



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Application 251 of 2004

REPUBLIC APPLICANT

AND

**THE PERMANENT SECRETARY, MINISTRY OF
LANDS AND HOUSING RESPONDENT**

EX PARTE

JAMES CHERUIYOT BOIT

JUDGMENT

Introduction

1. By a notice of motion dated 12th March 2004, the ex-parte applicant, James Cheruiyot Boit, (hereinafter ‘the applicant’) seeks the following orders;

(1) *An order of prohibition be and is hereby issued to prohibit the respondent, Permanent Secretary in the Ministry of Roads, Public works and Housing and/or its officers, servants and agents whomsoever from evicting the Applicant JAMES CHERUIYOT BOIT from L R No. 209/13262 NAIROBI in execution of the ‘Final Eviction Notice’ and decision by the respondent dated 6th February 2004 or at all and or otherwise howsoever from illegally interfering with the Applicant’s quiet possession, use and enjoyment of the said immovable property and all improvements erected and being thereon.*

(2) *An order of certiorari be and is hereby issued to remove the High Court for purposes of the same being quashed the decision and Eviction Notice entailed in the letter ref. A86.01 Vol VI/48 of 6th February 2004 by the respondent, Permanent Secretary, Ministry of Roads, Public Works and Housing declaring the subject premises to be “Government property”, demanding for the applicant’s payment of Kshs.838,000/= and or ordering, directing and or authorising the eviction of the applicant from his property comprised in LR No. 209/13262 on 14th February 2004 or thereabouts or at all.*

(3) *The stay granted herein on 5th March 2004 regarding the implementation and or execution of the content, tenor purport and or decision threats/intention, demands and declaration by the*

respondent entailed in the respondent's letter to the applicant Ref No. A86.01 VI/48 dated 6th February 2004 be and is hereby extended until the hearing and final determination of this application.

(4) The costs of, relating and incidental to, this application be provided for.

2. The notice of motion is supported by the verifying affidavit of the applicant sworn on 3rd March 2012 and the statement of facts dated 3rd March 2004.

Applicant's Case

3. The applicant's case is that in 1982 he was employed as Agricultural Officer in the Ministry of Agriculture whereupon he was allocated the then Government Quarter No. HG 655 "B" off Tabere Crescent, Kileleshwa, Nairobi for use as his residence in his capacity as a civil servant and or Government Officer. On 31st October 1995 he applied to the President to be allotted the house and on 3rd November 1995 he received the President's approval.

4. The applicant was allotted House No. HG 655 "B" Kileleshwa, Nairobi by the Government of Kenya through the Ministry of Lands and Settlement by a Letter of Allotment Ref: 6000/III dated 2nd April 1996. The applicant thereafter paid the stand premium, land rent, conveyance fees, registration fees, stamp duty, survey fees, road and road drains charges and other approval and planning fees totalling to Kshs.509,610/=.

5. Upon payment the applicant was issued with a Title Deed for the property being a grant registered on 3rd July 1998 as Number I R 76901/1. The Grant was issued to him under the provisions of the **Registration of Titles Act (Chapter 281 of the Laws of Kenya)**.

6. The applicant avers that he received the respondent's letter Ref No. A86.01 Vol VI/48 dated 6th February 004 on 23rd February 2004 and entailing the respondent's demand for Kshs.838,000/= from himself in purported rent arrears payable "*within 7 days from the date of this letter*" failing which he would forthwith be forcefully evicted from the "*Government house.*"

7. The applicant contends that he does not owe the Government or respondent Ministry any monies relating to monthly or land/ground rent and that the respondent cannot demand any rent from him.

8. The applicant's case is that the respondents demand for rent and threat of eviction is arbitrary, unreasonable and unlawful as it is not sanctioned by the **Registration of Titles Act** and the Constitution. Counsel for applicant submitted that **section 23** of the **Registration of Titles Act** protects the sanctity of title to property. This position, he submitted, is supported by the cases of **Mbothu and Others and Waitimu and Others (1981) KLR 171, Central Kenya Limited v Trust Bank Limited and Others Civil Appeal No. 215 of 1996 (Unreported)** and **Dr Joseph arap Ng'ok v Justice Moijo ole Keiwua and Other Nairobi Civil Application No. NAI 60 of 1997 (Unreported)**.

9. According to the applicant the acts of the respondent are an attempt to wish away the applicant's proprietary interest evidenced by the Grant issued in accordance with the law. The acts of the respondent could not be justified in law and must therefore be set aside by granting the application.

Respondent's case

10. The respondent opposes the application by the affidavit of Tirop Kosgey, the Permanent Secretary, Ministry of Housing, sworn on 9th July 2012.

11. The respondent's contention is that the house dispute HG655 situated in Kileleshwa belongs to the Government of Kenya and is recorded as a Government House in the register of Government Buildings and Houses to date. The general tenor of the respondents case is that the procedure for the allocation of government houses in force was not followed and if indeed it was done then it was contrary to

government policy which requires that the Government dispose of its house at the prevailing market value.

12. The permanent secretary states that he is a stranger to the letter of allotment dated 2nd April 1995 and the title issued in respect of LR No. 209/13262. The permanent secretary also asserts that the documents the applicant seeks to rely on as proof ownership of the house may not be genuine and should be verified by their authors.

13. Counsel for the respondent submitted that the purported transfer of the house in dispute herein to the applicant is void and invalid and the same does not bestow on the applicant absolute rights over the Government House that has not been properly disposed off. Therefore the respondent is entitled to demand for rent as the applicant occupies the house as a tenant and that the notice to evict the applicant is lawful, prudent and justified.

Determination

14. The only question for determination in this matter is whether the demand for rent and threat of eviction of the applicant contained in the letter dated 6th February 2004 is arbitrary, reasonable or lawful therefore entitling the applicant to orders of judicial review.

15. Before considering this issue it is proper to put the issue in the perspective. The application before the court is one for judicial review. In such an application, the court is not concerned with the merits of the decision but rather the process by which the decision is reached.

16. 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.

17. The lawfulness or otherwise of the acquisition of the title is not a matter for these proceedings. These proceedings are concerned with the process by which the respondent seeks to “retake” the property. The concern for judicial review is that due process must be followed. A threat to demand rent and evict the applicant in the face of a registered title does not meet the standards of due process. I agree with the sentiments of Hon. Lady Justice H. Omondi expressed in the case of ***Fahim Yasim Twaha & Another v District Land Registrar Lamu Malindi JR App. No, 17 of 2010 (Unreported)*** where the District Land Registrar purported to cancel titles by Gazette Notice. She observed, “*I doubt that an illegality or what is deemed as irregular or an act of impunity can be cured by another irregular action of impunity. Just because the ex-parte applicants may have obtained the plot using improper process does not mean that the same has to be taken away from them using equally improper process.*”

Conclusion

18. I therefore find that the applicant has made out a case to warrant the grant of the orders of certiorari and prohibition.

19. I therefore grant the following orders;

(1) An order of Certiorari be and is hereby issued to remove the High Court for purposes of the same being quashed the decision and Eviction Notice entailed in the letter ref. A86.01 Vol VI/48 of 6th February 2004 by the respondent, Permanent Secretary, Ministry of Roads, Public Works and Housing declaring the subject premises to be “Government property”, demanding for the applicant’s payment of Kshs.838,000/= and or ordering, directing and or authorising the eviction of the applicant from his property comprised in LR No. 209/13262 on 14th February 2004 or thereabouts or at all.

(2) An order of prohibition be and is hereby issued to prohibit the respondent, Permanent Secretary in the Ministry of Roads, Public works and Housing and/or its officers, servants and agents whomsoever from evicting the Applicant JAMES CHERUIYOT BOIT from L R No. 209/13262 NAIROBI in execution of the 'Final Eviction Notice' and decision by the respondent dated 6th February 2004 or at all and or otherwise howsoever from illegally interfering with the Applicant's quiet possession, use and enjoyment of the said immovable property and all improvements erected and being thereon.

(3) The costs of this application shall be borne by the respondent.

DATED and DELIVERED at NAIROBI this 21st day of September 2012

D.S. MAJANJA

JUDGE

Mr M. Maweu instructed by Adera and Company Advocates for the ex-parte applicant.

Ms Masaka, Litigation Counsel, instructed by the State Law Office for the respondent.