REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Civil Application 54 of 2010

IN THE MATTER OF: AN APPLICATION FOR LEAVE BY SHELL EAST AFRICA LIMITED *(FORMERLY KNOWN AS B.P. KENYA LIMITED)* TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE RESPONDENTS

BETWEEN

REPUBLIC…….....
…….APPLICANT

-VERSUS-

MINISTER IN THE MINISTRY OF ROADS…….....……..
….1ST RESPONDENT

THE DIRECTOR GENERAL KENYA NATIONAL HIGHWAYS AUTHORITY…….2ND RESPONDENT

THE COMMISSIONER OF LANDS…….....
……..3RD RESPONDENT

CHIEF LANDS REGISTRAR…….....……
4TH RESPONDENT

EX-PARTE
SHELL EAST AFRICA LIMITED
(FORMERLY KNOWN AS B.P. KENYA LIMITED)

J U D G M E N T

What falls for determination by this Court is the Notice of Motion dated 15th July 2010 filed in

court on even date in which the exparte applicant Shell East Africa Ltd*(formerly known as B.P. Kenya Ltd hereinafter referred to as the Applicant)* seeks the following orders:

1. An order for judicial review by way of certiorari to quash the decision communicated to the applicant by two unidentified Government officials on behalf of the Ministry of Roads on 9th July 2010 threatening to immediately demolish the applicant's Belle Vue Service Station situated on the parcel of land known as **NAIROBI/BLOCK/93/1051** belonging to the applicant.

2. An order for judicial review by way of prohibition to prohibit the Minister in the Ministry of Roads, the Director General Kenya National Highways Authority, the Commissioner of Lands and the Chief Lands Registrar from alienating, demolishing or otherwise interfering with the applicant's Belle Vue Service Station situated on the parcel of land known as **NAIROBI/BLOCK/ 93/1051 belonging to the applicant.**

3. **An order for the costs of this application to be awarded to the applicant.**

The application was filed pursuant to leave granted on 13th July 2010 and is supported by the statutory statement of facts dated 13th July 2010 and three affidavits namely; the two affidavits sworn by Catherine Musakali on 12th July 2010 and 13th July 2010 and the affidavit sworn by Kiragu Kimani on 13th July 2010.

The application is opposed by the 3rd & 4th respondents through the replying affidavit sworn by Silas Kiogora Mburugu, a Chief Land Administration Officer in the Ministry of Lands, Arthi House Nairobi on 30th November 2010. The 2nd respondent, the Director General of the Kenya National Highway Authority ***(hereinafter referred to as the Authority)*** has also opposed the motion through the replying affidavit sworn by Eng. Meshack Kidenda the current Director General of the Authority on 21st September 2010. The 1st Respondent did not file any response to the applicant's motion.

The case for the applicant as can be discerned from the pleadings filed herein is that it is the registered proprietor of all that piece of land known as **NAIROBI/BLOCK/ 93/1051** *(hereinafter referred to as the suit property) a*s a leasee from the Government of Kenya for a term of 99 years from 1st January 1981. The applicant has licensed one Nixon Ombati Sigara to operate a petrol station on the suit property by the Name of Belle Vue Service Station ***(hereinafter referred to as the service station).***

The applicant contends that on 9th July 2010, two persons who identified themselves as Government officials visited the service station, marked it X and threatened to demolish it immediately. Copies of photographs showing the mark X were annexed to the affidavit sworn by Catherine Musakali sworn on 12th July 2010 and marked CMI.

The applicant claims that no reasons were given for the intended demolition but that the two Government officials stated that any questions regarding the intended demolition should be directed to the Ministry of Roads and/or the 2nd respondent. It is also the applicant's case that prior to 9th July 2010, it had not received any notice about the intended demolition of the service station in which it has invested heavily to the tune of approximately Kshs.47,259,828. The applicant prays for orders of certiorari and prohibition to be issued against the respondents on grounds that the respondents had no jurisdiction to carry out the intended demolition and that the threatened demolition contravened the principles of natural justice, was irrational, amounted to an abuse of power and violated the applicant's legitimate expectations.

In opposing the application, the 2nd respondent deponed that Kenya National Highway Authority is a public body established under Section 3 of the Kenya Roads Act No.2 of 2007 *(hereinafter referred to as the Act)* with the responsibility of managing, developing, rehabilitating and maintaining national roads.

In paragraph 5 -10 of the said affidavit, the 2nd respondent states that Mombasa Road is one of the national roads under the Authority's management and that in the process of designing and programming

the southern bypass which is intended to decongest traffic flow along Mombasa Road, officers from the Authority and Ministry of Lands relying on drawings and design maps developed in 1972 discovered that the applicant herein had encroached into the road reserve by 8 or so square metres which had been originally reserved for the expansion of Mombasa Road.

The 2nd respondent contends that the application is premature and untenable in law since the Authority is yet to conclude its investigative processes after which it would serve the applicant with a demolition notice if necessary. The 2nd respondent avers that no decision to demolish any part of the suit property had been made and the markings on the perimeter wall were preliminary steps taken on the ground to verify the width of the road and extent of the road reserve as originally designed. That if a decision was taken to demolish any part of the suit property, the applicant will be given sufficient notice as the Authority procedurally gives 3 months notice to developers before demolitions are carried out. It is also the 2nd respondent's case that the applicant unlawfully acquired the suit property in 1981 while the same was not available for private development as part of it had been set aside as a road reserve in the Year 1972.

Having gone through the replying affidavit sworn by Silas Kiogora Mburugu on behalf of the 3rd & 4th respondents, it is apparent that the suit property was initially leased to Phigeof Co. Ltd in 1981 for use as a petrol service station with an ascertained area of 0.3238 Ha. From the certificate of lease annexed to the affidavit sworn by Catherine Musakali on 12th July 2010, it would appear that the said leasehold interest was thereafter transferred to the applicant herein.

The 3rd & 4th respondents contend that given the area of the suit property as shown in approved plan No.42.28.79.7A if the applicant encroached on the road reserve while developing the petrol station, the Ministry of Roads was entitled to reclaim the road reserve and if there was no encroachment, then the applicant is entitled to compensation for the portion of land to be affected by the planned road expansion.

To further advance their respective positions on this matter, all the parties herein filed written submissions which their respective counsels highlighted before me on 16th March 2012.

Having carefully considered the pleadings and the submissions by learned counsels for the parties, I find that the main issue for determination by this court is whether the applicant is entitled to the reliefs sought in the instant application.

On the prayer for an order of certiorari, M/s Mbilu learned counsel for the 1st, 3rd & 4th respondents and Mr. Agwara learned counsel for the 2nd respondent submitted that the order of certiorari is not available to the applicant because no decision had been made by the respondents particularly the 2nd respondent to demolish any part of the suit property. They submitted that the application is premature as the 2nd respondent was still carrying out design works for the southern bypass and once a decision is made concerning where the bypass was to follow, then proper notices will be issued to the affected persons and it is only then that the applicant will be in a position to know whether or not the suit property will be earmarked for demolition.

It was further argued on behalf of the respondents that since the 2nd respondent has not made any decision to demolish the suit property, there is no decision capable of being quashed by orders of certiorari.

Mr. Kiragu Kimani, learned counsel for the applicant in his submissions conceded that the applicant has not produced/annexed any written decision as required by Order 53 Rule 7 of the Civil Procedure Rules which was capable of being quashed. He however proceeded to argue that under Article 159 (2)(d) of the Constitution of Kenya 2010, the court should determine matters before it without undue regard to technicalities but should determine the rights of the parties before it on the merits.

I wholly concur with that submission by Mr. Kiragu for the applicant but hasten to add that the court

should determine the rights of the parties before it within the confines of the law. In this regard, I wish to make reference to Order 53 Rule 7 of the Civil Procedure Rules which is in the following terms:

"In the case of an application for an order of +certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order,

warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

Where an order of certiorari is made in any such case as aforesaid, the order shall direct that the proceedings shall be quashed forthwith on their removal into the High Court".

It is clear from a reading of this section that the law contemplates that any decision, order, warrant ***inter alia*** which is being challenged by way of judicial review must be in writing and that is why a copy thereof is required to be either exhibited as an annexture to the application seeking leave or is lodged with the Court's Deputy Registrar verified by an affidavit before hearing of the Notice of Motion or an explanation is given accounting for failure to do so to the satisfaction of the court.

In my view, this provision of the law seeks to ensure that decisions or orders which are challenged in court actually exist so that orders of certiorari if issued would be capable of enforcement. The policy of the law is that courts should not issue orders in vain or orders which are incapable of enforcement.

The applicant herein has clearly stated in its pleadings that it was relying on information supplied by two people who identified themselves as government officials who claimed that the service station was likely to be demolished. The said two persons were not actually identified as government officials and their alleged information was not in writing. The 2nd respondent has maintained that no decision whether oral or written has been made to demolish any part of the suit property. This averment by the 2nd respondent has not been contraverted by any evidence to the contrary and this may perhaps explain why the applicants were not able to comply with the provisions of Order 53 Rule 7 of the Civil Procedure Rules.

Order 53 Rule 7 of the Civil Procedure Rules is couched in mandatory terms. The requirement to comply with its provisions is a matter of law not a matter of technicality that can be disregarded in the spirit of administering justice without undue regard to technicalities. It infact goes to the merits of the applicant's case. It is through compliance of the said law that a court can be satisfied that the impugned decision actually exists and that it had been made by a person, body or authority which is amenable to judicial review.

It is only upon proving existence of the impugned decision that a court can investigate the process within which it was made and where appropriate issue orders of certiorari.

In this case since there is no evidence that either of the respondents had made a decision to demolish the service station without following the principles of natural justice and as the court cannot act on speculative reports, I find that the applicant has failed to demonstrate that the respondents have made any decision that can be investigated by way of judicial review or which is capable of being quashed. And as stated earlier, since the court cannot issue orders in vain or orders which cannot be enforced, I decline to issue orders of certiorari as sought in Prayer I.

As regards the 2nd prayer for order of prohibition, the applicant seeks to prohibit the Minister in the Ministry of Roads, the Director General Kenya National Highways Authority, the Commissioner of Lands and the Chief Lands Registrar from alienating, demolishing or otherwise interfering with the applicant's Belle Vue Service Station situated on the parcel of land known as **NAIROBI/BLOCK/ 93/1051** belonging to the applicant.

Looking at the way the said prayer is framed, if the court were to grant such an order, it would mean

that the Authority and the Government of Kenya would be permanently forbidden from lawfully acquiring the suit property or demolishing the service station or any part thereof should this be found necessary in future for purposes of expanding Mombasa Road or constructing the southern bypass in the public interest.

Before considering the merits of whether or not the court should issue orders of prohibition as prayed, I think it is important to first establish in what circumstances orders of prohibition should issue.

The Court of Appeal had occasion to discuss this particular point in the case of Kenya National Examination Council –Vs- Republic, Exparte Geoffrey Gathenji and 9 Others, Civil Appeal No.266 of 1996 where it held that orders of prohibition would only issue to stop a body amenable to judicial review from acting in excess of its jurisdiction or in contravention of the laws of the land. The Court of Appeal expressed itself as follows:

"What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice"

The court continued to hold that prohibition looks into the future and while as it cannot be used to quash or correct wrong decisions already made, it can be issued to stop contemplated decisions which if made would be contrary to the laws of the land.

Applying the above principles to the present case, it is my considered view that the applicant has not demonstrated that it is entitled to the orders of prohibition as sought in Prayer 2.

I make this finding because in the first place the applicant has not demonstrated that any of the respondents particularly the authority represented by the 2nd respondent whose mandate involves management and development of national roads has made any decisions or contemplated making any decision which is either in excess of its jurisdiction or is contrary to the Laws of Kenya or the principles of natural justice.

It is not clear why the 1st, 3rd & 4th respondents were enjoined in this suit since the markings on the service station according to the copies of photographs annexed to Catherine Musakali's affidavit were allegedly made by the Authority. The applicant has not claimed that the 1st, 3rd & 4th respondents have taken any action or played any role in the alleged threatened demolition that would warrant the issuance of any orders against them.

Be that as it may, it is not disputed that the suit property is next to Mombasa – Nairobi Highway and that Mombasa road is one of the national roads that falls under the mandate of the Authority.

As stated earlier, the Authority is established under Section 3 of the Kenya Roads Act No.2 of 2007 *(the Act)* and tasked with the responsibility of managing, developing, rehabilitating and maintaining national roads. Under Section 4(2) of the Act, the authority in discharging its mandate is *inter alia* authorized to carry out the following functions and duties:

(a) constructing, upgrading, rehabilitating and maintaining roads under its control;

(b) controlling national roads and road reserves and access to roadside development;

(f) in collaboration with the Ministry responsible for transport and the police Department, overseeing the management of traffic and road safety on national roads;

(i) planning the development and maintenance of national roads;

(k) preparing the road works programmes for all national roads;

(l) liaising and co-ordinating with other road authorities in planning and on operations in respect of roads.

The 2nd respondent has submitted that the sole purpose of the applicant's motion is to frustrate the Authority's efforts to improve the conditions of the Kenyan Highways with the aim of reducing road accidents and also to prevent it from carrying out its lawful mandate of planning, developing, and preparing the road works programmes for national roads which includes Mombasa Road. The 2nd respondent has also maintained that it has not threatened to demolish or to interfere with the applicant's property since investigations and planning works for the southern bypass have not been completed and that the markings on the suit property were just preliminary steps taken to verify the true width of the road and extent of the road reserve as originally designed. The applicants have not countered this assertion by the 2nd respondent with any evidence to the contrary.

The applicant appears to have taken the X marking on the suit property to be an indication of the 2nd respondent's alleged intention to demolish the property. The 2nd respondent has however denied having any such intention for now as no decision has been made regarding where the southern bypass will follow.

The 2nd respondent has maintained that in planning for the construction of the southern bypass and carrying out investigations to ascertain the width of the road and extent of road reserve hence the markings on the suit property, the Authority was acting within the law and in execution of its mandate under Section 4(2) of the Act.

The 2nd respondent deponed in his replying affidavit that the applicant's service station had encroached on the road reserve. This averment by the 2nd respondent went unchallenged by the applicant. Though I do not intend to make any findings as to whether the applicant has in any way encroached on the said road reserve or not or whether the suit property was lawfully acquired by the applicant or not since in my view, such findings are not material to the current judicial review proceedings, I find that the authority is statutorily empowered to carry out all activities that appertains to its mandate that is, construction, rehabilitation and preparing the road works programmes for all national roads as well as implementing road policies in relation to national roads including Mombasa Road.

It is not disputed that the Government of Kenya in conjunction with the Authority has decided to construct the southern bypass which is to pass along Mombasa Road to decongest traffic along that road and the City of Nairobi for the benefit of the public. Though no decision has apparently been made to acquire the suit property or any part thereof for purposes of the said road construction, even if there is a possibility of such acquisition being made in future in the event that it is found necessary once design works for that road are completed, this court cannot issue orders of prohibition to stop the respondents from acquiring or alienating any part of the suit property desired for road expansion if there is no evidence that such acquisition/alienation will be done irregularly or contrary to the law or that the respondents do not have jurisdiction to lawfully acquire the said property for purposes of road construction.

The court cannot stop the lawful acquisition of the applicant's suit property by the 2nd respondent or by the Government of Kenya as prayed since this would amount to prohibiting the 2nd respondent from executing its statutory mandate under the Act. It is instructive to note that the applicant has not availed any evidence to demonstrate that any of the respondents intend to unlawfully demolish or alienate/acquire the applicant's property.

The 2nd respondent has asserted that it is a law abiding body and that should the need arise to demolish or acquire any part of the suit property for purposes of construction of the southern bypass, it will as it has done in the past comply with the law including giving the applicant three months notice of its intended action and inviting the applicant's response. This particular averment by the 2nd respondent was not responded to or disputed by the Applicant.

Judicial review is concerned with monitoring or controlling the exercise of statutory power by public bodies or inferior tribunals to ensure that it is not abused or used arbitrarily or in contravention of the law to the detriment of citizens. The purpose of judicial review is to ensure that an individual who in this context includes a juristic person is given fair treatment by the authority to which he has been subjected. The court in its supervisory jurisdiction cannot prohibit statutory bodies from performing their statutory functions and obligations unless it is established that the body intends to make decisions or undertake actions which are either in excess of its jurisdiction or are otherwise illegal or which may be done in breach of the rules of natural justice.

In this case, the applicant has not produced any evidence to show that any of the respondents is contemplating to demolish or acquire the suit property illegally or in a manner that amounts to abuse of its powers under the Act. Infact, apart from the markings on the suit property's wall, there is no evidence that the respondents have done anything else to the property that would be suggestive of any intention to unlawfully demolish, alienate or interfere with the said property. There is no evidence in this case that the respondents generally and in particular the 2nd respondent has treated the applicant unfairly.

It should always be remembered that judicial review remedies are discretionary and the court will decline to grant the same even in situations where they are deserved if it considers that their issuance is either unnecessary, or they are not efficacious in the circumstances of the case or that they will significantly injure public interest. Even if the applicant has not proved that it is entitled to the order of prohibition sought in this case, it is my view that even if it had proved that it was so entitled, this would not be an appropriate case for granting such orders since the same would go against the public interest of having national roads expanded and/or constructed in order to facilitate free flow of traffic and to reduce road accidents which are claiming the lives of Kenyans daily. Having a modern road network is essential for the development of our nation and this is an issue of great public interest which should be weighed *visa vis* an individual's right to own property. It is my opinion that if the Government finds it necessary to compulsorily acquire private property either for purposes of road construction/expansion or for other reasons in the public interest, the court's intervention by way of judicial review to stop or prohibit such a programme should only be sought and obtained where there is clear evidence that there is a threat to acquire private property without strict adherence to the relevant laws or without paying the property owner prompt and full compensation.

For all the foregoing reasons, I am satisfied that the applicant herein has not established any basis upon which this court can issue orders of prohibition as prayed.

The upshot of this judgment is that the Notice of Motion dated 15th July 2010 lacks merit and it is hereby dismissed with costs to the 2nd, 3rd & 4th respondents.

Dated, **Signed**and**Delivered** by me at Nairobi this 17th day of May, 2012.

C. W. GITHUA
JUDGE
In the presence of:

Florence – Court Clerk
Kirago for Applicant
Agwara for 2nd Respondent

No appearance for 1st,3rd,and 4th respondents