



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 61 OF 2009

REPUBLIC APPLICANT

VERSUS

COMMERCIAL BANK OF AFRICA LTD 1ST RESPONDENT
COMMISSIONER OF LANDS 2ND RESPONDENT

AND

MASTO DEVELOPERS LTD..... EX PARTE APPLICANT

RULING

By an amended Notice of Motion dated 9th July, 2010, **Master Developers Limited**, the ex parte applicant, hereinafter referred to as **“the applicant”**, sought the following orders:

“(a) This Honourable Court be pleased to issue an Order of certiorari to bring into this honourable court and quash the decision of the 2nd respondent to amalgamate the title of all that L.R. No. 209/7998 together with the portion adjacent thereto which prior thereto was a public road, thereafter issuing a new title deed for the now amalgamated portion being all that L.R. No. 209/17304 to the 1st respondent.

(b) This honourable court be pleased to issue an order of prohibition to prohibit the 1st respondent from constructing on the portion of the now amalgamated property being L.R. No. 209/17304 which was formerly a public road enjoyed by many inclusive of the applicant.

(c) This honourable court be pleased to issue an order of mandamus directed at the 2nd respondent compelling him to cancel the new title being L.R. No. 209/17304 and to revert the suit property back to its previous position by reinstating the subject road.”

The application was based on grounds that:

“(i) At all material times hereto, the applicant is the registered proprietor of all that parcel of land situate in Nairobi and known as L.R. Number 209/11135 whilst the 1st respondent is the registered proprietor of all that parcel of land situate in Nairobi and known as L.R. Number

209/7998 (now L.R. No. 209/17304) which said plots are adjacent to each other and are separated by an access road being a portion of the said L.R. No. 209/17304 (“the suit property”)

(ii) On or about the month of May 2009, the 1st respondent wrongfully entered and took possession of the suit property and have thereafter, wrongfully remained in possession thereof.

(iii) The 1st respondent has alleged that the suit property was allocated to it by the 2nd respondent by their surrendering the title to L.R. Number 209/7998 and them being issued with a new title L.R. No. 209/17304 despite the fact that the same being a road is a public utility property that is currently being used by the applicant together with other members of the public.

(iv) The applicant avers that at no time did it ever receive any notice of the intention of the said intended amalgamation nor were its views ever sought being that the suit property contained certain easementary rights which were being enjoyed by the applicant.

(v) The applicant intends unless restrained by this honourable court from doing so, to complete its takeover of the suit property to the detriment of the applicant and other road users.”

The application was supported by an affidavit sworn by **Ramji Shamji Patel**, a director of the applicant. He deposed that the applicant is the registered proprietor of a parcel of land known as **L.R. No. 209/11135** whilst the 1st respondent is the registered proprietor of a parcel of land known as **L.R. No. 209/7998**. The two plots are adjacent to each other and are separated by an access road, hereafter referred to as **“the suit property”**. The applicant further stated that on or about the month of May 2009, the 1st respondent wrongfully entered and took possession of the suit property and has thereafter wrongfully remained in possession thereof.

When the 1st respondent was about to start construction on the suit property, the applicant sought an explanation, saying that the suit property provided access to the rear side of its property according to its approved plans. The 1st respondent informed the applicant that the 2nd respondent had allocated the suit property to them and the same had been amalgamated with their parcel of land by their surrender of the title to L.R. No. 209/7998 and being issued with **L.R. No. 17034**.

The applicant averred that:

“(a) That the 1st and 2nd respondents breached the rules of natural justice as they failed to give the applicant a fair hearing or at all as to their aforesaid intentions and as such the actions of the aforesaid respondents were arbitrary, premature and fraught with illegalities which should be rejected in toto.

(b) That the decision of the 2nd respondent to allocate the 1st respondent the said suit property being a road and a public utility parcel of land was contrary to the express provisions of the law and the applicant seeks that this honourable court does intervene and quash the decision and order allocating the said parcel.”

The applicant further stated that at no time did it ever receive any notice of intention of the said intended amalgamation nor were its views sought.

The 1st respondent filed a replying affidavit that was sworn by **Derrick Ouma**, its Chief Financial Officer.

He deposed that the 1st respondent purchased L.R. No. 209/7998 and became the registered proprietor thereof on 7th February, 2002. The property was purchased with a view to constructing the 1st respondent’s headquarters and main branch thereon.

When the 1st respondent applied for approval of the construction plans from the Nairobi City Council, it ascertained that it was the intention of the City Council to widen both Mara and Ragati Roads. The property is situated at the junction of the two roads aforesaid. The council required the 1st respondent to surrender strips of land adjoining both roads. At the same time the 1st respondent became aware that the City Council had formulated a plan to construct a new road on a piece of land on the western boundary of the property which would require a further surrender from the 1st respondent's property.

The 1st respondent supported the move to widen Mara and Ragati Roads but the intended surrenders had the effect of reducing the area available for construction of the 1st respondent's headquarters. Therefore, on 9th April, 2002 the first respondent wrote to the Commissioner of Lands explaining the first respondent's concerns and requesting that consideration be given to constructing the planned new road on the northern boundary of the first respondent's property and to compensate the first respondent for the surrender by extending the first respondent's property to the west by including the area in which Nairobi City Council had originally planned to construct a new road. The first respondent copied the letter to the director of City Planning, the Director of Physical Planning and the City Engineer. A copy of the letter is at pages 4 and 5 of the exhibit thereto.

On 21st May, 2002 the Director of Physical Planning at the Ministry of Lands and Settlement confirmed his agreement to the first respondent's proposal and in particular, to have the planned new road open on to Ragati Road rather than on to Mara Road.

By **Gazette Notice 5929** published on 30th July, 2004 the Director of Physical Planning gave notice of the completion of Part Development Plans including **PDP No. 42/16/04/01** for the proposed extension of the first respondent's property L.R. No. 209/7988 and the opening of the road of access to Ragati Road.

Thereafter the Ministry of Lands and Settlement approved the Part Development Plan on 5th November, 2004.

On 8th December, 2006 the Commissioner of Lands issued a letter of allotment for an extension to L.R. 209/7988.

On 14th May, 2002 the City Engineer confirmed that the Nairobi City Council had no objection to the proposed realignment of the proposed road from the western to the northern boundary.

By a letter dated 8th March, 2007 the Commissioner of Lands asked the first respondent to surrender the original grant so that the Commissioner could prepare the new grant and the 1st respondent did so.

A new grant was issued to the 1st respondent on 25th August, 2009. The property was now known as **LR 209/17304** and Construction work on the first respondent's new headquarters and main branch commenced in 2004.

Mr. Ouma further stated that at the time of commencement of construction work the piece of land on the western boundary of the first respondent's property was vacant and overgrown with vegetation. There was no road in existence. The 1st respondent denied the applicant's contention that there had been access to its property through this land as there was no road in existence. The applicant had direct access to his property from Mara Road, Mr. Ouma added.

In 2006 the 1st respondent instructed the building contractor who was constructing the new headquarters building to pave the area which had been allotted to the 1st respondent so that the boundary wall could be moved as soon as the new title was issued.

He further stated that the land which has been added to the 1st respondent's property was never a public road until after the 1st respondent paved the area.

The 1st respondent verily believed that the Director of Physical Planning gave the necessary notice of the change of the Part Development Plan and that the land was properly and lawfully allotted to itself.

The 2nd respondent filed a replying affidavit which was sworn by **Gordon Odeka Ochieng**, a Senior Lands Officer. He stated that the suit land was unalienated and vacant land. It was created between the then L.R. No. 209/7998 belonging to the 1st respondent and L.R. No. 209/1135 belonging to the ex parte applicant. He denied that it was an access road. He further confirmed that the Nairobi City Council was desirous of expanding Mara and Ragati Roads and that would have had the effect of reducing the size of the 1st respondent's land. He further confirmed that the Nairobi City Council had also planned to construct a new road on the western part of the 1st respondent's property and that would have further eaten into the 1st respondent's land.

It was therefore agreed that a new road be constructed on the northern boundary of the 1st respondent's land instead of the western part and compensate the ex parte applicant with the said parcel. Subsequently, the Director of Physical Planning gazetted the completion of Part Development Plan and the ex parte applicant had due notice of the intended changes, Mr. Ochieng stated. The Part Development Plan was approved by the Minister for Lands and Settlement and thereafter the Commissioner of Lands issued a letter of allotment in respect of the amalgamation of L.R. 209/7998 and the suit land to create L.R. 209/17034.

The ex parte applicant filed a supplementary affidavit which was also sworn by Ramji Shamji Patel. He asserted that the suit land was previously a road contrary to the averments by the respondents. He further stated that there was no adequate notice or at all that was ever given to the ex parte applicant notifying her of the intended changes. He said that it was only on 3rd June, 2009 when the applicant realized that the suit land had been allocated to the 1st respondent after construction had commenced thereon.

The ex parte applicant further reiterated that the allotment of the suit land to the 1st respondent was done unlawfully and in a manner that denied the applicant right of easement.

All the parties filed their respective submissions which I have carefully perused.

The applicant does not dispute that the 2nd respondent has allocated the suit property to the 1st respondent. What is being questioned is the manner in which the said allotment was carried out. The applicant contended that no notice of any intention to close the access road and allocate the same to the 1st respondent was ever served upon the persons who were to be affected by such closure. Secondly, the applicant argued that the 2nd respondent is guilty of impunity and wanton abuse of authority by blocking the applicant's access point without following the laid down legal provisions.

On the part of the 1st respondent, it was submitted that the prayers sought cannot be granted against it because judicial review is the process by which the High Court exercises its supervisory jurisdiction for purposes of control of power, functions and procedures of administrative authorities and bodies discharging public functions. The 1st respondent is a bank and not a body discharging any public functions. The court does not therefore have jurisdiction to make any judicial review orders against it.

The 1st respondent further submitted that the applicant had not identified the actual decision by the 2nd respondent which is the subject matter of the application for certiorari. The 1st respondent further contended that the process of allotment of the suit property to itself was done in accordance with the provisions of the law and in particular **Sections 24 to 27** of the **Physical Planning Act**. The 2nd respondent gave effect to the decisions taken by the Director of Physical Planning and approved by the

Minister for Lands and Settlement and further obeyed the orders of the President.

Lastly, the 1st respondent submitted that there was no road over the strip of land complained about until the 1st respondent paved it. The strip of land was Government land until the date when it was allotted to the 1st respondent.

On the part of the 2nd respondent, it was submitted that the applicant's complaint, if at all, ought to have been dealt with as per the provisions of the Physical Planning Act. **Section 13(1)** of that Act states that any person who is aggrieved by a decision of the Director of Physical Planning, who is responsible for preparation of all physical development plans, may within 60 days of receipt of a notice of such decision appeal to the relevant Liaison Committee, in this case, Nairobi Liaison Physical Planning Committee. The committee may confirm or vary the decision.

Secondly, it was submitted that in view of the role of the Director of Physical Planning in this matter, it was wrong to sue the Commissioner of Lands who was merely implementing the decision of the Director of Physical Planning, the Minister of Lands and the Director, City Planning.

Thirdly, the 2nd respondent submitted that the applicant's claim cannot be a subject of a judicial review application. Whether the suit land is an access road as claimed is a matter that can only be determined through adduction of oral evidence and not affidavit evidence.

Fourthly, the 2nd respondent submitted that judicial review does not concern itself with the merits of a decision but the decision making process. The process vide which the 1st respondent was granted title to the suit property is proper and the applicant is questioning the decision of the 2nd respondent.

Lastly, the 2nd respondent submitted that the Director of Physical Planning gazetted the completion of the Part Development Plan of the area and hence the ex parte applicant had due notice of the changes in respect of the subject property.

I have considered the affidavits sworn by the parties as well as the submissions on record. The first issue for determination is whether the prayer for an order of prohibition can issue as against the 1st respondent. In the Amended Notice of Motion the applicant seeks an order of prohibition to prohibit the 1st respondent from constructing on its parcel of land now registered as L.R. No. 209/17034 alleging that a portion thereof was formerly a public road.

In **JUDICIAL REVIEW - LAW PROCEDURE AND PRACTICE** by Peter Kaluma, the learned author states at page 1 that:

“Judicial review is the law concerning control by the courts of the powers, functions and procedures of administrative authorities and bodies discharging public functions.”

At page 94 thereof the learned continues to state:

“Prohibition lies to restrain an inferior tribunal from assuming jurisdiction where it has none or from doing what it is not authorized to do. It does not lie to correct the practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings.”

The 1st respondent is obviously not a tribunal and neither is it discharging any public function. It is therefore not amenable to the judicial review remedy of prohibition. This court does not have jurisdiction to issue an order of prohibition against the 1st respondent in judicial review proceedings. In appropriate proceedings, the court can issue an injunction to restrain the 1st respondent from developing its property if the facts and the law warrant such an order. I agree with Mr. Fraser that the application is an attempt to get a declaration or an injunction against a private company in judicial review proceedings as opposed to ordinary civil proceedings.

As regards the prayer for an order of certiorari to bring into this court and quash the decision of the 2nd respondent, it is paramount that the court determines whether prior to issue of the new title to the 1st respondent the suit land was a public road or not.

In the verifying affidavit sworn by Ramji Shamji Patel on 11th June, 2009, he alleged that the suit land was a public access road which is located at the back side of the applicant's property L.R. No. 209/11135. That contention was denied by the 1st respondent who stated that it was an undeveloped parcel of land that had not been alienated. The 2nd respondent also denied that the suit land was an access road.

From the drawings annexed to the applicant's affidavit as well as the drawing annexed to the 1st respondent's affidavit, it appears to the court that the suit land was surveyed and left to be an access road. It runs between the applicant's parcel of land and the 1st respondent's parcel of land. It is named as Kibo Lane and runs from Chyulu Road on the western side to Mara Road on the southern side. It is however not clear whether it was in use prior to its allocation to the 1st respondent who paved the same.

There is no dispute that the suit land was allocated to the 1st respondent by the 2nd respondent. The process through which that was done was well explained by Mr. Derrick Ouma in his affidavit sworn on behalf of the 1st respondent. The process was initiated by a letter dated 9th April, 2002 by the 1st applicant's Managing Director to the Commissioner of Lands. In the said letter, the 1st respondent's Managing Director referred the suit property as **"an existing way leave"**. The suit property was allocated to the 1st respondent in compensation for portions of its parcel of land which it was going to lose as a result of the widening of Mara and Ragati Roads.

Was any notice required to be served upon the ex parte applicant and other property owners who were to be affected by the 2nd respondent's act? The ex parte applicant contends that such notice was required but was not given. Notwithstanding that submission, the ex parte applicant did not cite any law in support of that contention.

Section 185(1) of the Local Government Act Cap 265 states as follows:

"(1) Subject to this section, a Municipal Council may permanently close or divert or alter the line of any street or road vested in it under this Act."

Subsection (2) thereof stipulates the steps which a local authority must take before closing or diverting a road or a street. It provides as hereunder:

"(2) Before any such closing or diversion or alteration is carried out, the Municipal Council shall

(a) prepare a plan showing the nature thereof; and

(b) not less than 1 month before the proposed commencement of the work, give notice in the Gazette and in one or more newspapers (if any) circulating in its area, as well as by a sufficient number of placards posted on or near the street or road which it is proposed to close, divert or alter, of the proposed work and of a place where the said plan may be inspected at all reasonable hours; and

(c) serve a copy of the said notice on the owners or reputed owners, lessees or reputed lessees, and occupiers of all property abutting upon the said street or road or appropriate part thereof and, where it is proposed to divert or alter the line of such street or road or all property which will abut upon the street or road if diverted or altered as aforesaid, whose address can after reasonable inquiry be ascertained; and

(d) if the proposed closure, diversion or alteration will affect land not vested in the municipal

council, serve a copy of the said notice on the Commissioner of Lands; and

(e) in the case of a proposal to close a road, serve a copy of such notice upon the Minister for the time being reasonable for town planning.”

Section 4 of the **Physical Planning Act, 1996**, creates the office of Director of Physical Planning. The functions of the said officer are set out under **Section 5** of the **Act** and include advising the Commissioner of Lands and local authorities on the most appropriate use of land including land management such as change of user, extension of user, extension of leases, subdivision of land and amalgamation of land.

Section 24 of the **Physical Planning Act** empowers the Director of Physical Planning to prepare with reference to any Government land, trust land or private land within the area of authority of a city, municipal, town or urban council, a local physical development plan. The local physical development plan may be a long term or a short term physical development or for a renewal or re-development of the land in issue. The second schedule to the Act sets out the matters which may be dealt within a local physical development plan. Such matters include adjustment and alteration of boundaries, areas, shapes and positions of any land, road, street or right of way. They also include effecting exchanges of land or cancellation of existing subdivision as may be necessary or convenient.

The 1st respondent stated that the letter to the Commissioner of Lands on 9th April, 2002 was copied to the Director of City Planning, the Director of Physical Planning and the City Engineer. Both the City Engineer and Director of Physical Planning agreed to the proposal that was given by the 1st respondent. Subsequently, the Director of Physical Planning gazetted completion of the Part Development Plan in respect of the suit property. The Gazette Notice was published on 30th July, 2004. The Director of Physical Planning stated in the said notice that copies of the Part Development Plans had been deposited for public inspection at his office located at Ardhi House and will be inspected between 8.00 a.m. to 5.00 a.m., on all working days. Interested parties or those with objections were required to make the same within 60 days from the date of publication of the notice.

No objections were received from anyone and the Minister for Lands and Settlement approved the Part Development Plan on 5th November, 2004. The Commissioner of Lands effected the Part Development Plan by amalgamating the suit land to the 1st respondent's parcel of land and issuing a new title thereto.

Apart from publication of the Part Development Plan by the Director of Physical Planning as aforesaid, it is not clear whether the Nairobi City Council gave any other notice to the applicant and owners of other properties abutting upon the said access road. It is also not disclosed whether any placards were posted on or near the access road which was proposed to be closed as required under **Section 185** of the **Local Government Act**. That ought to have been done even if the access road was not in use at the material time. The ex parte applicant denied having been served with any notice. The aforesaid steps ought to have been taken by the Nairobi City Council which is not a party to these proceedings and therefore it cannot be stated with any certainty that the Council failed to comply with the aforesaid mandatory provisions of the law. The applicant ought to have joined the Nairobi City Council as a respondent.

In allowing closure of the access road and amalgamating part of that land to the 1st respondent's property the 2nd Commissioner acted on the advise of the Director of Physical Planning, there being no objection from the Nairobi City Council or any other person.

In the circumstances, I find and hold that the 2nd respondent did not act *ultra vires* as alleged by the applicant since the Part Development Plan aforesaid had been published in the Kenya Gazette as required and no objection was raised by the applicant. **Section 69** of the **Interpretation and General Provisions Act Chapter 2** states as follows:

“The production of a copy of the gazette containing a written law or a notice, or of a copy of a written law or a notice, purporting to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of the written law or notice.”

The applicant, having failed to include the Nairobi City Council as a respondent, cannot blame the respondent’s herein for failure to serve notice upon itself.

Since the applicant did not demonstrate that the 2nd respondent exceeded its jurisdiction or abused its power in approving closure of the access road and allocating the land to the 1st respondent, the order of certiorari cannot issue. If there was any breach of the rules of natural justice the same is not attributable to the 2nd respondent but to the Nairobi City Council which is not a party to these proceedings.

An order of mandamus can only be granted to compel an administrative body or quasi-judicial authority to perform a peremptory duty imposed upon it by the law when such a body has unreasonably refused and/or failed to perform such duty. In this case, the applicant sought an order of mandamus to compel the 2nd respondent to cancel the title for L.R. No. 209/17034. The order sought cannot be granted in view of the court’s finding regarding the manner in which the 2nd respondent allocated the disputed parcel of land to the 1st respondent.

In addition to what I have stated hereinabove regarding the 2nd respondent’s act of allocating the suit land to the 1st respondent, I wish to add that judicial review remedies are also discretionary remedies. The court may refuse to grant such relief even when it is otherwise deserved, if upon consideration of all the relevant factors the court is of the view that the orders sought ought not to be granted. See

ADMINISTRATIVE LAW 9th Edition by W.W.R. Wade and C.F. Forsyth at page 616, KARINA v TRANSPORT LICENSING BOARD [2004] 2KLR 466.

The 1st respondent demonstrated that even though it was allocated the suit land, that was in compensation for parcels of land which it surrendered to facilitate widening of Mara and Ragati roads. It appears that the portions which were surrendered by the 1st respondent are bigger than the parcel of land that was allocated to it in return. The respondents acted transparently and conducted themselves above board in the said transaction. If there was any default in the process in which the suit land was allocated, the blame lies elsewhere. Even if this application was being considered on the basis of exercise of discretion only, the court would still not grant the orders sought by the applicant.

All in all, I find this application wanting and dismiss the same with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MAY, 2011.

**D. MUSINGA
JUDGE**

In the presence of:

Nazi – Court Clerk

Mr. Fraser for the 1st Respondent

No appearance for the Applicant

No appearance for the 2nd Respondent