



REPUBLIC OF KENYA

High Court at Nakuru

Judicial Review 103 of 2011

**IN THE MATTER OF AN APPLICATION BY JAMES RISA KOOL FOR JUDICIAL REVIEW
ORDERS IN THE NATURE OF CERTIORARI AND**

**IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT 18 OF 1990, THE LAW
REFORM ACT (CAP 26) LAWS OF KENYA, THE REGISTERED LAND ACT (CAP 300) LAWS
OF KENYA, ORDER 53 (1), (2) AND (3) OF THE CIVIL PROCEDURE RULES, IN THE
INHERENT POWERS OF THE COURT AND ALL ENABLING PROVISIONS OF THE LAW**

AND

IN THE MATTER OF AN ORDER ADOPTED BY SP MAGISTRATE NAROK ON 5.4.2011

**AN AWARD BY THE PROVINCIAL LAND DISPUTES APPEALS COMMITTEE
R.V.P.L.D.A NO. 49 OF 2010 FROM DLT CASE NO. 31 OF 2011 NAROK IN RESPECT OF
LAND PARCELS NO. CIS-MARA-ILMASHARIANI/MORIJO/NAROK/1559**

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE SENIOR PRINCIPAL MAGISTRATE NAROK 1ST RESPONDENT

THE LAND DISPUTES APPEALS COMMITTEE

RIFT VALLEY NAKURU 2ND RESPONDENT

JOSEPH OLE MASIKONDE 3RD RESPONDENT

EX-PARTE APPLICANT: JAMES RISA KOOL

RULING

By the Notice of Motion dated 27/4/2012, Joseph Ole Masikonde (3rd respondent hereinafter referred as “the applicant”) sought:

1. An order of status quo as obtaining at the time of filing the Judicial Review application be maintained pending the hearing and determination of the Judicial Review application.

2. Costs be provided for.

The motion was premised upon the grounds on the face of it and the Verifying Affidavit dated 27/04/2012, sworn by the applicant, Joseph Ole Masikonde. He deponed that he is the registered proprietor of CIS-MARA/ILMASHARIANI MORIJO/1559. On 16/1/2004, he entered into an agreement with James Risa Kool (Ex-parte applicant, hereinafter referred as respondent) for the sale of 5.5 acres being CIS-MARA/ILMASHARIANI MORIJO/1559. A dispute arose between the parties as to where the respondent was to occupy, on the ground. The parties took the matter to the Narok District Land Tribunal which gave its verdict and the same was adopted as judgment of the court by the Principal Magistrate at Narok, Miscellaneous Case No. 31 of 2010. Aggrieved by that decision the applicant appealed to the Rift Valley Provincial Appeals Committee. The verdict of the appeals tribunal set aside the Narok District Tribunal's verdict and its adoption as judgment of the court. The decision of the Appeals Committee was subsequently adopted as judgment of the court in Senior Principal's Magistrates Court, miscellaneous application number 31 of 2011 on 5/4/2011. The respondent applied for leave to commence judicial review which was granted by Ouko J. on 28/9/2011. The court further ordered that the said leave was to operate as stay pending the hearing and determination of the substantive application. The applicant further deponed that he had been in occupation of the suit property, however, on 24/4/2012, the respondent invaded the suit property and started construction before yet judicial review application is not determined. He now prays that the respondent be restrained from interfering with the suit land pending the hearing and determination of the judicial review application.

The application was opposed. James Risa Kool (respondent) swore the replying affidavit dated 4/5/2012. He deponed that jointly with Joseph Kuntai Kool and Francis Nganga, they entered into an agreement with the applicant for the purchase of CIS-MARA/ILMASHARIANI MORIJO/1005 measuring 16.5 acres. The property was sub-divided and shared equally among the purchasers; Francis Nganga (plot 1557), Joseph Kool (plot 1558) and respondent (plot 1559). Since the sub-division, the respondent has been in occupation of plot 1559. The applicant thereafter secretly registered plot 1559 in his name in order to defeat justice. He avers that the application is misleading and that the applicant has not come to court with clean hands.

Mr. Tombe, counsel for the applicant submitted that the applicant is the registered owner of CIS-MARA/ILMASHARIANI MORIJO/1559 and has been in occupation of the said property. The respondent obtained orders staying the proceedings of the lower court and since then he has not taken any steps to prosecute the case. He therefore urged the court to maintain the status quo as at the time of filing the judicial review application. This would stop the respondent from interfering and dealing with the suit property.

In reply, Mr. Muriuki, counsel for the respondent, submitted that the application is brought in bad faith. He admitted that though the suit property was registered in the name of the applicant, it was registered after selling it to the respondent. The respondent therefore has a claim over the suit property. It was his further submission that there was no evidence that the respondent had put up structures on the suit property. They had not taken a date to prosecute the judicial review application as this present application was pending. It was his submission that this application was meant to delay the judicial review application and the same should be dismissed with costs.

Before I consider the merits of the application, it is worth noting that the applicant, Joseph Ole Masikonde, can not be a respondent in a judicial review application as judicial review orders can only issue against public bodies and officers. He can only be party to these proceedings as an interested party.

The purpose of stay in judicial review proceedings is to prevent the decision-maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. A stay is appropriate to restrain a public body from acting. Both parties do agree that leave granted by Ouko J on 28/10/2011, which was to operate as stay pending the hearing and determination of the substantive application. Glidewell LJ in the case of **Republic vs Secretary of State for Education and Science, Exparte Avon County Council (No. 2) CA (1991) 1 ALL ER 282** said that:-

“An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay.”

So what was stayed by Ouko J? The judge stayed the decision of the Rift Valley Provincial Lands Disputes Appeals Committee which was adopted as an order of the court by Senior Principal Magistrate on 5/4/2011. Its verdict would have meant that the respondent herein would be allocated a different portion of land other than the one he contracted with the applicant.

It is in agreement that the suit property is registered in the name of the applicant and there is an existing agreement between them for the sale and purchase of the suit property. What is in dispute is who occupies the suit property. Both parties deponed that they are in occupation. It would be improper for this court to adjudicate on the merits of the case at this forum because there is no evidence before to support either allegation and it is not within the jurisdiction of the court having a judicial review application to consider the merits of a case but its jurisdiction is limited to reviewing that decision making process. It is also not clear what status quo is at the time of filing judicial review as both parties claim to have been in occupation at the filing the judicial review application.

For the foregoing reasons, I find that the court cannot grant the order sought. This is a matter that should proceed to full hearing so that the court can determine all the issues in the Notice of Motion. I hereby dismiss the application with costs being in the cause.

DATED and DELIVERED this 9th day of November, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Tombe for the applicant

N/A for the respondent

Kenney – Court Clerk