brought in the name of Republic which in this case is represented by the Attorney General. In so far as the consent purports to conclude the matter without participation of the Attorney General, it must without more, be set aside.

Disposition

26. I think I have stated enough to show that the consent recorded on 23rd November 2011 lacks a legal basis, it must be set aside and it is hereby set aside. I award the costs of both applications to the respective applicant and such costs to be borne by the ex-parte applicants and the 1st respondent.

27. As a consequence thereof, the Notice of Motion dated 3rd October 2008 shall now be fixed for hearing.

DATED and **DELIVERED** at Nairobi this 19th day of April 2012.

D.S. MAJANJA

JUDGE